

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT-V, MUMBAI BENCH**

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
read with Rule 11 of the National Company Law Tribunal Rules,
2016

**I.A No. 2995 of 2021
IN
CP (IB) No: 1390 of 2020**

Filed by

Beacon Trusteeship Limited

... Applicant

Versus

Jayesh Sanghrajka

... Respondent

IN THE MATTER BETWEEN

Beacon Trusteeship Limited

..... Financial Creditor

Versus

Radius Estates and Developers Private Limited

.....Corporate Debtor

**Order Reserved On: 12.12.2022
Order Delivered On: 09.01.2023**

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearance:

For the Applicant (Beacon Trusteeship Limited):

Ld. Counsel Mr. Ashish Kamat, Mr. Abhineet
Sharma, Riya Gokalgandhi i/b Parinam Law
Associates.

For the Respondent (Jayesh Sanghrajka, Resolution Professional):

Ld. Senior Counsel Mr. Mustafa Doctor a/w Mr.
Nausher Kohli, Mr. Devesh Juvekar, Mr. Ashish
Parwani, Mr. Dikshat Mehra, Mr. Yash Jain and
Miss Honey Chandnani.

Per: Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The present Application is filed by Beacon Trusteeship Limited (hereinafter referred as "**Applicant**") against the Radius Estates and Developers Private Limited (hereinafter referred as "**Corporate Debtor**") under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 claiming that due to the inadvertence of the Applicant it has been wrongly classified as the '**Financial Creditor**'

in the ongoing Corporate Insolvency Resolution Process of the Corporate Debtor.

2. SUBMISSIONS OF THE APPLICANT ARE AS UNDER;

- a. The Applicant states that, it is the Debenture Trustee, acting on behalf of various Debenture Holders of the Corporate Debtor under several Debenture Trust Deeds. The Debenture Holders under each of such Debenture Trust Deeds form one separate unit. These groups were classified separately and voted independently as a group under the CIRP of the Corporate Debtor.

- b. The Applicant submits that, in or around 2016, the Corporate Debtor and MIG (Bandra) Realtors and Builders Private Limited, jointly undertook development of a Residential Project known as 'X (Ten) BKC' ("**Project**") forming part of a larger redevelopment project on all those pieces and parcels of land bearing Survey No. 341 (part), corresponding to City Survey Nos. 649 and 649/1 to 48 of Village Bandra, measuring 20149.40 sq. mtrs., or thereabouts, lying, being and situate at Gandhi Nagar, Bandra (East), Mumbai – 400 051. The Project is registered

with Maharashtra Real Estate Regulatory Authority (MahaRERA) under registration no. P51800004889 and consists of 15 Wings, each wing comprising of ground + basement + 22 to 29 upper floors.

- c. Further a Debenture Trust Deed (hereinafter referred as “**DTD**”) dated August 8, 2017 was entered between the Applicant, Corporate Debtor and MIG (Bandra) Realtors and Builders Private Limited, wherein, the Corporate Debtor agreed to allot and issue 250 fully paid-up, unlisted, unrated, secured, redeemable, tradable, taxable and non-convertible debentures of face value of Rs. 10,00,000/- each aggregating to Rs. 25,00,00,000/- as per the terms and conditions of the DTD.
- d. The Applicant further states that, the NCDs were primarily secured by an English Mortgage over the 8 (Eight) residential flats in the Project, which are set out in detail in Schedule I of the DTD, Furthermore, the NCDs were also secured by other security documents as follows:
 - i. Escrow Agreement dated on or around the date of the Trust Deed, Personal Guarantee dated August 2, 2017, executed by Mr. Sanjay Chhabria;

- ii. Shortfall Undertaking cum Indemnity dated August 2, 2017, executed by Mr. Chhabria;
 - iii. Demand Promissory Note dated August 2, 2017;
 - iv. Letter of Continuity for the Demand Promissory Note dated August 2, 2017.
- e. However, the Applicant submits that, the Corporate Debtor had failed to comply with its financial obligations under the DTD. Pursuant to this, several correspondences have been exchanged between the parties. The Applicant further states that, the post-dated cheques provided by the Corporate Debtor towards discharge of its obligations were not honored by banks and therefore, the Applicant was constrained to initiate proceedings under Section 138 of the Negotiable Instruments Act, 1881, against the Corporate Debtor.
- f. Thereafter, this Hon'ble Tribunal vide order dated April 30, 2021, admitted the Corporate Debtor into CIRP. On the basis of the above, the Resolution Professional on May 8, 2021, issued a Public Announcement and invited Claims from Creditors of the Corporate Debtor. The Applicant

states that, the present Applicant was not representing the debenture holders under the present DTD.

