NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 484 of 2024

[Arising out of order dated 19.09.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi in CP (IB) No. 234(PB)/2019]

In the matter of:

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…Appellants/Financial Creditors

Versus

ORRIS INFRASTRUCTURE PVT. LTD.
Through its Director /Authorized Representative
J-10/5, DLF phase II,
M.G. Road, Gurgaon, Haryana

Registered Office:
RZ-D-5, Mahavir Enclave
New Delhi 110045

…Respondent/Corporate Debtor

Present :

For Appellant: Mr. Rajat Malhotra, Mr. Sunil Malhotra, Madhu K. Singh, Ms. Priya Mishra, Mr. Amit Agnihotri, Advocates.

For Respondents: Mr. P. Nagesh, Sr. Advocate with Ms. Ranjana Roy Gawai, Mr. Shikher Upadhayay, Mr. Prateek Gupta, Mr. Akshay Sharma, Mr. Pervinder, Advocates.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 19.09.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in C.P.(IB)234(PB)/2019. By the Impugned Order, the Adjudicating Authority dismissed the Section 7 application filed by the Appellants for initiating Corporate Insolvency Resolution Process (**'CIRP'** in short) against M/s Orris Infrastructure Pvt Ltd – Corporate Debtor. Aggrieved by this impugned order, the present appeal has been preferred by the Appellants.

2. We have heard Shri Rajat Malhotra, Learned Advocate appearing on behalf of the Appellants and Shri P. Nagesh, Learned Sr. Advocate representing the Respondent.

3. The Learned Counsel for the Appellants while making his submissions submitted that the Corporate Debtor - Orris Infrastructures Pvt Ltd was developing a commercial building/complex known as Floreal Tower, Gurgaon. The Corporate Debtor had entered into an Agreement with the Appellants on 24.04.2010 (hereinafter referred to as **'MOU'**) for providing Monthly Assured Return ('**MAR**' in short). Clauses 2, 4, 5 and 6

of the MOU dated 24.04.2010 stipulated that MAR would continue to be paid by the Corporate Debtor for 36 months after the completion of the building or till the office space was leased out on completion, whichever is earlier, by the Corporate Debtor.

4. Further submission was made that the Corporate Debtor having not completed the project applied for renewal of License issued by the Town and Country Planning Department. The License had been renewed up to 13.11.2024 until final completion. Furthermore, it was submitted that though an Occupancy Certificate dated 16.08.2017 was placed before the Adjudicating Authority by the Corporate Debtor, the Occupancy Certificate cannot be viewed as Completion Certificate of the building. In any case, the liability for payment of MAR was up to 36 months from the date of Occupancy Certificate which was not complied to by the Corporate Debtor.

5. It was pointed out that the Appellant had paid the entire consideration amount of Rs.29.98 lakhs and thus had discharged their part of the obligation. It is also contended that neither the building is completed nor the office space leased out till date by the Corporate Debtor. However, the Corporate Debtor failed to make the payments as per MAR following which notices for default were issued on 09.01.2018 and 12.02.2018. Since payments were still not forthcoming, Section 7 application was filed before the Adjudicating Authority on 01.06.2018 but subsequently withdrawn following a Settlement Deed entered into by both parties on 09.07.2018. As the post-dated cheques issued in pursuance to the above Settlement Deed of 09.07.2018 were dishonoured, a fresh Section 7 application was filed.

Again, the matter was amicably settled between the two parties following a Settlement Deed dated 06.03.2019. The Section 7 application was disposed of by the Adjudicating Authority on 07.03.2019 with the liberty to revive the petition in case of default. Due to further default, notice was issued on 10.12.1019 and the Section 7 application was again revived. The Corporate Debtor thereafter handed over two bank drafts in the name of the Appellants with a view to settle all payments due and payable by them under the MOU dated 24.04.2010. It was submitted that these two bank drafts were not encashed by the Appellants since the amount contained in the bank drafts were not the complete amount of financial debt due and payable by the Corporate Debtor. It was vehemently contended that the Section 7 application was filed by the Appellants for the debt which had accumulated and continued to accumulate under MAR Plan.

