(2024) 03 NCLT CK 0069

National Company Law Tribunal, Principal Bench, New Delhi

Case No: CP (IB) No.54/(PB)/2023

Mr. Paritosh Jain & Anr	APPELLANT
Vs	
Anand Divine Pvt. Limited	RESPONDENT

Date of Decision: March 21, 2024

Acts Referred:

- Real Estate (Regulation and Development) Act, 2016 - Section 2(d)
- Insolvency and Bankruptcy Code, 2016 - Section 5(7), 5(8)(f), 7
- Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act of 2002 - Section 13(2)
- Indian Stamp Act, 1899 - Section 35
- Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 - Rule 4, 4(1)

Hon'ble Judges: Ramalingam Sudhakar, Member (J); Avinash K. Srivastava, Member (T)

Bench: Division Bench

Advocate: Amrita Sarkar, Krish Kalra

Final Decision: Dismissed

Judgement

1. This is an application filed by Mr. Paritosh Jain and Ms. Nidhi Jain (Applicant/Financial Creditor), represented by their power of attorney holder Mr. Sanjay Bharadwaj, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (Adjudicating Authority Rules), for initiating the Corporate Insolvency Resolution Process (CIRP), declaring moratorium and for appointment of Interim Resolution Professional (IRP), against the Respondent/Corporate Debtor (CD) viz., M/s. Anand Divine Developers Private Limited.

2. As per Part-IV of the application, the Petitioner/Financial Creditor claims a default on the part of respondent/Corporate Debtor for an aggregate amount of Rs. 5,87,76,100/- (Rupees Five Crore Eighty-Seven Lakh Seventy-Six Thousand One Hundred Only) as on 30.11.2022. A copy of the working for computation of amount and days of default in a tabular form is annexed as Part- IV of the Application at Page 21.

3. The Respondent/Corporate Debtor was incorporated on 27.04.2011, having CIN No.: U70101DL2011PTC218192, under the Companies Act, 1956, with the purpose of doing business of Real estate activities with own or leased property. The registered office is at 11/92, Deepali Nehru Place New Delhi DL 110019. Therefore, this Bench has jurisdiction to deal with this application. A copy of the Master Data of the Respondent/Corporate Debtor as accessed from the MCA website is annexed at Annexure 2 at Pg. 45-46 of the Application.

4. **Facts of the Case**

i. It is submitted that in April 2014, the Financial Creditors were approached by the representatives of Corporate Debtor to invest in their Group Housing Project namely "ATS Triumph", situated in Village Dhanwapur, Sector 104, Gurgaon, Haryana.

ii. It is submitted that the Applicant/ Financial Creditor made an application for booking a flat in the Project under subvention-cum-guaranteed buy back scheme in terms of a fixed price which would be repaid to the Financial Creditors.

iii. It is submitted that the Applicant invested in the project by making a booking amount of Rs 15,00,000/- (Fifteen Lakhs). On 18.06.2014 the Financial Creditors and the Corporate Debtor entered into a Buyer's Agreement and Memorandum of Understanding, both dated 18.06.2014 for the purchase of a flat for a sum of Rs. 2,01,07,750/- (Rupees Two Crores One Lakh Seven Thousand Seven Hundred and Fifty only) in a project namely "ATS Triumph" situated in Village Dhanwapur, Sector 104, Gurgaon, Haryana, and accordingly the Applicant was allotted a flat bearing no. 3262 on 26th Floor in Tower/ Building 3 by the Corporate Debtor.

iv. It is submitted that Financial Creditors took a loan to the tune of Rs. 1,50,00,000/-(Rupees One Crore Fifty Lakhs) for the purchase of the flat and executed a Home Loan Agreement dated 07.08.2014 and a Tripartite Agreement dated 18.06.2014 with HDFC Bank and Corporate Debtor. Upon Signing the agreement, HDFC Bank disbursed Rs. 1,50,00,000/- to the Corporate Debtor as and when requested by Corporate Debtor.

