NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 338 of 2024

[Arising out of Order dated 05.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court–III), in I.A. No. 3962/2020 in IB – 1771(ND)/2018]

IN THE MATTER OF:

M/s. Star Maxx Properties
Through its Authorised Representative
Mr. Nakul Goel, B-798, 1st floor,
Greenfield Colony, Sector 43,
Faridabad, Haryana **...Appellant**

Versus

1. Arunava Sikhdar
Resolution Professional
Dream Procon Pvt. Ltd.
IBBI REG. No.:IBBI/IPA-001/IP-P00022/2016-17/10047
C-10, Lower Ground Floor,
Lajpat Nagar-II
New Delhi – 110 024 **...Respondent No. 1**

2. Victory Ace Social Welfare Society
Through its President
Mr. Sushil Kumar Singh
1403, Block W, Homes 121, Sector – 121,
Noida – 201301, Uttar Pradesh. **...Respondent No. 2**

Present:

For Appellant : Mr. Gaurav Mitra, Sr. Advocate with Mr. Vaibhav Tyagi, Ms. Lavanya Pathak, Advocates.

For Respondent : Ms. Varsha Banerjee, Mr. Akash Srivastava, Advocates for R1 (RP).

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed challenging the order dated 05.12.2023 passed by the adjudicating authority (National Company Law Tribunal, New

Delhi, Court – III) rejecting I.A. No. 3962/2020 filed by the appellant. Appellant aggrieved by rejection of I.A. No. 3962/2020 has filed this appeal.

2. Brief facts necessary to be noticed for deciding the appeal are:

i. The corporate debtor M/s. Dream Procon Private Limited is a Real Estate Company which has commenced construction of Multi-storey Housing and Commercial Complex by entering into the Joint Development Agreement with M/s. Logix City Developers Ltd.

ii. M/s. Dream Procon Private Limited approached the appellant for investment in the said project at Victory Ace, Plot No. GH-02, Sector 143, Expressway Gautambudh Nagar, NOIDA.

iii. 6 Articles of Agreement were entered between the appellant and corporate debtor, where appellant agreed to invest in residential units (6 in number) in the project Victory Ace. Article of Agreement were entered in 2015 and again on 13.04.2017.

iv. Appellant's case is that the amount of Rs. 37 Lakhs was paid for one unit. The appellant initiated arbitration proceedings against the corporate debtor and award dated 28.08.2019 was issued in favour of the appellant against the corporate debtor. Prior to the issuance of the aforesaid award, an application under Section 7 was filed against the corporate debtor by Priyanshi Arora a homebuyer, the Corporate Insolvency Resolution Process (CIRP) proceedings were initiated by order dated 06.09.2019 against the corporate debtor.

v. Public announcement was made by the Resolution Professional (RP) in pursuance of which appellant filed a claim of Rs.5,38,95,222/- in 'Form-C' on 28.10.2019.

vi. On 23.12.2019, the appellant was noticed as secured financial creditor by the Interim Resolution Professional (IRP).

vii. The appellant was reclassified from secured financial creditor to financial creditor with 'NiL' security on 17.06.2020. Appellant send a communication on 20.06.2020 objecting to reclassification of the appellant as unsecured financial creditor.

viii. Appellant filed I.A. 3962/2020 before the adjudicating authority seeking reclassification of its claim as secured financial creditor or in alternative as a financial creditor in a class i.e., a homebuyer.

ix. Adjudicating authority after hearing learned counsel for the appellant and RP has rejected I.A. No. 396/2020 by order dated 05.12.2023, against which this appeal has been filed.

3. We have heard learned Sr. counsel Mr. Gaurav Mitra appearing for the appellant. Learned Counsel Ms. Varsha Banerjee and Mr. Akash Srivastava appearing for the RP.

4. Learned counsel for the appellant submits that appellant is secured financial creditor of the corporate debtor on the strength of arbitration award dated 28.08.2019. RP having admitted the appellant as a secured financial creditor, the RP is estopped from affecting any further reclassification. Appellant is liable to be included as a creditor in a class and in no event,

appellant is an unsecured financial creditor. Learned counsel for the appellant referring to the Clause 4 of the Articles of Agreement submits that agreement contemplated that in event the first party defaults in refund being the payment second party will be absolute owner of the residential unit. It is submitted that Ld. Arbitrator has also passed an order on 28.08.2019 directing to make payment to the appellant and restraining the corporate debtor from creating any third party rights qua the subject units which clearly created the security interest in favour of the appellant. It is submitted that arbitral award has attained finality and has never been challenged by the corporate debtor. Arbitral award itself observed that units are to be kept as security in favour of the appellant. Adjudicating authority committed error in not declaring the appellant as secured financial creditor. The RP having once admitted the appellant as secured financial creditor, it had no jurisdiction to reclassify the appellant's claim as unsecured financial creditor. Adjudicating authority committed error in relying on the judgment of the Hon'ble Supreme Court in the matter of ***'M/s. RPS Infrastructure Ltd.' Vs. 'Mukul Kumar & Anr.'*** in ***Civil Appeal 5590/2021.*** In any event, appellant is at least liable to be classified as creditor in a class/allottee by virtue of Articles of Agreement.

