



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

C.A. NO. 1501/2019 and C.A. NO. 1500/2019
IN
Company Petition No. (IB)- 456(ND)/2018

IN THE MATTER OF:

Pallavi Joshi Bakhru

... Petitioner/
Financial Creditor

Versus

Universal Buildwell Private Limited.

... Respondent

AND IN THE MATTER OF C.A. NO. 1501/2019:

Banwari Lal Saraf

H. No. 7/15, Forest Lane, Neb Sarai Extn
New Delhi-110068

... Applicant

Versus

Mr. Atul Kumar Kansal

Resolution Professional of

M/s Universal Buildwell Private Limited
Universal Trade Tower
8th Floor, Sector-49, Sohna Road,
Gurgaon, Haryana-122101

... Respondent

Under Section: 60(5) of IBC 2016

AND IN THE MATTER OF C.A. NO. 1500/2019:

Shyam Kishan Saraf

H. No. 7/15, Forest Lane, Neb Sarai Extn
New Delhi-110068

... Applicant

Versus

Mr. Atul Kumar Kansal

Resolution Professional of

M/s Universal Buildwell Private Limited
Universal Trade Tower
8th Floor, Sector-49, Sohna Road,
Gurgaon, Haryana-122101

... Respondent

Under Section: 60(5) of IBC 2016

Order Delivered on: 12.09.2023



CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Shyam Kishan Saraf in CA-1500/ 2019-,
Adv. Ruby Sharma in CA-1501/2019

For the RP : Adv. Swapnil Gupta, Adv. Sadiq Noor

ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

CA-1501/2019

The CD viz. Universal Buildwell Pvt. Ltd. was admitted to CIRP in terms of the order dated 03.07.2018 passed in IB-456(ND)/2018. Subsequently, the RP filed IA-1550/2019, seeking approval of the plan for Resolution of the Insolvency of the CD, approved by CoC in its meeting dated 11.11.2019 with 70.44% voting in favour of the plan. Considering the application, this Adjudicating Authority passed the order dated 11.06.2021 remitting the Resolution Plan to CoC for modification in terms of the payments to the objectors, namely, DHFL, Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited. The ground perceived by this Adjudicating Authority to take such a view was that the two NBFC/bank (ibid) could not be kept attached to the Corporate Debtor till completion of the project and they were entitled to get the payment of Rs.3 Crores within a specified period.

2. Assailing the aforementioned order, the Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited preferred a Company Appeal (AT)



(Insolvency) No. 661 of 2021 before the Hon'ble National Company Law Appellate Tribunal. The appeal was dismissed in terms of the order dated 11.04.2023, with the view that the directions contained in para 49 of the order dated 11.06.2021 were to be affirmed while those contained in para 50 thereof were to be deleted.

3. Nevertheless, as the appeal was dismissed, the order passed by this Adjudicating Authority remitting the Resolution Plan to CoC for modification in terms of the payment as specified in the order viz., DHFL, Kotak Mahindra Bank and Kotak Mahindra Prime Limited were to be paid in cash and could not be made attached to the plan/project till execution/completion of the same attained finality.

4. After the order dated 11.06.2021 passed by this Adjudicating Authority, the CoC circulated notice and Agenda for the 16th meeting of CoC scheduled to be held on 25th June, 2021. The Financial Creditors, AR and Suspended Directors were apprised of the agenda.

5. Nevertheless, the present IA was preferred in the year 2019, with the following prayers: -

- “1. To direct the Resolution Professional to process the claim in Form-C filed by the present applicant as a secured Financial Creditor u/s 5(8)(a) of the Code;*
- 2. To determine the rights of the applicant as per the provisions of the I & B Code' 2016;*
- 3. To pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.”*



6. In the captioned application filed by him, the Applicant Mr. Banwari Lal Saraf has narrated that he preferred a claim for Rs.27,58,55,046/- (Twenty Seven Crores Fifty Eight Lakhs Fifty Five Thousand Forty Six only) before Mr. Atul Kumar Kansal, IRP/RP, in Form C i.e. as Financial Creditor. He has placed a copy of the claim on record as Annexure-1 to the application. In terms of the e-mail dated 11.09.2018, the RP informed the Applicant that being a real estate allottee, he was required to file the claim in Form CA, as specified in the public announcement. The Form CA is prescribed for submissions of the claim by Financial Creditors in a class. Copy of the e-mail sent by IRP to the Applicant is enclosed as Annexure-2 to the application. For convenient reference, the e-mail is reproduced thus: -

