NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1338 of 2023

(Arising out of Order dated 19.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-V in I.A. 2974 of 2021 in C.P. (IB) No.3169/MB/2019)

IN THE MATTER OF:

Fervent Synergies Limited
Through its Authorised Signatory
B-7/8, Satyam Shopping Centre,
M.G. road, Ghatkopar East,
Mumbai – 400077. ... Appellant

Vs

1. Manish Jaju,
   Resolution Professional,
   D-502, Neelkanth Business Park,
   Vidya Vihar (W), Mumbai – 400086.

2. Kabra Estate and Investment Consultant
   Successful Resolution Applicant
   Kamla Hub, JVPD Scheme, N.S. Road No.1,
   Juhu, Mumbai – 400049.

3. LIC Housing Finance Ltd.
   Bombay Life Bldg. 2nd Floor,
   45/47, Veer Nariman Road,
   Mumbai – 400001.

4. IDBI Trusteeship Services Ltd.
   Asian Building, Ground Floor,
   17, R. Kamani Marg, Ballard Estate
   Mumbai MH 400001.

5. Nepean Finvest Private Limited
   801, Pleasant Place
   Narayan Dabholkar Road,
   Mumbai 400006.

6. Mr. Nirav Prakash Shah,
   T1, 3304, Crescent Bay,
   Jerbai Wadia Road,
   Bhoiwada, Parel, Mumbai 400014. ... Respondents

Present:

For Appellant: **Mr. Arunava Mukherjee, Mr. Nisarg P. Khatri, Advocates.**

For Respondents: **Mr. Abhijeet Sinha, Mr. Dhaval Deshpande, Advocates for R-1.**

Mr. Arun Kathpalia, Sr. Advocate with Mr. Vishesh Kalra, Mr. Kunal Kanungo, Advocates for R-2.

Ms. Anannya Ghosh, Ms. Doel Bose, Advocates for LICHFL.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 19.07.2023 passed by National Company Law Tribunal, Mumbai Bench, Court-V in IA No.2974 of 2021 filed by the Appellant. The IA was filed by the Appellant objecting to the Resolution Plan submitted by M/s Kabra Estate and Investment Consultant (Respondent No.2 herein), which objection came to be rejected by the impugned order. The Appellant aggrieved by the order, has come up in this Appeal.

2. The brief facts necessary to be noticed for deciding the Appeal are:

(i) The Corporate Debtor – Sivana Reality Private Limited launched a Project known as 'Samriddhi Garden' at Bhandup, Mumbai.

(ii) On 15.09.2017, LIC Housing Finance Limited ("**LICHFL**") sanctioned a Term Loan Facility of Rs.130 crores to the Corporate Debtor. The Project of the Corporate Debtor 'Samriddhi Garden' was mortgaged to the LICHFL. In terms of the Mortgaged Deed any sale or third party right could have been created by the Corporate Debtor only after the prior written consent/ NOC from LICHFL. On 09.08.2018, the Appellant – Fervent Synergies Limited and the Corporate Debtor entered into 10 separate Agreements for sale of 10 flats in the Project being developed by the Corporate Debtor.

(iii) On 11.08.2020, Corporate Insolvency Resolution Process ("**CIRP**") was initiated against the Corporate Debtor by an order passed by the Adjudicating Authority.

(iv) The Appellant filed its claim with respect to 10 flats as per Agreement to Sell dated 09.08.2018. The Interim Resolution Professional ("**IRP**") vide email dated 13.09.2020 informed the Appellant that its claim has been admitted as a 'Financial Creditor, which is under verification. The Resolution Professional ("**RP**") vide email dated 03.06.2021, called upon the Appellant to provide a No Objection Certificate ("**NOC**") in respect of the 10 flats sold to it by the Corporate Debtor. The RP on 17.06.2021, informed the Appellant that its claim has been rejected since NOC has not been obtained from LIC HFL.

The RP, however, vide email dated 30.06.2021 informed the Appellant that pursuant to the decision taken by the Committee of Creditors ("**CoC**") held on 28.06.2021, the claim of the Appellant has been restored as a Financial Creditor belonging to a class of creditors.

(v) Respondent No.2 submitted a Resolution Plan. The Resolution Plan dealt with Financial Creditors class in two categories, i.e., affected homebuyers and unaffected homebuyers. Those homebuyers who have not obtained NOC from the LICHFL were treated as affected homebuyers and were dealt differently in Resolution Plan and those homebuyers, who have obtained NOC were treated differently.

