

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

**IA-2232/2022 IN**

**CP/IB/4469/(MB)/2019**

Under Section 7 of the IBC, 2016

*In the matter of*

**UTI Employees Sai Samruddhi**

**Co-operative Housing Society**

...Applicant

V/s.

**PNB Housing Finance Ltd. & Ors.**

...Respondent(s)

*In the matter of*

**Idbi Trusteeship Services Limited**

...Financial Creditor

Versus

**Ornate Spaces Private Limited**

...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. Partho Sarkar i/b Vidhi legal,  
Adv.

- Respondent No.1 : Adv. Ashish Kamat, Ld. Senior Counsel a/w Adv. Rashmin Khandekar, Adv. Shalaka Patil, Adv. Rugved More and Adv. Porus Titina i/b Trilegal for the Respondent No.1.
- Respondent No.2 : Adv. Ryan D'souza a/w Mr. Parag Kabadi, Mr. Zaid Mansuri i/b DSK Legal, for the Respondent No.2 present.
- Respondent No.4 : Mr. Vikram Nankani, Ld. Senior Counsel a/w Mr. Nausher Kohli Mr. Devesh Juvekar, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi and Ms. Anjali Dhoot i.b Rajani Associates for the RP. Mr. Jayesh Sangharajka RP present in person.
- For the SRA: Mr. Mustafa Doctor Ld. Senior Counsel a/w Mr. Akshay Doctor, Mr. Parag Sawant and Ms. Priyank Kulkarni i.b P.S. Chambers, adv.

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This application is filed by the applicant, M/s UTI Employees Sai Samruddhi Cooperating Housing Society, the allottee of the land by Respondent 5 i.e. Maharashtra Housing and Area Development Authority (MHADA) for construction of 152 tenements for the benefit of its members and seeks holding of enquiry u/s 340 Cr.P.C. for an offence of forgery in relation to letter dated 04.07.2019, a copy of resolution purported to have been passed at general body meeting held on 11.04.2014, and letter dated 14.03.2014 purported to have been issued by the applicant; declaration of loan document in favour of PNB Housing Finance Limited (R1) and IDBI Trusteeship Private Limited (R2); declaration of debenture trust deed dated 29.06.2016 as non-est; declaration of constitution of CoC as ultra vires; declaration of Resolution Profession (R4) in violation of regulation 7 (2)(h) of the IBBI insolvency professional regulations; and to referred the conduct of resolution professional to IBBI(R6).
2. The Applicant submits that the issues raised in the instant goes to the root of the constitution of COC since a Fraudulent document is being relied upon & an ultra vires agreement has been executed. Further, an ultra-vires Resolution plan approved by Respondent 1 & 2, and presented by Respondent 4 of for approval of this Hon'ble Tribunal tends to usurp the rights of the instant applicant. These false/fraudulent documents have been presented to PNB Housing Finance Limited i.e. R-1 to create a charge on the land owned by the applicant and the Corporate Debtor could have been created no third-party rights under the terms set by Respondent 5 until the last tenement was handed over to the instant applicant. Accordingly, the

applicant has submitted that the plan is ultra-vires and sought inquiry against R-4 i.e. Resolution Professional.

3. The R4 i.e. Resolution Professional has filed affidavit dated 08.03.2023 in IA-651/2022 and pleaded that his reply in that IA be considered to this reply in IA also.
4. The Ld. Counsel for the R-1 drew our attention to clause 36 of agreement dated 18.05.2010 between the applicant and the Corporate Debtor which reads as “*The Developer shall be entitled to raise finance by creating charges etc. on the free sale component i.e. on the developer constructed area as the developer may deem fit. No finances can be raised on the said entire property vis. Land. The Developer shall not be entitled to assign and/or transfer the benefits of this agreement to any persons/s without the prior resolution of the society duly approved by the General Body.....*”. He also drew our attention to tripartite agreement dated 15.03.2010 entered amongst MHADA, the applicant and the Corporate Debtor. He also drew our attention to sanction letter dated 21.12.2017 (placed at **Page 114** of additional affidavit dated 16.02.2023). He further invited attention to para.7 of the said affidavit where it is stated that the loan facility provided by R1 was to be utilized to replace NCDs issued by the Corporate Debtor. It was further submitted that the development agreement between the Corporate Debtor and the applicant authorises the Corporate Debtor to raise funds without the intervention or concurrence of the applicant. It was further submitted that section 340 CIRP is not attracted in the present case as it has different ingredients and the appellant has failed to fulfil those ingredients.
5. The Counsel for the R2 submitted that the debenture trust deed supplied by the Applicant is not complete and the incomplete deed suppresses clauses after 15.6. He drew attention to clause 20 of the said deed, which provides for creation of mortgage by way of a first charge on the entire

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development rights in the project property. Clause 20.1 thereof further states that the security created by or pursuant to this deed is a continuing security and shall remain in full force and effect notwithstanding any intermediate payment or statement of account or other matter. The Ld. Counsel submitted that the pages containing said clauses are not found in the copy of deed appended to the application filed by the applicant, and submitted that the applicant has consciously suppressed these documents. It was also brought to our notice that R2 was the original petitioner in Section 7 application. Our attention was also drawn to a decision dated 23.09.2019 delivered by Hon'ble Bombay High Court, wherein the applicant was a party as defendant No.8 and the allegation of the fraud was not pleaded there at.

