

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 593 of 2021

(Arising out of the Order dated 23rd July, 2021 passed by the Learned
Adjudicating Authority (National Company Law Tribunal, Division
Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-
1348(ND)/2019)

IN THE MATTER OF:

Gaurav Katiyar,
Resolution Professional of
Earthcon Universal Infratech Private Limited

Having Office at: D-32,
East of Kailash, New Delhi – 110065.

...Appellant

Versus

1. Nisus Finance and Investment Managers LLP

Having its registered office at:
201D, Poonam Chambers A Wing,
Dr. Annie Besant Road, Worli,
Mumbai – 400018,
Maharashtra (India).

...Respondent No. 1.

2. Beacon Trusteeship Limited

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

...Respondent No. 2.

Present

For Appellants: **Mr. P. Nagesh, Sr. Advocate with Mr. Rishabh Jain & Mr. Harshal Kumar, Advocates.**
Mr. Gaurav Katiyar (RP in person).

For Respondent No. 1 & 2: **Mr. Abhijeet Sinha, Mr. Shikhil Suri, Ms. Komal Gupta & Ms. Mahima Aggarwal, Advocates for R-1 & R-2.**

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 656 of 2021

(Arising out of the Order dated 23rd July, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-1348(ND)/2019)

IN THE MATTER OF:

1. Nisus Finance and Investment Managers LLP

Having its registered office at:
201D, Poonam Chambers A Wing,
Dr. Annie Besant Road, Worli,
Mumbai – 400018,
Maharashtra (India).

...Appellant No. 1.

2. Beacon Trusteeship Limited

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

...Appellant No. 2.

Versus

Gaurav Katiyar,

Resolution Professional of
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

Present

For Appellants:

**Mr. Krishnendu Datta, Sr. Advocate with
Mr. Shikhil Suri, Ms. Mahima Aggarwal &
Ms. Komal Gupta, Advocates.**

For Respondent:

**Mr. P. Nagesh, Sr. Advocate with Mr. Rishabh
Jain & Mr. Harshal Kumar, Advocates.
Mr. Gaurav Katiyar (RP in person).**

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 659 of 2021

(Arising out of the Order dated 23rd July, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-1348(ND)/2019)

IN THE MATTER OF:

1. Rupesh Das,

C-308, Earthcon Sanskriti
GH – 10, Sector - 1,
Greater Noida West 201306.

...Appellant No. 1.

2. Anil Dewan,

Flat No. D 704,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 2.

3. Santosh Chaudhary,

Flat No. A -803,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 3.

4. Ghananand Srivastava,

Flat No. C -702,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 4.

5. Lalit Mohan Sharma,

Flat No. 403,
Sanskriti Apartments,
Tower – D, Sector -1,
Greater Noida West 201306.

...Appellant No. 5.

6. Kaustav Mukherjee,

Flat No. C1 -912,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 6.

7. Rajeev Kumar,

Flat No. B -1202,
Sanskriti Apartments,

GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 7.

8. Bhimbhaw Kumar Singh,
Flat No. B -201,
Earthcon Sanskriti Apartments,
Sector -1,
Noida Extension.

...Appellant No. 8.

9. Prabhat Pankaj,
Flat No. C -901,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 9.

10. Nishant Gupta,
Flat No. C -304,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 10.

11. Manoj Kumar Tiwari,
Flat No. A -906,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 11.

12. Yahspal Singh,
Flat No. 140,
Block C-2,
Shriniketan Kunj Apartment,
Sector -17,
Rohini, Delhi 110089.

...Appellant No. 12.

13. Deepak Vashishtha,
Flat No. B -1402,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 13.

14. Raghwendra Kumar,
Flat No. C009,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 14.

15. Praveen Kumar,
Flat No. A -703,
Sanskriti Apartments,
GH – 10, Sector -1,

Greater Noida West 201306.

...Appellant No. 15.

16. Anil Kumar Tyagi,

Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 16.

17. Sanjay Kumar Tyagi,

Flat No. C -809,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 17.

18. Shailender Singh,

Flat No. B -205,
Earthcon Sanskriti,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 18.

19. Sunil Chawla,

Flat No. C -1304,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 19.

20. Ajivit Roy,

Flat No. C -1204,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 20.

21. Abhay Kumar,

Flat No. A -806,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 21.

22. Amit Sharma,

Flat No. C1 -1104,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 22.

23. Amit Kumar Singh,

Flat No. D -1302,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 23.

24. Ashish Tripathi,

Flat No. D -804,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 24.

25. Devesh Vashist,
Flat No. B -1403,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 25.

26. Neeraj Mishra,
Flat No. 308,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 26.

27. Vivek Sheel,
Flat No. C -1206,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 27.

28. Atanu Saha,
Flat No. C -605,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 28.

29. Shailesh Mishra,
Flat No. D -1303,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 29.

30. Vikas Mishra,
Flat No. B -507,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 30.

31. Subir Kumar Singh,
Flat No. C -608,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 31.

32. Himanshu Chawla,
Flat No. 1404,
Sanskriti Apartments,

GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 32.

33. Basir Raza,
Flat No. D -506,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 33.

34. Mehar Chand Naithani,
Flat No. C -709,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 34.

35. Puja Kumari,
Flat No. C -1102,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 35.

36. Sushma Khandelwal,
Flat No. C-1-1003,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 36.

37. Vijay Shaw,
Flat No. C1-1009,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 37.

38. Alok Kumar,
Flat No. C1-109,
Sanskriti Apartments,
GH – 10, Sector -1,
Greater Noida West 201306.

...Appellant No. 38.

Versus

1. M/s. Nisus Finance and Investment

Through its Director
201D, Poonam Chambers,
A-Wing, Dr. Annie Besant Road,
Worli, Mumbai – 400018,

...Respondent No. 1.

2. Beacon Trusteeship Limited

Through its Director

Comp. App. (AT) (Ins.) Nos. 593, 656, 659, 694, 703 With Comp. App. (AT) (Ins.) No. 736/2021 & I.A. No. 647/2022 With Comp. App. (AT) (Ins.) No. 912/2021

Allied House, Plot No. 5 & 6,
Shopping Complex,
B-7, Vasant Kunj,
Nelson Mandela Marg,
New Delhi – 110070.

...Respondent No. 2.

3. Gaurav Katiyar,
Resolution Professional of
M/s. Earthcon Universal Infratech Private Limited

Office No. D-32, East of Kailash,
Near M. Cinema,
New Delhi – 110065.

...Respondent No. 3.

4. M/s. Saya Homes Private Limited
B-7/45 Extn. Safdarjung Enclave,
New Delhi – 110029.

...Respondent No. 4.

Present

For Appellants:

**For Respondent No. 1 Mr. Shikhil Suri, Ms. Mahima Aggarwal &
& 2: Ms. Komal Gupta, Advocates for R-1 & R-2.**

For Respondent No.3: Mr. Rishabh Jain, Advocate for R-3.

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 694 of 2021

**(Arising out of the Order dated 23rd July, 2021 passed by the Learned
Adjudicating Authority (National Company Law Tribunal, Division
Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-
1348(ND)/2019)**

IN THE MATTER OF:

Committee of Creditors

Through, Sh. Jawed Ahmad Ansari,
S/o. Late Habib Ahmad Ansari,
R/o. 30Y, Chitra Gupta Road,
Pahar Ganj, Delhi – 110055.

...Appellant

Versus

1. Nisus Finance and Investment Managers LLP

Having its registered office at:
201D, Poonam Chambers A Wing,

Dr. Annie Besant Road, Worli,
Mumbai – 400018,
Maharashtra (India).

...Respondent No. 1.

2. Beacon Trusteeship Limited

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

...Respondent No. 2.

3. Gaurav Katiyar,

Resolution Professional of
Earthcon Universal Infratech Private Limited

Having Office at: D-32,
East of Kailash, New Delhi – 110065.

...Respondent No. 3.

Present

For Appellants: Mr. Karthik Seth, Ms. Shriya Gilhotra,
Advocates.

For Respondent No. 1 & 2: Mr. Abhijeet Sinha, Mr. Saikat Sarkar,
Mr. Shikhil Suri & Ms. Komal Gupta, Advocates
for R-1 & R-2.

For Respondent No.3: Mr. Rishabh Jain, Advocate for R-3.

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 703 of 2021

**(Arising out of the Order dated 23rd July, 2021 passed by the Learned
Adjudicating Authority (National Company Law Tribunal, Division
Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-
1348(ND)/2019)**

IN THE MATTER OF:

1. Sanskriti Allottee Welfare Association (Reg.)

A Society Registered under the Societies
Registration Act, 1860.
Having its Registered Office at:
Flat No. 101, Tower-C,
Earthcon Sanskriti Apartment,
GH-10, Sector-1, Greater Noida West,
Gautam Buddha Nagar – 201306, Uttar Pradesh,
Through its Authorised Representative

Mr. Prabhat Kumar, Vice President.

...Appellant No. 1.

2. Mr. Anurag Giri

R/o. Flat No. B-604,
Earthcon Sanskriti Apartment,
GH-10, Sector-1, Greater Noida West,
Gautam Buddha Nagar – 201306, Uttar Pradesh.

...Appellant No. 2.

3. Mr. Anand Singh Bora

R/o. Flat No. D-202,
Earthcon Sanskriti Apartment,
GH-10, Sector-1, Greater Noida West,
Gautam Buddha Nagar – 201306, Uttar Pradesh.

...Appellant No. 3.

4. Mr. Saket Jha

A/o. Flat No. D-104,
Earthcon Sanskriti Apartment,
GH-10, Sector-1, Greater Noida West,
Gautam Buddha Nagar – 201306, Uttar Pradesh,
R/o. A-576, G.D. Colony, Mayur Vihar,
Phase-3, New Delhi – 110096.

...Appellant No. 4.

5. Mr. Aditya Gupta

R/o. Flat No. D-002,
Earthcon Sanskriti Apartment,
GH-10, Sector-1, Greater Noida West,
Gautam Buddha Nagar – 201306, Uttar Pradesh.

...Appellant No. 5.

6. Mr. Bahadur Singh

R/o. Flat No. D-1201,
OSIMO-1, Mahagun Mention, Phase-2,
Vaibhav Khand, Indirapuram
Ghaziabad, Uttar Pradesh.

...Appellant No. 6.

7. Mr. Raghuveer Singh Rawat

R/o. Flat No. C-011,
Earthcon Sanskriti Apartment,
GH-10, Sector-1, Greater Noida West,
Gautam Buddha Nagar – 201306, Uttar Pradesh.

...Appellant No. 7.

Versus

1. Nisus Finance and Investment Managers LLP

Having its registered office at:
201D, Poonam Chambers A Wing,
Dr. Annie Besant Road, Worli,
Mumbai – 400018,
Maharashtra (India)
Through its Designated Partners.

...Respondent No. 1.

Comp. App. (AT) (Ins.) Nos. 593, 656, 659, 694, 703 With Comp. App. (AT) (Ins.) No. 736/2021 & I.A. No. 647/2022 With Comp. App. (AT) (Ins.) No. 912/2021

2. Beacon Trusteeship Limited

Having its Registered Office at:
4C & D, Siddhivinayak Chambers,
Gandhi Nagar, Opposite MIG Cricket Club,
Bandra (East), Mumbai – 400051.
Maharashtra (India)
Through its Director.

...Respondent No. 2.

3. Gaurav Katiyar,

Resolution Professional of
Earthcon Universal Infratech Private Limited

Having Office at: D-32,
East of Kailash, New Delhi – 110065.

...Respondent No. 3.

Present

For Appellants: Ms. Bitisha Singh, Advocate.

**For Respondent No. 1 & 2: Mr. Abhijeet Sinha, Mr. Saikat Sarkar,
Mr. Shikhil Suri & Ms. Komal Gupta, Advocates
for R-1 & R-2.**

For Respondent No.3: Mr. Rishabh Jain, Advocate for R-3.

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 736 of 2021

&

I.A. No. 647 of 2022

**(Arising out of the Order dated 23rd July, 2021 passed by the Learned
Adjudicating Authority (National Company Law Tribunal, Division
Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-
1348(ND)/2019)**

IN THE MATTER OF:

Sh. Deepak Gupta

(IPA Registration No. IBBAI/IPA-001/IP-
P01340/2018-2019/12235)

The AR of Financial Creditors in Class (Home
Buyers).