6. It is also submitted that the present application has been filed by the Appellants not in their capacity as allottees of the Floreal Tower project but predicated on the MOU dated 24.04.2010 and that the Appellants are claiming the sum not paid by them as allottees but for the amount which has become due and payable on account of MAR. Emphatically asserting that MAR Plan was entirely independent of the terms of allotment, it was stated that the investment arrangement was distinct from an allotment simpliciter. The Appellants have relied on the judgment of this Tribunal in ***Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd*** in ***CA(AT)(Ins) No. 07 of 2017*** wherein it was held that a recipient under an identical assured return investment scheme is a Financial Creditor in terms of the said

agreement and not as allottees. It was articulated that the moment there is an assured return clause, and the Corporate Debtor defaults to make good the due that arises out of the said clause, a Section 7 application can be filed *dehors* the capacity of the Financial Creditor as an allottee.

7. Making rival submissions, the Learned Counsel for the Respondent while admitting that the two parties had entered into an MOU dated 24.04.2010 and Space Buyers Agreement (SBA) dated 26.04.2010, stated that MAR was payable by them to the Appellants up to 36 months after completion of the building or till the office space was put on lease, whichever was earlier. Since the Occupation Certificate was received on 16.08.2017, thus, in terms of the MOU, the obligation to pay MAR was only till 16.07.2020. This amount had already been paid till June, 2019 and for the remaining period up to July, 2020, the Corporate Debtor had already handed over demand drafts to the Appellants amounting Rs. 8.03 lakhs. Despite having received the complete amount, the Appellants have unlawfully claimed that the obligation of the Corporate Debtor is still continuing. The terms of the MOU being definitive and conclusive in nature, and the Corporate Debtor having complied thereto, there is no obligation to be further discharged by the Corporate Debtor. The demand of further amounts by the Appellants is not in conformity with the MOU clauses and is only a ploy to arm-twist the Corporate Debtor with a *mala fide* intention.

8. It is also the contention of the Respondent that the IBC is not a recovery legislation and that the judgment of the Hon'ble Supreme Court in

Mobilox Innovation Pvt Ltd Vs Kirusa Software Pvt Ltd (2018) 1 SCC 353 clearly held that IBC is not intended to be a substitute to a recovery forum. It was also contended that Section 65 of IBC expressly bars initiation of CIRP on fraudulent and malicious grounds and present is a case where the Appellants have clearly tried to trigger the initiation of CIRP of the Corporate Debtor for their unjust enrichment. The Appellants despite having received the Demand draft which liquidated their entire outstanding debts, did not deliberately encash the same with *mala fide* intention to extort more money from the Corporate Debtor.

9. It was vehemently contended that during the pendency of the present Section 7 application before the Adjudicating Authority, the IBC came to be amended on 13.03.2020 with effect from 28.12.2019 by virtue of which recourse under Section 7 could be availed by financial creditors who are allottees numbering not less than 100 of such financial creditors or 10% of the allottees, whichever is less, in a real estate project. This amendment was subsequently upheld by the Hon'ble Supreme Court in ***Manish Kumar Vs UOI 2021 SCC Online SC 30***. In terms of the judgment of the Hon'ble Supreme Court in ***Manish Kumar supra***, the Appellants were required to modify their Section 7 application within the stipulated time frame given to conform to the second proviso of amended Section 7. Having not done so, the petition is liable to be dismissed as not maintainable.

10. We have heard both the parties and perused the records carefully. The primary and foremost issue for our consideration is whether the present Section 7 application filed by the Appellants is maintainable or not

in view of the threshold introduced by Amendment Act 1 of 2020 of the IBC which expressly provides that a Section 7 application is required to be filed jointly by not less than 100 allottees under the same real estate project or not less than 10% of the total number of allottees, whichever is less.