9/16/2018

Email - Claim of Banwari Lal Saraf In Form C



BANWARI LAL SARAF <banwarisarafelegal@gmail.com>

Claim of Banwari Lal Saraf in Form C

29
Annexure-2

ATUL KANSAL <cirp.universal@gmail.com>
To: BANWARI LAL SARAF <banwarisarafelegal@gmail.com>

Tue, Sep 11, 2018 at 1:11 PM

Dear Sir,

From the letter dated 30.7.2018 addressed to the undersigned it is noted that you have filed Form-C with regard to claim of Rs. 27,58,55,046/- as on 2.7.2018 against a loan of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs only) paid by you for purchase of Unit No. 414 admeasuring 3000 square feet on 4th floor, commercial complex known as 'Universal Business Park' in terms of Agreement to sell dated 27.5.2014 followed by Builder Buyer Agreement of even date and this agreement is duly signed by the Corporate Debtor in terms of resolution dated 26.5.2014 placed by you at page 45 of your said letter. Therefore, you are the 'real estate allottee' in term of provisions of the Insolvency & Bankruptcy Code, 2016 and you are advised to file your claim in form -CA as specified in the advertisement.

It is also noted from the agreement placed by you with your captioned petition and from page 61 of the captioned communication it is noted that you have made a claim of Rs. 27,58,55,046/- against loan of Rs. 1,50,00,000/- and this amounts to more than 18 times in a period of little more than 3 years. Thus, your claim in Form-C appears to be covered under the provisions of section 50 of IBC, 2016.

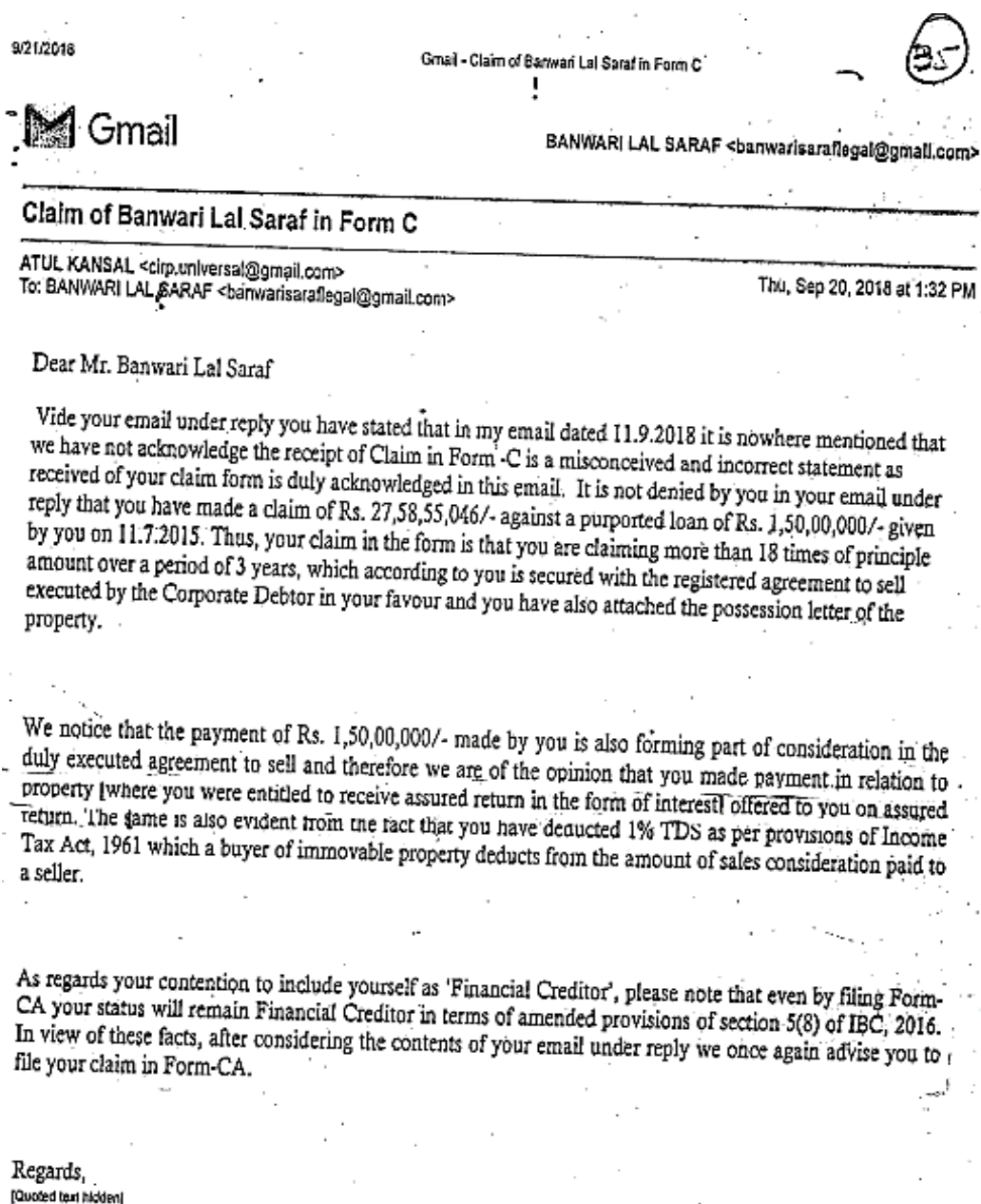
You are advised to do the needful.