- g. Further, the Applicant submits that erroneously, the Applicant filed its claim as a **'Financial Creditor'** against the Corporate Debtor via e-mail dated May 18, 2021.
- h. Further, Applicant has executed various transactions with the Corporate Debtor, for and on behalf of several debenture holders, which are separate and independent of the DTD. The Applicant has filed separate claims in respect of such other transactions which were entered into with the Corporate Debtor. The same are not being set out herein as they are not germane to the facts of the present proceedings.
- i. On July 2, 2021, the claim of the Applicant was as Financial Creditor accepted, and accordingly the Applicant was duly classified as a 'Financial Creditor'. However, the Applicant in or around the first week of October 2021, came to realize that the aforesaid claim was incorrectly filed as 'Financial Creditor' under Form 'C', when in fact under the DTD, the Corporate Debtor has transferred the Mortgaged Premises

in favour of the Applicant under an English Mortgage. Therefore, on December 30, 2019, on account of the failure of the Corporate Debtor to comply with its repayment obligations, the transaction attained finality.

- j. Pursuant to the above, the Applicant via e-mail dated October 14, 2021, re-filed its claim under Form 'C' and requested the Resolution Professional for due re-classification of the Applicant as 'Homebuyers/ Allottees/ Financial Creditors in a 'Class' instead of 'Financial Creditor'.
- k. Thereafter on the basis of the abovementioned email, the Applicant was intimated on October 21, 2021 that the request of the Applicant cannot be acceded to, as the Resolution Professional does not have the power to review, change or modify the claim of the Applicant, which is already admitted, in accordance with the judgment of the Hon'ble NCLAT, New Delhi in ***Rajnish Jain vs. Manoj Kumar Singh 2020 SCC OnLine NCLAT 824***. The RP in view of the said Judgment, asserted that the Applicant would have to approach this Hon'ble Tribunal for such change in the status from Financial Creditor to that of a

Home Buyer. Accordingly, the Applicant has approached this Hon'ble Tribunal.

1. The Applicant further submits that, the nomenclature under the DTD and the contents of the deed, is an English Mortgage, which is not challenged by the Respondent. Therefore, the type of security created under the DTD, is not disputed in fact as well as in law, it is as an English Mortgage. The Applicant has relied on the Section 58 of the Transfer of Property Act, 1882 ("**TOPA**"), Further, the Applicant has placed its reliance on the relevant clauses and recitals of the Debenture Trust Deed.

- m. The Applicant states that the Mortgaged Premises under the DTD have duly been transferred to the Applicant *vide* an English Mortgage and the Applicant is the allottee in respect of the same. The re-transfer of the same in favour of the Corporate Debtor was conditional. Further, the Corporate Debtor was obligated to make payments under the DTD, as agreed. Upon the admitted and undisputed failure of the Corporate Debtor to make the said payments/ repayments, much prior to the commencement of CIRP, the mortgage under the DTD has attained finality and there

exists no question of re-transfer of the Mortgaged Premises. Therefore, the Applicant has become the lawful owner of the Mortgaged Premises.

- n. The Applicant submits that, as it had filed the claim as 'Financial Creditors' in any event, because of an error in understanding while filing the claim, the Applicant's rights cannot be denied and the facts have to be independently looked into which clearly show that, the Applicant has to be re-classified as 'Homebuyers/ Allottees/ Financial Creditors in a Class' instead of 'Financial Creditor'. The Applicant has relied on the amendment brought to the definition of "Financial Debt" under section 5(8) of the IBC, 2016 for re-classification as a homebuyer.
- o. It is further submitted that, the Respondent in their reply has incorrectly mentioned that Beacon Trusteeship Limited had filed its claim as a financial creditor. It is submitted that Beacon Trusteeship Limited is merely a debenture trustee which represents various debenture holders under separate ISINs. Further, in the present case, the ISINs of the Financial Creditor (Beacon Trusteeship Limited) which has filed CIRP Petition under section 7 of the Insolvency

and Bankruptcy Code, 2016 against the Respondent is not related to the ISINs of the present case. Furthermore, Beacon Trusteeship Limited is being represented by other Advocates in that matter for such ISINs. The claims for each ISINs have been admitted and treated separately by the RP himself under law.

