

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

IA-225/2022 IN

CP/IB/4469/(MB)/2019

Under Section 7 of the IBC, 2016

In the matter of

Home Craft Avenues

...Applicant

V/s.

Jayesh Sangrajaka and Ors.

...Resolution Professional

In the matter of

IDBI Trusteeship Services Ltd.

...Financial Creditor

Versus

Ornate Spaces Frt. Ltd.

...Corporate Debtor

Order delivered on: **02.05.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant:

Mr. Chaitanya B. Nikte, Adv.

For the Respondent(s):

Mr. Nausher Kohli a/w Mr. Devesh
Juvekar, Mr. Ashish Parwani, Mr.

Dikshat Mehra, Mr. Chintan Gandhi
and Ms. Anjali Dhoot i/b Rajani
Associates for the RP.

For the SRA:

Mr. Akshay Doctor a/w Mr. Parag
Sawant and Ms. Priyank Kulkarni i.b
P.S. Chambers, Ld. Counsel for the
Successful Resolution Applicant.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present application is filed on 23.12.2021 by Applicant i.e. Home Kraft Avenues for seeking direction against the Resolution Professional to include it as “Secured Financial Creditor” and to give treatment accordingly in the plan. The Applicant further seeks rejection of action of the COC approving the Resolution Plan and prays this Bench for rejection of the Resolution Plan. The Applicant has made the Resolution Professional, the COC and SRA as Respondents in the application.
2. Applicant lent Rs.11,00,00,000/- to the Corporate Debtor on interest as loan vide an Agreement dated 29/10/2015 executed between the parties. The said loan was disbursed in instalments starting from 02.06.2015 to 03.10.2015 and the tenure of the loan was 29 months from the date of receipt of first tranche i.e. 02.06.2015, accordingly, the loan was repayable on or before 15.11.2017.
3. The applicant submits that the clause 3.2 of the loan agreement provides that “*However, in lieu of the interest amount payable by the Developer to the Firm on the Loan advanced in terms of this Agreement, the Developer has proposed to*

allot, transfer and assign to the firm, in consideration of the interest amount, four apartments being apartment Nos. (1501), Nos. (1502), Nos. (1504), Nos. (1601) admeasuring in aggregate about 4508 sq.ft. carpet are and 9304 sq.ft saleble area, on the 15th and 16th floor of the building to be constructed on the property by the developer together with four car parking space”

4. The applicant further states that in terms of clause no.4.1 of the agreement, the Corporate Debtor allotted 4 apartments being apartment No. 1901, No. 1902, No. 1904 and No.2001 *admeasuring in aggregate about 4508 sq.ft. carpet are and 9304 sq.ft saleble area, on the 19th and 20th floor of the building to be constructed on the property by the developer together with four car parking space* as and by way of Security, in order to secure the due and punctual repayment of the Principle Loan Amount.
5. It is further stated as per clause no. 4.1.6. on the failure of the Developer to repay the entire loan to the firm within fifteen (15) days from the expiry of the loan period as provided hereinabove, the applicant may, at its sole discretion, exercise any of the following options:
 - i. extend the time for repayment of the entire loan subject to the payment of interest by the Developer @18% p.a. on the loan from the date of expiry of the loan period till the date of repayment of the entire loan together with interest thereon by the developer to the firm;
 - ii. deposit the repayment cheque/Post Dated Cheque issued by the Developer in favour of the Firm
 - iii. Have the AFS of Secured Apartments duly stamped and registered and have the secured apartments conveyed, transferred and assured unto the firm absolutely in lieu of the repayment of the loan.
6. Its further states that as per clause no.4.1.7, *in the event the firm opts to have the secured apartments conveyed, transferred and assured in favour of the Firm, the Escrow Agent shall, upon receipt of joint intimation from the parties that the developer has failed to repay the entire loan within the loan period set out herein,*

immediately release the signed and executed AFS of Secured Apartments and the POA to the firm.

7. It is further stated that the RP has considered the Claim of the Applicant for the Principle Loan Amount, which is secured against the allotment of flats as per claimant, in the category of Unsecured Financial Creditor, which ought not to have been done by the RP as the claim of the Applicant should have been considered in the category of Secured Financial Creditor. Therefore, the Applicant is approaching this Hon'ble Court for necessary directions to the RP.
8. The applicant has also filed written submission dated 23.03.2022, contending that the resolution professional has to vet and verify the claims made and ultimately determine the amount of his claim; and insufficiency of the stamp duty cannot invalidate the document, and has placed reliance on following decisions:
 - a. *M/s. Prasad Gempex vs. Star Agro Marine Exports Private Limited & ors. And SREI Infrastructure Finance limited vs. Kannan Tiruvengadam (R.P.) & Anr. [Company Appeal (AT) (Insolvency) Nos. 291 & 591 of 2018].*
 - b. *Dynepro Private limited Vs. mr. V. Nagarajan [Company appeal (AT) (Insolvency) No. 229 of 2018]*
 - c. *Swiss Rebbons Private Limited & Anr. Vs. Union of India & ors. Supreme Court Writ Petition (Civil) No.99 of 2018.*
 - d. *Mr. K.N. Rajakumar v/s V. Nagarajan and Ors (NCLAT)*
 - e. *Dipco Private Limited V/s Aristo Developers Private Limited [NCLAT]*
 - f. *Mr. Sunil Gopichand Teckchandani & ors Vs. Metallica Industries Limited through Jitender Kumar Jain, interim Resolution professional (CP No. 1329/2017 in M.A. No. 1253/2018) [NCLT Mumbai]*
 - g. *Mangalam Vannijya Private Limited v/s Reward Business Solutions private Limited., [NCLT Mumbai]*