Thanking you,

[Quoted text hidden]
[Quoted text hidden]



7. By way of e-mail dated 17th September, 2018, the Applicant espoused before the IRP/RP that he had advanced money to the Corporate Debtor against interest thus he was a Financial Creditor rather than a real estate allottee. To buttress his plea, he relied upon the provisions contained in Section 5(8)(a) of the Code. However, vide e-mail dated 20.09.2018, the Applicant IRP/RP rejected the plea raised by the Applicant. The e-mail dated 20.09.2018 sent by the IRP/RP to Applicant reads thus: -





8. According to the Applicant, his detailed e-mail dated 21.09.2018, could not be responded to by the IRP/RP till filing of the CA. While browsing the website of the CD, the Applicant could notice the list showing the defective claims in which the name of the Applicant also figured. While questioning the decision of IRP/RP to not treat him as Financial Creditor, the Applicant has saliently contented that : - (i) in terms of the definition of Financial Creditor mentioned in Section 5(8)(a), the Applicant has to be treated as Financial Creditor; (ii) while examining the claim of the Applicant, the RP ignored to consider the Board Resolution passed by the CD, Loan Agreement, Builder Buyer Agreement, Agreement to Sell and Memorandum of Understanding (MoU); (iii) the RP could not take into account the statement of Directors/Promoters of the CD in the trial qua a complaint filed by Applicant under Section 138 of Negotiable Instrument Act, 1881; (iv) the RP sought to change the nature of transaction on the basis of his whims and fancies; (v) The entire transaction involved in aforementioned instruments should have been treated as one or in other words all the documents/instruments should be read with reference to one transaction only.

9. Per contra, the Ld. RP has pleaded that: - (i) both the CAs 1501 and 1500 are not maintainable, as the issues raised therein could also be raised in CAs 982/2019 and 1062/2019 effectively; (ii) the bare perusal of the documents/agreements shows that the amount of Rs.1,50,00,000/- was paid by the Applicant No.1 as consideration for Unit bearing No. 233 admeasuring 2725 sq. ft. 2nd Floor, Universal Trade Tower (Commercial Complex) Sector-49, Gurgaon, Haryana, developed by the Corporate Debtor; (iii) being allottee of a dwelling unit in real estate project, the Applicant was qualified to stake



his claim as Financial Creditor as a class; (iv) the claim of Rs.27,58,55,046/- in lieu of Rs. 1,50,00,000/- amounts to an extortionate transaction. The Transaction Audit Report dated 24.05.2019 could clearly establish that the transaction was extortionate; (v) in terms of the contents of para 12 of the application, the Applicant is a real estate allottee; (vi) the amount of interest was an assured return qua the dwelling unit and was part of transaction regarding allotment of the same; (vii) on submission of his claim by the Applicant for an amount of Rs.1,97,74,027/- in appropriate form i.e. as Financial Creditor as a class, the RP would admit the same.