...Appellant

Versus

1. Nisus Finance and Investment Managers LLP

Comp. App. (AT) (Ins.) Nos. 593, 656, 659, 694, 703 With Comp. App. (AT) (Ins.) No. 736/2021 & I.A. No. 647/2022 With Comp. App. (AT) (Ins.) No. 912/2021

Having its registered office at:
201D, Poonam Chambers A Wing,
Dr. Annie Besant Road, Worli,
Mumbai – 400018,
Maharashtra (India).

...Respondent No. 1.

2. Beacon Trusteeship Limited

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

...Respondent No. 2.

3. Gaurav Katiyar,

Resolution Professional of
Earthcon Universal Infratech Private Limited
(CD in CIRP)

Having Office at: D-32,
East of Kailash, New Delhi – 110065.

...Respondent No. 3.

Present

For Appellants: Mr. Sanjay Khanna, Ms. Pragya Bhushan,
Mr. Tarandeep Singh & Mr. Karandeep Singh,
Advocates.

For Respondent No. 1 & 2: Mr. Abhijeet Sinha, Mr. Saikat Sarkar,
Mr. Shikhil Suri & Ms. Komal Gupta, Advocates
for R-1 & R-2.

For Respondent No.3: Mr. Rishabh Jain, Advocate for R-3.

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 912 of 2021

**(Arising out of the Order dated 23rd July, 2021 passed by the Learned
Adjudicating Authority (National Company Law Tribunal, Division
Bench, Delhi, Bench - III), in I.A. No.1606/2021 in C.P. (IB)-
1348(ND)/2019)**

IN THE MATTER OF:

1. Rajesh Kumar Bhandula

S/o. Ashok Raj Bhandula,
R/o. D-603, Casa Royal,
Plot No. GH-10, Sector-1,
Greater Noida West,
Gautam Buddha Nagar,

U.P. 201309.

...Appellant No. 1.

2. Hayat Karim Khan,

S/o. Lt. Shujat Karim Khan,
R/o. 1214, Tower – VII,
Purvanchal Royal Park,
Sector 137, Noida – 201305,
U.P.

...Appellant No. 2.

3. Abhinav Jain

S/o. Santosh Kumar Jain
R/o. E-81/A, Ganesh Nagar,
Pandav Nagar Complex,
New Delhi – 92.

...Appellant No. 3.

4. Anil Kumar

S/o. Mitthan Singh,
R/o. 134, Global City, IIMT College,
Ganganagar, Meerut,
Defence Colony, Mawana,
U.P. – 250001.

...Appellant No. 4.

5. Faizan Khan,

C/o. Amar Khan,
R/o. A-801, 8th Floor, Kalyani Heights,
100ft Road, Dayal Bagh, Agra,
U.P. – 282005.

...Appellant No. 5.

6. Neeta Singh,

W/o. Kashinath Singh,
R/o. 17, Neel Vihar, Near Sector 14,
Power House, Indira Nagar,
Lucknow (U.P.) – 226016.

...Appellant No. 6.

7. Shagufta Jamal

W/o. Jamal Rizvi
R/o. Modern School, Kot – Garbi,
Sambhal, U.P. – 244302.

...Appellant No. 7.

8. Dhruv Kumar

S/o. Radhey Shyam
R/o. 172, Girdhar Enclave, Near IME College,
Sahibabad, Ghaziabad,
U.P. 201005.

...Appellant No. 8.

9. Shadab Hussain

S/o. Ausaf Hussain
R/o. 64-D, Near Police Station,
Kisrol, Moradabad,
U.P. – 244 001.

...Appellant No. 9.

10. Andleeb Khan

W/o. Inamul Ghani Khan,
R/o. 33, Shadab Colony,
Mahanagar, Lucknow,
U.P. 226006.

...Appellant No. 10.

11. Raj Kumar Singh

S/o. Indradev Verma
R/o. 2/42, Rajendra Nagar,
Sector 5, Sahibabad, Ghaziabad,
U.P. – 201005.

...Appellant No. 11.

12. Jodha Singh,

S/o. Bahadur Singh Negi,
R/o. 68-Naula Kote, Awam Chakra,
Deodhar, Almora,
Uttarakhand – 263621.

...Appellant No. 12.

13. Prathiba Agarwal,

W/o. Ashok Kumar Agarwal,
R/o. 103/2, National Chemical MBD Road,
Sambhal, U.P. – 244302.

...Appellant No. 13.

14. Atesham Khaliq,

S/o. Shri. Abdul Khaliq,
R/o. 5896/51, Basti Harphool Singh,
Sadar Bazar, Sadar Thana,
Quraish Nagar,
North Delhi – 110006.

...Appellant No. 14.

15. Mahendra Vyas,

S/o. Shr. Krishna Ballabh Vyas,
R/o. H. No. 600, 1st Floor,
Sector 45, Gurugram,
Haryana – 122003.

...Appellant No. 15.

16. Aditya Verma,

S/o. Shri Braj Pal Verma,
R/o. Flat No. 246, Ekta Apartment,
Pocket – 1 & 2,
Near DPS Sector – 3,
Dwarka Sector 6,
South West Delhi – 110075.

...Appellant No. 16.

17. Gazala Saad

C/o. Ahmad Saad,
R/o. 5132/1 SF, Sharif Manzil Ballimaran,
VTC, Delhi, GPO,
North Delhi – 110006.

...Appellant No. 17.

18. Islam Ahmad Khan

S/o. Nafis Ahmad Khan,
R/o. 36, Reli, Near Moti Lawn,
Bareilly City, Bareilly,
U.P. – 243 003.

...Appellant No. 18.

19. Sarita Sharma

W/o. Mahesh Chandra Sharma,
R/o. B-18, Paper Mill Road,
Himmat Nagar, Saharanpur,
U.P. – 247 001.

...Appellant No. 19.

Versus

1. Nisus Finance and Investment Managers LLP

Having its registered office at:
201D, Poonam Chambers A Wing,
Dr. Annie Besant Road, Worli,
Mumbai – 400018,
Maharashtra (India).

...Respondent No. 1.

2. Beacon Trusteeship Limited

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

...Respondent No. 2.

3. Gaurav Katiyar,

Resolution Professional of
Earthcon Universal Infratech Private Limited
(CD in CIRP)

Having Office at: D-32,
East of Kailash, New Delhi – 110065.

...Respondent No. 3.

4. Shadab Khan,

Erstwhile Promoter,
Earthcon universal Infratech Private Limited,

Having Office at:
B-1, Sector 4,
Noida – 201010,
Uttar Pradesh.

...Respondent No. 4.

**5. Greater Noida Industrial Development
Authority (GNIDA),**

Having its Office at:
Plot No. 01,
Knowledge Park – 04,
Greater Noida, Gautam Buddha Nagar,
Uttar Pradesh 201308.

...Respondent No. 5.

6. Punjab & Sind Bank

Having its Office at:
1st Floor, 21,
Rajendra Palace,
New Delhi – 110008.

...Respondent No. 6.

Present

For Appellants:

For Respondent No. 1 & 2: **Mr. Abhijeet Sinha, Mr. Saikat Sarkar, Mr. Shikhil Suri & Ms. Komal Gupta, Advocates for R-1 & R-2.**

For Respondent No.3: **Mr. Rishabh Jain, Advocate for R-3.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

Comp. App. (AT) (Ins.) No. 593/2021

1. Challenge in this Appeal, is to the Impugned Order dated 23.07.2021, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench, Delhi, Bench – III) in I.A. No. 1606/2021 in C.P. (IB) No.1348/ND/2019, whereby the Adjudicating Authority has directed the Resolution Professional ('RP') to exclude 205 Flats from the pool of the Assets of the 'Corporate Debtor'.

2. Facts in brief are that I.A.1606/2021 was preferred by the Applicants namely Nisus Finance and Investment Managers LLP (hereinafter referred to as 'Nisus Finance') and Beacon Trusteeship Limited (hereinafter referred to as 'Beacon') seeking the following reliefs:

(a) direct the RP to amend the Information Memorandum so as to exclude 268 Flat Units in the Real Estate Project Casa Royal Sanskriti from the agents of the 'Corporate Debtor'.

(b) declare that 268 Units which are Mortgaged in favour of the Appellants are within the exclusive charge of the Applicants, and hence not available to any other Creditor during the CIRP and further direct the RP, not to include these 268 Flats in the pool of the 'Corporate Debtor'.

3. It was averred that Nisus Finance and Beacon are 'Financial Creditors' and claim their rights by virtue of the Debenture Trust Deed ('DTD') dated 13.06.2017, executed between Nisus Finance as facility Agents/Debenture Holders, Beacon as 'Debenture Trustee', M/s. Earthcon Infracon Private Limited, ('EIPL') and the capacity of the 'Issuer Company/Principal Borrower' and the 'Corporate Debtor', Earthcon Universal Infratech Private Limited as a Corporate Guarantor as Issuer Company was to raise funds upto Rs.30Cr./-. It was averred that the DTD was amended on 20.12.2017 and on 24.12.2018 and the Principal Borrower raised an additional Rs.20Cr./- and Rs.2.5Cr./- for which additional 2,250 Debentures were issued. It is stated that the purpose of raising funds by the Issuer Company/EIPL was to purchase and acquire the units in the Real Estate Project developed by the 'Corporate Debtor'. It is averred that in the event the Issuer Company had failed to fulfil its obligations under the DTD then the 'Corporate Debtor' would be liable to fulfil the financial obligations as the guarantor under the DTD. It was stated in the Application that from the money raised from the DTD, the Issuer Company had paid a sum of Rs.51,79,00,000/- to the 'Corporate Debtor' and acquired substantial rights of 268 Units in the Project developed

by the 'Corporate Debtor'. Initially Builder Buyers Agreement ('BBA') were executed for 205 Units out of the 268 Units between the 'Corporate Debtor', and the Issuer Company, for which irrevocable Power of Attorney was also executed in favour of the Applicants/Nisus and Beacon authorising them to endorse such sale for and on behalf of the 'Corporate Debtor' in favour of the third-party purchaser. For the balance 63 Units, it is stated that they were assigned to the Issuer Company from the inventory Casa Royal on the assurance that these units would be sold in the market and due approval from G.NOIDA would be obtained. To give effect to the rights of the EIPL as 63 Units, a Deed of Mortgage was executed in favour of the Debenture Trustee, wherein the 'Corporate Debtor' confirms the rights of the EIPL and became a co-Mortgagee.

4. It is averred that EIPL sold 61 Units to various third parties upon receiving NoCs from Beacon and amount was deposited in EIPL Escrow Account. It is stated that Rs.12,43,00,000/- was received and a balance sum of Rs.12.56Cr./- was pending. It was averred in I.A.1606/2021, that pursuant to the DTD, EIPL as a Mortgager along with the 'Corporate Debtor' as a co-Mortgager has executed the Mortgage Deeds dated 16.06.2017, 05.12.2017 and December 2018, in favour of Beacon as Mortgagee collectively mortgaging 268 Units and transferred all rights, title and interest in relation to the said units to Beacon and further created as an exclusive charge of the Mortgage Properties by way of various Mortgage Deeds in favour of Beacon which was acting for and on behalf of the Debenture Holders.

5. It is stated that the RP in the Information Memorandum included these 268 Flat Units receivables thereof, when Nisus Finance objected to the same

vide, email dated 04.02.2021 and the RP in his Reply dated 20.02.2021 sought for the relevant Clause from the Guarantee Deed, creating Mortgage pledge and hypothecation. Nisus Finance responded to the email and provided BBAs and the Power of Attorney and the mentioned the relevant Clauses of 9.1 and 9.6 of the DTD. While so, the RP vide email dated 01.03.2021 denied the transaction between the 'Corporate Debtor' and EIPL as well as the charge in favour of Nisus. The Adjudicating Authority while allowing the Application preferred by Nisus and Beacon framed the following issues and observed as hereunder:

"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 honour 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 favour 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 favour 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 favour 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 favour of Applicant No. 2. This has been done to secure repayment of amount owed to the entire outstanding 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 favour 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 aforesaid 205 flats.