v. It is submitted that under the subvention-cum-guaranteed buy back scheme, the CD guaranteed to buyback the apartment and the Applicants were assured by the Respondents/Corporate Debtors that the flat was being sold at Rs. 8100 per Sq. ft. i.e., the basic price of the flat was Rs. 1,85,49,000/-for 2290 Sq. ft. and would be purchased

back by the Corporate Debtor at Rs. 9,600 per Sq. ft after 3 years along with all the interest liability to the bank during these 3 years.

vi. It is submitted that as per Clause 8 of the MOU dated 18.06.2014 the Financial Creditor applied for the assured buy back offer on 25.04.2017 within the time frame of 33 months, however the CD did not adhered to its obligations.

vii. It is submitted that vide letter and email dated 22.07.2017, the CD informed the Financial Creditors that they cannot honor the MOU because of lack of funds and later arbitrarily and unilaterally extended the MOU for a period of 12 months and confirmed to FC that they are committed to honoring the guaranteed buyback agreement and will bear all EMI's during this 12 months extended period.

viii. It is submitted that FC filed a complaint on 30.05.2018 against the CD seeking enforcement of guaranteed buyback with the Confederation of Real Estate Developers Association of India (CREDAI), the apex body of private Real Estate developers.

ix. It is submitted that when this 12 months extended period was coming to an end, the FC again applied for the assured buyback on 22.02.2018 to the CD and the CD once again failed to honor the guaranteed buyback agreement citing lack of funds.

x. It is submitted that all the efforts made by the FC during the period from 2017 till date to recover their financial dues from the CD through calls, personal meetings, WhatsApp and email messages have not been fruitful.

xi. It is submitted that on 25.03.2022, this tribunal vide its order commenced insolvency proceedings against the CD being instituted by ICICI Prudential Venture Capital Fund and appointed Mr. Harish Taneja as the IRP. Pursuant to public announcement being issued, the Financial Creditors submitted their claim Form for an amount of Rs 4.27 Crores, the said claim was duly verified and admitted by the IRP as a lawful claim against the CD. However, since the CD settled the dispute with ICCI Prudential Venture Capital Fund, the matter was accordingly withdrawn.

xii. It is submitted that as per clause 8 of the MOU, an amount of Rs. 5,87,76,100/- (Rupees Five Crores Eighty-Seven lakhs Seventy Six thousand and One hundred) is due from the CD which includes buyback price of Rs. 9,600 per sq.ft/-, service tax paid, interest @18% p.a and pending EMIs, additional interest and incidental charges.

xiii. It is submitted that the defaults committed by the CD has resulted in the loan account of FC being classified as a Non-Performing Asset (NPA) by HDFC Bank and HDFC Bank has sent a demand notice dated 21.09.2022 under section 13(2) of the SARFAESI Act, 2022 with an intent to arm twist and extort monies from the FC. Till date the CD has paid 54 EMIs starting from September, 2017 till February, 2022 of Rs. 1,58,449 (Rupees One Lakh fifty-eight thousand and four hundred and forty-nine).

HDFC Bank has not taken any action against the CD and rather are illegally and arbitrarily putting pressure on the FC to make payments towards monthly instalments otherwise they will liquidate the property even though they are aware that the responsibility of the same is upon the CD.

5. **Submissions made in Reply by the Ld. Counsel appearing for the Respondent/Corporate Debtor are:**

i. It is vehemently denied that the answering Respondent is liable to pay Rs. 5,87,76,110 (Rupees Five Crores Eight Seven Lakhs Seventy-Six Thousand and One hundred only) to the applicant in terms of Memorandum of Understanding dated 18.06.2014. It is further submitted that the applicants have not approached this Adjudicating Authority with clean hands and have defaulted in terms of MOU dated 18.06.2014 and have deliberately concealed material facts from this Adjudicating Authority which led to extinguishment of the MOU.

ii. It is submitted that even though it is denied that the sums alleged to be due and in default are a financial debt, however, the payment of any alleged sum under the MOU was in any event subject to the Applicants duly complying with the terms and conditions enshrined under the MOU. Since the Applicants herein failed to perform its obligations under the MOU, the respondent is under no obligation to purchase/buy-back the unit by paying the alleged amount. All the rights and liabilities of the parties are now governed by the terms and conditions of the buyer’s agreement.

