

NATIONAL COMPANY LAW TRIBUNAL
COURT ROOM NO. 1,
MUMBAI BENCH

Item No. 12

CA 239/2024 (NEW CA) CA 632/2022 CA 179/2024 CA 185/2024 in
CP/3638(MB)2018

CORAM:

SH. PRABHAT KUMAR JUSTICE VIRENDRASINGH BISHT (Retd.)
HON'BLE MEMBER (TECHNICAL) HON'BLE MEMBER (JUDICIAL)

ORDER SHEET OF THE HEARING ON **15.07.2024**

NAME OF THE PARTIES: **UNION OF INDIA V/s INFRASTRUCTURE**
LEASING AND FINANCIAL SERVICES
LTD. & ORS.

Section 241-242 of the Companies Act, 2013 & Rule 11

ORDER

CA 239/2024 in CP/3638(MB)2018

- 1) Ms. Sneha Kulkarni, Ld. Counsel for the Applicant and Mr. Aditya Sikka, Ld. Counsel for the Union of India are present.
- 2) Ld. Counsel for the Applicant submits that other connected Application are listed on Board on 23.08.2024, thus, prays that the present Application also be adjourned to same date.
- 3) At request, stand over to 23.08.2024, for further consideration and hearing.
In the meantime, Respondents shall file and place on record Affidavit in Replies well before the adjourned date thereby duly serving copies thereof to the other side well in advance.

CA 632/2022 in CP/3638(MB)2018

- 1) Ms. Prachi Pandya, Ld. Counsel for the Applicant and Mr. Shwetaank Nigam, Ld. Counsel for the Respondent/Claims Management Advisor are present.
- 2) The present Interlocutory Application has been filed by the Applicant/State Bank of India seeking the following reliefs:
 - a. Direct the Resolution Professional to reclassify the Applicant's claim as a secured creditor;
 - b. The Resolution Professional be directed that the Applicant be paid its dues/claim amount as per due process of law;
- 3) Brief facts to the case in hand are as follows:
 - a. Mytas Hill County Private Ltd. (hereinafter referred to as "Mytas") acquired under the terms and condition of Development Agreement dated 3.12.2005 all that pieces of land admeasuring 85 acres 36 Guntas or thereabout situated at Hill County, Bachupalli structure of dwelling units with all infrastructure facility for sale on ownership basis and also for the construction of other buildings to house community facilities in accordance with the layout plan sanctioned by the competent authority.
 - b. Mytas approached the Applicant to render financial assistance for the construction of dwelling units to such of its dwelling unit purchasers / members as may be in need their off and in consideration of

Applicant doing so in accordance with its lending policies. Thereby several borrower's / dwelling unit holders applied to the Applicant for a loan to buy a dwelling unit to be constructed by Mytas. Accordingly, Mytas, the Applicant and the borrowers (i.e. the dwelling unit purchasers) entered into a Tri - Partite Agreement recording the terms and conditions *inter se*.

- c. Subsequent to the execution of the Tri - Partite Agreement, the Applicant and the borrower (dwelling unit purchasers) entered into a Memorandum of Loan Agreement for SBI – Maxgain’ Home Loan Granted to Public for the dwelling units. Hereto annexed and marked as **Exhibit – A** is a copy of one such Memorandum of Loan Agreement dated 06.02.2007 executed between the Applicant and the Borrower therein (Shashi Bhushan Mannepalli).
- d. Several clauses of the Memorandum of Loan Agreement recorded that the dwelling unit for which loan has been availed shall be secured by an equitable mortgage in favour of the Applicant. A few clauses of the Memorandum of Loan Agreement are as follows :
 - i. Clause (1) Page 3 – “The loan shall be secured by a valid equitable/ legal mortgage of the land/house/flat purchased/constructed by me/us for which the Loan facility is provided by executing/registering such documents in such form as may be decided by the Bank.”

e. Mytas was promoted by the family of erstwhile Satyam Computer founder B Ramalinga Raju. Mytas Hill County Pvt Ltd. was gravely affected when the accounting fraud at the Information Technology services firm (Satyam Computers) came to light in January 2009. Pursuant to the said fraud, Infra structure Leasing & Financial Services Ltd./ Respondent (hereinafter referred to as “IL&FS”) took over the said real estate company- Mytas in January 2011.