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

6. Submissions of the Learned Sr. Counsel, Mr P. Nagesh appearing on behalf of the Appellants/Resolution Professional of the ‘Corporate Debtor’:

- Learned Sr. Counsel, Mr P. Nagesh submitted that the relationship of the ‘Corporate Debtor’ and the Issuer Company is disputed and submitted that the Issuer Company gave a loan to the ‘Corporate Debtor’; that ‘Corporate Debtor’ sold Flats worth more than 1115.50Crs./- to the Issuer Company and Rs.5.79Crs./- represents the Sale Consideration of 268 Flats and after looking into the ‘substance over form’, it can be clearly seen that the amount involved is a ‘loan’, as a Sale Consideration is never required to be returned back, whereas a loan along with interest is required to be repaid. The Respondents are the secured ‘Financial Creditors’ of the ‘Corporate Debtor’ for these Flats and further in CIRP, the Assets mortgaged are available with the ‘Corporate Debtor’, and as per Section 52 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘The Code’), the Creditor can invoke the Security Interest in the Liquidation process only.
- The BBA sought to be relied upon by the Respondents proved the alleged sale of 205 Flats of EIPL as non-est. The BBAs are compulsorily registerable documents as per Section 13 of UP RERA and Transfer of Property Act, 1882 and Registration Act, 1908 has amended by the State of UP. In the present case, the BBAs are not registered. It is

submitted that the BBAs relied upon by the Respondents are merely Agreements to sale and it is the well settled principle of Transfer of Property Act, 1882 that an Agreement to sale does not create any right in the property save the right to enforce the said Agreement. The Purchase Price mentioned in the BBA was included on the basis of Clause 9.8 of DTD which says that the Purchase Price would be 33% for the value of Flats i.e., 1,250 per square foot and will have a margin of 66% in favour of the Debenture Holders and by showing a similar *modus operandi* for alleged 200 Flats, the 'Corporate Debtor' received an amount of Rs.51.79Cr./- from the Issuer Company/EIPL as against the fair value of the property i.e., Rs.105.5Cr./- . The Market Value of the BBA is much more than what is actually mentioned in these BBAs. The difference of 63.75Cr./- represents the Margin Money which is clearly corroborated in Clause 9.8 of the DTD.

- The Corporate Debtor also executed the Escrow mechanism wherein, the 'Corporate Debtor' was liable to repay all the secured obligations of the EIPL even when the Issuer Company/EIPL made no default and therefore the 'Corporate Debtor' was indirectly made responsible to pay all past dues, default amounts outstanding to Debenture Holders. As per Clause 14 of the DTD, the Respondent shall release the security in favour of relevant obligers or as they may direct.
- The 'Corporate Debtor' also executed Offer Purchase Agreement that the Issuer Company/EIPL to buyback the Flats sold to the Issuer Company at a price of Rs.1,250 per square foot at a Minimum Guarantee Price of Rs.2,500 per square foot and the buyback period coincides with the

redemption schedule of the Debentures. It is submitted that no man of ordinary prudence would enter into a transaction of sale and purchase involving a loss of Rs.69.67Cr. /-.

- It is argued that a conjoint reading of the Offer Purchase Agreement and the Escrow mechanism, the money is going back from the 'Corporate Debtor' to the Respondent even without any default made by the Issuer Company. Hence the circle of incoming and returning of funds is complete which clearly establishes that the amount received from the Issuer Company is a 'loan' and not a Sale Consideration.
- Clauses 4 & 9 of the DTD are contradictory to each other and if two constructions are possible, the one which gives effect to all the Clauses of the document must be preferred to over that which defeats some of its Clauses. The BBAs were not acted upon at the time of sale to the actual end user.
- No sale was recorded by the 'Corporate Debtor' in its Balance Sheet and in fact, the Balance Sheet shows an amount of Rs.43.04Cr. /- as a loan from the Issuer Company. The Issuer Company did not have any business, Real Estate Project and the same was submitted by the Respondents themselves in I.A. filed by the Respondents under Section 65 of the Code for quashing CIRP of the Issuer Company. The real net worth of the Company was Rs.61,511/- only.
- BBAs provided by the Respondent cannot be equated with the BBAs of a Homebuyer because the 'Corporate Debtor' entered into BBAs with Homebuyer at hundred percent Real Value of the Property, whereas the Issuer Company BBAs were executed at roughly 45% of the Real Value

of the Property. No guarantee was given by the 'Corporate Debtor' to any of the real Homebuyers to secure their debts in compensation to the purported sale made to the Issuer Company.

- It is argued that the Adjudicating Authority did not take into consideration that the charge forms digitally signed by the second Respondent/Beacon as charge holder filed with the Registrar of Companies ('RoC'), the estimated value of properties i.e., 205 Flats where 100.50Cr./-, whereas, as per the Respondents own admission, EIPL paid only 51.79Cr./- to the 'Corporate Debtor', which shows that the value of 205 Flats ranges around Rs.3000 per square foot, whereas the amount mentioned in the BBAs is Rs.1,250 per square foot. Therefore, Rs.51.79Cr./- could not and cannot be the fully paid up consideration of 205 Flats. The Adjudicating Authority ought to have directed the Respondents to pay the balance money i.e., Rs.63.75Cr./- to be further adjusted by the flats sold by the 'Corporate Debtor' directly.
- It is also contended that the Adjudicating Authority has failed to see that Flat Nos. J101, J102, J103, J104 & J201 admeasuring assailable area of 12,875 square feet are reflecting two times and schedule 1 to the Mortgage Deed of Series – 2 Debentures and as per Section 58 of the Transfer of Property Act, 1882, a Mortgage is a transfer of an interest a specific Property, and in the absence of identification of a specific Property, no valid Mortgage can be created.

7. Submissions of the Learned Sr. Counsel appearing on behalf of the

Respondents:

- Learned Counsel submitted that on 13.06.2017, DTD was executed between EIPL. Issuer Company on the Nisus Finance as facility Agent/Debenture Holder and Beacon as a DTD and EIPL, the 'Corporate Debtor', herein in the capacity of the Corporate Guarantor for the purpose of raising funds to the Issuer Company. Learned Counsel placed reliance on the Clauses 9.1, 9.1.1, 9.1.7 of the BBAs, on the details of the Mortgage Premises and '151 Units' as defined in the first DTD.
- On 20.12.2018, DTD was amended including 54 Units as additional area of units. On 24.12.2018, in the second amendment to the DTD, 63 Units defined in Clause 2.9 was included.
- On 13.06.2017, Offer Purchase Agreement was executed between the Issuer Company, the 'Corporate Debtor', the Promoters of the 'Corporate Debtor' and Earthcon Constructions Private Limited, whereby the 'Corporate Debtor' undertook to buyback the units from the Issuer Company, which reinforces the existence of BBAs entered into between the 'Corporate Debtor' and the Issuer Company. It also establishes that the ownership of the units is vested with the EIPL the 'Corporate Debtor' was appointed as a selling Agent on behalf of EIPL to sell the units to a third party.
- On the same date i.e., 13.06.2017, a Deed of Corporate Guarantee was executed by the 'Corporate Debtor' in favour of the Respondents. The right of subrogation as surety/guarantor is not available to the

‘Corporate Debtor’ until and unless the entire debt of Nisus and Beacon has been paid by the ‘Corporate Debtor’.

- On 16.06.2017, the first Mortgage Deed was entered into and Clauses 3 & 4 depict the exclusive and first charge over the units mortgaged to Beacon. On 05.12.2017, the second Mortgage Deed was executed whereby 54 Units of Casa Royal was mortgaged to the Respondent. In December 2018, the third party Mortgage Deed was executed whereby 63 Units of Casa Royal was mortgaged to the Respondent.
- It is averred that in November 2017, the ‘Corporate Debtor’ and EIPL, executed an irrevocable Power of Attorney in favour of Respondent No. 1 & 2 authorising Respondent 1 & 2 to sell the said 205 Units for and on behalf of the ‘Corporate Debtor’ in favour of the third-party purchaser.
- On 13.12.2017, a simple BBA was entered into between the ‘Corporate Debtor’ and EIPL. Learned Counsel placed reliance on the Sale Clause and Sale Consideration Clause together with Clause 9-A of the BBA.
- It is submitted that the Offer Purchase Agreement was entered into three years prior to the initiation of the CIRP which came into effect on 08.01.2020. It is submitted that when the RP included the 268 Flat Units in the pool of the ‘Corporate Debtor’ several objections were raised vide email by the Respondents, providing and the POAs to the RP with the proof of additional Security Interest created in favour of EIPL under the DTD.
- Despite an email dated 06.03.2021 sent by Nisus to RP reiterating that 205 out of 268 Units have been sold by ‘Corporate Debtor’ to the Buyer

Company, and full and final NoCs were also obtained, the RP proceeded to include the 268 Units in the Information Memorandum as Assets of the 'Corporate Debtor'. Hence, I.A.1606/2021 was preferred by the Respondents herein and the Adjudicating Authority has rightly allowed the same.

- It is contended that the RP cannot take control of Assets which are owned by a third-party and the Counsel placed reliance on the Judgement of the Hon'ble Supreme Court in **'Embassy Property Developments Private Limited' Vs. 'State of Karnataka & Ors.'**¹, in support of his case.
- Learned Counsel, Mr. Sinha submitted that RP is bound by the contracts entered into the 'Corporate Debtor' and that these contracts cannot be interfered with by the Adjudicating Authority. The RP ought to have challenged the documents of transferring the 268 Flats to EIPL and cannot simpliciter include the same in the Information Memorandum as inventory of the 'Corporate Debtor'.
- The BBAs can be relied upon by the Respondents which prove that these 268 Flats are not the Assets of the 'Corporate Debtor'. Registered Mortgage Deed dated 16.06.2017, 05.12.2017 and December 2018, executed by EIPL and 'Corporate Debtor' as Mortgagor and co-Mortgagor collectively create first and exclusive charge over the said 268 Units in favour of Respondent 2 to secure repayment of entire outstanding amount owed to the Respondents. The sub-Registrar could not have registered the Mortgage Deeds if the title of EIPL/Mortgagor

¹ 2019 SCC OnLine SC 1542

for the Units was not perfect or if EIPL did not have the title. The BBAs entered into between the 'Corporate Debtor' and EIPL are valid, *bona fide*, and independent sale and purchase transactions.

- BBAs entered into with more than 1900 Homebuyers are exactly the same, and none of these BBAs are registered or stamped, yet the claims of all the Homebuyers have been admitted by the RP.
- It is submitted by Mr. Sinha that the terms of the BBAs are very clear and the amounts have been paid as a Sale Consideration and the BBAs are testimony to it as they are commercial contracts and there is no occasion for the Adjudicating Authority to go behind the valid contracts and therefore it has rightly allowed the exclusion of these 268 Flats.
- Any incorrect recording of entries in the Books of Accounts by the 'Corporate Debtor' would not nullify or frustrate the duly executed Agreements between the parties and the Legal Rights created thereunder.
- Clause 7(c)(v) of the Mortgage Deeds (i) & (ii) are substantially the same except for the fact that Mortgage Deed (ii) refers to the 'Additional Units'.
- These 268 Flats have not been undervalued. The Selling Price was negotiated between the parties and since the sale was a bulk sale for an undeveloped Property where the construction was halted for several years the valuation of the same was at a pre-determined Selling Price. The charge forms confirm the evaluated value of 205 Units at Rs.42Crs./- and the said evaluated price is in the context of the Security Interest created and not the Sale Consideration.

- BBAs have been executed by the 'Corporate Debtor' and not EIPL with the original Homebuyers. Money for 59 Units sold to the Homebuyers was transferred directly by the lending Banks to EIPL Escrow Account.
- Lastly, it is submitted that the 63 Flats are similarly placed as the 205 Flats, which were directed to be excluded from the Information Memorandum. The entire consideration for the 63 Units mortgaged with Beacon vide Mortgage Deed dated December 2018 has already been paid by EIPL to the 'Corporate Debtor'. The RP has not taken any steps to challenge or set aside the Agreements for these 63 Units and therefore the RP is estopped from objecting to the sale of these 63 Units.