iii. It is submitted that since the applicants failed to validly exercise their alleged right to buy - back under the terms of the MOU read with the terms and conditions prescribed under the Tripartite Agreement dated 18.06.2014, the MOU entered between the Applicant and the Respondent stood extinguished and the right and obligations of the parties hereto were strictly governed by the buyer's agreement dated 18.06.2014.

iv. It is clear from the documents on record that the transaction between the Applicants and the Answering Respondent is not a financial transaction and that the nature of the MOU is in the nature of a buy - back. In view of the aforesaid, it is submitted that the Applicants falsely have invoked the jurisdiction of this Ld. Adjudicating Authority under the provisions of Section 7 of the Code which is specifically devised for genuine Financial Creditors.

v. It is submitted that the applicant, by instituting the present application has incorrectly submitted and is misleading this Adjudicating Authority into believing that the sums alleged to be due and defaulted by respondents are in the nature of a “financial debt” and that applicants are “Financial Creditors”, whereas on the contrary the alleged sum is not a financial debt and was merely a sale consideration that was agreed to be paid by the respondent to the applicants towards the purchase of the

units subject to compliance of the MOU and the tripartite agreement.

vi. It is submitted that ongoing through the contents of buyer’s agreement dated 18.06.2014, it is evident that the applicants did not disburse any debt to the respondent nor were they offered any fixed return consideration towards time value of money.

vii. It is submitted that the Applicants and Respondent were clearly aware of their respective obligations under not only the Buyer's Agreement and the MOU, but also under the Tri-partite Agreement - of which both the Applicants and the Respondent were a party. The Applicants could not be allowed to read the provision of MOU in isolation to state that it had the unqualified right of exercising the buy-back option within 33-36 months from the date of booking of the Unit/Apartment. The said option was available to the Applicants under the MOU, however, the same was always subject to the Applicant’s obligations, particularly under the Tripartite Agreement and the Loan Agreement, which the Applicants had to abide before exercising any option under clause 8 of the MOU.

viii. It is submitted that the Applicants failed to comply with its obligation of obtaining all necessary documents, in particular the prior written consent of the Bank before exercising the option under Clause 8 of the MOU. Considering the same, the Respondent could not have and rightly did not re-purchase the Unit/Apartment from the Applicants.

ix. It is submitted that in light of failure of the Applicants to correctly and validly exercise the option under Clause 8 of the MOU in the time frame agreed between the Parties i.e. 33 to 36 months from the date of the booking of the said Unit/Apartment, the MOU is no longer valid and binding on the parties and the parties are now governed by the buyer’s agreement which governs the rights and obligations of the parties. The applicant failed to validly exercise the option for buy-back of the Unit/Apartment by the respondent under Clause 8 of the MOU, which in-turn triggered clause 9 of the MOU due to which the MOU has already come to an end and the same is no longer valid and binding on the parties. Therefore, as per clause 9 of the MOU, the applicants are now governed by the terms and conditions of the buyer’s agreement.

x. It is submitted that the written request by the Applicants to the Respondent, which the Applicants allege to have been made in a timely manner to cancel the booking was not sufficient for the Respondent to re-purchase the Unit/Apartment and refund the amounts received by the Respondent. The said refund and other modalities were always subject to the provisions of the Buyer's Agreement, Tripartite Agreement entered between the Respondent, Applicants and the Bank and the Loan Agreement entered into between the Applicants and the Bank.

xi. The Applicants were very much aware of its obligation to obtain prior written consent from the Bank to surrender / transfer the Unit/Apartment. However, the Applicants never even approached the Bank for obtaining the said prior written consent. The obligation of the Respondent not to entertain any request of the Applicants to transfer the Unit / Apartment was not based on any mere understanding or arrangement between the Respondent and the Bank rather the same was clearly agreed between the Applicants, Respondent, and the Bank under the Tri-partite Agreement. Under the agreement it was agreed that the Respondent was required not to entertain any request for transfer of the Unit / Apartment without the prior permission of the Bank. Therefore, the Respondent was under an obligation to not consider any request from the Applicants to repurchase the Unit / Apartment which would have in effect meant transfer of the Unit / Apartment to the Respondent itself, without the prior written consent from the Bank to do so - which was admittedly not obtained by the Applicants from the Bank.

