NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) NO. 134/2022
(IA No. 319/2022)
(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 09/03/2022 in C.P.(IB)/107/7/HDB/2021, passed by the 'Adjudicating Authority', National Company Law Tribunal, Hyderabad Bench)

In the matter of :

Venkat Rao Marpina,
S/o Mr. Appalaswamy Naidu Marpina,
Suspended director of Bhrighu Infra Private Limited,
Villa No. 55, Aparna Cyber County,
Nallagandla Road, Tellapur Road,
Hyderabad, Telangana – 500019. **…Appellant**

Versus

1. **Vemuri Ravi Kumar**
   No.5, Open Skies, Kokapet,
   Hyderabad, Telangana – 500075. **….Respondent No. 1**

2. **Bhrighu Infra Private Limited,**
   Represented by its Resolution Professional
   Mr. Abhinav Akkinapalli,
   Plot No. 1246, Road No. 62,
   Lane Beside Krishna Jewellers,
   Jubilee Hills, Hyderabad,
   Telangana – 500038. **…Respondent No. 2**

Present :

For Appellant : Mr. P.H. Arvindh Pandian, Sr. Advocate
For Mr. M. Roshan Atiq, Advocate

For Respondents : Mr. Uma Shankar Gollapudi, Advocate

J U D G M E N T

(Virtual Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the Impugned Order dated 09/03/2022 passed in C.P.(IB)/107/7/HDB/2021 by the 'Adjudicating Authority', 'National Company Law Tribunal, Bench – I, Hyderabad', whereby and whereunder the 'Adjudicating Authority' has admitted the Section 7 Petition, filed under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code'), by Mr. Vemuri Ravikumar / the Financial Creditor against 'M/s. Bhrighu Infra Pvt. Ltd.' / the Corporate Debtor, the Suspended Director has preferred this Appeal.

2. It is submitted by the Learned Senior Counsel for the Appellant / Suspended Director of the Corporate Debtor Company that the Company is engaged in the business of developing and promoting real estate layouts. It is stated that the Corporate Debtor Company had entered into three Agreement of Sale with the 1st Respondent on 27/08/2016 and on 29/09/2016 for purchase and development of 10 plots numbering Plot Nos. 23 to 28 and 30 to 33, at the rate of Rs. 7,500 per sq. yard and an advance of Rs. 1,36,00,000/- was paid by the 1st Respondent over a

period of time from 26/08/2016 to 09/03/2017. The Learned Counsel submitted that HMDA Approval was procured on 27/03/2017 but unfortunately HMDA mortgaged Plot Nos. 24 to 29 in the lay out, which included the plots of the 1st Respondent. This mortgage is only as per the general guidelines of HMDA to mortgage 15.54 % of the plotted area to ensure smooth development of the layout. It is submitted that the 1st Respondent neither purchased the Plot nor sought for repayment and is hence, entitled only to a sum of Rs. 35,97,500/-.

3. It is further submitted by the Learned Counsel that the Financial Creditor is not a genuine homebuyer but is a speculative investor as he has sought to sell five plots out of the 10 plots to third parties for higher consideration and then has filed this Section 7 Petition, falsely claiming Rs. 2,27,28,360/- which computes a sum of Rs. 69,25,000/- towards principal and a sum of Rs. 1,58,03,360/- towards interest, while he is entitled to only a sum of Rs. 35,97,500/- which is the admitted amount in CMA No. 296/2021 filed before the Hon'ble High Court, Telangana against the Order in IA 61/2020 in O.S. No. 113/2020 and therefore, now cannot Claim a sum of Rs. 2,27,28,360/- in contradiction to the statement made in CMA No. 296/2021.

4. It is strenuously argued by the Learned Senior Counsel for the Appellant that the 1st Respondent is hit by the principles laid down by the Hon'ble Apex Court in the mater of ***'Pioneer Urban Land and Infrastructure Limited and Ors. Vs. Union of India (UOI) and Ors.'*** reported in ***[(2019) SCC Online SC 1005]*** and also the

ratio in the matter of ***'Ankit Goyal Vs. Sunitha Agarwal & Ors.'*** and in the matter of ***'Nidhi Rekhan Vs. Samyak Projects Pvt. Ltd.',*** passed by the Principal Bench, NCLAT, New Delhi in ***Company Appeal (AT) (Ins) No. 1020/2019*** and in ***Company Appeal (AT) (Ins) No. 1035/2020*** respectively.