5. Learned counsel for the RP refuting the submissions of the appellant submits that no security interest was created in favour of the appellant. Appellant in claim 'Form-C' dated 28.10.2019 has stated that there is a security interest in favour of the appellant on the said units in the project, however, no material was provided by the appellant except the arbitration

award. Arbitration award dated 28.08.2019 is admittedly only a money decree and Clause (v) on which the appellant places reliance merely retrains the corporate debtor from allotting or alienating or dealing with or disposing of the units which cannot be said to create any security interest in the assets. Appellant has not provided any document showcasing creation of any security interest in favour of the appellant on the said units. Appellant in terms of the provisions of the IBC was required to prove existence of security interest on the basis of (a) records of the information utility; (b) certification of registration of charge with the RoC; or (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India, however no document to prove the aforesaid requirement has been brought on record by the appellant. The units mentioned in the Article of Agreement were allotted to different homebuyers. The RP has admitted the claim of the appellant in full as unsecured financial creditor. Appellant is not a financial creditor in a class. No Builder Buyers Agreement (BBA) was executed qua the units mentioned by the appellant and said units were already allotted to the allottees who have BBA which was executed before the Articles of Agreement was executed with the appellant. Appellant need to have a BBA to seek any right as a creditor in a class. The alternate relief made by the appellant to declare the appellant as a creditor in a class cannot be granted. Present is not a case of reclassification. It is the duty of the RP to verify and collate the claims received in terms of the record of the corporate debtor. RP had to told the appellant as unsecured financial creditor since no document regarding creating of a security interest was produced by the appellant. It is further submitted that resolution plan has already been approved by the Committee

of Creditors (CoC) on 07.05.2021 with 90.66 % vote shares, whereas, fresh claim under 'Form-CA' was filed by the appellant on 21.08.2021 to be treated as allottee. The said claim having been filed after the approval of the resolution plan by the CoC was not considered. Appellant has rightly been classified as unsecured financial creditor. Adjudicating authority has rightly rejected the application filed by the appellant which needs no interference.

6. Learned counsel for the parties have placed reliance on various judgments of this Tribunal, which we shall consider while considering the submissions in detail.

7. From the submissions of the Counsel for the parties and materials on record only two questions arise for consideration in this Appeal namely—

(i) Whether Appellant is Secured Financial Creditor; and

(ii) Whether Appellant's claim filed in Form CA need to be accepted as Financial Creditor in class i.e. a homebuyer.

In response to the publication made by the IRP, Appellant submitted its claim in Form C dated 28.10.2019. Total amount of claim as claimed in Column 4 in Form C is as follows:-

4.	Total amount of claim (including any interest as at the insolvency commencement date)	1. Total in Principal - **Rs 2,77,00,000** 2. Total due interest @2.5% per month (up to 31.01.2019) **Rs.2,51,95,200** 3. Check Bounce penalty at 1% per month-**Rs. 51606** 4. Expense of Arbitration Arbitrator's fees -**Rs. 9,48,416** including

		(Expenses borne by M/s Star Maxx properties, as per clause 13 of the Agreements) Total Claim: **Rs. 5,38,95,222 (Rupees Five crores thirty eight lakhs ninety five thousand two hundred and twenty two only)** (As per the Arbitration Award Dt.28.08.2019 in ARB Case No. 1 of 2019, before Ld. Sole Arbitrator Mr. MC Mehra, Additional District & Session Judge(Retd.))

8. In Column 8 which provides for details of any security held, the value of the security, and the date it was given, Appellant has referred to Agreements of year 2015 and Agreement dated 17.04.2017. Column 8 of the Form C is as follows:-

8.	Details of any security held, the value of the security, and the date it was given.	1) Agreement dated 04.06.2015 (Annexure A1) renewed on 17.04.2017 (Annexure A7) Value: Rs. 30,00,000 Security/Unit A2-2203 2) Agreement dated 12.06.2015 (Annexure A2) renewed on 17.04.2017 (Annexure A8) Value: Rs. 37,00,000/- Security/Unit A1-001 3) Agreement date 17.06.2015 (Annexure A3) renewed on 17.04.2017 (Annexure A9) Value: Rs. 50,00,000/- Security/Unit D1-202 and D1-402 4) Agreement dated 20.06.2015 (Annexure A4) renewed on 17.04.2017 (Annexure A10) Value: Rs. 50,00,000/- Security/Unit D1-701

		5) Agreement dated 22.08.2015 (Annexure A5) renewed on 17.04.2017 (Annexure A11) Value: Rs. 60,00,000/- Security/Unit D1-502 6) Agreement dated 21.10.2015 (Annexure A6) renewed on 17.04.2017 (Annexure A12) Value: Rs. 50,00,000/- Security/Unit D2-1701 Total value of security 2,77,00,000/-

9. Copy of the Agreement dated 17.04.2017 has been brought on the record as Annexure A3. The Agreement was entered between M/s. Dream Procon Pvt. Ltd.- first part and M/s. Star Maxx Properties- second part. The Agreement stated following:-