xii. It is submitted that the MOUs are Agreement to Sell, the provisions enshrined under the Indian Stamp Act, 1899 (Haryana) and Registration Act, 1908 (Haryana) will be applicable. In this regard, it is submitted that the MOUs are insufficiently stamped in terms of the Indian Stamp Act, 1899 (Haryana) and not registered in terms of the Registration Act, 1908 (Haryana). It is evident that the Applicants advertently chose to approach this Ld. Adjudicating Authority with unclean hands only to escape the rigors of the aforesaid statutes. Additionally, it is submitted that in terms of Section 35 of the Indian Stamp Act, 1899 (Haryana), the concerned MOUs ought not to be considered as evidence by this Ld. Adjudicating Authority until the same is duly stamped.

xiii. It is submitted that the Financial Creditors are speculative investor and cannot claim status and benefits as a Financial Creditors under Explanation (i) Section 5(8)(f) of the IBC, and is not interested in the financial well-being, growth, and vitality of the Corporate Debtor, but is just interested in his investment and has come in the garb of an allottee. The Hon'ble National Company Law Appellate Tribunal in the cases of 'Subha Sharma v. Mansi Brar Fernandes & Anr.(2020) SCC Online NCLAT 1104 and Nidhi Rekhan v. Samyak Projects Pvt. Ltd. 2022 SCC Online NCLAT 46' held that a 'speculative investor' of a real estate project ought not to be equated to Financial Creditors.

xiv. It is submitted that the entire transaction arising out of the MOUs and the Allotment Letters seems very 'lucrative' for an investor. The argument that applicants are speculative investor stems from the factum that the investment of the Applicants was secured under MOU. As per the MOU, Units were to be sold to the Answering Respondent for the alleged amount of INR 5,87,76,100/- for which the initial deposit was merely Rs. 1,91,49,000/-, secondly, the Applicants have not shown any interest in retaining the Units; thirdly, the sole purpose of the Applicants were to extract a huge amount of monies by selling the Units to the Answering Respondent and the same has

been admitted in the instant Application.

xv. It is submitted that the Applicants have deliberately not disclosed the actual financial position of the Answering Respondent which if disclosed would have rendered the present application meritless. The Applicants were required to specifically plead the details of the financial distress the Answering Respondent was undergoing and that the initiation of the CIRP was the only viable solution. Manifestly, in the absence of the aforesaid, it is stated that the Applicants have invoked the jurisdiction of Ld. Adjudicating Authority under Section 7 of the Code with an intent to use the same as a tool of recovery, which is expressly barred under law.

xvi. It is submitted that the Answering Respondent is part of the well-known ATS Group of Companies and has numerous projects in the real estate market and continues to enjoy unblemished goodwill and reputation amongst the buyers and is not undergoing any financial crunch as alleged by the Applicants in the purported Application and is financially stable and solvent to continue carrying on its business operations. It is submitted that Answering Respondent is a renowned real estate project developer with extensive experience in the area of real estate, no purpose shall be achieved if the present application is admitted and the existing management of the Answering Respondent is replaced.