5. It is the main case of the Appellant that the interest calculation made by the 1st Respondent for arriving at a Claim of Rs. 2,27,28,360/- is arbitrary and against the terms mentioned in the Sale Agreement. It is contended that the Sale Agreements do not provide for any interest paid to the 1st Respondent and that it was mutually agreed by the Parties to register the Sale Deed for the Mortgaged Plots once the Mortgage is lifted and hence, the 1st Respondent cannot arbitrarily apply interest for the delay in registering the Sale Deed for the Mortgaged Plots. A Suit for specific performance in O.S. No. 113/2020 was also preferred by the 1st Respondent. IA 61/2020 was filed to restrain the Corporate Debtor Company from alienating the unmortgaged plots. The same was dismissed and the CMA 296/2021 was filed admitting that only Rs. 35,97,500/- was due and payable and therefore, in the absence of any interest agreed to be paid and this admission in CMA 296/2021 the amount claimed is erroneous and the actual amount due does not meet the threshold amount as contemplated under the Code.

6. The two issues which arrive in this Appeal is whether the 1st Respondent is a Financial Creditor and whether interest accrued can be added to the principal amount and claimed as 'Financial Debt' in this Section 7 Petition.

6. At the outset, this 'Tribunal' addresses to the 1st issue raised by the Learned Counsel that the 1st Respondent is not a Financial Creditor and in fact is a speculative investor. The Learned Counsel placed reliance on the Judgment of the Principal Bench, NCLAT, in the matter of ***'Nidhi Rekhan Vs. Samyak Projects Pvt. Ltd.' (Supra)*** in which matter the homebuyer was held to be not a genuine allottee but an investor on the ground that the allottee had entered into an Agreement, with the developer, which terms entail a down payment and a balance amount *with an assured rate of return at 24 % p.a.*, which is not the case in the instant matter and is therefore, distinguishable. In the Judgment of ***'Ankit Goyal Vs. Sunitha Agarwal & Ors.' (Supra)*** the allottee was also *'assured'* a return of 25 % p.a. Hence, the ratio of this Judgment is not applicable to the facts of the instant Case on hand. In the instant case, the assured interest was conditional to the failure of getting approval from HMDA which was to be obtained as per Clause 3 of the Agreement of Sale dated 27/08/2016, within three months, failing which, the builder would repay the amount within two months with an interest of 24 % p.a. This Clause in the Agreement *cannot be equated to an assured rate of return* promised in the aforenoted Judgments relied upon by the Learned Counsel for the Appellant. Therefore, this Tribunal is of

the considered view that the 1st Respondent is a 'Financial Creditor' and the amount paid by the Allottee is a 'Financial Debt' as defined under Section 5(8) of the Code and held by the Hon'ble Apex Court in the matter of ***'Pioneer Urban Land and Infrastructure Limited and Ors. Vs. Union of India (UOI) and Ors.' (Supra)***. At this juncture, we find it fit to reproduce the relevant extracts from the Judgment.

> ***Para 40:***
> *"what is unique to real estate developers vis-s-vis operational debts, is the fact that, in operational debts generally when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund the*

manufacture of such goods or provision of such services."

...

"One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information of provided by the real estate developer compulsorily under RERA. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors."

Para 41:

"The object of dividing debts into two categories under the Code, namely, financial and operational debts, is broadly to sub-divide debts into those in which money is lent and those where debts are incurred on amount of goods being sold or services being rendered. We have no doubt that real estate developers fall squarely within the object of the Code as originally enacted insofar as they are financial debtors and not operational debtors, as has been pointed out hereinabove. So far as unequals being treated as equals is concerned, homebuyers/allottees can be assimilated with other individual financial creditors like debenture holders and fixed deposit holders, who have advanced certain amounts to the corporate debtor. For example, fixed deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors. Financial contracts in the case of these individuals need not involve large sums of money. Debenture holders and fixed deposit holders, unlike real estate holders, are involved in seeing that they recover the amounts that are lent and are thus not directly involved or interested in assessing the

viability of the corporate debtors. Though not having the expertise information to be in a position to evaluate feasibility and viability of resolution plans, such individuals, by virtue of being financial creditors, have a right to be on the Committee of Creditors to safeguard their interest. Also, the question that is to be asked when a debenture holder or fixed deposit holder prefers a Section 7 application under the Code will be asked in the case of allottees of real estate developers-is a debt due in fact or in law? Thus, allottees, being individual financial creditors like debenture holders and fixed deposit holders and classified as such, show that they within the larger class of financial creditors, there being not infraction of Article 14 on this score."