> *"WHEREAS the first party is an accomplished and renowned builder and has expertise, know-how and experience in the business of real estate development, construction of Multi-storied Housing & Commercial Complexes, infrastructural development and civil construction works and other related works. The first party has executed several projects successfully in the National Capital Region and other Parts of India.*
>
> *The first party has taken physical possession of land from M/s Logix City Developers Pvt. Ltd. Through Joint Development Agreement Dated 08.03.2013 and empowered through General Power of Attorney Dated 08.03.2013 to begin the construction activities, sale/broking etc.*
>
> *The First party has approached the second party for investment in the said project at "Victory Ace", Plot No.GH-02, Sector-143, Expressway, Gautam Budh Nagar, Noida, Uttar Pradesh." After taking into consideration the successful execution and completion of the other project undertaken by the first party. The second party agreed to invest in the below mentioned said Residential unit in the*

project "Victory Ace, Plot No. GII-02, Sector-143, Expressway, Gautam budh Nagar, Noida, Uttar Pradesh"

S.No	***Residential Unit (Flat) No.***	***Area (sq.ft)***	***Floor***
1.	*A1-001*	*1475*	*Ground*

AND WHERES the first party has agreed to allot the said Residential area at "Victory Ace", Plot No. GH-02, Sector-143, Expressway, Gautam budh Nagar, Noida, Uttar Pradesh" to the second party (the allottee) and the second party has agreed to acquire the ownership of above said unit In the above said project for total consideration of Rs. 37,00,000/- (Rupees. Thirty Seven Lacs Only) including of IDC, EDC, Service Tax, life time maintenance charges/expenses or any other government/non government tax as applicable. The second party has paid to the first party as below against the said residential area.

In pursuance of above agreement, the first party and the second party have agreed to deal on the following terms and condition:

That in pursuance of the meeting held and the agreement between the first party and the second party, the second party has paid a sum of Its. 37,00,000/- (Rupees. Thirty Seven Lacs Only) towards entire value of the Residential Unit and the first party has allotted the above said Residential in favour of the second party as per details below:-

RTGS No.	***Date***	***Amount (Rs.)***
RTGS	*12.06.2015*	*37,00,000/-*

Acknowledged by Receipt dated 17.04.2017 of the first party.

1. That the second party shall not be liable to make any further payment towards the cost of the Residential Unit after the above payment has been made.

2. That the first party has not entered into any type of transaction of sale for the aforementioned Residential Unit

with any third party. The first party is executing the agreement only with the second party and shall not create any encumbrance of any nature in the said Residential Unit in any manner whatsoever.

3. In order to assure the second party and to secure the interest of the second party, the following undated cheque for Rs. 37,00,000/- (Rupees. Thirty Seven Lacs Only) has been issued by the first party.

Cheque No.	***Date***	***Amount (Rs.)***	***In Favor***
991505	*----*	*37,00,000/-*	*Star Maxx Properties*

4. Further the second party, at his sole discretion, has an option to cancel the above said booking. at any time after ONE year from the date of booking and encash the above said security cheque, without any deduction whatsoever, on its due dates and thereafter and the first party has agreed to honor the same. If the first party defaults to refund the payment, the second party will be the absolute owner of the said Residential Unit/ Flat without any further payment and in such case the first party shall be bound to execute & register the deed of sale in respect of the said flat/unit in favour of the second party or his/her nominee."

10. The above indicate that second part has agreed to invest in residential unit mentioned therein and first part has agreed to allot the said residential area. Second part, at his sole discretion, has an option to cancel the booking. The above Agreement is titled as Articles of Agreement and was not Builders' Buyer Agreement. Agreement contained agreement of first part to allot the residential area but the said Articles of Agreement cannot be treated itself to be allotment.

11. Appellant after initiation of CIRP against the corporate debtor has filed its claim in Form C as a financial creditor which claim was accepted by the

Resolution Professional. The grievance which has been raised by the Counsel for the Appellant is that although Appellant was accepted as a Secured Financial Creditor but subsequently in the list of creditors uploaded by the Resolution Professional, security was shown as 'nil'. Appellant has relied on minutes of the CoC meeting held on 23.12.2019 in which minutes under Agenda Item No.3, CoC has taken note of the list of creditors. Agenda Item No.3 is as follows:-

"**AGENDA ITEM NO. 3**

To take note of the list of Creditors

The IRP apprised the member with the following details of the claims received & admitted by him and voting for the second meeting of the Committee of Creditors:

Sr. No.	Name of the Financial Creditor	Claim Amount		Voting %	Remarks
		Submitted (Rs.)	Admitted (Rs.)		
1	Home Buyers (FC in class)	3,53,17,78,271	2,67,83,99,469	95.49	Secured Against the Flat Purchased & mentioned in Builder Buyer Agreement
2	Moneywise Financial Services Private Limited	7,25,19,134	7,25,19,134	2.59	Secured-Against the following 22 units in Victory Ace Residential Project Al-401,802,1003,1101,1102,1603 A2 00003,101,201,301,801,1003, B1-101,201,501,1001,1402, B2-1401,1402, CI 1001. 1201, C2 1001
3	M/s Star Mas Properties	5,38,95,222	5,38,95,222	1.92	Secured-Against the following 7 units in Victory Ace Residential Project A2-2203, Λ1-001, D1-202. D1-402, D1-701, 01-502 and D2-

					1701 as per the Clause 21 (V) of the Arbitration Order
	Total	3,65,81,92,627	2,80,48,13,825	100	

12. The above indicate that CoC has taken note of the list of creditors where homebuyers as well as Appellant were held to be secured creditors and security was mentioned against seven units in Victory Ace Residential Project as per Clause 21 of the Arbitration order.

