NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(INS) NO.756/2023

(Arising out of judgement and order dated 02.05.2023 passed in IA No.225/2022 in CP(IB/4469/MB/2019 passed by NCLT Mumbai Bench, Mumbai)

In the matter of:

Home Kraft Avenues,
1/8 Safalya, 14, Bandra Reclamation,
Mumbai, Maharashtra 400005 Appellant

Vs

1. Jayesh Sanghrajka,
   RP of Ornate Spaces R/t Ltd,
   4-5-407, Hind Rajasthan Building,
   DS Phalke Road,
   Dadar East,
   Mumbai 400014

2. Committee of Creditors of Ornate Spaces Pvt Ltd

3. Ashdan Properties Pvt Ltd,
   S No.36/1/1, Office No.701, 7th Floor,
   Mumbai Bangalore Highway,
   Baner, Pune 411045 Respondents

For Appellant: Mr Krishnendu Datta, Sr Advocate, Mr Anuj Tiwari, Mr Chaitanya Nikte, Ms Aroshi Pal, Ms Soumya Kumar, Advocates.

For Respondent: Mr Tishampati Sen, Ms Riddhi Sancheti, Mr Dikshat Mehra, Mr Chintan Gandhi, Mr Anurag anand, Mr. Mukul Kulhari, Advocates for R1.

Mr. Puneet Singh Bindra, Mr Rishabh Gupta, Advocates for R3.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

This appeal is filed against an impugned order dated 02.05.2023. The appellant is aggrieved of the fact it has been kept in the category of an *unsecured creditor* instead of being a secured creditor.

2. The learned counsel for the Appellant has referred to Loan Agreement dated 29.10.2015 to show the Appellant had granted a loan of Rs.*11* crores to the Corporate Debtor on 29.10.2015, initially payable after three years, but the date was later extended from time to time. Two options were given *qua* interest payable on such loan ***(a)*** the interest @ 18% or ***(b)*** four flats bearing No.1501, 1502, 1504 and 1601 could be transferred in favour of the appellant towards interest in its full and final payment. It was one of the clauses of the agreement that in case the Corporate Debtor fails to pay the principal amount of Rs.*11* crore then also four apartments bearing No.1901, 1902, 1904 and 2001 would be transferred in favour of the appellant. Admittedly the Corporate Debtor could not pay the principal amount of Rs.*11* crore and the cheques given were dishonoured due to insufficient funds.

3. On 29.06.2020 the Corporate Debtor was admitted to CIRP. The appellant filed two claims, one in Form *C* for Rs.*11* crore as a *secured* financial creditor and another in Form *CA* as the holder of four flats towards the interest payable.

4. The RP had admitted the claim of the appellant as home buyer *qua* four flats allotted in lieu of interest and the appellant has no grievance *qua* the same. However, he is aggrieved as the four flats to be given to him towards non-payment of principal amount Rs.*11* crores, the appellant was shown as

an *unsecured financial creditor*. To proceed further it would be important to examine relevant clauses of the agreement dated 29.10.2015 as under:

