

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.661 of 2021

(Arising out of Order dated 11.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-II in IA 1550/2019 of C.P.(IB) No.456 (ND)/2018)

IN THE MATTER OF:

1. Kotak Mahindra Bank Limited,
D-10 Local Shopping Centre,
Vasant Vihar, New Delhi 110057.
2. Kotak Mahindra Prime Limited
Kotak House, Plot No.7,
Second Floor, Sector 125,
Noida, Uttar Pradesh. Appellants

Vs

1. Resolution Professional of Universal
Buildwell Private Limited
3rd Floor, SCO-61, Above Kotak
Mahindra Bank, Old Judicial Complex,
Civil Lines, Gurgaon-122001.
2. Universal Aura Welfare Association,
Universal Greens Buyer Association and
Universal Business Park Association,
Resolution Applicant of
Universal Buildwell Private Limited
GM-35, DLF Phae-2, Gurugram, Haryana-122001. ... Respondents

Present:

**For Appellants: Mr. Krishnendu Dutta, Sr. Advocate
alongwith Ms. Apoorva Chowdhury and Ms.
Versha, Advocates.**

**For Respondents: Mr. Swapnil Gupta, Ms. Sabhya Jain,
Advocates with Mr. Atun Kansal, RP in
person for R-1.**

**Mr. Himanshu Kapoor and Mr. Harshal
Kumar, Advocates for R-2.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 11.06.2021 passed by National Company Law Tribunal, New Delhi Bench-II in IA No.1550 of 2019 and others IAs in CP(IB) 456 (ND)/2018.

2. The Corporate Debtor – Universal Buildwell Pvt. Ltd. was admitted in insolvency by an order dated 03.07.2018 on an Application filed by Pallavi Joshi Bakhru under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”). The Appellant Nos.1 and 2 submitted their claim in Form-C to the Resolution Professional (“**RP**”) on 18.07.2018. The claim of Appellant No.1 was admitted for an amount of INR 13,82,73,227/- and Appellant No.2 for an amount of INR 37,34,83,401/- Voting share allocated to Appellant No.1 was 1.59% and 4.27% to Appellant No.2 in the Committee of Creditors (“**CoC**”).

3. The RP appointed two Valuers namely – Adroit Technical Services Private Ltd. and Sapient Services Private Limited in August 2018. The RP invited Expression of Interest (“**EOI**”) in Form-G. The RP shared the Valuation Report with Appellant Nos.1 and 2 vide email dated 27.07.2019. In response to fresh EOI issued by RP, six prospective Resolution Applicants including Welfare Association Consortium – Respondent No.2 submitted EOI. The 14th CoC Meeting was held on 01.11.2019 and the 15th Meeting was on 11.11.2019, in which Resolution Plan submitted by Welfare Association Consortium – Respondent No.2 was approved by 70.44% voting share. Both the Appellants voted against the Resolution Plan.

4. Pursuant to approval of Resolution Plan, an IA No.1550 of 2019 was filed by RP under Section 30 sub-section (6) of the Code before the Adjudicating Authority for approval of the Resolution Plan. Both the Appellants aggrieved by the treatment provided to them by the Resolution Applicant in the Resolution Plan filed objections. The Adjudicating Authority vide order dated 11.06.2021 decided the plan approval Application as well as objections filed by the Appellants. The Adjudicating Authority vide impugned order remitted the Resolution Plan to the CoC for modification in terms of the payments as specified in the order. The objections raised by the Appellants regarding the NIL liquidation value ascribed to the Appellant with respect to project Universal Business Park was rejected. Aggrieved by the order impugned, specifically directions issued in paragraph 49 and 50, this appeal has been filed by the Appellants.

5. The Resolution Plan, which was submitted by the Resolution Applicant was in two parts. The first part of the Resolution Plan dealt with the three residential projects, i.e. Universal Aura, Universal Green and Universal Business Park. Part-2 of the Plan dealt with other projects including the Pavilion. The Promoters of the projects have obtained financial facilities from the Appellant, creating a charge/ mortgage with respect to projects Universal Business Park and the Pavilion. The Resolution Plan dealt with secured creditors, unsecured creditors and other stake holders with respect to the projects Universal Aura, Universal Green and Universal Business Park. With regard to all other projects, including Pavilion, the Plan permitted the secured creditors to realise their security.

In the present Appeal, no issue has been raised with regard to security interest of the Appellants in Pavilion, which security they have been permitted to realise. The issues raised in the Appeal relates to only the liquidation value of security interest of the Appellant in project Universal Business Park. The Plan has earmarked an amount of Rs.3 crores to the Appellants with regard to Universal Business Park and liquidation value ascribed to the Appellant with respect to Universal Business Park is NIL.