13. We need to first notice the Arbitral Award dated 28.08.2019 which was basis of the claim filed by the Appellant as Financial Creditor. Arbitral Award dated 28.08.2019 has been brought as Annexure A4. Arbitral Award in favour of the Appellant granted following reliefs: -

> ***"21. <u>ISSUE NO. 9</u>***
>
> *"(9). Relief."*
> *As a sequel to my findings & observations, the present claim petition is allowed with cost and with the following directions:*
>
> *(I) I direct the Respondent to pay the Principle amount of Rs. 2,77,00,000/- (Rupees Five Crore Seventy-seven Lac only).*
>
> *(II) The Respondent is also directed to pay the accrued interest till the date of filing the Claim Statement, amounting to Rs. 2,51,95,200/-plus penal interest of Rs.51,606/-, totaling Rs.2,52,46,806/-(Rupees Two Crore Fifty-two Lac Forty-six Thousand and Eight Hundred & Six only).*
>
> *(III) The Respondent is further directed to pay a sum of Rs. 9,48,416/-(Rupees Nine Lac Forty-eight Thousand and Four*

Hundred & Sixteen only) as expenses of Arbitration including the Arbitrator's fees.

(IV) The Respondent is directed to pay the awarded amount as directed in above said sub-paras (I) to (III) within 45 days from the receipt of the copy of award. If the said amount is not paid by the Respondent within the said period, then the Respondent shall pay the interest @9% per annum till the amount is paid.

(V) Until the payment of the award is not paid, the Respondent is permanently restrained, in terms of para no.6 of order dated 17.08.2019, from allotting or alienating or dealing with or disposing off or creating any sort of third party right or Interest in the secured disputed properties A2-2203, A1-001, D1-202, D1-402, D1-701, D1-502, D2-1701 as situated in 'Victory Ace' Plot No. GH-02, Sector 143, Expressway, Gautambudh Nagar, Noida, U.P.; wherein the Claimant has paid the entire sale consideration.

22. Pending application, if any, stands disposed off. A copy of this award is to be sent free of cost to both the parties. File be consigned to the record room."

14. Clause 5 of the Arbitral Award has referred to be treated as security. List of creditors has been uploaded by the Resolution Professional as on 17.06.2020 which is brought on record at Page 211 of the paper book which is as follows:-

"**LIST OF FINANCIAL CREDITORS AS ON 06.09.2019 (UPDATED UPTO 17TH JUNE, 2020)**

S.No.	Name of Creditor	Total Claimed Amount (In Rs.)	Total Claim Admitted (In Rs.)	Status of Claims	Voting %	SECURITY INTEREST

1	Moneywise Financial Services Private Limited	72,519,134	72,519,134	Admitted	2.20%	As per Annexure-A
2	M/s Star Max Properties	53,895,222	53,895,222	Admitted	1.64%	NIL

DREAM PROCON PRIVATE LIMITED
(UNDERGOING CORPORATE GOLVENCY RESOLUTION PROCESS)

LIST OF FINANCIAL CREDITORS AS ON 06.09.2019 (UPDATED UPTO 17TH JUNE, 2020)

S.No.	Name of Creditor	Total Claimed Amount (In Rs.)	Total Claim Admitted (In Rs.)	Status of Claims	Voting %	SECURITY INTEREST
1	Moneywise Financial Services Private Limited	72,519,134	72,519,134	Admitted	2.20%	As per Annexure-A
2	M/s Star Max Properties	53,895,222	53,895,222	Admitted	1.64%	NIL
3	NK Associates	15,960,000	15,960,000	Admitted	0.48%	NIL
4	Naveen Kapur & Reshma Kapur	18,333,320	15,733,320	Admitted	0.48%	NIL
5	Virander Kumar Goyal & Sushila Goyal	6,596,200	6,596,200	Admitted	0.20%	NIL
6	Sushil Khanna and Sarnit Khanna	10,613,324	10,613,324	Admitted	0.32%	NIL
7	Vikash Rastogi, Payal Rastogi, K C Rastogi & KC Rastogi HUF	21,225,817	-	Rejected	0.00%	NIL
8	Arable Builders	1,187,130,555	206,870,529	Admitted	6.28%	NIL

	Private Limited					
9	Financial Creditor in a class (Home Buyer - First Sale) As per Annexure B attached	3,591,802,214	2,543,016,739	As per Annexure B Attached	77.18%	Refer Note No 2 below
10	Financial Creditor in a class (Financial Creditor having Builder Buyer Agreement for flats already agreed to be sold earlier) As per annexure C attached	513,198,185	369,879,875	As per Annexure C Attached	11.23%	Refer Note No 3 below
11	List of Financial Creditors (Whose Claims are under review) As per Annexure D attached	408,840,261	-	Under Review as information sought is awaited	0.00%	
	Total	**5,900,114,232**	**3,295,084,344**		**100.00 %**	

Note:

1. The amount of claim admitted and voting share may undergo a revision in case any additional Information/document coming to the notice of the RP warrants the same.