Comp. App. (AT) (Ins.) No. 736/2021

A. I.A. 647/2022 is filed in *Comp. App. (AT) (Ins.) No. 736/2021*, seeking intervention on behalf of the Homebuyers. This Appeal is preferred by the Authorised Representative of the 'Financial Creditor' in class (Homebuyers) in the Committee of Creditors ('CoC') of the 'Corporate Debtor', aggrieved by the Impugned Order dated 23.07.2021 passed by the Learned Adjudicating Authority in I.A. No. 1606/2021, whereby the Adjudicating Authority on basis of DTD, Mortgage Deed and Deed of OPA has directed the RP to exclude 205 Flats from the Assets of the 'Corporate Debtor'.

B. Submissions of the Learned Counsel appearing on behalf of the Homebuyers in 736/2021:

- It is submitted that the Homebuyers constitute 70% of the Voting Rights in the CoC; and Respondents 1 & 2 have connived with the 'Corporate Debtor', the erstwhile Director of the 'Corporate Debtor', the Issuer Company who are signatories to the DTD dated 13.06.2017 and the

amendments dated 20.12.2017 and 24.12.2018, diverting the hard earned money of the Homebuyers; that in the garb of Financial Transactions, Rs.52.5Cr./- was routed through the Issuer Company purportedly executing a number of documents including DTD, amendments, BBAs, Mortgage Deeds, Offer to Purchase Agreement, Corporate Guarantee etc., and the Adjudicating Authority did not consider whether these 268 Units had been actually sold by the 'Corporate Debtor' to the Issuer Company or whether the claimed documents were executed merely to secure the Financial Facilities extended by Respondents 1 & 2 to the 'Corporate Debtor' through the Issuer Company.

- 'Corporate Debtor' had already availed one Escrow Account with Punjab and Sindh Bank hence second Escrow Account could not have been opened by the 'Corporate Debtor'. The Promoters had meticulously planned to bring into existence a new Corporate Entity through which these Financial Facilities could be routed.
- It is to be noted that the Management of the EIPL is almost the same as that of the 'Corporate Debtor'.
- The sample BBA does not speak of all the other BBAs and the rate mentioned is much below the Market Rate which is around Rs.3,000 per square foot + GST. The rates mentioned by the Respondents in their Counter Affidavit as to the Sale Consideration Price is much below the circle rate fixed by the concerned authority.
- The future of the Flat Buyers to whom Flats have been finally sold from the pool of Rs.268 Flats is in complete confusion.

- Further, it is submitted that the BBAs relied upon by the Respondents 1 & 2 are non-est for want of Registration. The 205 flats in question are situated in State of Uttar Pradesh and in State of Uttar Pradesh by U.P. Civil Laws (Reforms and Amendment) Act 1976, U.P. Act No. 57 of 1976 Section 54 of Transfer of Property Act, 1882, Section 17(1)(f), proviso of 17(1), Section 17(2)(v), Explanation of 17(2), Section 49 of the Registration Act, 1908 was amended as follows:
 - The contract for sale under Section 54 of Transfer of Property Act, 1882 (as amended by U.P. Act No. 57 of 1976) is mandatory to register;
 - Necessary amendments were made in Section 17(2)(v) of Registration Act, 1908 to exclude the contract for sale from optional registrable documents;
 - As per Section 13 of UP RERA, the Registration of BBA is mandatory in case Sale Consideration is accepted more than 10%;
 - As per Section 17(1)(f) as inserted by U.P. Act No. 57 of 1976 registration of any other instrument is mandatory if it is required by any law for the time being in force;
 - As per Section 49 of Registration Act, 1908 (as amended by U.P. Act No. 57 of 1976) no document shall affect the Immovable Property if not registered in accordance with Section 17 or by any provision of the Transfer of Property Act, 1882, or any other law for the time being in force.

- It is submitted that money i.e., Rs. 51.75Cr./- paid by the Issuer Company (EIPL) to the 'Corporate Debtor' is a loan because of the following reasons:
 - As per Offer Purchase Agreement the 'Corporate Debtor' was liable to buyback the Flats @ Rs.2500+GST per sq. ft. to repay the secured obligations of the EIPL as against the ostensible sale price of Rs. 1150 + GST per sq. ft.
 - The properties of more than Rs. 115.50Cr./- were ostensibly sold as ostensible Sale Consideration of Rs. 51.75Cr./- which is equivalent to 44% of total value of property which shows the Margin Money of loan of Respondents.
 - The Respondents were having charge over the debtors/receivables of the Corporate Debtor via Escrow Agreement. And as per Escrow Agreement the net receivables of 'Corporate Debtor' were required to be deposited in Escrow Account to repay the secured obligations.
 - The Corporate Debtor directly exposed itself to the liabilities of the EIPL whereas in Sale Consideration from other Homebuyers the 'Corporate Debtor' has not exposed itself to the loan of Homebuyers.
 - As the director, Shareholder of the EIPL are common with the 'Corporate Debtor', there was no reason for 'Corporate Debtor' to sell the flats in EIPL because the director, Shareholder could earn profits by selling of 205 flats in 'Corporate Debtor' itself and that

there was no commercial expediency for the 'Corporate Debtor' to give Corporate Guarantee or enter into other documents.

Comp. App. (AT) (Ins.) No. 703/2021

A. This Appeal has been preferred by Sanskriti Allottee Welfare Association & 6 Ors./Homebuyers, aggrieved by the Impugned Order dated 23.07.2021 in I.A. 1606/2021. It is submitted that the Appellants/ Applicants have locus to file the present Appeal as they are part of the Stakeholders in the process of CIRP and Liquidation Process and Section 61(1) of the Code authorised 'any person aggrieved by the Order of the Adjudicating Authority under this part' to prefer an Appeal before the Appellate Tribunal. The 'part' refers to Part II of the Code which comprises CIRP and Liquidation Process. It is submitted that the Appellants are the major Stakeholders and that the Impugned Order is against the Principles of Natural Justice and that the Appellants were not made a party to the Application filed by Respondents 1 & 2 before the Adjudicating Authority for exclusion of 268 Flats from the Information Memorandum knowing fully well, that the presence of Homebuyers was essential for the proper adjudication of the said Application.

B. Submissions of the Learned Counsel for the appearing on behalf of Sanskriti Allottee Welfare Association:

- The Transactions between 'Corporate Debtor', Respondents 1 & 2 and EIPL are fraudulent in nature and this can be seen from the fact that R-1 had agreed to grant Financial Facility to a Company i.e., EIPL which was not doing any business since the day of commencement and ex-facie is a shell Company. This Financial Facility was disbursed to a shell

Company based upon the Guarantee of the 'Corporate Debtor' by way of allegedly Mortgaging Flats in favour of Respondents 1 & 2.

- The Transactional Audit Report dated 12.04.2021 captures the Fraudulent Sham Transactions between the 'Corporate Debtor', Respondents 1 & 2 and EIPL. The Learned Counsel drew our attention to the findings of the Auditors which are detailed as hereunder:

- The Respondent No. 1 provided funds to EIPL which was incorporated on 19.02.2015 and at the time of issue of Debentures, has not even started its business operations. EIPL was a shell company and it raises question on the business model of Respondent No. 1 as whether any entity can sanction such a significant amount without any proper due diligence.
- There has been non-compliance of the basic terms and condition of the Debenture Trust Deed since the funds given by EIPL are only towards the construction of the units to be purchased by EIPL but the funds have been utilized to the tune of Rs. 23.87 Crores for the repayment of loan from Punjab & Sind Bank. The 205 Units of the Corporate Debtor have been mortgaged in accordance with Debenture Trust Deed to secure the amount paid by EIPL to the Corporate Debtor. However, the amount received from EIPL as per terms of Debenture Trust Deed is not a loan amount but is only an advance for the purchase of units. Since the basic terms and condition for utilization of funds have not been complied with, there should be no amount payable to Respondent No. 1.

- The transaction of Respondent No. 1 with EIPL and 'Corporate Debtor' is preferential, Undervalued and Fraudulent Transactions under the Code.
- The Builder Buyer Agreement entered with EIPL for 205 Flats, mortgaged with Respondent No. 2 as one of the obligor to the Debenture Trust Deed were sold at Rs. 49.52 crores which is considerably lower to the prevailing average rate in 2017. The undervalued amount was assessed as Rs. 69.83 crores.
- It is submitted that Respondent No. 1, Corporate Debtor, EIPL and the Directors of the Corporate Debtors are in connivance with each other to divert the funds of the Homebuyers by making fraudulent entries.
- As per the Debenture Trust Deed, money received by EIPL from the issue of Debenture should be utilized for purchase of 205 Units in the project of Earthcon Construction Private Limited and for other general office expenses. It is also confirmed from the fact that EIPL and Earthcon Universal Infratech Private Limited 'Corporate Debtor' entered into Builder Buyer Agreement for sale 205 Units having total carpet area of 3,61,790 sq. ft. to EIPL at Rs. 49.52 crores at a square feet rate of Rs. 1,369. The sale of 205 Units is booked at a significant undervalued rate as the average rate in the same project at the time of the Agreement was Rs 3,299 which leads to the total undervalued amount in the Project to Rs. 69.83Crs./-.

- 'Corporate Debtor' has mortgaged assets of Rs.51.79Cr./- for providing guarantee to EIPL. But the 'Corporate Debtor' only received Rs.49.52Cr./- as Rs.2.27Cr./- was charged as professional fees by Respondent No. 1 for financing Debentures for EIPL but charged in the books of 'Corporate Debtor' and shown in its books as amount received against professional charges without any inflow of money.
- Out of the 205 Units mortgaged, 70 Units are sold to Homebuyers from whom a sum of Rs. 15,10,31,955/- was received by EIPL in its 'HDFC Escrow Account' and Rs. 8,52,62,758/- was directly deposited in the bank account of 'Corporate Debtor'. Additionally, sum of Rs. 4,82,81,161/- received from Homebuyers is not recorded in Tally Data but recorded in Pinga Software from which receipts are issued and customer balances are ascertained.
- Further a sum of Rs. 20,74,38,285/- debited to interest account and credited to EIPL and SIPL (HO) needs to be reversed since the entry has been recorded on arbitrary basis without any calculation.
- It is submitted that the Auditors had recommended that the Mortgage of the 205 Flats ought to be set aside and included in the inventory of the 'Corporate Debtor' and that the BBA has no debt on the Agreement.
- In the 8th Meeting of the CoC concluded on 03.05.2021, the Resolution Plan given by Ms. Saya Homes Private Limited ('Saya Homes') along with Saya Buildcon Consortium Private Limited and Roseberry Developers Private Limited was duly approved with 91% Affirmative Votes and the

Respondent No. 1 had also voted in favour of the Resolution Plan. This Resolution Plan was based on the Information Memorandum dated 14.01.2021 prepared by the RP and is therefore binding on all concern. Once having given their consent, Respondents 1 & 2 could not have been allowed to question the Information Memorandum.

- Most of the Sanskriti Buyers have paid the amount in full and are in physical possession of the Flats. It is submitted that out of the 57 Flats belonging to Sanskriti Project which purportedly have been mortgaged in favour of Respondents 1 & 2, most of them have been sold to the Members of the first Appellant in a surreptitious manner without even disclosing any of the underlying documents executed between the Members of the first Appellant and the 'Corporate Debtor'. This fact is clearly evidenced from the BBAs executed by the 'Corporate Debtor' with the Appellant and Tripartite Agreement executed between the 'Corporate Debtor', the Appellants and the Lenders who have financed the Homebuyers Loan to the Appellants wherein knowing regarding any NoC issued by Respondents 1 & 2 finds mentioned. Most of the Appellants have made the payments in respect of the Flats allotted to them directly to the 'Corporate Debtor' and or EIPL and the same is mentioned in their Transaction Audit Report. Respondent 1 was duly represented on the board of EIPL since 14.06.2017 and was well aware of the Transactions that ensued between the Appellants and EIPL, but fail to inform the Homebuyers about the alleged Pre-Existing Mortgage Offer for those Flats.

- Admittedly, Respondents 1 & 2 received a sum of Rs.12.43Cr./- in the Escrow Account against sale of Flats in Sanskriti and Casa Royal Project. However as per the Transaction Audit Report, a sum of Rs.15.10Cr./- was received by EIPL in its HDFC Escrow Account and Rs.8.52Cr./- was deposited directly in the Bank Account of the 'Corporate Debtor'. Additionally, the sum of Rs.4.82Cr./- is received from Homebuyers and not recorded in the Tally Data but recorded in a Software from which receipts are issued.
- Though the Respondents vide email dated 05.05.2021 objected to certain discrepancies in this Report, they did not object to the table contended in pages 259 & 260.
- Even on the basis of the Mortgage Deeds executed by the 'Corporate Debtor', the Respondents cannot become the owner of the limited units and the 'Corporate Debtor' remains the owner. Even the alleged BBAs, in the absence of Registration, do not create any right, title or interest in the said Property.