4) It is submitted that the Resolution Professional has clearly erred on multiple counts, including the following:

- a. The Resolution Professional has failed to appreciate the Applicant’s application / Form C and its subsequent email dated 16.02.2022 in the correct perspective;
- b. The Resolution Professional has failed to appreciate the terms of the Tri Partite Agreement, especially clauses 3 and 9, which clearly states the loans advanced by the Applicant are secured by a mortgage on the units for which the loans have been advanced;
- c. The Resolution Professional has failed to appreciate the terms of the Memorandum of Loan Agreement, which further establishes creation of a mortgage in favour of the Applicant. Hence, the Resolution Professional has gravely erred in categorising the Applicant’ claim as a ‘unsecured debt’.

- d. The Resolution Professional failed to appreciate that clause (1) of the Memorandum of Loan Agreement clearly stipulates that the loan shall be secured by a valid equitable / legal mortgage on the land / house / flat / constructed and for which the loan facility is provide.
- e. The Resolution Professional failed to appreciate the findings of the Hon'ble DRT passed in various of its orders where it categorically holds that the loan advanced by the Applicant was secured by an equitable mortgage and that the Applicant Bank is entitled to recover the same.
- 5) Heard Ld. Counsel for the Parties extensively for a considerable time and perused the material available on record.
- 6) Ld. Counsel for the Applicant took us through Tripartite Agreement dt. 05.02.2007 entered into between Mytas, the Applicant and the Borrower and relied upon Clause 3 and Clause 9 of the said Agreement, which reads as under.

“(3) As authorised by the Borrower the Developer shall hold all the rights, title, interest, claim of the Borrower in respect of the dwelling unit and/or the agreement in respect thereof and/or any money paid to or deposited with the Developer under the said agreement or any allotment letter in respect of the said dwelling unit for and on behalf of and in favour of SBI. The Developer further agrees to total subrogation of Borrower's right to refund all the monies received by the Developer from SBI on behalf of the Borrower/s in favour of SBI. In any event in which such refund

becomes due and payable to the Borrower under any Agreement/arrangement executed/made between the Developer and the Borrower, the Developer in particular agrees and undertakes not to pay any amount on any account to the Borrower by way of refund or otherwise without written consent of SBI. The Borrower and the Developer also agrees that as soon as the first disbursement is made by SBI the mortgage/charge in favour of SBI shall fasten on the said dwelling unit and the same shall continue (notwithstanding its allotment, completion and occupation) until the loan of SBI is fully repaid with interest and all other dues.

The Borrower also authorises the Developer to handover the original registered conveyance deed as and when executed in borrower's favour directly to SBI to be held by SBI till the pendency of the loan”.

(9) That in the event of default in payment of any dues to SBI by the Borrower, SBI may at its sole discretion enforce the security by sale of the land and dwelling unit for which the loan has been availed by the Borrower/s and the Developer shall not raise any objection/obstruction for the same and shall accept another purchaser for the House or Flat in place of the borrower, however subject to the substituted purchaser complying with the necessary requirements of the Developer in this respect. If there are any dues/out standings payable by the Borrower to the Developer the same shall be subordinate/secondary to that of the liability of the Borrower to SBI”.