9. It is further stated that the RP has adopted dual standards in the present case, he has admitted the claim of 4 flats received towards interest as a homebuyer but the flats given as collateral security for the principal amount are not considered and the claim is treated as an unsecured financial creditor. The reasoning given by the RP in the reply is misconceived and hollow and is trying to make up for the lapse committed by the RP by raising frivolous issues. Once the claim arising from the same contract is dealt with in a particular manner, the other claim also from the same contract dealing with the same issues needs to be considered in a similar manner only and cannot be treated differently as has been sought to be done by the RP.
10. The Respondent No.1 i.e. Resolution Professional has filed reply dated 31.01.2022 pleading that -
- i. Applicant having voted in favour of the revised plan cannot challenge the same.
 - ii. Applicant has correctly been identified as an unsecured Financial Creditor stating that the veracity of loan documents as well as agreement towards security is in suspicion and these documents are not in compliance with the relevant and mandatory legal criteria. No stamp duty has been paid on the loan agreement and no charge is registered with the Registrar of Companies. It is also submitted that even agreement towards interest is also not a credible document.
 - iii. If the applicant is considered as Secured Financial Creditor it would be detrimental to the interest of other Secured Financial Creditor as plan contemplates distribution of incremental amount and 22% of the revenue amongst secured financial creditors only.
 - iv. If the applicant is considered as Secured Financial Creditor it would be detrimental to the interest of SRA

11. The Respondent No.3 i.e. successful resolution applicant m/s Ashdan Properties Private Limited has filed an affidavit reply dated 31.01.2022 and written submission dated 02.03.2022 stating that the applicant has voted in favour of the Resolution plan, wherein the applicant is recognized as unsecured Financial Creditor and such exercised of the vote can not be said to be 'without prejudice'. It is further stated that the applicant is evidently enamoured by the provisions of the Resolution Plan vis-à-vis the Secured Financial Creditors and the applicant evidently wants to avail of the arrangements provided to the Secured Financial Creditor.
12. This bench heard both counsel and perused the material on record.
13. This bench notices that present application i.e. IA-225/2022 seeks to recognise the applicant's claim of principle amount of debt as secured debt while the Resolution Professional has considered the said claim as unsecured. Further, the application seeks to admit claim of interest on the principle debt, against which four flats are stated to have been allotted to the applicant. The Applicant has claimed that it should be classified as secured creditor for a sum of Rs.15,45,36,787/- instead of as unsecured creditor and it should be further included in the class of home buyer for a sum of Rs.12,44,54,898/- which is not done by the Resolution Professional.
14. Clause 3.1 of loan agreement dated 29.10.2015 stipulate payment of lump sum interest for the tenure of loan, however, the space for amount is left blank. This bench further notes that no date is stated on the agreement and the board resolution giving authority to sign documents for sale/mortgage, annexed to the agreement, is certified by Mr. Vijay Machindar as director. It is further noted that agreement to sale entered with the applicant is also undated and the date of resolution is missing. Further, it is noted that sale agreement for Flat No. 1501, Nos. 1502 and 1601 stipulates a consideration of Rs.2,73,96,210/- for each flat and sale

agreement for 1504 stipulates a consideration of Rs.2,74,99,425/-. As per said agreement the sale consideration is stated to have been paid prior to execution of the agreement. The security of 4 flats, given under the loan agreement is not registered with the registrar of companies in terms of section 77 of the Companies Act, 2013. It is noticed that section 77(3) the Companies Act, 2013 provides that no charge created by a company shall be taken into account by the liquidator appointed under this act or I&B code or any other creditor unless it is duly registered u/s 77(1) and a certificate of registration is given by the Registrar. Accordingly, this bench is of the view that the resolution professional has not committed any error in classifying the applicant as unsecured financial creditor.

15. This bench further feels that the obligation to pay interest in the manner agreed in the said loan agreement does not appear to be a transaction having been entered in a normal course of business. If, one analyse the effect of allotment of four flats towards payment of interest and a principal sum of Rs.11 Crore paid between 02.06.2015 to 03.10.2015 for a period 29 months from 02.06.2015, it is noticed that the Corporate Debtor is stated to have agreed for payment of Rs.12,44,54,898/- as interest for a period of 29 months on the loan amount of Rs.11 Crores. This bench fails to understand that though the loan agreement contains two options for payment of interest on such principal, however, the first option to pay lump sum interest for the initial loan tenor is left blank. It follows there from that the Corporate Debtor was made to exercise option of paying interest by allotment of flat only. It is further notice from clause 4.1.6.1 of the agreement that the agreement stipulates payment of interest at the rate of 18% per annum on the unpaid amount as on the date of expiry of loan tenor. If, this rate is applied to the interest which can be said to have accrued on the principal outstanding during the loan tenor, the total interest would come to approximately Rs.4.78 Crores. Accordingly, this

bench is of the view that the claim of interest, on consideration of facts in totality, does not look to be tenable, as this bench feels that this transaction requires examination by the Respondent No.1 in the light of provisions of Section 66 of the Code.

16. The decisions relied upon by the Applicant are distinguishable as the issue in the present case pertain to proper execution of the agreement apart from the insufficiency of the stamp duty and the clauses contained in the agreement.
17. In view of above discussion, this bench is of the considered view that the Resolution Professional did not commit any error in rejecting the claim of the applicant insofar as it pertains to classification under home buyer's class for a sum of Rs.12,44,54,898/-, being aggregate of amount stated in the agreement for sale stated to have been entered in pursuant to clause no. 3.2 of agreement; and also in considering the claim of the applicant for a sum of Rs.15,45,36,787/- as Unsecured Financial Creditor.
18. In view of this, the present application IA-225/2022 is **dismissed**. Accordingly, IA-225/2022 disposed of.

Sd/-

Prabhat Kumar
Member (Technical)

SVR/02.05.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)