IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

Item No. 136
(IB)-875(PB)/2020

IN THE MATTER OF:

M/s. Dhankalash Distributors Pvt. Ltd. .... Applicant/petitioner

Vs.

Arena Superstructures Pvt. Ltd. .... Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016 (CIRP)

Order delivered on 10.05.2022

CORAM:
JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant	Ms. Madhavi Divan ASG & Adv. Abhishek Kumar for IBBI Adv. Sahil Monga Adv. Tejaswi Bhanu in IA-934/2022 Mr. P.K. Sachdeva Adv. for AR Mr. B.S. Goyal AR in person
For the Respondent	Adv. Raj Kamal, Adv. Anurag Chandra, Adv. Avish Bhati for R-31 & 32 Adv. Manish Kumar Srivastava, Mr. Sagar Arora Adv. for R-26 Mr. Sourav Roy, Adv., Adv. Kaushal Sharma, Adv. Prabudh Singh for Noida Authority in IA-5361/2021 Mr. Harsh N. a/w Rohil Pandit Adv. For R-15 in IA-4615/2021 Mr. Sumesh Dhawan, Mr. Manmeet Singh, Mr. Shantanu Chaturvedi, Mr. Surbhi Shah and Mr. Shatakshi Tripathi, Advs. for RP

ORDER

IA-4546(PB) of 2021

M/s. PNB Housing Finance Limited presently the Assets Reconstruction Company India Limited has filed this for the following reliefs:

"(a)Hold that Regulation 16A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is not applicable in favour of Homebuyers in the present case;

(b) Direct the Respondent No. l Resolution Professional to revise the Admitted Claim and Voting Share of the Homebuyers without affording them the

benefit under Regulation 16A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016."

(c) Grant an ad-interim stay directing the Respondent No. 1 Resolution Professional not to put any major decisions for vote, especially voting on Resolution Plans, before the CoC till the pendency of the present application;

(d) Pass any other order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of Justice."

In the present application the M/s. PNB Housing Finance Ltd. ("Applicant"), has pressed only prayer (a) and (b).

The Financial Creditor, M/s. Dhankalash Distributors Pvt. Ltd. has moved a Section 7 Petition against the Corporate Debtor, M/s. Arena Superstructures Pvt. Ltd.

M/s. Arena Superstructures Pvt. Ltd. is a Corporate Debtor engaged in business of development of housing projects, which ran into rough grounds forcing the Financial Creditor to initiate CIR proceedings. The Section 7 petition was admitted on 29.10.2020. The IRP was appointed and he initiated proceedings to constitute the Committee of Creditors (CoC). The present applicant i.e., M/s. PNB Housing Finance Ltd. ("Applicant"), one of the members of the CoC along with various Homebuyers has submitted their claims to the IRP.

The new Resolution Professional has been appointed and the claims were already taken up by the RP. The number of Homebuyers is around more than 800 approximately. The RP while admitting the claims of the Class of Creditors namely Homebuyers, determined the financial debt @ of 8% interest in terms of Regulation 16A(7) of Insolvency and Bankruptcy

Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), which reads as follows:-

(7) "The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties."

It is stated that total 15 CoC meetings were held and in one of the meetings of the CoC, the Applicant, M/s. PNB Housing Finance Ltd, had raised an objection with respect to 8% interest added to the debt owed to the Class of Creditors namely Homebuyers should not be considered for the purpose of determining the debt which will work unfairly against the Applicant. The reason for stating so was that, in the Apartment Buyer Agreement executed by the Corporate Debtor in favour of various Homebuyers, there is a specific clause namely 5.5 which reads as follows:-

"5.5 Subject to any Force Majeure conditions and the Buyer having complied with his timely payment obligations, in the event of any willful delay in construction of the Apartment for reasons attributable solely to the Company, delay charges would be payable to the Buyer, in the manner and to the extent specified herein below:

Period of delay after expiry of grace period as mentioned above (in months)	***Penatly per month (Rs. per sq. ft.)***
1-6	*05.00*
7-12	*07.50*
13 onwards	*10.00*

It is hereby clarified that, the above said delay charges shall be payable, subject to a demand being made by the Buyer for the same (and be calculated from the date of the said demand), till the date when possession of the Apartment is offered to the Buyer. Notwithstanding anything contained to the contrary, it is clarified

that in case the Buyer has defaulted/delayed payment of any instalment, the Buyer shall not be entitled to claim any damages, delay charges, penalty even if Company has charged interest against such delay instead of choosing to cancel the Apartment."