(vi) The Appellant filed an IA No.2974 of 2021, raising objections to the Resolution Plan. To the IA filed by the Appellant, both RP as well as the Successful Resolution Applicant ("**SRA**") filed the replies.

(vii) The Adjudicating Authority after considering the IA, rejected the objection. The Adjudicating Authority observed that since the Resolution Plan has been approved by the Homebuyers as a class, the Applicant, who belong to the class of Homebuyers, cannot individually object to the Resolution Plan. The Adjudicating Authority for coming to the said finding has relied on the judgment of the Hon'ble Supreme Court in ***Jaypee***

Kensington Boulevard Apartments vs. NBCC (India) Limited and others, (2022) 1 SCC 401. Aggrieved by the said order, this Appeal has been filed.

3. We have heard Shri Arunava Mukherjee, learned Counsel appearing for the Appellant; Shri Abhijeet Sinha, learned Counsel appearing for Respondent No.1; Shri Arun Kathpalia, learned Senior Counsel, appearing for Respondent No.2 and Ms. Anannya Ghosh, learned Counsel appearing for LIC HFL.

4. The learned Counsel for the Appellant challenging the impugned order, submits that the Adjudicating Authority has erroneously rejected the IA filed by the Appellant. It is submitted that the RP having admitted the claim of the Appellant filed with regard to 10 flats, as was communicated vide email dated 30.06.2021, there was no question to treat the admitted claim of the Appellant differently from other Homebuyers. It is submitted that the Resolution Plan does not recognize the 10 flats sold to the Appellant on the ground that LICHFL has not given NOC in respect of the said flats. It is submitted that Resolution Plan discriminates between Homebuyers, who belong to one class of creditors. The classification between affected and unaffected Homebuyers is erroneous and illegal. It is submitted that claim of the Appellant having been admitted and the Appellant having acted by the representation made by the RP, the Respondents are bound by principle of promissory estoppel and cannot deny the claim, which was admitted by the RP. It is submitted that

principle of promissory estoppel is fully attracted in the present case. The learned Counsel for the Appellant relied on the judgments of the Hon'ble Supreme Court in ***Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. – (1979) 2 SCC 409*** and ***Manuelsons Hotels (P) Ltd. v. State of Kerala – (2016) 6 SCC 766***. The learned Counsel for the Appellant submits that fraud has been committed on the Appellant denying his rightful claim.

5. The learned Counsel for the RP opposing the submissions of the Appellant submits that Homebuyers have been classified as affected and unaffected Homebuyers. Those Homebuyers, who were sold flats after obtaining NOC are unaffected allottees and those Homebuyers, who were sold flats without obtaining the NOC from LICHFL are affected Homebuyers. It is submitted that the Appellant belongs to a class of creditors, who have approved the Resolution Plan and now cannot be allowed to question the Resolution Plan. The Adjudicating Authority has rightly relying on the judgment of the Hon'ble Supreme Court in ***Jaypee Kensington Boulevard Apartments*** has rejected the IA.

6. The learned Counsel for Respondent No.2 submits that similar issues have been raised by another set of Homebuyers in ***Company Appeal (AT) (Insolvency) No. 1162 of 2023 – Sabari Reality Pvt. Ltd. vs. Sivana Realty Pvt. Ltd. & Ors.***, which had already been heard and the judgment is reserved by this Tribunal. The learned Counsel further submits that there is a valid classification between affected and unaffected Homebuyers

and the Resolution Plan having been approved by the Homebuyers with requisite majority, the Appellant, who belongs to class of Homebuyers, cannot be allowed to challenge the Resolution Plan.

7. The learned Counsel for Respondent No.3 – LIC HFL has also supported the impugned order and submits that that NCLT Mumbai Bench vide its order dated 19.07.2023 has already approved the Resolution Plan passed in IA No.2981 of 2021, which order has not been challenged by the Appellant. The Appellant having not challenged the order approving the Resolution Plan, no relief can be granted to the Appellant. It is submitted that Resolution Plan is in consonance of the provisions of the IBC. The learned Counsel further contends that Deed of Mortgage having been entered on 15.09.2017 and Agreement of Sell in favour of the Appellant being executed on 09.08.2018, which is subsequent to the Mortgage, no allotment could have been made in favour of the Appellant without obtaining of NOC from LICHFL. It is submitted that the allotment in favour of the Appellant was not a valid allotment and hence, those allottees, who have been allotted flats without obtaining the NOC rightly have been separately dealt in the Resolution Plan.