6. **Rejoinder of the Applicant/Financial Creditor in reply to the Respondent/Corporate Debtor are:**

i. The Financial Creditor specifically denies that the present application is not maintainable on the alleged ground that sum due is not financial debt and that the applicants herein do not fall under the definition of financial creditor.

ii. The applicants have invoked the buy-back twice in compliance of the terms and conditions of MOU dated 18.06.2014 on 25.04.2017 and 22.02.2018. Corporate Debtor has mentioned lack of funds to applicants several times that they do not have funds to pay guaranteed buyback with interest to applicants.

iii. It is submitted that non-payment, in case of commitment to pay fixed amount after a fixed period of time plus interest on time is a financial debt arising due to committed assured buyback and subvention scheme.

iv. It is submitted that it is the MOU, and not the buyer’s agreement nor the tripartite agreement which is the principal agreement governing the relationship between the parties.

v. It is submitted that the applicants are financial investors and not allottees as per section 5(7) of the code and that CD is the beneficiary of the loan amount which has been disbursed by the HDFC bank directly therefore, in such disbursement there is an

element of time value of money.

vi. It is submitted that the applicants are not speculative investors. Further the CD is relying upon the case of “Subha Sharma v. Mansi Brar Fernandes & Anr.” 2020 SCC Online NCLAT 1104 wherein it has been stated that the allottee who had entered into MOU of similar nature as in the present case is to be regarded as a “speculative investor”. It is submitted that that the Hon’ble Supreme Court in the case of Mansi Brar Fernandes & Anr v. Subha Sharma has clearly stated that Subha Sharma case as decided by Ld. NCLAT ought not to be used as a precedent on the issue of “speculative investor” in the prospective cases.

7. The Applicant/Financial Creditor in support of the Application placed the following documents on record:-

a. True copy of the Master Data of the Corporate Debtor.

b. True copy of the booking/application form of the unit dated 28.04.2014

c. True copy of the Buyer's Agreement and Memorandum of Understanding, both dated 18.06.2014

d. True copy of the allotment letter dated 18.06.2014, letter of permission to mortgage issued by Corporate Debtor dated 18.06.2014

e. True copy of the Tripartite Agreement dated 18.06.2014 and the Home loan agreement dated 07.08.2014

f. True copy of the account statement of Corporate Debtor which reflects payments received from the Financial Creditors.

g. True copy of email exchange in July, 2018 between the Financial Creditor and Corporate Debtor through CREDAI grievance cell

h. True copy of the email dated 20.06.2019 and 22.06.2019 exchanged between Financial Creditor and the Corporate Debtor in which the FC expressed its intention of not taking possession of the apartment and requesting for honoring the buy back and CD on the other hand offering FC to take possession on account of Occupancy Certificate being received for the project.

i. True copy of the demand notice dated 21.09.2022 u/s-13(2) of the SARAFESI Act, 2022 issued by HDFC Bank. Copy of legal notice dated 14.10.2022 issued by FC to CD and HDFC Bank and Reply dated 20.10.2022 to the demand notice dated 21.09.2022.

8. **Analysis and Findings**

i. We have heard the Ld. Counsels appearing for both the parties and have perused the documents on record. The Applicant/Financial creditors applied in the group housing project of the CD namely, “ATS Triumph” situated in Sector 104, Gurugram, Haryana and was allotted a flat bearing no. 3262 on the 26th Floor in Tower/Building 3 by the CD. The total purchase consideration of the flat was Rs. 2,01,07,750 (Rupees Two Crores One Lakh Seven Thousand Seven Hundred and Fifty only). For this allotment, a Buyer’s Agreement dated 18.06.2014 was executed between the applicant and the Corporate Debtor governing various terms of allotment. In addition to this, two more agreements i.e. MOU and Tripartite agreement both dated 18/06.2014 were also executed between the parties.

ii. Tripartite Agreement has been executed between the Applicant, Corporate Debtor and HDFC Bank which states that the Applicant and CD have jointly approached HDFC Bank for securing loan towards payment of the purchase consideration of the residential apartment in the project.

iii. In the application, the Applicant does not want themselves to be considered as an “allottee” but as a financial investor in view of Clause 8 of the MOU dated 18.06.2014 which governs the buyback relationship between the parties. Clause 8 of the MOU dated 18.06.2014 is extracted as under:

iv. We observe that the Buyer’s Agreement dated 18.06.2014 is the basic agreement governing sale of apartment/unit allotted and to supplement this Buyer's Agreement two subsequent agreements i.e. MoU and Tripartite Agreement both dated 18.06.2014 were executed. Throughout the terms of this Buyer’s Agreement, the applicant has been referred to as the “allottee”. For ready reference some of the clauses of the buyer’s agreement are extracted as under:

AND WHEREAS the Allottee after satisfying about the right, title, location and limitation in the said land/project of the Company has applied to the company vide Application No. 278 dated 16/05/2014 agreeing to the terms and conditions set out therein for provisional allotment of an apartment No. 3262 on 26th floor in Tower/Building No. 3 and for provisional allotment of covered/open car parking spaces Nos. (two).