- p. With regard to the issue of the delay, the Applicant submits that he had approached the RP for re-consideration of its claim as a Homebuyer before a Resolution Plan was even placed before the CoC. Therefore, the Respondent's arguments that the Applicant has filed the Application at a belated stage and/ or that the Applicant has filed the present Application only because the Resolution Plan provides better provisions for Homebuyers cannot be sustained.
- q. Without prejudice to the above, it is submitted that there is no estoppel against law for which reliance can be placed on the Hon'ble Supreme Court's decision in ***Directorate of Elementary Education Orissa vs Pramod Kumar Sahoo reported in (2019) 10 SCC 674*** wherein it is held by the

Hon'ble Supreme Court that there is no estoppel against law.

- r. The Applicant states that it represents small time debenture holders of the Corporate Debtor, who has a strong *prime facie* case in the matter and the balance of convenience is overwhelmingly in its favour and against the Corporate Debtor. In these circumstances, the Applicant submits that the reliefs sought in this Application are equitable, fair and in the interest of justice.

3. SUBMISSIONS OF THE RESOLUTION PROFESSIONAL :

The Resolution Professional has filed a detailed reply, dated 04.03.2022, opposing the present Application. The contentions raised by the Resolution Professional are summarised as follows:

- a. The Resolution Professional states that, the CIRP of the Corporate Debtor is at very advanced stage. The I.A No. 573 of 2022 has been filed by Resolution Professional for Approval of the Resolution Plan for the Corporate Debtor which was approved by the COC of the Corporate Debtor, on December 27, 2021, with a majority voting of 83.93%. In view of the aforesaid,

the present I.A 2995 of 2021 is belated and will cause immense prejudice to the CIRP of the Corporate Debtor.

- b. The Resolution Professional further states, that the Applicant initially lodged its claim on May 18, 2021, as a “Financial Creditor” and submitted its Form C to be classified as a Financial Creditor (**“Applicant’s Claim”**). Based on this submission, the erstwhile IRP duly accepted the Applicant’s Claim and admitted the Applicant as a Financial Creditor in the Corporate Debtor’s CIRP. Subsequently, from May 18, 2021, until October 14, 2021, the Applicant duly participated in the Corporate Debtor’s CIRP including participating in the CoC meetings and raised no dispute and/or protest and/or demur whatsoever, to its classification as a “Financial Creditor”.
- c. The Resolution Professional submits that, the Applicant was aware of the nature of its claim and consequently submitted the Claim as a Financial Creditor. As per the Resolution Plan, the Homebuyers are getting their respective flats as specified, in their respective Agreements for Sale, as per the location and configuration mentioned therein. Therefore, the Applicant as an afterthought is now attempting to seek re-classification as a

'Homebuyer', as the Applicant has now realized it shall be more beneficial to the Applicant if it is classified as a Homebuyer.

- d. The Resolution Professional further states that, firstly, the Applicant having once submitted its claim as a Financial Creditor and thereafter having extensively participated in the on-going CIRP including by voting on the Resolution Plan, the Applicant cannot at this belated stage seek re-classification as Homebuyer.
- e. Secondly, **it is pertinent to note that the Corporate Debtor's CIRP came to be commenced on the basis of the Section 7 Petition filed by the Applicant itself claiming a default on a "Financial Debt"**. In this Petition, the Applicant recognized itself as a Financial Creditor and not a *'Homebuyer'*. Thirdly, in the Application, the Applicant has miserably misconstrued and misinterpreted the terms of the DTD, the Transfer of Property Act, 1882 and the Real Estate (Regulation and Development) Act, 2016. The transaction between the Applicant and Corporate Debtor was purely that of a financial transaction. The 8 residential flats in question were only earmarked as security for repayment of the Financial Debt due under the

DTD.

- f. Furthermore, the Applicant is now attempting at leading oral evidence contrary to a written document which is not permissible in law. It was never the intention of the parties that, the Applicant was to be allotted these 8 residential flats for if this was the case, the parties would have entered into written agreement such as Allotments Letters, Agreements for Sale etc. and not a Debenture Trust Deed.
- g. Notwithstanding the aforesaid, it is trite law that “absolute interest” in the mortgaged property does not get transferred to the mortgagee immediately upon creation of the English mortgage, and the ownership and rights in the mortgaged property continue to vest with the mortgagor right up till the time of redemption or sale of the mortgaged property. The expression “transfer” in Section 58(e) of the Transfer of Property Act is not conveyance. The mortgagor continues to have an interest in the property, and it is not merely left with a right of redemption. In the present case, the Applicant initiated no steps whatsoever for enforcement of the mortgage created in its favour.