> *"2.1 It is agreed by and between the Parties that the tenure of the Loan shall be twenty nine (29) months (Loan Period) to be commenced from the date of receipt of the first tranche of Loan amount (Loan Period). The Developer shall within fifteen (15) days from the expiry of the Loan Period i.e. on or before November 15, 2017, repay the entire Loan to the Firm in the manner provided in this Agreement.*
>
> *"3.1 It is agreed by and between the Parties that the Developer would be liable to pay to the firm, interest on a lump sum basis of Rs.____(Interest Amount) on the Loan from the date of receipt of the Loan tranches as provided above in Clause 2, till expiry of the Loan Period as and by way of interest during the entire loan period.*
>
> *3.2 However, in lieu of the Interest Amount Payable by the Developer to the Firm on the Loan advanced in terms of this Agreement, the Developer has proposed to allot, transfer and assign to the Firm, in consideration of the Interest Amount four apartments being apartment No.s 1501, 1502, 1504 and 1601, admeasuring in aggregate about 4508 sq ft carpet area and 9304 sq ft saleable area, on the 15th and 16th floor of the Building to be constructed on the Property by the Developer together with four car parking spaces in the (basement/podium/automatic) in the Building (the Car Parking Spaces) (the aforesaid apartment No.1501, 1502, 1504 and No.1601 and the Car Parking Spaces are hereinafter collectively referred to as the "**Allotted Apartments")** and more particularly described in **schedule II** hereunder written, to which the Firm has agreed. The floor plans of the Allotted apartments are annexed as **Annexure III to this Agreement.***
>
> *3.3 The Developer has, simultaneously on the execution of this Agreement, executed four (4) separate Agreements for Sale, as required under the provisions of the Maharashtra Ownership of Flats Act, 1961 (MOFA), in respect of each of the Allotted apartments thereby, inter alia, selling, transferring and conveying the Allotted Apartments absolutely in favour of the Firm in consideration of the Interest Amount and on the terms and conditions more particularly set out therein. It is clarified that the Firm shall not be liable to pay to the Developer, any amount under any name whatsoever, in respect of the Allotted apartments save and except the amounts shown specifically payable in the Agreements for Sale and the Interest amount shall be deemed to be an adequate and full purchase*

consideration in respect of the transfer/conveyance of the Allotted Apartments in favour of the Firm.

4.1 In order to secure the due and punctual repayment of the Loan (in proportion to the amount lent by the Firm in terms of Clause Error ! Reference source not found) , ***the developer has allotted to the Firm, as and by way of security, four apartments being apartment No.1901, 1902, 1904 and 2001 admeasuring about 4508 sq ft carpet area and 9304 sq ft*** *saleable area in aggregate, on the 19th and 20th floor of the building to be constructed on the Property by the Developer together with four car parking spaces in the (basement/podum/automatic) in the Building (the "Car Parking") (the aforesaid apartment No. No.1901, No.1902, No.1904 and No.2001 and the Car Parking are hereinafter collectively referred to as the "Secured Apartments") and more particularly described in* ***Schedule*** *III hereunder written, with the following undertaking:*

4.1.1 The Developer shall, simultaneously on the execution of this Agreement, sign and execute the Agreement for Sale (AFS of Secured Apartments) in respect of the ***Secured Apartments in favour of the Firm.***

4.1.2 The Developer shall also, simultaneously on the execution of this Agreement sign and execute a Power of Attorney (POA) in favour of the Firm thereby inter alia, authorising (1) the Firm or its partners/representatives to register the AFS of ***Secured Apartments*** *in terms of this Agreement and (2) such other matters incidental to the main matters including but not limited to procuring the NOC from ECL Finance.*

4.1.3 The signed and executed AFS of ***Secured Apartments*** *shall, however, neither be stamped nor registered but shall be kept in escrow with Rajani, Singhania and Partners, Solicitors (Escrow Agent)*
4.1.6.3 have the AFS of ***Secured Apartments*** *duly stamped and registered and have the* ***Secured Apartments*** *conveyed, transferred and assured unto the Firm absolutely in lieu of the repayment of the Loan.*
4.1.7 In the event the Firm opts to have the ***Secured Apartments*** *conveyed, transferred and assured in favour of the Firm, the Escrow Agent shall, upon receipt of joint intimation from the Parties that the Developer has failed to repay the entire Loan within the Loan Period set out herein, immediately release the signed and executed AFS of Secured Apartments and the POA to the Firm.*

5.3 In the event the Developer repays the entire amount of Loan within fifteen (15) days from the expiry of the Loan Period as

> *provided hereinabove, the Escrow Agent shall, upon receipt of intimation from the Firm that the Developer has repaid the entire Loan within the period set out herein, immediately release the* ***AFS of Secured Apartments*** *and the executed POA to the Developer and the Developer shall thereafter, be entitled to deal with the Secured Apartments in such manner as it may deem fit without any recourse to the firm.*