10. We heard the counsels for the parties and perused the record. As far as the plea with reference to Section 5(8)(a) raised on behalf of the Applicant is concerned, indubitably, the Applicant herein entered into an agreement (Agreement to Sell) dated 11.07.2014, with Universal Buildwell Private Limited. Vanya Developers Pvt. Ltd. was the confirming party qua the agreement. From the agreement, it is apparent that the seller relying on the confirmation, representation, and assurance of the buyer to faithfully abide by all the terms and conditions and stipulations contained in the agreement accepted in good faith his application to allot unit no. 233 measuring 2725 sq. ft. It is also mentioned that the Applicant herein before us willingly entered into the agreement on the terms and conditions mentioned herein. It has been specifically mentioned in the agreement that the seller had agreed to sell to the buyer unit no. 233 measuring super area 2725 sq. ft. on second floor of the Commercial Complex (ibid) for a total consideration of Rs.1,50,00,000/- only. Relevant excerpt of the sale deed reads thus: -



“AND WHEREAS the seller, relying on the confirmations, representations and assurances of the Buyer to faithfully abide by all the terms, conditions and stipulations contained in this Agreement has accepted in good faith his/her application to allot unit no. 233 area 2725 sq. ft. and is now willing to enter into this Agreement on the terms and conditions appearing hereinafter

SELLER has agreed to sell to the Buyer unit no. 233 measuring super area 2725 sq. ft. on 2nd Floor of the Commercial Complex Called ‘UNIVERSAL TRADE TOWER’ at Sector-49, Sohna Road, Gurgaon, Haryana (which hereinafter referred to as the Flat) for a total sale consideration of Rs.1,50,00,000/- (Rupees One Crore Fifty Lacs only)

NOW THIS AGREEMENT FOR SALE OF RIGHT WITNESSETH AS UNDER:

- 1. That the Seller has developed the above mentioned Unit and has sold the Units to the Buyer @ Rs.1,50,00,000/- (Rupees One Crore fifty lakh only).*
- 2. That the Seller agrees to Sell and the Buyer agrees to purchase upon and subject to the assurances and representations of the seller as hereinabove stated the said Unit subject to a good and marketable title being made in respect thereof and the property being found free from all sorts of encumbrances such as mortgage, lien, gift, exchange, dispute, litigation, attachment, pledge and decree or any court of law at total price of Rs.1,50,00,0000/- (Rupees Once Crore Fifty Lacs only) subject to the terms and conditions hereunder contained.*
- 3. That the Buyer has already paid to the Seller a sum of Rs.14,85,000/- (Rupees Forteen Lakh Eighty Five Thousand only) vide Cheque number 000029 dated 11/07/2014 drawn on HDFC Bank Ltd. & TDS challan for property Rs.15,000/- as and by way of advance money and the balance of the purchase money amounting to Rs.1,35,00,000/- (Rupees One Crore Thirty Five Lacs only) shall be paid by 11/07/2015.”*



11. It is the case of the Applicant himself that as has been provided in Section 194 IA of the Income Tax Act, 1961 the Applicant had deducted TDS of Rs.1,50,000/- and deposited the same with the Income Tax Department.

The relevant excerpt of the para 12 of the CA reads thus: -

“12 It is submitted that the Agreement to Sell, BBA and MoU were executed at the behest of Raman Puri, Varun Puri and Vikram Puri with the sole intent of creation of collateral security in respect of unit no. 233 measuring area 2725 sq. ft. on 2nd Floor of Commercial Complex called Universal Trade Tower at Sector-49, Gurgaon, Haryana. In this connection it is also pertinent to mention here that the Schedule-1 to the Loan Agreement also reflects unit no. 233 measuring are 2725 sq. ft. which clearly shows that the aforesaid property was kept with the applicant as a collateral security. It is further submitted that since Agreement to Sell relating to collateral security was to be registered, therefore TDS of Rs.1,50,00,000/- was deducted as per section 194 IA of the Income Tax Act, 1961 and the same was deposited with the Income Tax Department.”

12. As can be seen from Section 194 IA of the Income Tax Act, 1961 (ibid), it is only a transferee responsible for paying to a resident transferor any sum by way of consideration for transfer of immovable property (other than the agriculture land) shall, at any time of the credit of sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, deduct an amount equal to 1% of such sum as an Income Tax thereon. The provision does not provide for TDS relating to any security or collateral. Thus, from the averments made in para 12 of the CA, it is more than clear that the transaction entered into by the Applicant with the CD was the one qua allotment/purchase of a dwelling unit



and the amount of Rs.1,50,00,000/- claimed by the Applicant as loan given by him to CD was in fact the consideration for the dwelling unit.