7) Further he took us through a decree passed by Debt Recovery Tribunal, Hyderabad on 30.08.2017, whereby the Debt Recovery Tribunal, Hyderabad had directed that *“The Applicant bank is entitled to proceed against the person and properties of defendant Nos. 1 and 2 and properties of defendant No. 3 towards realisation of its dues”*. In this matter, the Respondent No. 3 was Mytas. Ld. Counsel relied upon the decisions of the Hon’ble Appellate Tribunal in the case of *Sicom Limited, Solitaire Corporate Park...vs... Sundaresh Bhatt, Liquidator of ABG Shipyard Limited*, and took us through para 25 & 26 thereof, which reads as under:

25. The Hon’ble Supreme Court also approved the judgment of Bombay High Court in Suryakant Natvarlal Surati v. Kamani Bros. Ltd., (1985) 58 Comp Cas 121, where Section 125 of the Companies Act was held to be inapplicable. In paragraph 18-19, following was laid down: "18. In Suryakant Natvarlal Surati v. Kamani Bros. Ltd. ((1985) 58 Comp Cas 121 (Bom)] the Company created a charge under a mortgage in favour of the trustees of the Employees Gratuity Fund. The creditors, by a preliminary decree of 3-12-1977 were entitled to receive the amount secured on the property of the Company; the Court fixed 8-12-1988 as the date for redemption and ordered that in default of payment of the sum due by that date, the property was to be sold by public auction. On an application made on 16-2-1978, the Company was ordered to be wound up by an order dated 3-8-1979. As default in payment of the decreed amount was committed, the mortgagees applied for leave of the Court under Section 446 to execute the decree against the Official Liquidator by application dated 10-7-1981. Three contributories sought injunction

against taking any further action on the ground that the charge created by the Company was not registered under Section 125 of the Companies Act, therefore, the mortgagees should be treated only as unsecured creditors. Their application was dismissed by a learned Single Judge. On appeal, speaking for the Division Bench of the Bombay High Court Justice Bharucha (as he then was) laid down, Inter alia, the principle that the question of applicability of Section 125 had to be decided on the terms of the decree whether the unregistered charge created by the mortgagor was kept alive or extinguished or replaced by an order of sale created by the decree; if upon a construction of the decree, the Court found that the unregistered charge was kept alive, the provisions of Section 125 would apply and if, on the other hand, the decree extinguished the unregistered charge, the section would not apply. We are in respectful agreement with that principle. We hold that a judgment-creditor will be entitled to relief from the Company Court accordingly.

19. Reverting to the facts of this case, on the construction of the decree we have already held that the charge was kept alive till 28-8-1982 and thereafter in default of payment of decree amount the sale order would take effect. In this case, admittedly the decree amount was not paid before 28-8-1982, as such the matter had passed from the domain of contract to the realm of the judgment. The Official Liquidator filed application on 21-3-1983 seeking to declare the decree as void. By that date, what was operative in the decree was not a mere unregistered charge but an order for sale of mortgaged property for realisation of decree amount. The preliminary decree cannot therefore be said to be void and inoperative.

26. The ratio of the above judgments of the Hon'ble Apex Court is that when charge though unregistered forms part of a decree, in executing

the Decree, the plea of charge not being registered does not hold any water.

8) Per contra, the Counsel for the Respondent submitted that Clause 2(1) of the Loan Agreement provides that the loan extended by the Applicant to the Borrower, shall be secured by a valid, equitable/legal mortgage of the residential unit purchased by the Borrower for which the loan facility has been provided by the Applicant, and shall require the Borrower to execute/register the relevant documents as required by the Applicant. Additionally, the Borrower would be required to seek the prior approval of the Applicant, before further mortgaging or renting the residential unit in the Project owned by the Borrower. It is further submitted that even if HCPL has not filed a charge form, in case there was a security, Section 78 of the Companies Act, 2013 allows the mortgagee to also file for such security. Such filing has also not been made by the Applicant. Therefore, it can be clearly emphasized that there was no mortgage/security created by HCPL in favour of the Applicant.