Comp. App. (AT) (Ins.) No. 659/2021

A. This Appeal has been preferred by the Homebuyers of Sanskriti Residential Project being developed by the 'Corporate Debtor', aggrieved by the Impugned Order dated 23.07.2021 on the ground that the Appellants herein are threatened with cancellation of units as well as eviction and direct receipt of legal notices from the Respondents 1 & 2.

B. Submissions of the Learned Counsel appearing on behalf of the Appellants/Homebuyers of 'Sanskriti' Project:

- It is submitted that the Information Memorandum, was within the knowledge of the Respondents and the Resolution Plan drawn on the strength of this Information Memorandum and providing for inclusion of these units, in the corpus of the 'Corporate Debtor', was tabled for approval in the 8th CoC Meeting, concluded on 03.05.2021 and therefore is final.
- The alleged sale through execution of the BBA and the irrevocable Power of Attorney is fraudulent. It is submitted that the challenge in these Appeals is not to these documents but the Claim of Transfer of Title under them. The exclusion of units from the corpus of the 'Corporate Debtor' on the ground of Mortgage, during the pendency of the CIRP is against the provisions contained in Section 14 of the Code which prohibits any action to foreclose, recover or enforce in the Security Interest created by the 'Corporate Debtor'.
- The BBAs were executed way back in January 2013-2014 with the possession due to be given within 36 months from there. At a time when it was defaulting in handing over the possession, the CIRP of the 'Corporate Debtor' came to be orchestrated by the Respondents in conclusion with the Promoters of the 'Corporate Debtor'.
- The Lease Deed dated 01.09.2010 which governs the transfer/sub-Lease of the Units developed by the 'Corporate Debtor' was concealed by the Respondents before the Adjudicating Authority. In terms of the restrictions contained therein the 'Corporate Debtor' could not have

been sold, transfer or assign the units in favour of any third Party without making payments to Greater Noida in accordance with the schedule.

- It is submitted that neither the Homebuyers nor the SRA made parties to the Application filed before the Adjudicating Authority.

Comp. App. (AT) (Ins.) No. 694/2021

A. This Appeal has been preferred by the Committee of Creditors ('CoC') aggrieved by the Impugned Order dated 23.07.2021 in I.A.1606/2021.

B. Submissions of the Learned Counsel appearing on behalf of the CoC:

- It is submitted that the Appellants/CoC was not impleaded as a party to the said Application despite being directly concerned with the subject matter.
- It is submitted that the 'Corporate Debtor' sold Flats worth Rs.115.50Cr./- to Issuer Company for Rs.51.75Cr./- and may it appear like a transaction, which however is a Loan Transaction. Sale Consideration is never required to be returned back whereas the loan along with interest is required to be returned back.
- The Resolution Plan has already been approved with 91% Affirmative Vote whereunder Respondents 1 & 2 had already voted in favour of the Resolution Plan and is therefore estopped from objecting to the contents of the Information Memorandum and seeking its modification at the stage of approval.

- The Members of CoC consisting of 70% Voting Shares of Real Estate Allottees and who are Unsecured Creditors are at a great loss with this Order.
- The BBAs executed show that Purchase Price was calculated on the basis of Clause 9.8 of the DTD which states that Purchase Price would be 33% of the Value of Flats i.e., Rs. 1250 and will have a margin of 66% in favour of the Debenture Holders. In this manner, the 'Corporate Debtor' received an amount of Rs.51.75Cr./- from EIPL against the Fair Value of the Property of Rs.115.50Cr./-.
- There is no requirement for effecting such sale as Directors of both 'Corporate Debtors', EIPL are one and the same. There was no commercial expediency for 'Corporate Debtor' to give a Corporate Guarantee or execute other documents. The recitals in DTD do not portray the correct picture and Clause 4 contradicts with Clause 9 of the DTD. Sale Consideration is never required to be returned back whereas Clause 9 of DTD makes the 'Corporate Debtor' liable to pay the secured obligations received by the 'Corporate Debtor' as alleged Sale Consideration of 200 Flats.
- On 29.04.2017, 'Corporate Debtor' executed the Offer Agreement with the Issuer Company to buyback the Flats sold to the Issuer Company at (Rs.1,250 per square feet) at Minimum Guaranteed Price of Rs.2,500 per square foot. Therefore, the amount mentioned in the BBA is a loan to the 'Corporate Debtor' and not a Sale Consideration.

Comp. App. (AT) (Ins.) No. 912/2021

A. This Appeal has been preferred by Homebuyers Mr. Rajesh Kr. Bhandula & Ors., aggrieved by the Impugned Order dated 23.07.2021 passed in I.A. 1606/2021 on the ground that they were not made parties to the Application.

B. Submissions of the Learned Counsel appearing on behalf of the Mr. Bhandula & Ors./Homebuyers:

- It is submitted that the Adjudicating Authority has not taken into consideration that the Resolution Plan was approved by the CoC; that the Information Memorandum including these 268 Flats and that the CoC's decision is final.
- After the execution of the Impugned Order, there shall be no Financial viability for SMA to undertake a Project and sizeable amounts of haricuts would be given and additional contribution would have to be paid by the Homebuyers.
- Nisus Finance was the Applicant under Section 7 of the Code which triggered the CIRP and Nisus claiming to be a 'Financial Creditor', preferred the Section 7 Application, which was set aside by this Tribunal vide Order dated 29.05.2020, aggrieved by which Nisus Finance approached the Hon'ble Supreme Court vide Civil Appeal No. 2807/2020 and the Hon'ble Supreme Court has restored the matter.
- The conduct of Nisus in the entire process has been questionable and associate Company of the erstwhile Promoters namely EIPL was put under CIRP under Section 9 of the Code and Nisus filed its Claim before the IRP of EIPL and the Claim was admitted by the RP. Nisus Finance

became the lone Member of the CoC being the only Financial Creditor of the EIPL. However, the Order stated by the Hon'ble Supreme Court in Civil Appeal No.764/2019. It is submitted that Nisus had already staked its claim in the CIRP of EIPL.

- In this case, Nisus Finance filed its Claim as a Lender and became a Member of the CoC holding 11.44% of the Voting Rights and has voted in favour of SMA Group based on the Information Memorandum.
- The Appellant submits that all the documents are entered into are Fraudulent Transactions and that the Adjudicating Authority ought not to have allowed the exclusion of 205 Flats based on these Fraudulent Transactions.
- 205 Flats cannot be allotted to a Secured Creditors to the detriment of Homebuyers as the law laid down shows a Secured Creditor such as a Financial Institution cannot be provided with an Asset by way of preference over the Allottees who are 'Unsecured Financial Creditors'.

Comp. App. (AT) (Ins.) No. 656/2021

A. This Appeal has been preferred by M/s. Nisus Finance Investment Managers LLP and Beacon Trusteeship Limited, aggrieved by the Impugned Order dated 23.07.2021 passed in I.A.1606/2021 on the limited ground that the Adjudicating Authority considered an exclusion of only 205 Flats instead of total 268 Flats and also directed that the Voting Rights of the first Appellant as a 'Secured Financial Creditor' in the CoC be reduced by the amount of 205 Flats held to be as the exclusive Asset of the Appellant and outside the scope of the Information Memorandum. Therefore, this Appeal is limited to the

reduction of Voting Rights and balance 63 Flats excluded as being Assets of the 'Corporate Debtor'.

B. Submissions of the Learned Sr. Counsel appearing on behalf of the Appellants:

- Learned Sr. Counsel Mr. Krishnendu Datta submitted that I.A. 1606/2021 was filed seeking exclusion of 268 Flats from the pool of the 'Corporate Debtor' based on the documents executed namely the DTD, the BBAs, the Mortgage Deeds and the Offer Purchase Agreements. The Adjudicating Authority has held that 205 Flats were not within the pool of this 'Corporate Debtor' and directed the RP to exclude the same and hence this Appeal is limited to whether the Adjudicating Authority was justified in not including the Balance 63 Flats and also in reducing the Voting Rights.
- Learned Counsel Mr. Shikhil Suri submitted that the security has no co-relation to the Voting Rights and drew our attention to the DTDs and the amended Deeds and submitted that EIPL issued Debentures subscribed by Nisus Finance and the amount was given to Earthcon Infratech which is the 'Corporate Debtor'. Learned Counsel also drew our attention to a Flow Chart depicting the flow of funds.
- The DTD dated 13.06.2017 was executed between the Issuing Company Earthcon Infracon Private Limited, Beacon Trusteeship Limited, Earthcon Constructions Private Limited and Earthcon Universal Infratech Private Limited (Obliger 3)/defaulter/co-Mortgagor and Nisus Finance and Investment Manger LLP. Learned Counsel Mr. Suri placed reliance on the following terms of Deed:

“A. The Company is engaged in the business builders, developers, real estate consultant, real estate contractor, buying, selling and trading real estate and immovable properties and allied services;

B. This Obligor 3, is engaged in the business of real estate construction and development;

C. The Obligor 3 is in the process of developing the Projects (as defined below);

D. The company is desirous of buying and Obligor 3 is desirous of selling the Units (as defined below) forming part of the Projects, pursuant to which the Obligor 3 has agreed to allot and perform an outright sale in favour of the Company in relation to the Units;

E. The Company requires funds for funding of the acquisition of the Units from Obligor 3 as well as for other general corporate purposes and has therefore agreed to raise funds up to Rs. 30,00,00,000/- (Rupees Thirty Crores Only) through the issue and allotment of up to 3,000(Three Thousand) senior, secured, transferable, unlisted, unrated, redeemable non-convertible debentures carrying a face value of Rs. 1,00,000/- (Rupees One lakh Only) each (“Debentures”) in one or more tranches as determined by the Debenture Trustee (as instructed by the Facility Agent) (the “Issue”) on the terms and conditions set forth under this Deed.”

- *Clauses 9.1.7, 9.1.9, 9.3, 9.6, 9.8 & 13.2 relied upon by the Counsel*

Mr. Suri is reproduced as hereunder:

“9.1.7 Builder buyer agreements (“BBAs”) and the letters of allotments (“LoAs”) along with executed endorsement annexure, payment receipt for full consideration along with executed sale deeds and registered power of attorneys executed by the Obligor 3 in favour of the Company in relation to the Units and such that all dues in relation to the said Units shall be fully paid up.”

“9.1.9 Power of attorney (“Registration PoA”) executed by the Obligor 3 in favour of the Company, Facility Agent or any of their nominees granting all the requisite powers to have (i) the BBAs and conveyance deeds executed pursuant thereto, registered with the applicable authorities and take on record the sale of

the Units; (ii) execute the conveyance deeds for the Units in favour of itself for its nominees.”

“9.3 The Debenture Trustee shall have the power, subject to obtaining prior approval of the Facility Agent (on behalf of all Debenture holders), to agree to the substitution or release of any property charged in their favour upon such terms and conditions as the Facility Agent (on behalf of all Debenture Holders) may deem fit.”

“9.6 The Obligor 3 states that it has availed of a facility of Rs.100,00,00,000/- (Rupees One Hundred Crore only) from CF lender and has opened the Obligor 3 Escrow Account under the terms of availing such facility. In addition to the Security mentioned above the Parties shall also create a first charge on the Obligor 3 Current Accounts such that 10% (ten per cent) on the amounts transferred to the Obligor 3 Current Accounts from the Obligor 3 Escrow Account shall be swept, in daily/weekly into the Escrow Account subject to a maximum of upto the amount of the next payment milestone including any past dues, default amounts, DSRA, statutory dues and other costs and charges due and payable by the Company under the terms of this Deed, Provided further that upon the occurrence of an Event of Default, 100% (one hundred percent) of the entire amounts transferred to the Obligor 3 Current Accounts from the Obligor 3 Escrow Account shall be swept in daily into the Escrow Account. It shall be the sole responsibility of the Obligor 3 to obtain the 1 requisite no objection certificates from CF Lender in this regard as well as effecting amendments in its Articles of Association as may be required to give effect to the same. The Company and Obligor 3 shall issue necessary standing instructions to CF Lender to transfer on a daily/weekly basis 10% of the amounts transferred to the Obligor 3 Current Accounts to the Escrow Account. The said instruction cannot be amended or revoked without prior written consent of the Debenture Trustee. The Debenture Trustee and the Facility Agent shall also be provided with online view rights of the Obligor 3 Current Accounts.”