6. The applicant has also filed a written submission dated 11.01.2023 common to IA-651/2022, IA-2074/2022, IA-2232/2022 AND IA-3376/2022 quoting newspaper clipping from "Hindustan Times" dated 30.12.2022 and further stating that the MHADA property is in illegal occupation of Respondent No.4 which suggest brazenness/acts of omission by the RP indicating his criminality. The Applicant has also brought on fact a mail communication dated 25.03.2022 to director general of Corporate Affairs, MCA and complaint made to IBBI and alleged that IBBI is indulge in protecting mis deed/criminalities of the RP. This Bench finds that the applicant has notified to MCA as well as IBBI and both of which are statutory authorities vested with necessary powers to investigate or inquire in to the allegations.
7. The Applicant has filed another written submission dated 24.10.2023 alleging that the Ld. Senior Counsel of Respondent No.1 has made contradictory arguments. This bench finds that the arguments alleged to be contradictory were made by the Ld. Counsel to submit that proceeding u/s 7 of the Code does not require reliance on the document alleged to be

forged, as the fact of loan having been extended to the Corporate Debtor is not in dispute.

8. This Bench heard the Ld. Counsel(s) and perused the material available on record.

8.1. Section 340(1) of Cr.PC reads as under –

*“(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, -*

*(a) record a finding to that effect;*

*(b) make a complaint thereof in writing;*

*(c) send it to a Magistrate of the first class having jurisdiction;*

*(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and*

*(e) bind over any person to appear and give evidence before such Magistrate.”*

8.2. From the bare perusal of the provision, it emerges that this section contemplates inquiry into an offence, amongst others, in respect of a document produced or given in evidence in a proceeding in that court. In the present case, the case of the applicant is that an offence of forgery has been committed by in relation to letter dated 04.07.2019 from R-1, and letter dated 14.03.2014 purported to have been issued by the applicant. However, the applicant has not demonstrated how these documents have been given in evidence in a proceeding before this Bench, except that R-1 is admitted as Secured Creditor in CIRP of the Corporate Debtor on the basis of these documents. This Bench finds

that there is no dispute in so far disbursement of loan from R-1 to the Corporate Debtor is concerned. Whether such loan was disbursed against enforceable security or whether the security created in favour of R-1 is perfect are the issues, are not in consideration before this Bench, as existence or absence of security for the purpose of admission of Corporate Debtor into CIRP on occurrence of default is immaterial. These issues require determination only when such security is enforced by R-1. So, this Bench is not inclined to hold any inquiry as this bench finds that no offence is made out in the present application so as to justify invocation of section 340 CrPC. This Bench is of the view that it is not required to examine the genuineness of the documents at Exhibit A & Exhibit G, the question of allowing the prayer no. 2 does not arise at this juncture.

- 8.3. This Bench finds that the tripartite agreement and development agreement dated 15.05.2010 authorises the corporate debtor to raise loans on the security of free saleable area under the development agreement without any recourse to the applicant. Accordingly, the question of genuineness of Exhibit A & Exhibit G is not of much relevance. It follows from it that the debenture trust deed dated 29.06.2016 can not be declared as non-est. Since, it is undisputed fact that the Corporate debtor had availed credit facilities from lenders and it owed the amount, admitted as claim in CIRP, to the lenders, it is immaterial whether such loan was secured or not, as in both cases, such lenders are entitled to be member of Committee of Creditors in terms of provisions of this Code. Hence, this Bench is not inclined to declare the constitution of CoC as ultra vires. The issue of conduct of Resolution Professional (R4) in violation of regulation 7 (2)(h) of the IBBI insolvency professional regulations and reference to IBBI (R6) has been dealt with in decision in IA 2074/2022 filed by same

applicant, hence this Bench is not dealing with this issue again. In view of findings recorded in the order in IA 2074/2022, this Bench rejects this prayer also.

- 8.4. The Hon'ble Supreme Court in the matter of **Amarsang Nathaji versus Hardik Harshadbhai Patel (2017)1 SCC 113**, *"The mere fact that a person had made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under sections 199 and 200 of the Indian penal Code (45 of 1860) (hereinafter referred to as "the IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings"*. In view of this also, we do not find any substance in the plea of applicant. Needless to say, the fact whether mortgaged on the saleable rights in the project property was validly created, is not a factor to be taken into consideration in the process of resolution of defaults of Corporate Debtor in so far as there is no dispute that the Corporate Debtor is in default of a financial debt.
9. This Bench considers it appropriate to put on record that the applicant, a society, has filed this application without appreciating the provisions of Section 340 CrPC as well as the fact whether the documents alleged to be forged are relevant for consideration before this bench at any stage till date. This bench is of considered view that this application as well as IA-2074/2022 are frivolous and an attempt to delay the process of adjudication in IA-2374/2021, filed for approval of Resolution Plan. This bench understands that the applicant society that applicant society may not be aware of legal position in relation to locus and contempt/perjury applicable to the proceedings under the Code and is guided by its legal counsel only. Though, this bench considers that it will be fit case for imposition of costs

However, considering it, being a litigant solely depending on its legal counsel, may not be indulged wilfully in filing of such frivolous applications, this bench refrains from imposing costs.

10. In view of the foregoing, IA-2232/2022 is **dismissed**.

**Sd/-**

**PRABHAT KUMAR**  
**Member (Technical)**

SVR/02.05.2023

**Sd/-**

**KISHORE VEMULAPALLI**  
**Member (Judicial)**