2. There is no security interest created or registered with Registrar of Companies in favour of Financial Creditors in a Class Homebuyers First

Sale. However, they have Builder Buyer Agreement executed in their favour in respect of flats allotted to them.

3. There is no security interest created or registered with Registrar of Companies in favour of the Financial Creditors in a class (Financial Creditors having Builder Buyer Agreement for flats already agreed to be sold earlier). However, they have Builder Buyer Agreement executed in their favour in respect of flats which had already been agreed to be sold to other financial creditors."

15. The above list indicate that security of Appellant was mentioned as 'nil' and security with regard to various homebuyers was mentioned as 'nil'. Secured creditor and security interest is defined in Section 3 of the IBC. Section 3(30) defines 'secured creditor' and Section 3(31) defines 'security interest' which are as follows:-

> *"**3. Definitions. – (30) "secured creditor"** means a creditor in favour of whom security interest is created;*
>
> ***(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"*

16. The question to be answered is as to whether the transaction i.e. Arbitral Award dated 28.08.2019 (Clause V as noted above) or Articles of

Agreement can be held to create a security interest. When we look into the Arbitral Award Clause V, direction was issued by Arbitrator that corporate debtor is restrained from allotting or alienating or dealing with or disposing off or creating any sort of third party right or interest in the secured disputed properties. Arbitrator had not examined the question as to whether Articles of Agreement which was basis of arbitration proceedings by the Appellant creates any security interest within the meaning of IBC. Provisions of the IBC was not under consideration before Arbitrator and the direction of restraining the corporate debtor was at best in injunction from not allotting or alienating or dealing with the assets by the corporate debtor, however, the said direction which is injunction in nature cannot be held to be creating a security interest in the assets.

17. Counsel for the Respondent has relied on a full Bench judgment of the Calcutta High Court in ***"Frederick Peacock vs. Madan Gopal and Ors.- 1902 SCC OnLine Cal 97"*** where the question was attachment by creditor there shall be any charge or lien upon the attached property. The question was answered by the full Bench holding that by mere attachment, there will be no charge or lien. It is useful to extract following judgment of the Calcutta High Court:-

> *"**MACLEAN, C.J.**:— The question referred to us is whether a vesting order made under the Insolvency Act (11 & 12 Vic., c. 21) has or has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached at the latter's instance previous to the passing of such order.*

I am not sure that the question would not have been better framed if it had been whether a judgment-creditor has priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order, but the distinction is not of much importance.

The reference has arisen from a difference of opinion in the case of A.B. Miller v. Lakhimoni Debi on the one hand, and of Soobul Chunder Law v. Russick Lall Mitter on the other.

It is worthy of immediate notice that the latter case was not brought to the attention of the Court which decided the case of A.B. Miller v. Lakhimoni Debi to which decision I was a party.

It seems to me that the first question we have to consider is, whether the judgment-creditor who had attached his debtor's property before the Bankruptcy proceedings has obtained by that attachment any charge or lien upon the attached property.

In the Full Bench case of Anand Chandra Pal v. Panchi Lal Sarnia, it was considered that the judgment-creditor who had obtained an attachment had a charge or lien upon the attached property; and that view is also expressed, at any rate, by one of the Judges in the Full Bench case of Shib Kristo Shaha Chowdhry v. Kishen Chand Golecha. But in the case of Soobul Chunder Law v. Russick Lall Mitter it is distinctly laid down that the attachment creates no charge upon the property and that view is supported by a recent case before the Judicial Committee of the Privy Council, which is Moti Lal v. Karrabuldin, where it is

distinctly held that attachment under Chapter XIX of the Code of Civil Procedure merely prevents alienation and does not give title. In advising Her late Majesty their Lordships say thus: "Attachment, however, only prevents alienation, it does not confer any title."

I think, therefore, it must be taken that the attaching creditor here did not obtain by his attachment any charge or lien upon the attached property, and if so, no question as to the Official Assignee only taking the property of the Insolvent subject to any equities affecting it, can arise. But even if there was such a lien, the law, as it stands now, is different from what it was when the Full Bench case Anand Chandra Pal v. Panchi Lal Sarma was decided. There is a marked distinction between the language of sec. 270 of the Code of 1859 and sec. 295 of the present Code which governs the present case.

Under sec. 270 of the Code of 1859 a creditor obtaining an attachment was entitled to be first paid out of the proceeds of the sale, notwithstanding a subsequent attachment of the same property by any party in execution of his decree: but sec. 295 of the present Code points to a rateable distribution of the proceeds of sale under a decree in certain events and under certain circumstances.