13. It is the plea espoused by the Applicant himself that when there are several documents which form part of one transaction and are contemporaneously executed, they have similar effect for similar purposes and as such are relevant to the case as if they are one deed. To buttress his plea, he has relied upon the judgment of Delhi High Court in **Commissioner of Income Tax Delhi IV. V. Shiv Raj Gupta** [2014] 52 Taxmann.com 425 (Delhi). Para 14 of the CA in which such plea has been raised by the Applicant reads thus: -

“14. It is understood that for all Municipal Taxes such as scavenging tax, fire tax, education cess etc separate bills or demands are expected to be raised in the names of the Allottee(s) by the civic body under whose jurisdiction UNIVERSAL TRADE TOWER is situated. The same will be paid by the Allottee(s) directly to such civic bodies, but in the event, a joint bill for the complete property including the property of the Developer and other Allottee(s) of space is raised by the civic bodies, the Allottee(s) would pay to the Developer his/her share of such taxes/demands keeping in view the total tax raised by the civic bodies. The apportionment so made by the Developer shall be final and binding on the Allottee(s) and will be payable in advance for each year. In case, such taxes have to be paid through the Developer, service charges of 10% (ten percent) shall be levied by the Developer to meet the administrative expenses for billing, postage, recovery etc. etc. The Allottee(s) will also be liable for interest and penalties for late payment of due amounts. These charges would be payable from the date of execution of Builder Buyer Agreement or Developer offers possession of the said Space to Allottee(s) whichever is earlier. The service charges shall however be subject to increase from time to time.



14. In view of the plea taken by the Applicant himself, the Loan Agreement dated 11.07.2014 (Annexure 7 to CA), regarding the amount of Rs. 1,50,00,000/- paid by the Applicant to CD i.e. the same amount which has been referred to in Agreement to Sell (Annexure 8 to CA) of even date as purchase money for unit no. 233 measuring 2725 sq. ft. on 2nd Floor of the Commercial Complex for Universal Trade Tower at Sector-49, Sohna Road, Gurgaon Haryana (Supra) has to be treated as part of transaction of sale only. In view of his own stand, the Applicant is not entitled to give a colour different from Agreement to Sell, to the Loan Agreement. Both the Loan Agreement and the Agreement to Sell need to be treated as part of the same transaction. The Builder Buyer Agreement (Annexure 9 to CA) also supports the semblance that the amount of Rs. 1,50,00,000/- was paid by the Applicant to CD as sale consideration for unit no. 2333 area 2725 sq. ft. (ibid). The relevant excerpt of the BBA reads thus: -

“

BUILDER BUYER AGREEMENT

This Agreement is made at Gurgaon on this 11th day of July, 2014

Between

*UNIVERSAL BUILDWELL PVT. LTD. a Company registered under The Companies Act 1956 having its Registered Office at 102, 1st Floor, Antriksh Bhawan, Connaught Place, New Delhi- 110001 and its Corporate Office at Universal Trade Tower, 8th Floor, Gurgaon Sohna Road, Sector-49. Gurgaon-122101, Haryana (hereinafter referred to as “**DEVELOPER**” which expression shall, unless repugnant to the context or meaning thereof be deemed to include its representatives, nominees, successors and assigns) through its duly Authorised Signatory Shri Raman Puri of the **FIRST PART.***

AND



(FOR INDIVIDUALS)

*Mr. Banwari Lal Saraf s/o Late Sh. Onkar Mal Saraf R/o 7/15, FOREST LANE, NEB SARAI EXTN., NEW DELHI – 110068, having PAN No. AAJPS0306A, Hereinafter singly/jointly, as the case may be referred to as ‘**ALLOTTEE (S)**’ (which expression shall unless repugnant to the context or meaning thereof, be deemed to include his/her heirs, executors administrators, legal representatives, successors and assigns) of the **SECOND PART**.*

WHEREAS *the Developer has acquired right, title and interest in the land measuring 2.49 acres comprising Khewat No – 13, Khata No -17, Khasra Nos 17/18 and 17/19 in Tikri Village, Sector-49, Tehsil & District-Gurgaon, Haryana.*