- h. Furthermore, as regards the contentions of the Applicant that the DTD Agreement is an English Mortgage Agreement, it is pertinent to mention that the said DTD is completely silent and nowhere in the said DTD agreement, it is mentioned that the same is to be treated as English Mortgage Deed.
- i. The Respondent states that to classify a Mortgage as English Mortgage, there are four conditions which need to be complied for classifying as an English Mortgage. Out of the said four conditions one of the Conditions closely resembles that, there should be conditions in respect to repurchase of the securities upon repayment of the Loan whereas it is pertinent to note that, there is no detail condition in respect to repurchase in the said DTD.
- j. The Respondent states that upon perusal of the DTD Agreement, the agreement appears to be that the Applicant will create registered Mortgaged of the properties whereas it is pertinent to note that no such mortgage has ever been got registered by the Applicant which is again contrary to the provisions and conditions of the English Mortgage Deed.

- k. Further, the Respondent submits that as per clause 14.1.1 of the said DTD, it is stated that the possession of the Mortgage properties shall remain with the Developer unless and until enforcement action has been initiated by the Debenture Trustees on behalf of Debenture Holders (Applicant) with respect to any or all of the Mortgaged Properties on the occurrence of an Event of Default. This clearly shows that the Transfer of the mortgage properties has not completely transferred to the Applicant which is again contrary to the conditions of the English Mortgage.
- l. Further as per Clause 21.1.6 it is agreed by and between the Applicant and Corporate Debtor that the Mortgaged Premises hereunder will continue to remain the absolute property of the Developer (Corporate Debtor) which again is contrary to the conditions and definition of the English Mortgage Deed as relied by the Applicant.
- m. Pursuant to above, the Respondents submit that the actions undertaken by Resolution Professional during the CIRP of Corporate Debtor have been always under the directions of the Hon'ble Tribunal and the COC and in accordance with the Code. The Respondent further states that, in view the object of the

Code, which is Resolution of a Corporate Debtor in time bound manner to maximize value, if such requests of applicants like the Applicant are accepted, the very purpose of the Code would be defeated.

- n. In view of the facts and circumstances and grounds set out hereinabove, the Respondent has requested that the Application to be dismissed with costs. The Respondent states that in any event, it is settled law, that a Resolution Professional has no power whatsoever to change / re-classify the status of a Creditor once the Resolution Professional has already categorized a claim.

FINDINGS

4. We have heard, Mr. Ashish Kamat, Ld. Senior Counsel appearing for the Applicant and Mr. Mustafa Doctor, Ld. Senior Counsel appearing for the Resolution Professional. After hearing the submissions of both sides and upon perusing the material available on record, this Bench is of the view that the issues that needs to be decided in the above is matter as follows:

- a. *Whether the Applicant which was initially claimed and classified as Financial Creditor can be Re-classified as the Homebuyer at an advanced stage of the CIRP of the Corporate Debtor?*
- b. *Whether an English Mortgage was created in respect of the 8 Flats with the execution of the Debenture Trust Deed Dated 08.08.2017 ?*

5. With respect to the above issue, it is pertinent to note that the Applicant itself lodged its claim as a Financial Creditor on May 18, 2021 and till the filing of the instant Application, the Applicant did not raise any dispute or objections till the approval of the Resolution Plan. Further, the Applicant has duly participated and voted in the CoC meetings during the CIRP of Corporate Debtor **in the capacity of a Financial Creditor.**

6. From the filing of the present Petition under Section 7 of the Code, till the approval of the Resolution Plan by the CoC members, the Applicant remained and acted in the capacity of a Financial Creditor. It is not disputed that the initiation of CIRP process of the Corporate Debtor was itself initiated by the Applicant in the capacity of a Financial Creditor under Section 7 of the IBC, 2016

(Code) pertaining to the existence of a Financial Debt and its Default and Repayment. In these circumstances, ex-facie, at this belated stage, the Applicant cannot turn around and claim itself as a Homebuyer. This Bench is of the view that it is untenable to consider the Applicant, who filed the present Petition in the capacity of a Financial Creditor be now treated or given the position of a Homebuyer. It appears that acts of the Applicant in turning around to claim itself as a Homebuyer is a clear afterthought strategy to benefit itself.

