

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, DELHI
BENCH III**

I.A. No. 1606/2021

In

IB-1348(ND)/2019

In the matter of:

M/s Nisus Finance & Investment Managers LLP

...Financial Creditor

Versus

M/s Earthcon Universal Infratech Pvt. Ltd.

...Corporate Debtor

In the matter of:

Nisus Finance & Investment Managers LLP & Anr.

...Applicants

Versus

Mr. Gaurav Katiyar

Resolution Professional

M/s Earthcon Universal Infratech Private Limited

...Respondent

Order delivered on 23rd July, 2021

Coram:

SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

**SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

Applicant

Mr. Jayant Mehta, Senior Advocate, Mr.
Shikhil Suri, Mr. Surya Kapoor, Ms. Komal
Gupta & Ms. Nikita Thapar (Advocates)

RP

Mr. Rishabh Jain (Advocate)



Memo Of Parties

Nisus Finance & Investment Managers LLP

Having its Regd. Office at:
201D, Poonam Chambers A Wing,
Dr. Annie Besant Road, Worli,
Mumbai-400018, Maharashtra (India)

...Applicant No.1

Beacon Trusteeship Limited

Having its Regd. Office at:
4C & D Siddhivinayak Chambers,
Gandhi Nagar, Opp. MIG Cricket Club,
Bandra (East), Mumbai-400051,
Maharashtra (India)

...Applicant No.2

Mr. Gaurav Katiyar

Resolution Professional
M/s Earthcon Universal Infratech Private Limited
Having its Regd. Address at
T-17, DDA Flats, Sector-7,
Jasola Vihar, New Delhi-110025

Also having Office at:
B-11, Sector-1, Noida
Gautambudh Nagar,
Uttar Pradesh-201309

...Respondent

ORDER

Per: NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

1.The present application has been filed by the Applicants to invoke jurisdiction of this Hon'ble Tribunal under section 60(5) of the Insolvency and Bankruptcy Code 2016 read with Rule 11 of the NCLT



Rules, 2016. By way of the present application, following reliefs are sought by the applicant:

- a. Direct the Resolution Professional to amend the Information Memorandum (IM) so as to exclude 268 flat units in real-estate project Casa Royale and Sanskriti, from the assets of the Corporate Debtor;
- b. Declare that the 268 units which are mortgaged in favour of the Applicant are within the exclusive charge of the Applicant and hence not available to any other creditor during the process of CIRP or as part of the assets of the Corporate Debtor;
- c. Direct the Resolution Professional that during the pendency of the present application to not deal with the 268 flats units as part of the general pool of Corporate Debtor.

2. The facts that led to the filing of the present application are as follow:

- a. It is submitted that the Applicants are financial creditors and claim their rights by virtue of the Debenture Trust Deed ('DTD') dated 13.06.2017 executed between Applicant No.1, Nisus Finance



and Investment Managers as "Facility Agent/Debenture Holders", Applicant No. 2 Beacon Trusteeship Pvt. Ltd. as "Debenture Trustee", M/s. Earthcon Infracon Pvt. Ltd. ('EIPL') in the capacity of the "Issuer Company/Principal Borrower" and the Corporate Debtor, Earthcon Universal Infratech Pvt. Ltd. as a Corporate Guarantor as the Issuer Company was to raise funds up to Rs. 30,00,00,000/-. The Corporate Debtor by way of DTD, issued and allotted 3000 secured, transferable, redeemable non-convertible debentures in one or more tranches for face value of Rs. 1,00,000/- each on a private placement ("Debentures") basis against a deposit of Rs. 30,00,00,000/- (Rupees Thirty Crores) by the debenture holders. That via amendments to the DTD dated 20th December, 2017 and 24th December, 2018, the Issuer company/principal borrower raised additional Rs. 20,00,00,000/- (Rupees Twenty Crores Only) and Rs. 2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only) and



issued additional 2250 Debentures. The purpose of raising funds by Earthcon Infracon Pvt. Ltd./Issuer Company was to purchase and acquire units in real-estate project to be developed by the Corporate Debtor. The Issuer Company failed to make payment of the First Principal repayment instalment along with the interest to the tune of Rs. 13,12,50,000/-.