5. The learned senior counsel for the appellant argued the appellant has a first charge on four flats *secured* for repayment of its principal amount of Rs.*11* crore. He relied upon Sections *3(4), 3(31)* and *3(33)* of the IBC Code. The sections are as below:

> *"3(4) "charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage;*
> *"3(30) "secured creditor" means a creditor in favour of whom security interest is created;*
> *3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;*
> *3(33) "transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;*

6. Thus it was argued *per* above facts and law, the appellant needs to be treated as a *secured creditor* and its name ought to have been included in the list of secured creditors.

7. Thus the issue is *whether the appellant is a secured creditor?*. The appellant did file an application before the Ld. NCLT to claim its status as a *secured creditor* for the principal amount of loan granted.

8. The impugned order, however, rejected the claim of the appellant only on the ground the charge was not registered under Section *77* of the Companies Act, 2013. The impugned order records:

> *"14.xxxxxThe security of 4 flats, given under the loan agreement is not registered with the registrar of companies in terms of Section 77 of the Companies act, 2013. It is noticed that Section 77(3) the Companies Act, 2013 provides that no charge created by a company shall be taken into account by the liquidator appointed under this act or I&B code or any other creditor unless it is duly registered u/s 77(1) and a certificate of registration is given by the Registrar. Accordingly, this bench is of the view that the resolution professional has not committed any error in classifying the applicant as unsecured financial creditor."*

9. The respondent relies upon the reasoning given in the impugned order.

10. Heard.

11. Section 77 (3) of Companies Act 2013 read as follows:-

> *"Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the 'liquidator' or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).*
> *(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge."*

12. A bare reading of Section *77 (3)* of Companies Act, 2013 casts an obligation upon 'Liquidator'. However, the present case is confined to the duty and role of 'Resolution Professional' and admittedly company is not under liquidation.

13. The intent of legislature was never to apply Section 77 of Companies Act upon the 'Corporate Insolvency Resolution Process'. This is for the reason the treatment of "secured creditor" and "security interest" in liquidation

process is entirely different from that of during the 'Corporate Insolvency Resolution Process'. A 'secured creditor' under 'liquidation process' has an indefeasible right to realise its security interest by excluding its assets from the Liquidation Estate *per* Section 52. In case of 'liquidation' a 'Secured Creditor' who intends to realise its 'security' outside the 'waterfall mechanism' as per section *53*, has to prove that he has a "Charge" over a property. In that case the Liquidator has to 'recognise a charge' which is "registered as per section 77 of Companies Act". Further, the definition of "Liquidation Estate" under *36(3) (g)* includes 'secured assets' only and only if the 'secured creditor' has relinquished its interest. Distinctively, Section *18 (1) (f)* and *25 (2) (a)* mandates the Resolution Professional to take control of 'all assets' of the Corporate Debtor irrespective of any encumbrance. Further, no secured creditor has right to 'realise' its 'security interest' during 'CIRP'.

14. For the same reason while Regulation *21* of Insolvency and Bankruptcy Board of India ('Liquidation' Process) Regulations, 2016 prescribes evidences for proving "security interest", consciously no such corresponding provision has been included in Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016. Only under liquidation process a question of charge under section *77* comes into play and the same has nothing to do with "CIRP".

15. Legislature never intended that "registration of charge" under section 77 is sine qua non to qualify as "secured creditor". The Resolution Professional has to follow the provisions of IBC. Section *3 (4)* of IBC defines 'charge' as interest or lien created on a property as 'security' and includes mortgage. As per Section *3(30)* 'Secured Creditor' means a Creditor in favour

of whom 'security interest' is created. Further Section *3(31)* states "Security interest" means right, title or interest or a claim to a property created in favor of or provided for a 'Secured Creditor' by a 'transaction' which 'secures payment' or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or 'arrangement' securing payment or performance of any obligation of any person. Section *3(33)* states that "transaction" includes an 'agreement' or 'arrangement in writing' for transfer of assets, or funds, goods or service from or to the Corporate Debtor and section *3(34)* of IBC states that transfer includes mortgage, pledge, gift, loan or any other form of transfer of right, title or lien. 'Registered Charge under section 77' is not mentioned in the definition of 'secured creditor' and infact a creditor is secured by way of any 'arrangement' like the 'loan agreement' in present case which secures *4* flats as secured property of Appellants against repayment of its Loan.