11. It is the case of the Appellants that their Section 7 application is not hit by the above-mentioned amendment by Act 1 of 2020 of the IBC since they had not approached the Adjudicating Authority as allottees. The present application has not been filed for default by real estate developer under terms of allotment but for reasons of default under an independent and separate agreement executed between the two parties for MAR. The present petition is maintainable *dehors* the allotment as the cause of action arises due to the default under the MOU of 24.04.2010 and not from the terms of allotment. Hence, the petition is not impacted by the judgment of the Hon'ble Apex Court in ***Manish Kumar supra*** and is maintainable without need of any modification. It is also the contention of the Appellants that the Corporate Debtor have repeatedly breached the Settlement Deed which clearly reflects their misconduct and that they are trying to wriggle out of their undertaking by taking refuge under the amendment of Section 7 of the IBC which amounts to abuse of process of law.

12. Repelling the above arguments of the Appellant, the Learned Counsel for the Respondent vehemently contended that the present petition is not maintainable in the light of amendment to Section 7 of the IBC which expressly provides that for financial creditors who are allottees, a Section 7 application can be filed against the Corporate Debtor jointly by not less than

100 of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project. It was submitted that there are 504 units in the Floreal Project of which 366 allottees fell under the category of Assured Returns Class of Creditors and that the Appellants constitute joint allottees of one single unit therein. Hence, the Appellants do not meet either the threshold level of 100 allottees or more than 10% of the total allottees under the same real estate project. Hence, the Section 7 application is not maintainable in the present facts of the case. Moreover, in terms of the judgment of the Hon'ble Supreme Court in ***Manish Kumar supra***, the Appellants were required to modify their Section 7 application within the stipulated time frame given under the relevant provision of amended Section 7. Having not done so, the petition is liable to be dismissed.

13. Before we proceed to test the correctness of the impugned order against the weight of rival submissions, it would be useful to have a look at the statutory provision as inserted by Act 1 of 2020 in Section 7 of IBC which is reproduced hereunder for ready reference:

> "**7. Initiation of corporate insolvency resolution process by financial creditor.**
>
> *(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*
>
> *Provided that……*
>
> *Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency*

resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act 2020, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission."

14. The second proviso to Section 7(1) of the IBC refers to financial creditors who are 'allottees' under a real estate project. As such 'allottees' are not defined in the statutory construct of IBC. However, in terms of Explanation (ii) to Section 5(8)(f) of IBC, the definitions of 'allottee' and 'real estate project' is to be derived from Real Estate (Regulation and Development) Act, 2016 ('**RERA**' in short) which is as under:

"2. Definitions. – In this Act, unless the context otherwise requires, -
…….
(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building as the case may be, is given on rent;
(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"

15. We however find that the Appellants while assailing the impugned order have claimed that their cause of action arises not from their status as allottees but their rights accrue from MAR Plan which is a separate and independent agreement from that of an allotment. It is their case that the present application has been filed by the Appellants not in their capacity as allottees but emanates from the MOU dated 24.04.2010 which provided for an MRP Plan entirely independent of the terms of allotment. The Appellants have submitted that they are claiming from the Corporate Debtor not the sum paid by them for allotment but an amount which has become due and payable on account of MAR Plan. It has therefore been contended that only if they had approached the Adjudicating Authority as an 'allottee' as defined under RERA, the threshold provided under the second proviso to Section 7(1) would have been applicable. Submission was also pressed that this distinction between an assured return investor and an allottee simpliciter involved in a real estate transaction is not artificial as these two types of investors in real estate projects are not of the same genus. In support of their contention that this investment arrangement is distinct from an allotment simpliciter, the Appellants have relied on the judgment of this Tribunal in ***Nikhil Mehta supra.***

16. Coming to our analysis and findings, we are of the considered view that on a plain reading of the provisions contained in the definition clause under RERA Act as outlined at preceding para 14 supra, a commercial space/unit allottee is covered under the purview of 'allottee' under RERA

Act. By virtue of Explanation (ii) to Section 5(8)(f) of IBC, the same interpretation is to be adopted for an 'allottee' under IBC.