8. We have considered the submissions of learned Counsel for the parties and perused the records.

9. The Resolution Plan submitted by Respondent No.2, has been approved by the CoC with 99.96% vote. The Appellant having voted as a Homebuyer, who is part of the CoC and out of 272 Homebuyers, 204

Homebuyers have voted in favour of the Resolution Plan and thus, the Plan has been approved by 99.96% vote. The Hon'ble Supreme Court in ***Jaypee Kensington Boulevard Apartments*** (supra) has laid down that the Homebuyers as a class shall be deemed to have voted in favour of approval of the Resolution Plan and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. In paragraph 214, following has been laid down:

> *"**214.** The suggestion about the so-called statutory right of appeal has only been noted to be rejected. The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval."*

10. The Adjudicating Authority has thus rejected the objection, relying on the said judgment, in which no fault can be found. However, the learned Counsel for the Appellant having raised other submissions on merits also, we have proceeded to examine the said submissions.

11. Insofar as, submission of the Appellant that in the Resolution Plan one category of Homebuyers has been arbitrarily classified in two groups, i.e., affected homebuyers and unaffected homebuyers. The above issue has already been dealt by us in judgment dated 02.11.2023 delivered in ***Company Appeal (AT) (Insolvency) No.1162 of 2023 – Sabari Reality***

Pvt. Ltd. vs. Sivana Realty Pvt. Ltd. & Ors., hence it needs no repetition in this judgment. In the above case, one of the issues which was framed in that case was Issue No.(iv), which is to the following effect:

> *"(iv) Whether the categorization of the homebuyers in class as 'Affected' and 'Unaffected' homebuyers is violative of Section 30(2)(e) and the Resolution Plan deserve to be set aside on this ground alone?*

12. We have decided the Issue No.(iv) in the above case holding the classification of affected homebuyers and unaffected homebuyer as justified. Following the above judgment, we hold that Resolution Plan does not violate any provisions of the Code and classification of the homebuyers into two group is justified. Hence, the argument of the learned Counsel for the Appellant in this regard has to be rejected.

13. The learned Counsel for the Appellant has made much emphasis on principle of promissory estoppel. The submission of learned Counsel for the Appellant that the RP having accepted the claim of the Appellant vide his email dated 30.06.2021 with regard to 10 flats sold to the Appellant, under the doctrine of promissory estoppel, the said allotment of 10 flats could not have been interfered with or reduced as has been done in the Resolution Plan. The learned Counsel for the Appellant has placed reliance on judgments of the Hon'ble Supreme Court in ***Motilal Padampat Sugar Mills Co. Ltd.*** (supra). The Hon'ble Supreme Court in the above case has elaborated the doctrine of promissory estoppel, its nature, scope and

extent. In paragraph 19 of the judgment, the Hon'ble Supreme Court has laid down the following:

> *"**19.** When we turn to the Indian law on the subject it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognized as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negatived. It is remarkable that as far back as 1880, long before the doctrine of promissory estoppel was formulated by Denning, J., in England, a Division Bench of two English Judges in the Calcutta High Court applied the doctrine of promissory estoppel and recognised a cause of action founded upon it in the Ganges Manufacturing Co. v. Sourujmull [(1880) ILR 5 Cal 669 : 5 CLR 533] . The doctrine of promissory estoppel was also applied against the Government in a case subsequently decided by the Bombay High Court in Municipal Corporation of Bombay v. Secretary of State [(1905) ILR 29 Bom 580 : 7 Bom LR 27] .*

The proposition laid down by the Hon'ble Supreme Court in ***Motilal Padampat Sugar Mills Co. Ltd.*** has been reiterated by the Apex Court time and again.