AND WHEREAS *the developer has been granted necessary Licenses from the Director, Town and Country Planning, Haryana for construction and development of a commercial complex called “**UNIVERSAL TRADE TOWER**” on the said LAND.*

AND WHEREAS *the Allottee/Allottees is/are interested in purchasing unit No. 233 area 2725 sq. ft. for a total sale consideration of Rs.1,50,00,000/- (Rupees one crore fifty lakh only) of the said Commercial Complex which is more particularly demarcated on the floor plan attached herewith as Annexure-1. The Allottee(s) acknowledges that the Developer has readily provided all information & clarifications as required by him/her but that he/she has not unduly relied upon and is not influenced by any architect’s plans, sales plans, sales brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever whether written or oral made by the Developer, its selling agents/brokers or otherwise including but not limited to any representation relating to description or physical condition of the property, the Building or the Flat or the size or dimensions of the Flat or the room therein or any other physical characteristics thereof, the services to be provided to the Allottee(s), the estimated facilities/amenities to be made available to the Allottee(s) or any other data except as specifically*



represented in this Agreement and that the Allottee(s) has relied solely on his/her own judgment and investigation in deciding to enter into this Agreement and to purchase the said Flat No. oral or written representations or statements shall be considered to be part of this agreement and that this Agreement is self-contained and complete in itself in all respects.

AND WHEREAS *the Allottee(s) has perused the title documents & the effective steps taken for getting plans sanctioned and has satisfied itself about the title and the authority of the Developer to construct the said complex and allot/sell/lease or transfer the ownership rights in the said complex, in full or in parts, on such terms as they deem fit and receive the consideration for such transfers.*

AND WHEREAS *the Allottee(s) has confirmed to the Developer that he/she has full knowledge of all the laws, rules, regulations, notifications etc. in general and applicable to the said Complex/said Building in particular and the terms and conditions contained in this Agreement and that he/she has clearly understood his/her rights, duties, responsibilities, obligations under each and all the clauses of this Agreement.*

AND WHEREAS *the Developer, relying on the confirmations, representations and assurances of the Allottee(s) to faithfully abide by all the terms, conditions and stipulations contained in this Agreement has accepted in good faith his/her application to allot Flat No. 233 on 2nd Floor and is now willing to enter into this Agreement on the terms and conditions appearing hereinafter*

IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

A 1.) **THE ALLOMENT**

*The Allottee(s) is/are hereby allotted unit No. 233 on 2nd Floor of the Commercial Complex called “**UNIVERSAL TRADE TOWER**” at Sector-49, Gurgaon, Haryana measuring 2725 Sq. Ft. super area each (which hereinafter referred to as the Flat) for a total sale*



consideration of Rs. 1,50,00,000 (Rupees one crore fifty lakh only) calculated @ Rs. 5504.29 per Sq. Ft.

A 2.) SALE CONSIDERATION

The Allottee/Allottees has/have options to choose any of the payment schedule mentioned below and strike out whichever is not applicable i.e.

(i) Self Use Plan (Down Payment/Installment)

(a) Down Payment

The flat is being agreed to be sold to the Allottee at Rs. 5504.59 (Rupees five thousand five hundred four & prise fifty nine only) per Sq. Ft. super area. Allottee(s) has paid the entire sale consideration of Rs.1,50,00,000/-(Rupees One Crore Fifty lakh only) as under:

- i) Ch.000029 on HDFC Bank dt. 11/07/2014 Rs.14,85,000/-
- ii) Ch.000030 on HDFC Bank dt. 12/07/2014 Rs.1,33,65,000/-
- iii) TDS Challan/Certificate Rs. 1,50,000/-

The receipt of which is acknowledged by the “Developer” and it is hereby clarified that the terms and conditions relating to the balance payment in this agreement shall cease to apply and the Developer hereby discharges the Allottee(s) of all the payments payable under this agreement relating to the sale consideration only. It is hereby agreed that Allottee(s) would pay the maintenance charges & all other charges to the agency nominated by the Developer every month. The super area and the carpet area would mean and include as defined below.”