- b. It is stated that in the event Issuer Company fails to fulfil its obligation under the DTD and its amendments thereto, then the Corporate Debtor would be liable to fulfil the financial obligations as a Guarantor under the DTD and the amendments thereto. From the money raised from DTD, the issuer company paid a sum of Rs. 51,79,00,000/- to the seller being the corporate debtor and purchased, acquired and transferred to itself as full and final beneficial ownership/substantial rights of 268 units in the said project being developed by Corporate Debtor. Initially, 205 of 268 units BBAs (Builder Buyer Agreements) were executed between



Corporate Debtor and Issuer Company and also executed irrevocable power of attorney in favour of the Applicants authorizing the present Applicants to endorse such sale for and on behalf of Corporate Debtor in favour of any third-party purchaser. No objection from the project lender, Punjab and Sindh Bank ("PSB") was also received to fully discharge these assets from its lien and mortgage in favour of Issuer Company.

- c. It is further submitted that the balance 63 units to be sold by the Corporate Debtor to EIPL, the Corporate Debtor assigned such units to EIPL from the inventory of Casa Royale on the assurance that these units can be sold and marketed and due approval from GNIDA would be obtained and made available for these units, post which BBAs would be entered into and made available for the 63 units as well. In effect, the Corporate Debtor accepted 100% of the monies due and payable from EIPL for the sale for these 268 units to EIPL. To give effect to the rights to EIPL on the 63 units, a deed of mortgage



was executed in favour of the Debenture Trustee wherein Corporate Debtor confirmed the rights of EIPL and became a co-mortgagee.

d. It is averred that EIPL has sold 61 units to various third parties upon receiving NOCs from Applicant No. 2 having a first and exclusive charge over the said units by virtue of the mortgage deeds executed in its favour, subject to receipt of consideration from such sale be deposited in EIPL's Escrow Account, and in relation to such sales, it has received a sum of Rs. 12,43,00,000/- (Rupees Twelve Crores Forty-Three Lacs Only) and a balance sum of around Rs. 12.56 crores is pending goes to show that these units belonged to EIPL. Such sale was bona fide and confirmed by the promoter, shareholder, ex-directors of the Corporate Debtor. The Resolution Professional has arbitrarily chosen to ignore the above facts and not to account for the ownership of EIPL over said 268 units which highlights the error in judgment and arbitrariness of the Resolution Professional.



e. It is further averred that pursuant to DTD, EIPL as mortgagor along with the Corporate Debtor as Co-mortgagor has executed Mortgage Deeds (without possession) dated 16.06.2017, 05.12.2017 and December, 2018 in favour of Applicant no. 2 Beacon Trusteeship Limited as Mortgagee, collectively mortgaging 268 units owned by EIPL in Sanskriti and Casa Royale Projects and transferred all rights, title and interest in relation to the said units in favour of Applicant No. 2 and further created an exclusive charge of the mortgaged properties (268 units) by way of various mortgage deeds in favour of the mortgagee ("Applicant No. 2") acting on behalf and for the benefit of debenture holders. Registered Mortgage Deed dated 16.06.2017 and Registered Mortgage Deed 05.12.2017 is executed in favor of Applicant No. 2 wherein the Corporate Debtor is a confirming party and said mortgage has been duly recognised by the sub-registrar of Noida as units held by EIPL free from any encumbrance. In addition to this, under



recital 4 of the mortgage deed, the mortgagors created the exclusive security interest in respect of the mortgaged properties in favour of the mortgagee *"to secure and facilitate the due payment of Secured Obligations of the Principal Borrower/Issuer Company under the DTD"*. The Applicants also referred to clause 5.1(a) and (b) in order to show the priority of mortgagee over mortgaged property and mortgage deeds is a continuing security of applicant and also referred to clause 7 of the Mortgage deed with respect to Declaration and warranties.