14. The learned Counsel for the Appellant has relied on judgment of the Hon'ble Supreme Court in ***Manuelsons Hotels (P) Ltd. v. State of Kerala – (2016) 6 SCC 766*** where the Hon'ble Justice Rohinton F. Nariman speaking for the Bench has reiterated the doctrine of promissory estoppel and in paragraph 19 of the judgment the Hon'ble Supreme Court has held the following:

> *"**19.** In fact, we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject-matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party. The entire basis of this doctrine has been well put in a judgment of the Australian High Court in Commonwealth of Australia v. Verwayen [Commonwealth of Australia v. Verwayen, (1990) 170 CLR 394 (Aust)] , by Deane, J. in the following words:*
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> > *"1. While the ordinary operation of estoppel by conduct is between parties to litigation, it is a doctrine of substantive law, the factual ingredients of which fall to be pleaded and resolved like other factual issues in a case. The persons who may be bound by or who may take the benefit of such an estoppel extend beyond the immediate parties to it, to their privies, whether by blood,*

by estate or by contract. That being so, an estoppel by conduct can be the origin of primary rights of property and of contract.

2. The central principle of the doctrine is that the law will not permit an unconscionable—or, more accurately, unconscientious—departure by one party from the subject-matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.

3. Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.

4. The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it. The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party:

(a) has induced the assumption by express or implied representation;

(b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption;

(c) has exercised against the other party rights which would exist only if the assumption were correct;

(d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.

Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted. In cases falling within Category (a), a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption. Particularly in cases falling within Category (b), actual belief in the correctness of the fact or state of affairs assumed may not be necessary. Obviously, the facts of a particular case may be such that it falls within more than one of the above categories.

5. The assumption may be of fact or law, present or future. That is to say, it may be about the present or future existence of a fact or state of affairs (including the

state of the law or the existence of a legal right, interest or relationship or the content of future conduct).

6. The doctrine should be seen as a unified one which operates consistently in both law and equity. In that regard, "equitable estoppel" should not be seen as a separate or distinct doctrine which operates only in equity or as restricted to certain defined categories (e.g. acquiescence, encouragement, promissory estoppel or proprietary estoppel).

7. Estoppel by conduct does not of itself constitute an independent cause of action. The assumed fact or state of affairs (which one party is estopped from denying) may be relied upon defensively or it may be used aggressively as the factual foundation of an action arising under ordinary principles with the entitlement to ultimate relief being determined on the basis of the existence of that fact or state of affairs. In some cases, the estoppel may operate to fashion an assumed state of affairs which will found relief (under ordinary principles) which gives effect to the assumption itself (e.g. where the defendant in an action for a declaration of trust is estopped from denying the existence of the trust).

8. The recognition of estoppel by conduct as a doctrine operating consistently in law and equity and the prevalence of equity in a Judicature Act system combine to give the whole doctrine a degree of flexibility which it might lack if it were an exclusively common law doctrine. In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and

would be unjust to the estopped party. In such a case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed."

(emphasis supplied)"

15. The question which needs to be answered in the present case is whether the doctrine of promissory estoppel can be pressed in respect to a Resolution Plan, which is submitted by Resolution Applicant and approved by the CoC in its commercial wisdom. The submission of the learned Counsel for the Appellant is founded on the ground that the RP has admitted its claim of 10 flats as communicated vide email dated 30.06.2021. Acceptance or admission of the claim of a Financial Creditor including homebuyers is one aspect of the scheme under the IBC. Subsequent steps in the IBC including the preparation of Resolution Plan are based on the list of creditors, admitted claims of the creditors etc. as per the scheme of the IBC, but the principle of promissory estoppel cannot be pressed against the Resolution Applicant, who submits Resolution Plan on the basis of relying on the Information Memorandum, the list of creditors and other aspect of the matter. The Resolution Applicant has not extended any promise to the Financial Creditors of the Corporate Debtor that the claim submitted by Financial Creditor or any other creditor shall be accepted in toto. The mandatory contents of the Resolution Plan are laid down in the CIRP Regulations, 2016. If a Resolution Plan is compliant with the provision of Section 30, sub-section (2) of the IBC and the

provisions of the Regulations, 2016, the Plan cannot be faulted on the ground of the promissory estoppel, which the Appellant is pressing against the Resolution Professional, who has admitted the claim. We, thus, are of the view that submission of the Appellant based on the doctrine of promissory estoppel cannot be pressed into service in reference to the Resolution Plan, which has been submitted by a Resolution Applicant and approved by the CoC in its commercial wisdom. We, thus, do not find any merit in the submissions of learned Counsel for the Appellant on the basis of promissory estoppel.

16. In view of the foregoing discussions, we are of the view that the Adjudicating Authority did not commit any error in rejecting the objections filed by the Appellant to the Resolution Plan. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

NEW DELHI

2nd November, 2023

Ashwani