“9.8 The Company shall ensure that at all times the Secured Properties shall have a value equal to 3 (three) times or more than the Outstanding Amounts. For the purpose of valuation of the Secured Properties to ensure compliance with this clause, the Units shall be valued at the rate of Rs 3,800 (Rupees Three Thousand

and Eight Hundred only) per sq. ft of super area/saleable area on an all-inclusive basis. In case the value of the Units mortgaged is less than the 3 (three) times of the Outstanding Amounts, the Company and the Obligors shall either (i) provide additional security acceptable to the Debenture Trustee: or (ii) prepay pro rata amount of the Outstanding Amounts to maintain the said cover of 3 (three) times, at the sole discretion of the Debenture Trustee. Pursuant to the allotment of a Unit to the Company by Obligor 3, the Company shall pay to Obligor 3 the price mentioned under the relevant BBA towards sale consideration of the said Unit, simultaneously with the execution of the BBA. The sale consideration is inclusive of the basic price, EEC, FFC, EDC, IDC as per the applicable rates, charges applicable for use of parking space, if any, club membership charges, and preferential location charges, if any. The aforesaid consideration includes the amount of Service Tax and all other applicable taxes. It has been agreed between the Parties hereunder that the aforesaid consideration is the final amount payable towards the transfer, possession and handover of a particular Unit and car parkings along with all approvals and rights of the said Unit to the Company and the Company shall not be responsible to pay any other amount to the Obligor 3 in any manner, whatsoever.”

13.2 GRANT AND TRANSFER, CONVEY, ASSIGN, ASSURE

In consideration of the Debenture Holders subscribing to the Debentures, the Company and Obligor 3 jointly and/or severally (“Mortgagors”) hereby creates a charge and mortgage on the assets prescribed.”

- The number of Flats mortgaged is 151. Second Debenture Deed was executed on 20.12.2017 and the number of Flats Mortgaged is 149.
- The third Mortgage Deed for covering Rs.30Cr./- is an unregistered one.
- Offer to Purchase Agreement substantiates that it is a Sale Consideration amount and not a Loan Amount.

- On 13.06.2017 Form CHG-1 was filed to create charge under Sections 77 & 78 of the Companies Act, 2013. The Evaluated Price shown here is 73.5Cr./- covering 94 Units of Casa Royal, 57 Units of Project Sanskriti covering a total area of 2,40,865 square feet.
- Learned Counsel also drew our attention to the Security Interest created for Rs.42Cr./- stating that the total is Rs.115.5Cr./- i.e., Rs.73.5Cr. + Rs.42Cr./- but the amount which has come in is only Rs.59Cr./-.
- Learned Sr. Counsel Mr. Datta placed reliance on Clause E from the DTD dated 13.06.2017. At the cost of repetition, the same is being reproduced as hereunder:

“E. The Company requires funds for funding of the acquisition of the units from Obligor 3 as well as for other general corporate purposes and has therefore agreed to raise funds up to Rs.30,00,00,000/- (rupees Thirty Crores Only) through the issue and allotment of up to 3,000 (Three Thousand) senior, secured, transferable, unlisted, unrated, redeemable, non-convertible debentures carrying a face value of Rs.1,00,000/- (Rupees One Lakh Only) each (‘Debentures’) in one or more tranches as determined by the Debenture Trustee (as instructed by the Facility Agent) (the ‘Issue’) on the terms and conditions set forth under this Deed.”

- He also drew our attention to Clause 4 ‘PURPOSE AND USE OF PROCEEDS’ which is reproduced as hereunder:

“PURPOSE AND USE OF PROCEEDS

It is understood by and between the Parties and that the proceeds of Debentures shall be used by the Company only for financing acquisition of the Units from Obligor 3 as well as for general corporate purposes of the Company and for no other purposes except as specified general corporate purposes of the company and for no other purposes except as specified under the Transaction Documents. The Company shall

furnish a certificate from the statutory auditors of the Company confirming the purpose of the utilization of the proceeds within 15 (Fifteen) days of the receipt of the subscription money towards the respective ---- of the Debentures. Notwithstanding the above, the Company under --- to provide pro rata security for the amount of investment made under the DTD free of any lien, charge or encumbrances as its own cost and resources from the effective date of each investment made.”

- Learned Counsel Mr. Datta drew our attention to Clause 9 dealing with ‘Security’, which is reproduced as hereunder:

“9. SECURITY

9.1 The Obligors hereby agrees that the Outstanding Amounts shall be secured by”

9.1.1 First ranking exclusive charge by way of a registered English mortgage over the Mortgaged Premises (as defined hereunder). It is agreed by and between the Parties that the first and exclusive charge created on the Mortgaged Premises and the Company and the Co-Mortgagor agrees and covenants to undertake all necessary statutory and corporate actions to give effect to the same;

9.1.2 An Escrow Agreement which grants the first and exclusive charge on the (a) Escrow Account (including the DSRA) opened under the terms of the Escrow Agreement; (b) all rights, title, benefit and interest in the Escrow Account; and (c) the amounts deposited or to be deposited in and forming part of the Escrow Account including the Receivables;

9.1.3 Unconditional and irrevocable corporate guarantee from Obligor 1 and Obligor 3 in favour of the Debenture Trustee (“Corporate Guarantee”);

9.1.4 Unconditional and Irrevocable Personal Guarantee from the Personal Guarantors in favour of the Debenture Trustee (“Corporate Guarantee”);

9.1.5 Demand Promissory Note by the Guarantors (“DPNs”) along with letter of continuity in relation to the DPNs (“Letter of Continuity”);

9.1.6 A pledge of 100% (Hundred per cent) of the issued, subscribed and paid up equity share capital of

the Company held by the Promoters of the Company in favour of the Debenture Trustee vide the Pledge.....”

Assessment:

8. The brief point which falls for consideration in *Comp. Apps. (AT) (Ins.) Nos. 593, 659, 694, 703, 736 & 912/2021* is whether the Adjudicating Authority was justified in excluding 205 Flats from the pool of the Assets of the ‘Corporate Debtor’.

9. The issue which arises in *Comp. App. (AT) (Ins.) No. 656/2021* filed by Nisus Finance and Beacon Trusteeship Limited is whether the Adjudicating Authority was justified in not including the Balance 68 Units and also in reducing their Voting Rights.

10. For the sake of brevity, the facts with respect to the terms of the DTDs, BBAs and OPA are not being repeated as they have already found place in the submissions of the Learned Counsels. It is the main case of Nisus Finance and Beacon that the relationship of EIPL and the ‘Corporate Debtor’ is that of a ‘buyer’ and ‘seller’ and not of ‘Debtor’ and ‘Creditor’ and that Rs.51.79Cr./- paid by EIPL to the ‘Corporate Debtor’ is a ‘Sale Consideration’ and not a ‘loan’. It is contended that Nisus Finance and Beacon are ‘Financial Creditors’ of the ‘Corporate Debtor’ and have invested through Debenture subscription, a total amount of Rs.52.50Cr./- in the Issuer Company in the EIPL and this investment is evidenced by DTD dated 13.06.2017 and the amendment dated 20.12.2017 and 24.12.2018. It is the case of the ‘Financial Creditors’ Nisus Finance & Beacon that EIPL has paid Rs.51.79Cr./- to the ‘Corporate Debtor’ as full and final consideration for purchasing 268 Units in Real Estate Projects developed by the ‘Corporate Debtor’.

11. It is contended that the Issuer Company under the Offer to Purchase Agreement dated 13.06.2017 in fact appointed the ‘Corporate Debtor’ as an agent to sell the said Flats for and on behalf of EIPL and transfer the said consideration to the Issuer Company. To avoid repetition only Clause 9.1.1 of the DTD dated 20.12.2017 relied upon by M/s. Nisus Finance and Beacon is being reproduced as hereunder:

“9.1.1 First ranking exclusive charge by way of registered English mortgage over the mortgaged premises (as defined hereunder). It is agreed by and between the parties that the first and exclusive charge created on the Mortgaged premises and the Company and the Co Mortgagor hereby agrees and covenants to undertake all necessary statutory and corporate actions to give effect to the same.”

12. Recital 3 of the Mortgage Deed, which the Respondent/Nisus Finance and Beacon claim that all rights, title and interest in the Mortgage premises is transferred to them, is reproduced below:

“3. One of the conditions of the DTD is that the Mortgagors shall collectively mortgage the Units (as defined hereinafter) and along with the same transfer all rights, title and interest in relation to the same and create an exclusive charge by way of registered mortgage of the Mortgaged properties (as defined below) in favour of the Mortgagee, acting on behalf of and for the benefit of the holders of the instruments issued under the terms of the DTD.”

13. Section 58 of the Transfer of Property Act 1882 which defines English Mortgage and relied upon by both the Parties is detailed as hereunder:

“58. (e)... English mortgage.—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.”

(Emphasis Supplied)

14. It is the case of Nisus Finance and Beacon as per Section 48 of the Transfer of Property Act, 1882, the rights if any of the Homebuyers in their Flats shall be subject to the 'Mortgage' which is created by the Issuer Company/EIPL as Mortgager and 'Corporate Debtor' as Co-Mortgagor in favour of Beacon for the benefit of Debenture Holders. Section 48 of the Transfer of Property Act 1882 reads as follows:

"48. Priority of rights created by transfer.—Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

(Emphasis Supplied)

15. It is submitted by the Home Buyers/Allottees that the challenge in the Appeals is not to these documents but the Claim and 'Transfer of Title' under them. Section 54 of the Transfer of Property Act, 1882 mandates that sale of Tangible Immovable Property for the value of Rs.100/- and upwards can only be made by registered instrument. Admittedly, no registered instrument for sale was executed in the present case. Section 54 also specifies that a 'Contract for Sale' such as a BBA itself does not create any 'interest' or 'charge' on the property. Section 17 of the Registration Act, 1908, specifies that non-testamentary instruments that create any right, title or interest of the value of Rs.100/- or upwards in an Immovable Property, must be compulsorily registered. Further, Section 49 of the Registration Act, 1908, states that no document which is required to be registered in terms of Section 17 shall affect any Immovable Property unless it has been registered. We find force in the

contention of the Homebuyers that if the BBA is taken to be an instrument creating Ownership Rights, then all Homebuyers ought to be declared as owners of the respective units without executing any registered instruments. It is seen from the record that Homebuyers had valid BBAs executed with the 'Corporate Debtor' way back in 2013-14, as per the terms of which, the possession was to be delivered within 36 months from the date of execution of the BBA. Admittedly, the 'Corporate Debtor' did not complete the project, during which period the CIRP was initiated.

16. At this juncture, we place reliance on paras 15, 16 – 20, 23 & 24 of the Judgement of the Hon'ble Supreme Court in **'Suraj Lamp & Industries Private Limited' Vs. 'State of Haryana & Anr.'**², in which the Hon'ble Supreme Court has observed as follows:

***"15.** The Registration Act, 1908 was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.*

***16.** Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs 100 and upwards to or in immovable property.*

***17.** Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affecting such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.*

² (2009) 7 SCC 363

18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified.

19. Recourse to “SA/GPA/will” transactions is taken in regard to freehold properties, even when there is no bar or prohibition regarding transfer or conveyance of such property by the following categories of persons:

(a) Vendors with imperfect title who cannot or do not want to execute registered deeds of conveyance.

(b) Purchasers who want to invest undisclosed wealth/income in immovable properties without any public record of the transactions. The process enables them to hold any number of properties without disclosing them as assets held.

(c) Purchasers who want to avoid the payment of stamp duty and registration charges either deliberately or on wrong advice. Persons who deal in real estate resort to these methods to avoid multiple stamp duties/registration fees so as to increase their profit margin.

20. *Whatever be the intention, the consequences of SA/GPA/will transactions are disturbing and far-reaching, adversely affecting the economy, civil society and law and order. Firstly, it enables large-scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying the benefit of such revenue to the Government and the public. Secondly, such transactions enable persons with undisclosed wealth/income to invest their black money and also earn profit/income, thereby encouraging circulation of black money and corruption."*

.....