If then the attaching creditor had obtained a charge or a lien upon the attached property, it would have been difficult, having regard to the change in the law, to hold that he was solely entitled as against the Official Assignee
to the proceeds of sale under the decree. It is unfortunate that the case of Soobul Chunder Law v. Russick Loll

Hitter was not cited to us, when Mr. Justice Banerjee and I decided the case of A.B. Miller v. Lakhimoni Debi and that the arguments which have been addressed to us to-day, the arguments based upon the difference between sec. 270 of the old Code and sec. 295 of the present, were not called to our attention. Nor was the Privy Council case to which I have referred, cited before us.

On these grounds, I think, that the question referred to us ought to be answered by saying that the judgment-creditor, under the circumstances, has no priority over the Official Assignee in respect of the property attached."

18. All Judges have agreed with the opinion of the Lord Maclean who was Chief Justice of the Court. We, thus, are of the view that any direction in the Arbitral Award restraining the corporate debtor shall not create any charge or security interest in the assets.

19. Counsel for the Appellant has relied on various judgments in support of his submissions. Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***"Paschimanchal Vidyut Vitran Nigam Ltd. Vs. Raman Ispat Pvt. Ltd. & Ors.- 2023 SCC OnLine SC 842"***. Reliance has been placed on paragraphs 57 and 58 of the judgment which is as follows:-

*"**57.** Lastly, the liquidator had urged that without registration of charge, the same was unenforceable under liquidation proceedings. Section 77 of the Companies Act, 2013 reads as follows:*

*"**77. Duty to register charges, etc**.—(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:*

Provided that the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed:

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with Section 87:

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) 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."

58. *Section 78 enacts, that when a company whose property is subject to charge, fails to register it, the charge-holder (or the person entitled to the charge over the company's assets) can seek its registration. Section 3(31) IBC defines "security interest" in the widest terms. In this Court's opinion, the liquidator cannot urge this aspect at this stage, because of the concurrent findings of the NCLT and NCLAT that PVVNL is a secured creditor."*

20. Judgment of the Hon'ble Supreme Court in ***"Paschimanchal Vidyut Vitran Nigam Ltd."*** (supra) itself has noted Uttar Pradesh Electricity Supply Code, 2005 by which charge is created. In this reference, paragraphs 42, 43 of and 44 the judgment are quoted:-

*"**42.** As previously stated above, the corporate debtor entered into an agreement with PVVNL for supply of electricity on 11-2-2010 which provided that outstanding electricity dues would constitute a "charge" on its assets. This was in accordance with Clause 4.3(f)(iv) of the 2005 Code. Clause 8 of the agreement also mentioned that the parties would be governed by the 2003 Act.*

43. *A recent ruling of this Court in K.C. Ninan v. Kerala SEB [K.C. Ninan v. Kerala SEB, (2023) 14 SCC 431 : 2023 SCC OnLine SC 663] examined the circumstances in which such a "charge" could be constituted in law, and held as follows : (SCC para 107)*

"107. Consequently, in general law, a transferee of the premises cannot be made liable for the outstanding dues of the previous owner since electricity arrears do not automatically become a charge over the premises. Such an action is permissible only where the statutory conditions of supply authorise the recovery of outstanding electricity dues from a subsequent purchaser claiming fresh connection of electricity, or if there is an express provision of law providing for creation of a statutory charge upon the transferee."

44. *This Court held that the creation of a charge need not necessarily be based on an express provision of the 2003 Act or plenary legislation, but could be created by properly framed regulations authorised under the parent statute. In these circumstances, the argument of PVVNL that by virtue of Clause 4.3(f)(iv) of the Supply Code, read with the stipulations in the agreement between the parties, a charge was created on the assets of the corporate debtor, is merited. A careful reading of the impugned order [Raman Ispat (P) Ltd. v. Paschimanchal Vidyut Vitran Nigam Ltd., 2018 SCC OnLine NCLT 25732] of the NCLT also reveals that this position was accepted. This is evident from the order of NCLAT which clarified that PVVNL also came under the definition of "secured operational creditor" as per law. This finding was not disturbed, but rather affirmed by the impugned order [Paschimanchal Vidyut*

Vitran Nigam Ltd. v. Raman Ispat (P) Ltd., 2019 SCC OnLine NCLAT 883] . In these circumstances, the conclusion that PVVNL is a secured creditor cannot be disputed."