AND WHEREAS the Allottee has also inspected and having satisfied itself/ himself/ herself with the facts as stated aforesaid, the ownership records and documents relating to the title of the said land, sanctioned building plans, the permits/licenses/consents for construction of the said apartment complex and legal rights of the Company. The allottee confirms that the allottee does not require any further investigation in this regard and that the allottee is fully satisfied in all respects.

v. Besides that, it is an undisputed fact that the applicant himself unequivocally confirms that he had purchased and was allotted a Flat No. 3262 on 26th Floor in Tower/ Building 3 by the CD, therefore by virtue of Buyers Agreement dated 18.06.2014 and Section 2(d) of the RERA Act, 2016 the applicant falls within the definition of the allottee. Section 2(d) of the RERA Act, 2016 in this regard read as under:

vi. The Applicant have attached at Page No. 121 & 122 of the application, their conversation with Mr. Harish Taneja, the IRP appointed in the insolvency proceedings against the CD vide order dated 25.03.2022. Though the said CIRP was later withdrawn on account of settlement, the applicant themselves in their communication dated 10.04.2023 with the IRP requested to the IRP to not withdraw the insolvency proceedings as the applicant themselves cannot meet the threshold for filing the section 7 application. Relevant exchange between the IRP and applicant is extracted as under:

vii. From the above-stated paras, it is clear that the applicant is an allottee in the Real Estate Project and as per the code an allottee is covered under the definition of Financial Creditor by virtue of Section 5(8)(f) of the Act and therefore they also need to satisfy the threshold of application being jointly filed by 100 allottees or not less than 10% of number of allottees whichever is less. Therefore, this petition filed by a single homebuyer/allottee does not qualify as a fit application as per Section 7 of the IBC, 2016.

viii. Further, the Applicant applied for the home loan finance from HDFC Bank by entering into a tripartite agreement dated 18.06.2014. Under the tripartite agreement it was specifically agreed that the builder has taken note of the mortgage created by the applicant in favor of Bank and that they will not create any third party rights without the written consent of bank. Relevant clause of the tripartite agreement is extracted below:

AND WHEREAS the Borrower has agreed to secure with HDFC the said residential apartment under finance as and by way of mortgage of all the rights, title, benefits that would accrue from the said residential apartment till the currency and term of the said loan to be advanced. The Builder also agrees and confirms that they shall take note of the said mortgage created by the Borrower and undertake not to create any third party rights or security interest of any sort, whatsoever on the said flat without the prior recent written consent of HDFC.

ix. We take note that the applicant has not shown any documents on record to show that they approached the HDFC bank to remove the encumbrance created by way of mortgage with bank before approaching the CD for buy-back of the unit/apartment. Being mortgaged with the Bank, the encumbrance created by the applicant over the aforesaid flat could not be taken over by the Respondent/CD in a resale without the

written consent of bank.

x. The IBC Proceedings is not a recovery proceeding and is intended for recovery of distressed companies. Further, the Corporate Debtor has also submitted in reply acknowledging that the project in question is complete and occupation certificate for the project has been received and no purpose will be served if the company is dragged into insolvency. We find merits in this submission of the CD.

Order

In light of the above facts and circumstances, it is, hereby ordered as follows:-

i. The Application bearing C.P. (IB) – 54 (PB)/2023 filed by Mr. Paritosh Jain & Anr, the Applicant/(FC), under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against M/s Anand Divine Developers Private Limited., the Respondent/ (Corporate Debtor), is hereby dismissed.

ii. No order as to cost.

iii. File be consigned to records storage (current)

iv. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.