- f. It is submitted that Information memorandum was published on January 2021 by Resolution Professional, it came to the attention of the applicants that the 268 flat units of EIPL including receivables thereof was erroneously included as Corporate Debtor's assets. The Applicant No.1 objected the same vide email dated 04.02.2021 in detail. The resolution professional vide email dated 20.02.2021 requested for relevant clause from the guarantee deed creating mortgage, pledge and



hypothecation and RP also agreed to remove the units from Information Memorandum. The Applicant responded to the same vide email dated 01.03.2021 and provided BBA and Power of Attorney and also mentioned the relevant clause (9.1, 9.6) of DTD. The resolution professional vide email dated 01.03.2021 denied transaction between the corporate debtor and EIPL as well as charge in favour of the applicant, such DTD and mortgagee deed as well as BBAs cannot be denied because of fraudulent accounting undertaken by the corporate debtor. Furthermore, the guarantee has not been denied by the corporate debtor in any of the proceedings means the obligations undertaken therein ought to be respected.

g. The applicant vide email dated 05.03.2021 raised objection to come to the conclusion that sale has never taken place relying on same erroneous information despite admitting it as wrong accounting and also relied on clause 2.1.2, 2.4, 5.1, 5.2, 2.9.1, 2.9.2, 2.9.3 of the Deed of guarantee to

show obligation of the Corporate Debtor and show that corporate debtor shall not claim anything from the EIPL till the complete discharge of debt owed to applicants. The applicants also referred to section 128 of the Indian Contract Act, 1872 regarding co-extensive liability of Principal debtor and surety. Reliance is also placed on clause 2.9 of Deed of Corporate Guarantee dated 13.06.2017 regarding no security taken by guarantor and also referred to Clause 5 regarding waiver of right of EIPL and corporate debtor until full discharge of debt owed to applicants. Hence, undisputed right belonging to debenture Trustee.

h. It is further submitted that all the rights flowing from the DTD which have crystallised in favour of the Applicant were never challenged before any forum, hence, it cannot be taken away by the Resolution Professional. Therefore, it is the case of the Applicant that residential units have to be excluded from the liquidation estate of developer/corporate debtor by virtue of the

provisions of section 36(4) of the Code. The applicant also referred to section 29 of code and Regulation 36 of IBBI (CIRP) Regulation, 2016 regarding preparation of information memorandum and further referred to the section 18 of the Code which speaks about the duties of interim resolution professional. At the end prayed that the reliefs sought by the applicant may be granted.

3.The Resolution Professional filed its reply to the application under consideration and raised the following contentions:

- a. It is submitted that in April 2017 the corporate debtor (CD) approached the applicants to lend the money. But at that time CD was already having borrowings/credit facility (C/F) with Punjab and Sindh Bank in tune to Rs.100 Crores under an escrow mechanism. Thus, the CD was not in position to have another escrow in the same company for separate borrowing. Hence, the entire loan transaction was routed through a shell, dummy, defunct entity of the same group i.e.,



Earthcon Infracon Private Limited (issuer company). Initially, the corporate debtor without passing necessary board resolution u/s 179(3)(f) of the Companies Act, 2013 for creation of mortgage over 151 units admeasuring saleable area of 2,40,865 sq. ft. filed e-form-CHG-1 with the Registrar of Companies (RoC) and the said charge of Rs. 30 Crore was registered by RoC. The mortgage is in contravention of section 185 of Companies Act.

- b. It is further submitted that Corporate Debtor further without complying section 179(3)(f) of the Companies Act, 2013 passed a board resolution for execution of various documents for creation of mortgage over 54 units and the RoC modified the existing debt to Rs. 50 crore after submission of e-form-CHG-1 and same happened when further 63 units mortgaged. Furthermore, the BBAs sent by the applicants to RP were not on the requisite stamp paper, not registered and not dated. It is stated that at the time of issuance of debentures by the issuer company, the net worth of the issuer company was



Rs. 68,800/- only. The audit balance sheet of the issuer company shows that the issuer company did not have any independent source of income and did not have any asset base to redeem the debentures and did not have any independent existence in the commercial world of real estate industry. Hence, the reasons behind the issuance of debentures as mentioned in the recitals of Debenture Trust Deed are false and are not in consonance with the facts.