16. This Tribunal in "Canara Bank vs. Mr. S. Rajendran, Liquidator of M/s Cape Engineers Pvt. Ltd. [Company Appeal (AT) (Ins) No. 277 of 2023]" held:

> *"53. In addition, the `non-registration of the Mortgage', as per Section 77 of the Companies Act, 2013, is not a sufficient / enough ground, to come to an `opinion', that the `Appellant', is not a `Secured Creditor'. In reality, the 'rights' of a `Mortgagee', under the `Transfer of Property Act', 1882 and the 'SARFAESI Comp. App (AT) (CH) (Ins) No. 277/2023 Act', are not to be diluted, in terms of Regulation 21 of IBBI (Liquidation process) Regulations, 2016."*

17. Thus, it is a settled law right of a mortgagee under the Transfer of Property Act, 1882 cannot be taken away only because of non-registration of the charge u/s 77 of the Companies Act, 2013.

18. This is in consonance with Section 77 of the Companies Act 2013. Section 78(3) of the Companies Act, 2013 states no charge shall be created by the Company shall be taken in account by the "Liquidator" unless it is registered under subsection 1 and 2. Section *77 (4)* of the Companies Act, 2013 clarifies nothing in subsection (c) shall prejudice any contract or obligation for repayment of money secured by charge. The obligation is only on the Liquidator. In fact, Section *3 (4)* of IBC defines charge and Section *3 (31)* of IBC states secured interest means and includes "Charge". Thus, combine reading of all the section clarifies only a Liquidator will not consider a claim without registration, however, the RP is bound to consider a "Charge" and a Creditor having charge is a Secured Creditor.

19. In the case of Pashchimanchal Vidyut (Civil Appeal No.7976 of 2019) the Hon'ble Supreme Court has clarified Section 3(31) of IBC is wider than Section *77* and *78* of Companies Act and defines security interest, however, the issue of non registration of charge was kept open.

20. In fact, in Canara Bank (Supra) it was held Section *77* of the Companies Act, 2013 is not a sine qua non for a Creditor being a Secured Creditor and held it is not a sufficient ground to reject such claim of Creditor. The said Order was passed after considering Volkswagen case as well.

21. Thus non registration of charge *per* Section *77* of Companies Act, 2013 will not make a difference in the claim of the Applicant being treated as a Secured Creditor.

22. Hence, there exists a debt and the Corporate Debtor had secured it by creation of security interest/charge., therefore, the Appellant is a secured financial creditor. Necessary correction be thus made in the record.

23. The next issue was *qua* a direction in the impugned order to initiate proceedings against the appellant under section 66 of the Code. It is alleged there was never any application moved by the Resolution Professional seeking initiation of proceedings under Section *66* of the Code and this part of impugned order appears to be violative of principle of natural justice as no show cause/or notice was ever issued to the Appellant giving them opportunity to contend as to why such directions could not have been passed and that such direction has rather been passed in an application filed by the Appellant himself seeking categorisation of it as a secured creditor.

24. Admittedly the aforesaid proceedings are presently initiated and there is no final finding by the Ld. NCLT as to if appellant is a related party or not, hence it would be premature at this stage to give any finding on this issue. Thus while keeping this issue open, the appeal is allowed and the impugned order is hereby set aside. Pending applications, if any, are disposed of.

(JUSTICE YOGESH KHANNA)
MEMBER (JUDICIAL)

(MR. ARUN BAROKA)
MEMBER (TECHNICAL)

Dated:14.02.2025

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