15. Even from the Memorandum of Understanding (MoU) dated 11.07.2014, placed by the Applicant on record as Annexure to his application, it is clear that the amount of Rs.1,50,00,000/- was agreed to be paid by the



Applicant to CD as sale consideration for Unit No. 233 (ibid). The relevant excerpt of the Memorandum reads thus: -

“NOW THEREFORE IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

- 1. That the FIRST PARTY hereby agrees to sell/allot to the SECOND PARTY space admeasuring a super area of 2725 sq. feet having unit no. 233 on 2nd Floor (Hereinafter referred to as the UNITS) in the commercial complex in Universal Trade Tower, Sec-49, Sohna Road, Gurgaon for a total sale consideration of Rs.1,50,00,000/- (Rupees One Crore Fifty Lacs only).*
- 2. The FIRST PARTY has also further assured the SECOND PARTY that the proposed Unit in commercial complex in Universal Trade Tower shall be free from all and any kind of lien, charge, mortgage, encumbrance, security, interest, acquisition proceedings, attachments etc. and has not been allotted to any other party & SECOND PARTY also confirm not to create any lien on the units.*
- 3. That if any provision of this agreement is determined to be void or unenforceable under any law, such unenforceability will not affect the operation or interpretation of any other provision of this agreement to the extent that the invalid or unenforceable provision will be treated as severed from this agreement. However, the SECOND PARTY or his nominee Mr Ram Kishan Saraf expressly agrees to enforce this agreement only in case of default of any post dated cheque of monthly interest or of Rs.1.50 crore, in case of default by FIRST PARTY, the SECOND PARTY reserves the right to get the units registered in its name and/or sell it to any third party.*
- 4. The FIRST PARTY hereby acknowledges the receipt of payment of Rs.1,50,00,000/- (Rupees one Crore Fifty Lacs only) vide cheque no. 000029 dated 11/07/2014 for Rs.14,85,000/- (Rupees fourteen lakh eighty five thousand only) & Cheque no. 000030 dated 12/07/2014 for Rs.1,35,65,000/- both drawn on HDFC Bank Ltd. & TDS*



challan/certificate for Rs.1,50,000/- towards the payment of Unit No.233 area 2725 sq. ft. on 2nd Floor.

- 5. The FIRST PARTY have leased the said premises, however SECOND PARTY will have first charge on the rental income. If FIRST PARTY pays the interest amount to the SECOND PARTY on respective due dates then FIRST PARTY will have right over this rental income.*

TERMS OF INVESTMENT:

- 1. The FIRST PARTY has taken the payment of the Units and the Unit No. 233 has been allotted to the SECOND PARTY on an assurance by the SECOND PARTY that the SECOND PARTY will irrevocably return the Unit to the FIRST PARTY on 10th July 2015, irrespective of the market price prevailing at the time of returning the Unit. The FIRST PARTY is liable to pay back a irrevocably BUY BACK amount of Rs.1,50,00,000/- (Rupees One crore Fifty Lacs only) on buying back the Unit for which a post dated cheque no.000488 for Rs.1,50,00,000/- drawn on Axis Bank Ltd. dated 11/07/2015 have been issued by FIRST PARTY in favour of SECOND PARTY if the FIRST PARTY fails to buy back the Unit then the SECOND PARTY has option to take the possession of the above said Unit & get the property registered in her name through court of law.*
 - 2. It is hereby agreed by the both parties that the above said area is only for security purpose and SECOND PARTY will have no objection for the same.*
 - 3. Also on payment of Rs.1,50,00,000/- (Rupees One Crore Fifty Lacs only) the SECOND PARTY will not have any right, and interest on the said unit & all documents related to above said units will become null & void.”*
16. The Applicant has also placed on record a copy of the possession letter dated 11.07.2014, in terms of which he was offered the possession of unit no.233 area measuring 2725 sq. ft.



17. From the aforementioned deeds, it is established that the Applicant had paid Rs.1,50,00,000/- to CD only as Sale Consideration for a unit allotted to him by the CD. Thus, we are left with no doubt that the IRP/RP was justified in treating the Applicant as a Financial Creditor in class and not as Financial Creditor.