Para 45 :

"The Code is thus a beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees, who are vitally interested in the financial health of the corporate debtor, so that a replaced management may then carry out the real estate project as originally envisaged and deliver the flat/apartment as soon as possible and/or pay compensation in the event of late delivery, or non-delivery, or refund amounts advanced together with interest. Thus, applying the ***Shayara Bano v. Union of India (2017) 9 SCC 1*** *test, it cannot be said that a square peg has been forcibly fixed into a round hole so as to render Section 5(8)(f) manifestly arbitrary i.e. excessive, disproportionate or without adequate determining principle. For the same reason, it cannot be said that Article 19(1)(g) has been infracted and not saved by Article 19(6) as the Amendment Act is made in public interest, and it cannot be said to be an unreasonable restriction on the Petitioner's*

fundamental right under Article 19 (1) (g). Also, there is no infraction of Article 300-A as no person is deprived of its property without the authority of a constitutionally valid law."

7. Further, interpreting the Explanation added to Section 5(8)(f) of the Code, the Court further held that allottees/homebuyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code. The advances given by Property buyers to real estate developer will be considered as a 'borrowing' and such amounts raised from allottees falls within the scope of Section 5(8)(f) of the Code. The Contention of the Learned Senior Counsel that the allottee is a speculative investor is unsustainable keeping in view that the 'interest' payable as per Clause 3 of the Agreement of Sale is *'conditional'* to not obtaining the approval of HMDA.

8. Now, this Tribunal addresses to the issue as to whether the interest was rightly added to the 1st Respondent to the Claim amount to fall within the threshold amount of Rs. 1,00,00,000/-.

9. Clause 3 is to be read with Clauses 9 and 16 of the Agreement of Sale dated 29/09/2016 and Clauses 8 and 15 of the Agreement of Sale entered into on 27/08/2016 which stipulates as follows:

Clause 3: If the vendor fails to get HMDA Approval within three months of this agreement then vendor agrees to repay the amount paid by the vendee within 2 months with an interest of 24 % per annum

(payable based on number of days from the date of execution of this Agreement).

10. The amount mentioned in CMA 296/2021 cannot be equated to the Claim amount in the Section 7 Petition as the prayer in the Civil Suit was for specific performance, whereas, the amount claimed in the instant Petition is for the amounts due and payable to the 1st Respondent, as the amounts fall within the definition of 'Financial Debt', as defined under Section 5 (8) (f) of the Code. It is an admitted fact that the Final HMDA Approval was obtained only in January 2019 and till April 2019, neither were the plots registered nor the amounts refunded. It is submitted by the Learned Counsel for the Respondent that the mortgaged plots with HMDA were released on 29/03/2019 and were registered to the 1st Respondent and another nominee only after a cheating case, FIR 20/1029 was filed against the Appellant in the SR Nagar Police Station, Hyderabad. Despite having received the entire sale consideration during the period between 2016 – 2019, the Appellant neither registered the plots nor refunded the amount. Therefore, the quantum of interest comes into play as per the clauses of the Agreement of Sale entered into between the Parties. Therefore, this Tribunal do not see any merit in the argument of the Learned Counsel for the Appellant that interest should not be added and that the amount does not meet the threshold limit.

11. This Tribunal is conscious of the fact that 'Liquidation' proceedings have been initiated against the Corporate Debtor. Further, this 'Tribunal' does not find

any substantial grounds to challenge to the admission of the Section 7 Petition of the Code.

12. For all the foregoing reasons, this Company Appeal (AT) (CH) (Ins) No. 134/2022 is dismissed. No Order as to Costs. The connected pending IA No. 319/2022 in C.A. (AT) (CH) (Ins) No. 134/2022, is closed.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

04/09/2023
SPR/TM