- c. It is also argued 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 and one deed cannot be given effect. Reliance is placed on judgment of Hon'ble Delhi High Court in **Commissioner of Income-Tax, Delhi-IV v. Shiv Raj Gupta [2014] 52 taxmann.com 425 {Delhi}**.

- d. It is averred that the balance sheet of the issuer company shows investment in preference shares and the CD has recorded loans from Issuer



Company and not recorded purchase of 205 flats from the corporate debtor by the issuer company. It is further stated that five units admeasuring saleable area of 12,875 sq. ft. are common in both Mortgage deed for series 1 and series 2 debentures. As per section 58 of Ttransfer of Property Act, 1882, a mortgage is a transfer of an interest in specific property and in the absence of identification of specification no valid mortgage can be created on admeasuring area of 12,875 sq. ft. No BBA in respect of 63 Flats were executed by the CD. Furthermore, total 63 flats aggregating 70,145 Sq. Ft. was sought to be mortgaged by the CD for petty amount of Rs. 3 crores (i.e., Rs. 407 per sq. ft.), which cannot be the 100% sale consideration of 63 Flats because the actual market value of the property of the CD is ranging from Rs. 2800-3000 per sq. ft + GST.

- e. In short, the basic objection of the respondent/RP is that the applicants are secured financial creditors qua the corporate debtor having security interest

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over 200 flats having admeasuring saleable area of 3,64,840 sq. ft. identified by the units' numbers as mentioned in Mortgage Deed 1 and 2 and the applicant may be accordingly directed to proceed in the CoC meeting to negotiate with the PRA.

4. The Applicant has filed the written submission and reiterated all the points mentioned in the application under consideration and further argued that DTD, Deed of Corporate Guarantee, Post-dated cheques make it clear that they represent two independent and separate legs of transaction with and by CD.

First Leg represents Investment made by the Debenture Holders (represented by the Applicants/Financial Creditors herein) is used by EIPL to pay the full sale consideration for 268 flats to CD. CD then transfers these 268 flats to EIPL in the aforesaid manner and, both - EIPL and CD - mortgage those flats to the Financial Creditors/Applicant No. 2 herein. CD is a confirming party to the Mortgage Deeds since it must execute the final sale document, being registered sub-leases, for

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those 268 flats. This leg represents sale of 268 units by CD to EIPL and, thus, those flats are no longer the corpus of CD.

The Second Leg represents Independent of the First Leg i.e., sale of 268 flats, CD has secured the Financial Creditors, pending repayment to them by EIPL from the sale of 268 flats which the CD itself is obliged to sell or repurchase through unquestioned documents set out in para 1 (C) above. Thus, independent of the First Leg, the Financial Creditors are secured Financial Creditors of CD.

Admittedly, RP has not questioned the documents in a manner prescribed by the law. Further reiterated the clauses A to D of DTD, according to which the purpose of raising funds by EIPL/issuer Company was to purchase and acquire units in real estate projects developed by CD. Further referred to clause 5.6 of Corporate Guarantee deed @ pg. 209 of Vol. II, which stated that the guarantee furnished by the CD is independent and distinct from any security the Debenture Trustee has taken whether by way of



mortgage, charge etc. over assets, movable/immovable property. With Respect to RP's arguments that the selling price of BBA's were undervalued, it is submitted that the prices fixed in the BBA were subject to the Circle rate fixed by the state government and there are no regulations that bar sale at a price in and around the circle rate. Furthermore, sale was a bulk sale for an underdeveloped property where the construction was halted for several years and same is duly approved by lender bank Punjab and Sindh Bank. It is stated further that Builder Buyer Agreements (BBAs) are valid, enforceable agreements of sale by the Developer/CD to Buyer Company/EIPL for consideration and transfer of absolute title, ownership and rights/interests thereto in said 268 units. Furthermore, EIPL is not carrying any business is not an issue as the main issue whether the units belong to EIPL should be included in the pool of assets of the CD or not. The ex-promoter Directors have duly



executed board resolutions for mortgage of these units.