18. It is not the case of the Applicant that there was any amount of Rs.1,50,00,000/- other than the one paid as consideration (after TDS) for the aforementioned office space unit, payable by CD to him. Rather, it is his own case that all the deeds relied upon by him viz. Loan Agreement, Agreement to Sell, Builder Buyer Agreement and MoU pertain to the same transaction, thus the ramification of all of those should be one and the same. Regarding the statement made by Mr. Raman Puri, Managing Director of CD, at the relevant point of time, we find that in the statement made by him in the Court of Ms Preeti Parewa : MM-02 (South) Saket Court, New Delhi, we find that in the statement made by him, he categorically stated that the loan amount was already compensated and there were multiple agreements that were executed with the complainant and the complainant concealed the same from the Court while filing the complaint. The relevant excerpt of the statement reads thus: -

“Q7 Do you want to say anything else?”

A7 The loan amount was already compensated and there were multiple agreement that were executed with the complainant, which were concealed by the complainant while filing of the present complaint. Thus, there is no legal liability on the accused.”

19. We may not be oblivious of the fact that most of the questions sought to be relied upon by the Applicant are suggestive/leading ones, while the



aforementioned answer is categorical and explanative one by Mr. Raman Puri. The answer is also in consonance with the plea and the stand taken by the Applicant in his application.

20. As can be seen from the provisions of Section 138 of the Negotiable Instrument Act, 1881, the cheque needs to be issued for discharge of debt or other liability. Thus, the mere issuance of a cheque by the CD would not lead to an inference that the transaction entered into by the Applicant with CD was only a loan transaction, more so for the reason that the deeds executed between Applicant and the CD speak a volume regarding the transaction for allotment/purchase of a commercial space. From a conjoint reading of all the deeds, the inference one should draw is that the issuance of cheque itself was a security qua allotment/possession of the allotted unit, which allotment has not yet been materialised. Thus, we are unable to countenance the contention advanced on behalf of the Applicant that the unit allotted to the Applicant was in fact a security for repayment of loan. Could the amount of Rs.1,50,00,000/- be the loan amount, there could be no occasion for Applicant to deduct 1% tax (TDS) qua the same.

21. In the proceedings under Section 138 of the Negotiable Instrument Act, 1881, what the Court needs to see is that there is a legally enforceable debt, a cheque was drawn on account of bank for discharge of the debt or other liability and the cheque issued is returned due to insufficiency of funds. It is not the scope of Section 138 to determine as to what is the nature of debt i.e., whether it is financial or operational or claim by a Financial Creditor in class. The RP has also not denied the entitlement of the Applicant to be Creditor qua



the CD. The only view taken by the RP is that the Applicant is a Financial Creditor in class. No support can be drawn from the judgment dated 08.04.2019 passed by Ld. Metropolitan Magistrate in CT Cases 469261/2016, in favour of the plea espoused by the Applicant.

22. The Respondent has raised a plea that the amount of Rs.27,58,55,046/- claimed by the Applicant against the amount of Rs.1,50,00,000/- paid by him to CD after deducting the tax, as consideration for the unit no. 233 (supra) allotted to Applicant in Universal Trade Tower is a transaction, extortionate in nature. Though, the transaction being beyond two years prior to the date of commencement of CIRP may not be called strictly as extortionate transaction, but such transaction may not be beyond the shadow of doubt and indicate a kind of collusion between the Applicant and the ex-management of the CD. Nevertheless, we are not deciding an application under Section 50 of IBC, 2016. The proposition which could arise to be determined by us is, “whether the Applicant can be treated as a Financial Creditor either secured or otherwise or only as a Financial Creditor in class”. On the basis of the sole fact that the Applicant paid Rs.1,50,00,000/- after making a deduction under Section 194-IA of the Income Tax Act, 1961, by treating the amount as consideration for Unit no. 233 in Universal Trade Tower (supra), we are left with no doubt that there is no infirmity in the decision taken by IRP/RP to treat the Applicant as Financial Creditor in a class.



23. In the wake, the prayer made by the Applicant in the captioned CA for issuance of direction to RP to process the claim of the Applicant as a secured Financial Creditor is rejected. The CA stands disposed of accordingly. No cost.

CA-1500/2019

The facts and issues espoused in the captioned IA are *pari materia* to those involved in CA-1501/2019. The arguments advanced at the end of Applicant qua the captioned CA as also in CA-1501/2019 were common. The RP filed common/joint reply both to CA-1501/2019 and the present CA. In the wake, the CA-1500/2019 is disposed of in terms of the order passed in CA-1501/2019. No cost.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)