"23. *Any process which interferes with regular transfers under deeds of conveyance properly stamped, registered and recorded in the registers of the Registration Department, is to be discouraged and deprecated. The present case is a typical example of the consequences of not obtaining a registered sale deed. There is apparently no reason as to why a company registered under the Companies Act should resort to such a transaction. Execution of a will by an individual bequeathing an immovable property to a company, is also incongruous and absurd.*

24. *If there was a bar and the process was adopted to overcome such bar regarding sale of lands, then courts should not go to their assistance, as that would amount to perpetuating illegalities. If there was no bar, then the questions that arise are: why should a company hold a property in a state of suspended animation from 1991? How can a company "verbally" agree to sell a property to someone? What is the reason for the delay in lodging the complaints? If the petitioner had purchased the property under a registered sale deed, numerous disputes, litigations and criminal proceedings could have been avoided. The illegal and irregular process of "power of attorney sales" spawns several disputes relating to possession and title, and also results in criminal complaints and cross-complaints and extra-legal enforcement and forced settlements by land mafia. We are, therefore, of the view that the situation warrants special measures."*

17. We find force in the contention of the Learned Counsel Mr. Nagesh appearing for the RP that the BBAs sought to be relied upon by the Respondents are compulsorily registrable documents as per Section 13 of UP

RERA and Transfer of Property Act, 1882, Registration Act, 1908, as amended by the State of UP, but in the present case, the BBAs are not registered. The Hon'ble High Court of Delhi in **'Jiwan Dass Rawal' Vs. 'Narain Das and Ors.'**³, in para 10 has observed as follows:

“10. Adverting, therefore, to the merits of the controversy, it may at the outset be taken note that unlike the law in England where an agreement of sale creates an equitable estate in the purchaser, the law in India does not recognise any such estate. Section 54 of the Transfer of Property Act in specific terms provides that a contract for sale does not, of itself, create any interest in or charge on such property. Such contract is merely a document creating a right to obtain another document in the form of sale deed to be registered in accordance with law. In other words, a contract for sale is a right created in personam and not in estate. No privity in estate can be deduced therefrom which can bind the estate, as is the position in cases of mortgage charge or lease. Of course, such personal right created against the vendor to obtain specific performance can ultimately bind any subsequent transferee who obtains transfer of the property with notice of the agreement of sale. (See in this respect AIR 1967 SC 744, Ram Baran Prasad v. Ram Mohit Hazra).”

18. It is also seen from the record that the Purchase Price mentioned in the BBA was calculated on the basis of Clause 9.1 of the DTD which specifies that the Purchase Price would be 33% of the value of Flats i.e., Rs.1,250 per square foot and will have the margin of 66% in favour of the Debenture Holders and adopting a similar *Modus Operandi* for 200 Flats, the 'Corporate Debtor' received an amount of Rs.51.79Cr./- from EIPL as against the fair value of the property which is Rs.15.5Cr./-. It is the case of the RP that the deed of Rs.63.75Cr./- represents the Margin Money which is clearly corroborated in Clause 9.8. The Offer to Purchase Agreement executed by the 'Corporate

³ AIR 1981 Del 291

Debtor' with the Issuer Company to buyback the Flats sold to the Issuer Company at a price of Rs,1,250 per square foot, was now be sold at a Minimum Guarantee Price of Rs.2,500 per square foot + GST of 5%. It is seen from the record that buyback period coincides with the redemption schedule of Debentures.

19. At this juncture, we refer to the Transactional Audit Report dated 12.04.2021 for the period of 08.01.2018 to 08.01.2020 (Annexure 13) in *Comp. App. (AT) (Ins.) No. 703/2021*, the conclusions of which are reproduced as hereunder:

“Conclusion

From perusal of above report, few points emerged as under:

- 1. There are a number of transactions involving huge amounts during the TRA period with related parties and others parties covered under 43 of IBC 2016. Most of debit balances Le amounts recoverable from the related parties have been adjusted by passing Journal entries without receipt of funds. Further flats have been allotted to supplier/vendors during the TRA period which has impact of putting such creditors in a beneficial position.*
- 2. Our sample checking of Home Buyers files with Pinga Software revealed that cash received from Horne Buyers amounting to Rs. 13.65 crores is not accounted for the tally data and not disclosed in audited financial statements. In addition to this there have been undervalued transactions with respect to sale of flats amounting to Rs.28.90 crores.*
- 3. There is sale of fixed assets during the TRA period amounting to Rs.2.42 crores without receiving any money in cash.*
- 4. Investments in properties/units of other companies amounting to Rs.9.50 crores are not disclosed in the audited financial statements.*

5. There are a number of other dubious/fraudulent entries as discussed in the report above. Most of these transactions have their origin before the TRA period.

We are already in the process of carrying out the forensic audit of earlier years since incorporation of the company since all the major transactions have taken place before the TRA period. All the secured/unsecured loans, some of which have adjusted during the TRA period by passing transfer entries only were taken in the earlier years. Some of these unsecured loans taken prior to TRA period creates doubt regarding genuineness of relevant transactions. Further commission/ salary has been paid to directors and related parties prior to TRA period also.”

20. Having regard to the nature of transactions involved herein and the contention of the ‘Corporate Debtor’ that the amount involved is a Sale Consideration and not a loan and the argument of M/s. Nisus Finance and Beacon Trusteeship Limited that right, title and interest of 268 Flats rests with them, we are of the considered view that this is a fit case for the ‘Corporate Veil’ to be lifted, to the extent to see the ‘Nature of Transaction’ whether ‘loan’ or ‘Sale Consideration’ as contended by the Appellant as laid down by the Hon’ble Supreme Court in **‘Arcelormittal India Private Limited’ Vs. ‘Satish Kumar Gupta & Ors.’**⁴.

21. The Hon’ble Apex Court in a catena of Judgements has laid down that the Courts must see the real intent of the parties towards documents/transactions. The Learned Counsel for the Resolution Professional drew our attention to the copy of the Net Worth Certificate of the Issuer Company which shows that the Issuer Company did not have any independent source of income and also did not have any asset base to redeem

⁴ (2019) 2 SCC 1

the Debentures. The Issuer Company had a net worth of Rs.68,800/- only and has common Shareholders and Directors with the ‘Corporate Debtor’. The Hon’ble Apex Court in **‘Sundaram Finance Ltd.’ Vs. ‘State of Kerala’**⁵, has held that a client in view of a Sale Letter is not estopped from proving that a Transaction was a Loan Transaction:

“21. The appellants are financiers and their business is to advance loans on favourable terms on the security of vehicles. This is effected by obtaining a promissory-note for repayment of the amount advanced, and a hire-purchase agreement which provides a mechanism for recovery of the amount. It is true that a “sale letter” is obtained from the customer, but the consideration for the sale letter is only the balance remaining payable to the dealer, after giving credit against the price of the vehicle the amount paid by the customer. The application for a loan, and the letter addressed to the appellants undertaking to insure the vehicle expressly mention that a loan is asked for and granted on the security of the motor-vehicle under the hire-purchase agreement. It is the customer who insures the vehicle, and in the books of the Motor Vehicle Authorities he remains, with the consent of the appellants, owner of the vehicle. Undue importance to the acknowledgment of sale in the “sale letter” and the recital of sale in the bill and in the receipt cannot therefore be attached. These documents — “sale letter”, bill and receipt — must be read with the application for granting a loan on the security of the vehicles, the letter in which the customer requests the appellants to pay the balance of the price remaining to be paid by him to the dealer, the promissory-note executed by him for that amount, the undertaking to insure the vehicle, and intimation to the Motor Vehicles Authorities to make note of the hire-purchase agreement.

.....

“24. The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has, unless prohibited by statute, power to go behind the

⁵ (1966) 2 SCR 828

documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. If there is a bona fide and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money. If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passes under the documents embodying the transaction, but subject to the terms of the hiring agreement, which become part of the buyer's title, and confer a licence to seize. When a person desiring to purchase goods and not having sufficient money on hand borrows the amount needed from a third person and pays it over to the vendor, the transaction between the customer and the lender will unquestionably be a loan transaction. The real character of the transaction would not be altered if the lender himself is the owner of the goods and the owner accepts the promise of the purchaser to pay the price or the balance remaining due against delivery of goods. But a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal obligation to buy has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction, subject to a hiring agreement under which the lender is given the license to seize the goods.”

(Emphasis Supplied)

22. It is clear from the aforementioned ratio that Homebuyers and the effected parties are not estopped from approving that a Transaction is a 'Loan Transaction'. Contractual interpretation must ascertain the real intention of the parties. The genesis of an Agreement and the context is to be seen as a whole and the intent of a Transaction cannot be at variance with the actual objective. Clauses 7.1 and 7.2 of Part II of the DTD were amended which provide that the Principle Amount was to be paid by the Issuer Company in four instalments namely 31.03.2019, 30.06.2019, 30.09.2019 & 31.12.2019 meaning thereby that the Issuer Company and the Corporate Debtor were under legal obligation to pay the 1st instalment by March 2019. The 'Corporate Debtor' cannot now avoid the adherence to the amended Clauses of DTD, which clearly demonstrates that in the event of failure of the Issuer Company to fulfil the conditions of the DTD and the Term Sheets, the 'Corporate Debtor' is under legal obligation to pay the same. At the time of initiation of CIRP admittedly, the 'Corporate Debtor' had not offered possession to the 'Financial Creditors'. This Tribunal is of the earnest view that the 'Corporate Debtor' had failed to fulfil the obligations under the DTD and other documents executed to guarantee/secure the repayment of the amount disbursed by the 'Financial Creditors' towards issuance of the Non-Convertible Debentures.

23. In the instant case, keeping in view the flow of funds, the nature of transactions, the amended DTD, the Term Sheets and the entire material on hand, this Tribunal is of the earnest view that the amount received from the Issuer company is a 'Loan' and not a Sale Consideration and the BBAs executed are secured documents.

24. It is the case of the RP that as on the date of the said email dated 20.02.2021 none of the BBAs were made available with the Resolution Professional. It is a fact that this amount was included as a 'loan amount' in the Balance Sheet of the 'Corporate Debtor Company' but it is the case of the 'Corporate Debtor Company' that this was a genuine error.

25. Be that as it may, as per the provisions of the Code, the Information Memorandum is required to be prepared on the basis of Assets as recorded in the Balance Sheet of the 'Corporate Debtor'.

26. The decisive issue which arises for consideration in these Appeals is whether *after* having voted in favour of the Resolution Plan, M/s. Nisus Finance/the 'Financial Creditor' is empowered under the Code to seek a direction to the Resolution Professional to amend the Information Memorandum, based on which the Resolution Plan has been approved by 91% Affirmative Votes. It is significant to mention that the Information Memorandum dated 14.01.2021 was prepared by the Resolution Professional in terms of Section 29 of the Code. For ready reference, the said Section is reproduced as hereunder:

"29. Preparation of information memorandum. –

(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes-

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation. – For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.”