5. The applicant also relied on certain judgments which are as follows:

- a. Under the doctrine of indoor management, the persons dealing with the company are entitled to presume that the internal requirements prescribed under the foundation documents have been properly observed (**MRF Ltd. v. Manohar Parrikar, (2010) 11 SCC 374, para 110-111**).
- b. It is settled law that once power is granted to perform an act in a certain way, it must be done in that way or not at all. (**Nazir Ahmad v. King Emperor, 1936 SCC Online PC 41; Greater Mumbai v. Abhilash Lal, (2020) 13 SCC 234, Para 39 and 46**)
- c. RP cannot take control of assets which are owned by a third party as on the insolvency commencement date. (**Embassy Property Development Pvt. Ltd. v. State of Karnataka and Ors. (2019) SCC Online SC 1542, para 38-40**)



- d. It is now well settled that role of the RP is not adjudicatory (**Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, para 88; Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1, para 80; and Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd. 2019 SCC OnLine NCLAT 721, Para 8**). The RP does not have any authority under the Code to decide the admissibility of the above transaction documents.
- e. It is no longer res integra that agreements are valid until appropriate action under law for cancellation of such agreements have not been taken. (**See, Section 31, Specific Relief Act, 1963; Abdul Rahim v. Abdul Zabbar, (2009) 6 SCC 160, para 28-29; and Bhupinder Jit Singh v. Sonu Kumar, 2017 SCC OnLine Del 11061, para 15**). Therefore, the actions of the RP ignoring genuine agreements entered between the Corporate Debtor and Buyer Company/EIPL and including 268 units in the pool of assets of CD and the revised IM are



unsustainable in law. Hence prayed that application may be allowed.

6. The respondent/RP also filed its written submissions and reiterated all the contentions raised in reply and further argued that the relationship of CD and the issuer company is in dispute. The applicant submits that CD sold flats of worth of more than Rs. 115 Crores to Issuer company and Rs. 52.50 Crores represents the sale consideration of flats and after looking into the "substance over form" the RP submits the issuer company gave loan to the CD and Rs. 52.50 Crores plus interest thereupon represents loan because sale consideration is never required returned back whereas loan along with interest is required to be repaid. And the Applicants are Secured Financial Creditor of the CD for these flats. Further stated that no financial credibility of Issuer Company and applicants are creating smoke screen, contrive and camouflage.

7. The RP/Respondent also filed relevant case laws which are as follows:

- a. It is trite 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 a one deed and one single document cannot be given effect. (Delhi High Court judgment in **Mercury Travels (India) Ltd. V. Mahabir Prasad** [2001] 89 DLT 440)
- b. No ownership of flats was transferred from CD to Issuer Company on the basis of execution of BBAs. (**SUKUMAR BYSACK V. SUSHIL KANTA BANERJE** AIR 1972 CALCUTTA 207 [para 5,7, 9-11 at pg. no-37-38])
- c. Even after existence of BBA, today RP is not precluded or estopped in proving the real bargain of the entire transaction was of loan and BBAs were executed for merely to create security interest in favour of Applicant (the Hon'ble Apex Court in the matter of **SUNDARAM FINANCE LTD. V. STATE OF KERALA**, (1966) 2 SCR 828.)



[para 16]). Hence, the RP prayed that the application may be dismissed keeping in view the submission made by him.

8. We have heard the Counsel for Applicants and the Resolution Professional in detail, perused the IA, documents placed by both parties as well as the Case Laws relied upon by them. It is an admitted fact, that Applicants are financial creditors and their claim against CD herein emanates from the Debenture Trust Deed (DTD) dated 13.6.2017. In terms of the said DTD, the Applicants have a right to proceed against CD since the CD has stood as Corporate Guarantor against Debentures issued by M/s Earthcon Infracon Pvt. Ltd. (EIPL) (which is the Principal Borrower) to tune of Rs. 30 crores. Such a right to proceed against CD is in case of failure on part of the Principal Borrower to pay/honor the Debenture terms. To secure the above, it is seen that the parties have entered into following agreements too:



i) Debenture Trust Deed dated 13.6.2017 and amendments to the DTD dtd. 20.12.2017 and 24.12.2018

(ii) Registered Mortgage Deeds dated 16.6.2017 (for 151 units) and 5.12.2017 (for 54 units) and unregistered Mortgage Deed dated December 2018 (for 63 units).