9) Additionally, a reference may also be made to Axis Bank Limited. v. Value Infracon India Private Limited. & Others [Company Appeal (AT) (Ins.) No. 582 of 2020]. The relevant extracts have been provided below, and a copy of the order has been attached and annexed hereto as Annexure I:

"...10. It is clear from the principle laid down by the Hon'ble Supreme Court in 'Pioneer Urban Land & Infrastructure Ltd. & Anr. (Supra) that it is the Home Buyer who should be considered as 'Financial

Creditors' of the 'Corporate Debtor' whether he self-financed his flat or has exercised his choice of taking a loan from the Bank."

"...13. We find force in the contention of the Learned Counsel for the Respondent that a mere 'Permission to Mortgage is of no relevance in the absence of not having 'registered a charge' under Section 77 of the Companies Act, 2013."

"...17. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximisation of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Home Buyer vis-a-vis the Bank and vis-a-vis the 'Corporate Debtor'. Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor' in this case and hence we find no reasons to interfere with the well-reasoned Order of the Adjudicating Authority."

- 10)** The above precedent is sufficient to establish that the financial creditor of the developer (in case any claim remains) is the home-buyer and not the financier of the home-buyer. In the instant case, as a result of the commitment provided under the Tripartite Agreement, as indicated above, the Applicant is also a creditor to the developer. However, it is elaborated and emphasized that such a credit is not a secured credit. In light of the above, it is once again reiterated that no charge has been created by

Mytas/HCPL, and accordingly the obligation to pay the Applicant out of the sale proceeds is merely an unsecured obligation undertaken by Mytas/HCPL. The Applicant, therefore, is not a secured creditor of HCPL.

11) We note that the facts of the case in *Axis Bank Limited vs. Value Infracon Private Limited* are distinguishable as in the present case there is decree order vesting the rights in the Applicant to proceed against the assets of Mytas for recovery of its dues. We have considered view that the facts of the present case are similar to facts in the case of *Sicom Limited (supra)*, whereby it was held at para 26 that “*The ratio of the above judgments of the Hon'ble Apex Court is that when charge though unregistered forms part of a decree, in executing the Decree, the plea of charge not being registered does not hold any water*”.

12) Accordingly, we have no hesitation to hold that the Applicant is secured creditor in the present facts and circumstances of the case and ought to be admitted as such. Accordingly, we direct the Claim Management Advisor to modify the class of the Applicant herein.

13) With the aforesaid observations and directions, the Company Application bearing CA No. 632 of 2022, is disposed of as Allowed.

CA 179/2024 in CP/3638(MB)2018

1) Ms. Drishti Das, Ld. Counsel for the Applicant and Mr. Aditya Sikka, Ld. Counsel for the Union of India are present.

- 2) Ld. Counsel for the Union of India submits that they have filed and placed on record Affidavit in Reply; however, further submits that there may be certain licenses under the attachment of the Enforcement Directorate. Therefore, Ld. Counsel for the Union of India further submits that the Reply of the Enforcement Directorate be come on record. In that view of the matter, Counsel for the Union of India is directed to approach the Enforcement Directorate to file their Reply in the present matter, for having clarity on this attachment aspects.
- 3) Union of India shall serve a copy of this Order upon the Enforcement Directorate for their Compliance. Stand over to 30.07.2024, for further consideration and hearing.

CA 185/2024 in CP/3638(MB)2018

- 1) None present for the Applicant, when the matter is called out. Mr. Aditya Sikka, Ld. Counsel for the Union of India is present.
- 2) Counsel for the Union of India seeks some time to file and place on record Affidavit in Reply. Time is allowed. Affidavit in Reply be filed and placed on record well before the adjourned date thereby duly serving a copy thereof to the other side well in advance.
- 3) Stand over to 30.07.2024, for further consideration and hearing.

Sd/-

**PRABHAT KUMAR
MEMBER (TECHNICAL)**

Sd/-

**JUSTICE VIRENDRASINGH BISHT
MEMBER (JUDICIAL)**