27. Once the Resolution Plan is approved by the CoC, the ‘Financial Creditors’ are estopped from seeking any Amendments/Modifications in the Information Memorandum. In the instant case, the Information Memorandum was prepared on 14.01.2021 and the Resolution Plan was approved in the 8th CoC Meeting which concluded on 03.05.2021. There are no substantial reasons given for the Creditor not having raised this issue or filed an Application in the Interim Period between 14.01.2021 and 03.05.2021. The Hon’ble Supreme Court in **‘Swiss Ribbons Pvt. Ltd. & Anr.’ Vs. ‘Union of India & Ors.’**⁶, has observed as follows:

“26. *The Preamble of the Code states as follows:*

“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an

⁶ (2019) 4 SCC 17

Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

27. *As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] at para 83, fn 3).*

28. *It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The*

interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

28. The aforementioned observations made by the Hon'ble Supreme Court in *Swiss Ribbons (Supra)* stresses on the timelines within which the Resolution Process is to take place and that it is a beneficial Legislation which aims to put the 'Corporate Debtor' back to its feet maximising the interest of all Stakeholders and is not a mere recovery Legislation. This Tribunal in ***'Kalinga Allied Industries India Private Limited' Vs. 'Committee of Creditors (Bindals Sponnge Industries Limited) through Punjab National Bank & Anr.'***⁷, has reiterated the importance of timelines and the effect of CoC seeking withdrawal of an already approved Resolution Plan which would have identical repercussions to the findings given by the Hon'ble Apex Court in ***'Ebix Singapore Pvt. Ltd.' Vs. 'Committee of Creditors of Educomp Solutions Limited'***⁸, in which the Hon'ble Apex Court discussing modifications and withdrawals by Successful Resolution Applicant ('SRA') has observed as follows:

⁷ 2022 SCC OnLine NCLAT 1618

⁸ 2021 SCC OnLine SC 707

“244. *The residual powers of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the 330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the Adjudicating Authority, irrespective of the content of the terms envisaged by the Resolution Plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a down-graded resolution amount of the Corporate Debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC.*

245. *If the legislature in its wisdom, were to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the Adjudicating Authority, it must specifically provide for a tether under the IBC and/or the Regulations. This tether must be coupled with directions on narrowly*

defined grounds on which such actions are permissible and procedural directions, which may include the timelines in which they can be proposed, voting requirements and threshold for approval by the CoC (as the case may be). They must also contemplate at which stage the Corporate Debtor may be sent into liquidation by the Adjudicating Authority or otherwise, in the event of a failed negotiation for modification and/or withdrawal. These are matters for legislative policy.

246. *In the present framework, even if an impermissible understanding of equity is imported through the route of residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority directing mandatory liquidation of the Corporate Debtor. Pertinently, this direction has been otherwise provided in Section 33(1)(b) of the IBC when an Adjudicating Authority rejects a Resolution Plan under Section 31. In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations. In the case of Kundan Care, since both, the Resolution Applicant and the CoC, have requested for modification of the Resolution Plan*

because of the uncertainty over the PPA, cleared by the ruling of this Court in Gujarat Urja (supra), a one-time relief under Article 142 of the Constitution is provided with the conditions prescribed in Section K.2.”

(Emphasis Supplied)

29. It is clearly laid down by the Hon’ble Apex Court that a submitted Resolution Plan is binding and irrevocable as between the CoC and SRA in terms of the provisions of the Code. Placing reliance on **‘Ebix Singapore Pvt. Ltd.’ (Supra)**, this Tribunal in **‘Kalinga Allied Industries India Private Limited’ (Supra)**, has further observed that the Commercial Wisdom of the CoC is not justiciable until and unless any material irregularity, which in the instant case, we are of the considered view that the submissions made by the ‘Financial Creditors’ do not fall within the provisions of the Section 30(2) of the Code. Having observed so, at the cost of repetition, it is noted that any modification after approval of the CoC and submission to the Adjudicating Authority, irrespective of the ‘content’ of the terms envisaged by the Resolution Plan, would only lead to further delay and defeat the very scope and objective of the Code.

30. The principle laid down by the Hon’ble Apex Court in **‘Ebix Singapore Pvt. Ltd.’ (Supra)** with respect to timelines and modifications of the Resolution Plan once approved by the CoC is applicable to the facts of this case. The Information Memorandum is prepared by the RP under Section 29 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (‘CIRP Regulations, 2016’) which contains the relevant provisions with regard to publication of Information Memorandum. Regulation 36 provides that the RP shall submit

the Information Memorandum in electronic form to each Member of the Committee within two weeks of his appointment, but not later than 54th day from the Insolvency commencement date, whichever is earlier. Regulation 36, sub-regulation (1) provides as follows:

“36. Information memorandum. -- (1) Subject to subregulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee 86 [on or before the ninety-fifth day from the insolvency commencement date.”

31. As per the statutory Scheme contained in Regulation, the Information Memorandum must be prepared and circulated to the Members of the Committee of Creditors prior to issuance of Form-G, which was done in the instant case. There are no substantial reasons given by the ‘Financial Creditor’ for being a part of the CoC and having approved the Resolution Plan to challenge at this belated stage the contents of the Information Memorandum.

32. The Hon’ble Apex Court in **‘Ngaitlang Dhar’ Vs. ‘Panna Pragati Infrastructure Private Limited & Ors.’**⁹, has observed as follows:

“31. It is trite law that ‘commercial wisdom’ of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC. It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC’s ‘commercial wisdom’ is non justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) of the IBC. This position

⁹ Civil Appeal Nos. 3665-3666/2020

of law has been consistently reiterated in a catena of judgments of this Court, including:

(i) K. Sashidhar v. Indian Overseas Bank and Others, (2019) 12 SCC 150.

(ii) Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Others, (2020) 8 SCC 531.

(iii) Maharashtra Seamless Limited v. Padmanabhan Venkatesh and others, (2020) 11 SCC 467.

(iv) Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another, (2021) SCC OnLine SC 204.

(v) Ghanashyam Mishra and Sons Private Limited Through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited Through the Director & Ors., (2021) 9 SCC 657.

.....

“33. We may gainfully refer to the following observations of this Court in the case of **Keshardeo Chamria v. Radha Kissen Chamria and others** (1953) 4 SCR 136 while considering the scope of the words ‘material irregularity’, as are found in Section 115 of the Code of Civil Procedure, 1908:

“Reference may also be made to the observations of Bose, J. in his order of reference in *Narayan Sonaji v. Sheshrao Vithoba* [AIR 1948 Nag 258] wherein it was said that the words “illegally” and “material irregularity” do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with.”

33. At a stage where the Resolution Plan has been approved with 91.64% Voting Share and Application seeking its approval is pending with the Adjudicating Authority, and the Letter of Intent (‘LoI’) has already been issued

to "Saya Homes", the Resolution Applicant, which Company has also bonafidely issued a Bank Guarantee on 19.05.2021 for an amount of Rs.2.5Cr./-, any steps taken by the 'Financial Creditor' at this stage for change in the Information Memorandum, is against the provisions of the Code and the adherence to timelines as laid down by the Hon'ble Apex court in a catena of Judgements. It is relevant to mention that 'the 'Financial Creditor' Nisus Finance participated in all the CoC Meetings being the Secured Creditor and having the maximum Voting Rights. Secondly, after attending several CoC Meetings and having approved the Resolution Plan proposed by Saya Homes, Nisus Finance preferred an Application for enforcing its Security Interest under Section 60(5) of the Code.

34. Letter of Intent dated 07.05.2021 is reproduced as hereunder:

Gaurav Katiyar
Insolvency Professional
D-32, East of Kailash, New Delhi - 110065
101943-4282
091-26110701
Gaurav Katiyar
Insolvency Professional

LETTER OF INTENT

To,
The Board of Directors
M/s. Saya Homes Private Limited
Registered office : B-7/45 Extension,
S/F Safdarjang Enclave, New Delhi - 110029

The Board of Directors
M/s. Saya Buildcon Consortium Private Limited
Registered office : B-7/45 Extension,
S/F Safdarjang Enclave, New Delhi - 110029

and

The Board of Directors
M/s. Roseberry Developers Private Limited
Registered office : B-7/45 Extension,
S/F Safdarjang Enclave, New Delhi - 110029

Subject: Letter of Intent (LOI) to declare the successful resolution applicant in the matter of M/s. Earthcon Universal Infratech Private Limited (In CIRP)

Sir(s)/ Madam(s),

In pursuance of the decision of the Committee of Creditors taken on 07.05.2021 in the resolution process of M/s. Earthcon Universal Infratech Private Limited (In CIRP) approving your Resolution Plan under Section 30(4) of the Insolvency & Bankruptcy Code 2016 read with Regulation 39 of the CIRP Regulations.

I, the resolution professional, acting under the instructions of the Committee of Creditors hereby advise you of the intention of the Committee of Creditors to declare you as the Successful Resolution Applicant subject to compliance being made to the steps mentioned in the RFRP and final approval by the Adjudicating Authority.

You are requested to submit Performance Guarantee of INR 2,50,00,000/- (Rupees Two Crore Fifty Lakhs) (as confirmed by you in your Resolution Plan) latest by 10.05.2021 and unconditionally accept this Letter of Intent.

Comp. App. (AT) (Ins.) Nos. 593, 656, 659, 694, 703 With Comp. App. (AT) (Ins.) No. 736/2021 & I.A. No. 647/2022 With Comp. App. (AT) (Ins.) No. 912/2021

Gaurav Katiyar

D-32, East of Kailash, New Delhi - 110065

Insolvency Professional

You are kindly advised to unconditionally accept this Letter of Intent by your authorized representative and attach a copy of the authorization for the said representative.

Subsequent steps will be taken as per the RFRP.

Expressions used here in but not defined shall have the meaning ascribed to these in the Request for Resolution Plan issued by the Resolution Professional on 27.01.2021

Thanking you

Yours sincerely

Gaurav Katiyar
Resolution Professional
M/s. Earthcon Universal InfraTech Private Limited (In CIRP)
IBBI Registration No.: IBBI/IPA-001/IP-P00209/2017-18/10409
Address: D-32, East of Kailash, New Delhi - 110065

KATYAR
GVRNVA
Date: 07.05.2021
Place: New Delhi

Accepted Unconditionally
For M/s. Saya Homes Private Limited
For Saya Homes Pvt. Ltd.

Director
[Signature along with name and stamp]

Accepted Unconditionally
For M/s. Roseberry Developers Private Limited
For ROSEBERRY DEVELOPERS PVT. LTD.

Director
[Signature along with name and stamp]

Accepted Unconditionally
For M/s. Saya Buildcon Consortium Private Limited
For Saya Buildcon Consortium Pvt. Ltd.

Director
[Signature along with name and stamp]

Date :
Place :

Letter of intent (LOI) to declare the successful resolution applicant

Page 2 of 2

35. The Resolution Applicant/M/s. Saya Homes sought to intervene in I.A.2510/2021 and submitted that the Adjudicating Authority itself has concluded that the documents were executed to create Security Interest of the Respondent over 205 Flats of the 'Corporate Debtor' and that the Resolution Professional has collated the Claim of the Respondent as Secured Financial

Creditors, pursuant to which the Respondent participated in various CoC Meetings having maximum Voting Share.

36. The Minutes of the proceedings of the 8th Meeting of the CoC admittedly attended by the 'Financial Creditors' M/s. Nisus Finance Investment Manager LLP shows the result of the e-Voting as hereunder:

<i>Name of Creditors</i>	<i>In favor</i>	<i>Not in favor</i>	<i>Abstain</i>
<i>AR – Real Estate Allottees</i>	<i>69.93</i>	<i>-</i>	<i>-</i>
<i>Nisus Finance & Investment Managers LLP</i>	<i>11.54</i>	<i>-</i>	<i>-</i>
<i>Punjab & Sind Bank</i>	<i>9.99</i>	<i>-</i>	<i>-</i>
<i>Greater Noida Industrial Development Authority</i>	<i>-</i>	<i>8.54</i>	<i>-</i>
	<i>91.46</i>	<i>8.54</i>	<i>-</i>

37. From the aforementioned table, it is clear that Nisus Finance having 11.4% Voting Share has voted in favour of the Resolution Plan based on the Information Memorandum which included these 268 Flats.

38. We are also conscious of the fact that most of the Homebuyers have paid their amounts in full and that they are in possession of the Flats allotted to them by the 'Corporate Debtor' and that the Respondent had failed to inform the Homebuyers about the Pre-Existing Mortgage, if any, over these Flats. Further, the exclusion of these Units from the Information Memorandum of the 'Corporate Debtor' would tantamount to giving preference to one similarly placed Creditor over another similarly placed Creditor.

39. For all the forgoing reasons, *Company Appeals (AT) (Ins.) Nos. 593, 659, 694, 703, 736 & 912/2021* are allowed and the Order of the Adjudicating Authority excluding the 205 Flats from the pool of the 'Assets of the Corporate Debtor', is set aside. Consequently, the *Company Appeal (AT) (Ins.) No.*

Comp. App. (AT) (Ins.) Nos. 593, 656, 659, 694, 703 With Comp. App. (AT) (Ins.) No. 736/2021 & I.A. No. 647/2022 With Comp. App. (AT) (Ins.) No. 912/2021

656/2021 is dismissed, accordingly. No order as to costs. The connected pending 'Interlocutory Applications', if any, are closed.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Principal Bench,
New Delhi
25th January, 2023

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