(iii) Builder Buyer Agreements (BBAs) executed for 205 units and to be executed for 63 units.

9. It is seen from the records that the primary transaction between the parties is with regard to investment made by the Debenture Holders (who are represented by the Applicant/Financial Creditors herein), to be used by EIPL to pay the full sale consideration for 268 flats to the CD. In support of the said transaction, corporate guarantee and mortgage deeds have been executed by CD.

10. The second aspect of the transaction is the additional security provided by CD in favor of Applicant herein by executing Demand Promissory Note (DPN) made on



13.6.2017; post-dated cheques (PDCs) issued by the CD in favor of the Applicants.

11. The moot questions which emerge from the above pleadings are as under:

a) Whether 268 flats can be taken off from the assets of CD in terms of Section 18 of the IBC or whether RP is right in holding the said flats as CD property in terms of Section 18 (f) of the Code.

b) Whether the Applicants, in view of Mortgage Deeds executed by CD and due to failure of CD to honor its Guarantee obligation are in exclusive charge of the Applicants and therefore the said 268 flats should be taken out of the Information Memorandum (IM).

12. ANALYSIS:

i) It is seen that the CD has failed to fulfil its obligations as secured through various Mortgage Deeds qua the said flats in favor of the Applicants, considering the provisions of DTD.

It has executed all the documents with regard to payment of consideration in relation to the said flats. Even the lien earlier marked in favor of Punjab & Sindh Bank concerning 205 flats (out of 268 flats) has already been cleared by the said bank.

The Debenture Issuer company/Buyer/EIPL has filed Form CHG-1 with the RoC for every registered mortgage created by it in favor of Applicant No. 2. The registered Mortgage Deeds dated 16.6.2017, 5.12.2017 and of December, 2018 executed by EIPL and CD as mortgagor and co-mortgagor collectively create first and exclusive charge over the said 268 flats in favor of Applicant No. 2. This has been done to secure repayment of entire outstanding amount owed to the Applicants.

- ii) It is further seen that the said mortgage deeds have been duly recognized by Revenue Department (Sub-Registrar). The fact about



transfer of ownership rights in favor of EIPL is duly mentioned in all the documents i.e., the DTD, Mortgage Deeds. It is also seen that RP has not till date challenged any of the aforesaid documents i.e., DTD, Mortgage Deeds, Demand Promissory Notes and PDCs signed by the CD in relation to the said flats.

- iii) It is contended by RP that in regard to 63 flats (out of 268 flats) as also admitted by the Applicants no charge was registered with the RoC, no Mortgage Deed registered with Sub-Registrar and no BBA was provided to him by the Applicants. Accordingly, these 63 flats cannot be treated as property of the Applicants herein. As regards, no sale being recorded in the Balance Sheet of CD, we are of the view that the Applicants herein cannot be penalized for any wrong accounting of the transaction done by CD, especially when all the documentation indicate full agreed consideration having flown between



CD and Applicant herein in terms of DTD,
Mortgage Deed etc.

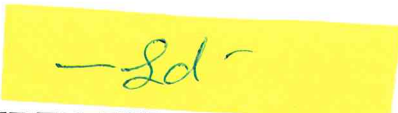
13. In view of the above findings, this Tribunal hereby
allows the IA on following terms:

i) Out of 268 flats, 205 flats shall be considered as
being under exclusive control and rights of Applicants
and the same shall not form part of the Information
Memorandum (IM) and rest of 63 flats for which no
Mortgage Deed was registered, no charge filed with
RoC and not registered with Sub-Registrar, shall
continue to remain part of the IM.

ii) The voting rights of Applicant No. 1 as secured Financial
Creditor herein in the CoC shall be reduced by the amount of
the value ^{of} aforesaid 205 flats.

iv) The RP is directed to issue appropriate amendment to
the IM immediately for information of all concerned.

14. No order as to costs.


(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)


(P.S.N. PRASAD)
MEMBER (JUDICIAL)