It is further stated that, the clause 5.5 of the Apartment Buyer Agreement provides payment in the nature of interest and that alone should be taken into consideration and not the standard rate of 8% as envisaged under Regulation 16(A)(7). On this premise the Applicant has sought the above stated reliefs.

On notice we have heard Ms. Madhavi Dewan, Ld. ASG appearing for the IBBI on an application for impleadment, which was allowed and the Ld. ASG submits as follows:-

The clause 5.5 of the Apartment Buyer Agreement has been misread and misconstrued by the Applicant. It only provides for the payment due to delay in construction of the apartment and it does not partake the character of interest as envisaged under Regulation 16A(7) of the CIRP Regulations. In the absence of any specific rate of interest between the parties, the standard rate of 8% as provided under Regulation 16A(7) of the CIRP Regulations has been rightly applied by the RP in the case of each Homebuyer. It is also stated that these agreements are uniform in respect to almost all the Homebuyers which are approximately 800 in number and there is no specific rate of interest mentioned in the agreement. She further pleaded that the purport and intent behind the Regulation 16A(7), was to give benefit to the Creditors in Class namely Homebuyers, who are heterogenous in nature and they do not have the ability to address this issue individually. In such an event the provision has been made to enable the Creditors in a class namely

Homebuyers to get the benefit of 8% interest without going into individual agreement.

The issue herein is 'whether in absence of any interest rate in the Agreement, the Creditors in a class namely Homebuyers will get the standard rate of interest of 8%'.

We have perused the clause 5.5 of the Apartment Buyer Agreement and the other provisions of this agreement, it is nowhere specified that interest is payable on the principal amount given by the Homebuyers. On the contrary what we find in clause 5.5 is that the construction of the apartment, if for any reason is delayed, the builder will pay a penalty and it is nowhere specified or nowhere stated that the said penalty in this case will be attributable to interest component on the principal amount given by the Homebuyers. We also notice that, the force majeure clause has been added and in case the Buyer have complied with the payment terms, the delay if any, caused by the Builder will enable the Homebuyers to seek penalty in relation to the 'built-up' area of the apartment in question, making it clear that the penalty is relatable to the built-up area of the apartment and not to the financial debt in question. Therefore, this clause cannot misread in the manner in which the applicant wants us to read. In any event as rightly pointed out by the Ld. ASG that, the amount of penalty cannot be equated to the rate of interest.

To buttress this argument Ld. ASG has placed their reliance on the judgment rendered in the case of ***Wing Commander Arifur Rahman Khan and Aleya Sultana and Ors. v. DLF Southern Homes Private Limited, (2020) 16 SCC 512,*** *decided on 24.08.2020 and relied on the para 25, 26 & 28 where it is held that,* the penalty is independent from the interest

component which can be claimed by the Homebuyers, independently from the clause in the agreement which relates to the delay in handing over the possession of the flat in question, for which the penalty can be sustained.

The interest component in this case has been computed as per the CIRP Regulation 16A(7), where no such interest has been specified in the agreement and we hold that in this case the agreement does not contain a clause of interest and penalty cannot be equated to interest and therefore, the application does not merit consideration and the IA 4546/2021 is **dismissed**. In so far as the submissions made by the Ld. Sr. Counsel for the Applicant, with regard to the manner of calculation of interest on the amount given by each Homebuyer, the applicant is allowed to raise this issue before the CoC in the next meeting.

At request of the Ld. Counsel for the parties, list the matter for physical hearing on 23.05.2022.

sd

(RAMALINGAM SUDHAKAR)
PRESIDENT

sd

(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)

VINEET - 10.05.2022