7. It is further noteworthy that the Applicant “Beacon Trusteeship Limited” as a Financial Creditor, filed an Interlocutory Applications vide I.A. 503 of 2021 and I.A. 931 of 2022, objecting the Resolution Plan filed by Resolution Applicant i.e. Adani Goodhomes Limited. It is further noteworthy that the Applicant continued to pursue the said IAs in the capacity of the Financial Creditors. It is to be noted that this Bench has dismissed the objections raised by the Applicant, in the captioned I.A. 503 of 2021 and I.A. 931 of 2022, vide order dated 02.12.2022.
8. The Applicant has claimed that by way of DTD, an English mortgage in respect of 8 residential flats was created in favour of the Applicant. In this regard, the Applicant has referred to Clause

14.1.1 of the DTD, wherein it is specifically mentioned that developer hereby convey, assign, assure, transfer and charge by way of first and exclusive charge and mortgage unto the Debenture Trustee by way of security interest all present and future rights, title, interest and benefit of the Developer arising with respect to the mortgaged premises, more particularly, described in Schedule 1 attached with DTD. On the strength of Clause 14.1.1, the Applicant has claimed that an English mortgage was created in its favour by virtue of DTD, more particularly, Clause 14.1.1 and in addition to this, security interest were further created by way of Clauses 14.1.2, 14.1.3 and 14.1.4. It has further been contended on behalf of the Applicant that since an English mortgage was created in its favour in terms of Section 58 of the Transfer of Property Act and the flats referred to in Schedule 1 of DTD stand transferred in favour of the Applicant, the latter is liable to be treated as a Home Buyer instead of Financial Creditor.

9. We have thoughtfully considered the above contentions raised on behalf of the Applicant and have found that the argument is wholly specious. An English mortgage, as defined under Section 58 of Transfer of Property, would correspond to a transaction in which the Mortgagor commits to paying the back the mortgaged money by a specific date and transfers the Mortgaged property unconditionally

to the Mortgagee with the stipulation that he will re-transfer it to the Mortgager upon payment of the mortgage money as agreed. The English Mortgage definition makes it abundantly clear that, in all actuality, the transaction is a legitimate sale except that the Borrower/the Mortgager must make a legally binding pledge to the Lender that he would repay money on a specific date. As a Mortgage is to give the Mortgagee an absolute transfer of the immovable property, similar to a legal sale, the transaction would be subject to stamp duty and the document must be registered as a purchase agreement/sale deed in terms of the Indian Registration Act, 1908. Therefore, the transaction ensuing from an English mortgage is supposed to be a legitimate sale except that the borrowers or the mortgagers, must make a legally binding obligation to the lender that he would pay the money on a specific date and further that since the mortgager is giving the mortgagee an absolute transfer of the immovable properties, similar to a legal sale, the transaction will be subject to payment of stamp duty and compliance of the provisions of the Indian Registration Act, 1908. However, from a perusal of the DTD, more particularly, Clause 14.1.1, no transfer of any property much less the flats referred to in Schedule 1 is shown to have effected by way of a registered Deed which is a sine qua non of an English mortgage. Therefore, It cannot be said by any stretch of imagination that an English mortgage was created in favour of the

Applicant. Had it been so, a legitimate sale deed/transfer agreement would have been executed in favour of the Applicant in respect of the Flats and there should have been a condition that the Mortgager would be entitled to get the Flats re-transferred in its name on repayment of the borrowed amount. Since there is no such term or condition in the DTD, the transaction cannot be treated as an English Mortgage. Therefore, the contention raised on behalf of the Applicant is wholly fallacious.

10. The Applicant has placed reliance on the clauses (d) and (zn) of Section 2 of RERA and also the fact that mortgaged flats are within the purview of the “English Mortgage” to support the contention of re-classifying itself as a Homebuyer. The Applicant further submits that as a consequence of the failure of the Corporate Debtor to make payments under the DTD, there remains no question of re-transfer of the Mortgaged Premises. However, in our considered view, the arguments made by the Applicant cannot be sustained for the simple reason that the Applicant has not got executed any document regarding transfer of the so called Mortgaged Flats as no registered document was got executed at the time of execution of DTD. Therefore, by way of DTD only a security interest has been created to secure the repayment of the loan advance in the shape of Debentures. As a result, the Applicant cannot be recognised as a

Homebuyer nor it can be said to have been covered fall under the purview/definition of an “Allottee” as per RERA, 2016. Further, **clause 14.1.1 of the said DTD** clearly indicates that since no registered transfer deed in respect of the flats was got executed in respect of the Flats, as required under the definition of English Mortgage, the transaction cannot be treated as English Mortgage, as sought by the Applicant. Therefore, looking at the case from any angle, absolutely no case is made out for re-classifying the Applicant as a Homebuyer instead of a Financial Creditor. For the aforesaid reasons this Bench is of the considered opinion that there is no merit in the above Application both on the question of fact, law and conduct and are liable to be dismissed.

SD/-

**ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)**

SD/-

**KULDIP KUMAR KAREER
MEMBER (JUDICIAL)**

//Renuka, LRA//