17. Extending this interpretation, we notice that the Adjudicating Authority has correctly held that even a commercial space or unit allotted to Assured Returns Class of Creditors is also covered in the ambit of an 'allottee'. After taking notice of the judgement of this Tribunal in ***Nikhil Mehta supra***, the Adjudicating Authority has also correctly noted that this judgement has nowhere observed that assured returns class of creditors in a particular project do not come under the definition of 'allottees'. The Adjudicating Authority has further held that in the facts of the present case, as per affidavit of the Corporate Debtor, the total number of allotted units in the Floreal Tower is 504 and 366 allottees therein fall under the Assured Returns Class of Creditors. Since the present Appellants happen to be part of the Assured Returns Class of Creditors, they continue to belong to the substratum of 'allottees' and therefore continue to be governed by the threshold limit prescribed under second proviso to Section 7(1) of IBC. This threshold criterion was also made applicable even in respect of all Section 7 applications filed before the amendment and given two months period for modifying their petition accordingly. Since the present application was filed before the IBC Amendment Act 1 of 2020 had come into effect, consequently upon the amendment, as financial creditors who are allottees under a real estate project, the Appellants were required to meet the threshold criteria of not being less than 100 such creditors in the same class or not being less than 10% of the total number of creditors in the same class, whichever is

less, to qualify to file Section 7 application against the Corporate Debtor. This parameter has clearly not been complied with thereby making the Section 7 application non-maintainable.

18. We also find force in the contention of the Learned Counsel for the Respondent that this matter has also been covered by a judgement of this Tribunal in ***Rahul Gyanchandani Vs Parsvnath Landmark Developers Pvt Ltd*** in ***CA (AT) (Ins) No. 309 of 2024*** wherein it has been held that Homebuyers are 'allottees' within the meaning of the IBC and as a Financial Creditor, when they file an application, they are required to comply to the requirements of second proviso to Section 7(1) of IBC. The above judgment of this Tribunal has been passed in the light of the judgment of the Hon'ble Supreme Court in ***Vishal Chelani & Ors. vs. Debashis Nanda in Civil Appeal No.3806 of 2023*** and the relevant excerpts are as reproduced hereunder:

> *"17. The Hon'ble Supreme Court after noticing the amendment of 2018 in sub-section 8(f) of Section 5, laid down following in paragraph-6, which is as follows:*
>
> > *"**6.** It is thus evident that with the introduction of the explanation home buyers and allottees of real estate projects were included in the class of "financial creditors" - because financial debt is owed to them. On a plain reading of Section 5 (8)(f) no distinction is per se made out between different classes of financial creditors for the purposes of drawing a resolution plan. Consequently, the reasoning of the Mumbai Bench of NCLT "Mr. Natwar Agrawal(HUF)" is correct in the opinion of this Court."*
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> *18. The view of RP was disapproved by the Hon'ble Supreme Court and it was held that when underlying claim of an aggrieved party specifically in the form of a Court order or decree, that does not alter or*

disturb the status of the converted party. Following was held in paragraphs 8 and 9 of the judgment:

> *"**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.*
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> ***9.** In view of the foregoing reasons, the impugned order 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 home buyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority.*
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> *The appeal is allowed in the above terms."*

19. We are therefore of the considered view that the Appellants cannot be said to go out of the definition of 'allottees' merely because they are part of MAR plan or that they should be treated in a different category wherein they are not required to comply with second proviso to Section 7(1). The

Adjudicating Authority has correctly held that the Appellants continue to hold the status of 'allottees' and having filed Section 7 Application, they are mandatorily required to comply with second proviso to Section 7(1) of IBC. We are not persuaded to accept the artificial distinction sought to be claimed by the Appellants with regard to their status as distinct from Financial Creditors in a class. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 02.07.2024
Ashok Kumar