21. Thus, charge was created by statutory provisions and further in paragraph 59, the reason has been given by the Hon'ble Supreme Court as to why the categorisation of Paschimanchal Vidyut Vitran Nigam Ltd. as secured operational creditor cannot be allowed to be challenged. Paragraph 59 is as follows:-

*"**59.** The record further shows that after the NCLT passed its order, the appellant preferred its claim on 10-4-2018. Based on that application, the liquidator had filed an application before the NCLT for modification of its order dated 21-8-2018 [Raman Ispat (P) Ltd. v. Paschimanchal Vidyut Vitran Nigam Ltd., 2018 SCC OnLine NCLT 25732] , and contended that PVVNL also came under the definition of "secured operational creditor" in realisation of its dues in the liquidation proceedings as per law. The application sought amendment of the list of stakeholders. The application was allowed. In view of these factual developments, this Court does not consider it appropriate to rule on the submissions of the liquidator vis-à-vis the fact of non-registration of charges under Section 77 of the Companies Act, 2013."*

22. The above judgment, thus, in no manner help the submissions of the Appellant.

23. Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***"Vishal Chelani and Ors. Vs. Debashis Nanda- (2023) 10 SCC 395"***. Counsel for the Appellant submitted that in the above case, homebuyers has obtained decree from the RERA and in the CIRP, they were not treated as financial creditor in class which decision was reversed. Reliance has been placed on paragraphs 11 to 13 of the judgment which is as follows:-

> *"**11.** The resolution professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of homebuyer. This Court is unpersuaded by the submission. It is only homebuyers that can approach and seek remedies under RERA — no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable.*
>
> ***12.** As held in Natwar Agrawal [Natwar Agrawal v. Ssakash Developers & Builders (P) Ltd., 2023 SCC OnLine NCLT 682] by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallised in the form of a court order or decree. That does not alter or disturb the status of the party concerned — in the present case of allottees as financial creditors. Furthermore, Section 238 IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently*

its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the RP is artificial; it amounts to "hyper-classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced.

***13.** In view of the foregoing reasons, the impugned order [Order dated 28-2-2023 by NCLAT, in Vishal Chelani v. Debashis Nanda, 2023 SCC OnLine Nclat 1118] is hereby set aside; the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other homebuyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority."*

24. The above facts of the case indicate that the Appellant in the said case have obtained decree from the RERA and decree was granted in favour of the homebuyers by RERA treating them as homebuyers, hence, the Hon'ble Supreme Court held that merely because they have decree in their favour they cannot be denied the classification as financial creditor in class. There can be no quarrel to the proposition of law laid down by the Hon'ble Supreme Court in the above case.

25. The present was a case there was no decree obtained by the Appellant by RERA rather arbitral award was obtained on the basis of Articles of Agreement which award we have already noticed above. Thus, there was no determination in the arbitral award that Appellant was allottee within the

meaning of provisions of IBC. Hence, the judgment of the Hon'ble Supreme Court in ***"Vishal Chelani and Ors."*** (supra) does not support the appellant.

26. Another judgment relied by the Counsel for the Appellant in ***"Dheeraj Raikhy vs. Raheja Developers Ltd.- Company Appeal (AT) (Ins.) No.1336 of 2023"*** was also a case where Appellant- homebuyer has a decree from the RERA and application filed under Section 7 was rejected since the Appellant did not fulfil the threshold. Judgment of ***"Vishal Chelani and Ors."*** (supra) was also relied in paragraphs 4 to 7. This Tribunal has held following:-

> *"4. Learned counsel for the Appellant submits that the judgment of 'Vishal Chelani' is distinguishable from the facts of the present case.*
>
> *5. We have considered the submissions of learned counsel for the parties and perused the record.*
>
> *6. Learned counsel for the Respondent has relied on judgment of Hon'ble Supreme Court in 'Vishal Chelani', where in Para 8 following has been held:*
>
> > *"8. The Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA - no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as*

ordered by the competent authority, would be highly inequitable. As held in Natwar Agarwal (HUF) (Supra) by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to "hyper-classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced."

7. In view of the law laid down by the Hon'ble Supreme Court, it is now well settled that the status of the party i.e. allottee does not change and therefore the Adjudicating Authority has rightly concluded that threshold being not met one allottee cannot trigger the insolvency. We are of the view that rejection of Section 7 application cannot be faulted. 8. In view of the above, we do not find any merit in the Appeal. Appeal is dismissed."

27. The above judgment, thus, in no manner held the Appellant in the present case.

28. The Judgment of ***"SICOM Limited vs. Mr. Sundaresh Bhat- Company Appeal (AT) (Ins.) No.470 of 2021"*** has relied by the Counsel for the Appellant that it was not necessary for the charge to be registered. Reliance has been placed in paragraph 23 which is as follows:-

"23. Learned Senior Counsel for the Appellant placed reliance on judgment of the Hon'ble Supreme Court in (1998) 5 SCC 401, Indian Bank v. official Liquidator, Chemmeens Exports (P) Ltd. & Ors.. In the above case, the provision of Section 125 of the Companies Act, 1956 came for consideration. The Indian Bank had advanced certain amount to M/s Chemmeens Exports Pvt. Ltd., which was secured by an equitable mortgage by deposit of title deeds of the debtor-Company. Winding up proceedings were initiated by the Bank. The Bank sought leave of the Company Court to file a suit for recovery, which was granted. In the suit, Official Liquidator filed written statement taking the plea that the properties of the Company not having been registered under Section 125 of the Act, the charge was void. A preliminary decree was passed against the Official Liquidator, which is quoted in paragraph 13 of the judgment, which reads as follows:

> *"13. The question, however, remains what is the effect of the preliminary decree passed by the Court against the Official Liquidator on 28-5-1982. It will be useful to read here the material portion of the preliminary decree: "It is ordered and decreed that a preliminary decree is passed and that the plaintiff is entitled to realise from the defendants a sum of Rs 29,50,605.59 with interest at 14% from the date of suit till the realization and that the plaintiff is entitled to the cost of the suit also and that Defendants 1 to 3 will deposit in court on or before 28-8-1982 the abovesaid amount and cost of the suit and on payment of the amount the equitable mortgage*

will stand discharged and the documents of title deposited with the plaintiff by the defendants and which are produced by the plaintiff in court will be delivered to the defendants and that in default of payment as aforesaid, the plaintiff may apply to the court for passing a final decree for the sale of the plaint schedule property and that the money realised by such sale shall be applied in payment of the amount due under the decree, and the balance if any, shall be paid to the 1st defendant and that if the money realised by the sale of the plaint schedule property is insufficient for payment of the decree debt in full, the plaintiff shall be at liberty to apply for a personal decree against Defendants 2 to 5 for the balance and that the defendants will suffer cost hitherto incurred."

After noticing the contents of the Decree, Hon'ble Supreme Court observed that right of the Company to deposit the decree amount was available till 28th August, 1982 and thereafter the matter had passed from the domain of the contract to that of judgment. In paragraph 16, following has been laid down:

"16. From the above discussion, it follows that the right of the respondents including the Company represented by the Official Liquidator to deposit the decree amount was available till 28-8-1982. In other words, the right to recover the amounts pursuant to the contract-creating charge, even under the terms of the decree was available till the said date and thereafter "the matter had passed from the domain of the contract to that of judgment".

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."

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."

29. Present is a case where admittedly no charge has been registered by the corporate debtor or by the appellant but Respondents are not placing their claims on the ground that no charge was registered, hence, the said judgment has no application in the facts of the present case.

30. Counsel for the Appellant has lastly relied on the judgment of this Tribunal in ***"Mr. Rajnish Jain vs. Manoj Kumar Singh, IRP & Ors.- Company Appeal (AT) (Ins.) No.519 of 2020"*** where this Tribunal has held that categorisation of financial creditor could not have been changed by the CoC. In the above case, the Adjudicating Authority has held one 'BVN Traders' as financial creditor. The Appeal was filed by promoter of the corporate debtor challenging the said decision. Challenge was made on the ground that the decision of the Adjudicating Authority is based on the decision of the CoC who was not empowered to decide as to whether 'BVN Traders' is a financial creditor or operational creditor. In the above facts, this Tribunal laid down following in paragraphs 58 and 59:-

"58. Thus, we hold that the Order of the Adjudicating Authority rejecting CA No.142/2019 is correct and needs no interference. However, we set aside the reasoning relying on the decision of CoC for holding BVN Traders to be Financial Creditor. We find that the Committee of Creditors has no adjudicatory power to

decide as such whether a creditor who files its Claim is a 'Financial' or 'Operational' Creditor.

59. Based on the above discussion, we clarify and hold that during CIRP, the IRP is authorised to collate the claims, and based on that he is empowered to constitute the Committee of Creditors. We hold that the Resolution Professional may add to existing claims of claimants already received, or admit or reject further Claims and update list of Creditors. But after categorisation of a claim by the IRP/Resolution Professional we hold that they cannot change the status of a Creditor. For example, if the Resolution Professional has accepted a claim as a Financial Debt and Creditor as a Financial Creditor, then he cannot review or change that position in the name of updation of Claim. It is also to be clarified that while updating list of Claims the Resolution Professional, can accept or reject claims which are further received and update list."

31. There cannot be any dispute to the proposition laid down by this Tribunal in the above case. In the present case, however, the categorisation of Appellant was not change from financial creditor only modification was made that security interest which was noticed by the CoC in the meeting held on 23.12.2019 was not found to be proved and hence, in the list of creditors uploaded on 17.06.2019, security interest was shown as 'nil'. We have already noticed that in the meeting of the CoC dated 23.12.2019 both homebuyers and Appellant were treated as having security interest wherein it is undisputed that the homebuyers who have been allotted a unit are not

secured creditors they are all unsecured creditors, hence, in the facts of the present case, we are of the view that no error can be said to have been committed by the Adjudicating Authority holding that the Appellant as unsecured financial creditor.

32. Now coming to the submission of the Appellant that Appellant is homebuyer. Adjudicating Authority has noticed that the claim Form filed by the appellant in Form CA was filed subsequent to approval of the Resolution Plan by the CoC, hence, in view of the judgment of the Hon'ble Supreme Court in ***"RPS Infrastructure vs. Mukul Kumar- Civil Appeal No.5590 of 2021"***, such claim cannot be considered which was filed after approval of the plan by the CoC. Moreover, the Articles of Agreement was Agreement to allot the unit to the Appellant, but actually no allotment was ever made since, no builder buyer agreement was ever entered by corporate debtor with the appellant.

33. We do not find any error in the impugned order. There is no merit in the appeal. The appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

23rd April, 2025

himanshu / anjali