6. Before we proceed further, we may notice paragraph 49 and 50 of the impugned order, which paragraphs have been prayed to be set aside by the Appellant. The Appellants have also prayed for a direction to the CoC to consider the Valuation Report submitted by the Registered Valuers while determining the valuation of assets of the Corporate Debtor and computing the liquidation value payable to the Appellant Nos.1 and 2. Paragraph 49 and 50 of the impugned order is as follows:

“49. Now, in the light of position of law settled by the Hon’ble Supreme Court (Supra), we consider the contention of Mr. Sumant Batra, Advocate and we notice that the amount proposed to be paid in the Resolution Plan is approved by the CoC. Under Section 30(2)(b) of IBC read with Section 53 of IBC, 2016, it is the duty of the Resolution Professional to examine the Resolution Plan, whether the distribution to the Creditors is made in terms of the provisions of law and Regulations, thereafter the Resolution Professional shall place the same before the Committee of Creditors u/s 30(3) IBC 2016 for its approval. The COC after considering the feasibility and viability, the manner of distribution proposed, may approve the Plan by not less than 66% of voting share

u/s 3(4) of the IBC 2016. It is the commercial wisdom of the CoC to determine what amounts are to be paid to different classes and sub classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder. It is seen that while deciding the amounts in the instant case, the CoC has considered the liquidation value placed by the Resolution Professional as well as the Resolution Applicant as mentioned in aforementioned paragraphs. Since the units, that have already been sold, are no longer an asset of the Corporate Debtor and consequently cannot be liquidated, their liquidation value has been provided as NIL. The COC after considering the same, approved the amounts proposed to be paid to Kotak Mahindra Bank Limited, Kotak Mahindra Prime Limited and similarly, to DHFL. Hence, we find, no force in the contention raised by the Ld. Counsel for the Objectors that the amounts which are proposed to be paid to the DHFL, Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited are contrary to the provision of Section 30(2)(b) of the IBC read with Section 53(1) of the IBC, 2016.

50. However, we notice there is significant differences between the liquidation value submitted by the Two Valuers and valuation assessed by the Resolution Professional and Resolution Applicant, therefore, we think it proper, to leave the matter upon the COC to reexamine this issue and if the properties/ infrastructure in the projects of the corporate debtor is available for sale/ disposal, the COC may consider taking steps for suitable correction of the Liquidation value of all the projects and subsequently, ask the Resolution Applicant to account for the same in the Resolution Plan.”

7. The learned Counsel for the Appellants challenging the directions issued in paragraph 49 and 50 of the impugned order, submitted that the total average liquidation value for Corporate Debtor as assessed by the Registered Valuers was INR 299.23 crores and the liquidation value assessed by the Registered Valuers for Universal Business Park is Rs.51,32,34,718/-. The Appellant having *pari passu* charge the liquidation value of the security interest in the Universal Business Park, comes to INR 23.09 Crores and the RP and Resolution Applicant have wrongly treated the liquidation value of the Appellants as NIL, which is not in accordance with law. The valuation given by Registered Valuers as per the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 (hereinafter referred to as the “**CIRP Regulations**”) is a statutory valuation, which cannot be tinkered with by the RP or the Resolution Applicant. Allocation of Rs.3 crores to the Appellant in the Resolution Plan is not in accordance with the amount, which the Appellants were entitled as per their liquidation value, which is INR 23.09 crores. The Resolution Plan, thus, is not in accordance with Section 30, sub-section (2) and ought not to have been approved. It is further submitted that the liquidation value, which has been determined by the two Registered valuers cannot be interfered with by the Resolution Applicant or the CoC. The CoC under the Code, does not have power to re-examine the liquidation value of the assets of the Corporate Debtor. The role has been clearly assigned to the Registered Valuers. The Appellants have raised the issue of liquidation value attributable to them in the 14th

Meeting of CoC, which objection was disregarded. Respondent No.2 relied upon a misplaced and incorrect premise that the entire area under the Universal Business Park has been sold and no asset remains with the Corporate Debtor. The Appellant Nos.1 and 2 collectively hold 46% charge over the Universal Business Park project. In any event, 89,025 sq. ft. area available with the Corporate Debtor has not been legally transferred as execution of Builder Buyer Agreement does not amount to transfer/sale. The decision of the RP and the CoC that Appellants have no liquidation value, since there was no transferrable area available with the Corporate Debtor in the Universal Business Park, is misconceived and untenable. The Appellants having voted against the Plan, they are entitled to minimum liquidation value in the allocation as per sub-section (2) of Section 30 of the Code read with Section 53(1).

8. The learned Counsel for the RP refuting the submission of the Appellants submits that Appellants are being provided INR 3 crores and further being provided the project 'The Pavilion' having liquidation value of INR 27.24 crores. The claim of security interest over Universal Business Park is based on mortgage executed in September 2010 over land and unsold super-built-up area. The fact of the matter is that in September 2010 at the time of creation of mortgage, the Promoters and Corporate Debtor had already sold area in excess of the total super area available in the project. By September 2010, the area of 1,65,115 sq. ft. had been sold by Builders Buyer's Agreement ("**BBA**") and an area of 90,606 sq. ft. have been sold by way of Conveyance Deed . No unsold inventory is available as

a security claimed by the Appellant, hence, the liquidation value of the Appellants have been treated as NIL. As per the definition of 'liquidation value' contained in Regulation 2(k) of the CIRP Regulations, no estimated realizable value of the assets of the corporate debtor could be determined as on date, since no inventory was available for the same. Thus, liquidation value has rightly been held to be NIL, which has been accepted by the Adjudicating Authority in the impugned order. The entire super area of Universal Business Park was conveyed by Conveyance Deed as well as BBA in September 2010, rather area sold was in excess of total super area and there was no super area available, which could be monetized in favour of the Corporate Debtor. Thus, in the project Universal Business Park, no liquidation value could have been ascribed to the Appellants, which have been done so rightly.

9. The learned Counsel for Respondent No.2 also adopted the submissions made by the learned Counsel for the RP and submits that the Resolution Applicant has rightly ascribed NIL liquidation value to the Appellants with regard to Universal Business Park. The entire area of the Pavilion has been given to the Appellants under the Resolution Plan, since the Appellants are only creditor with regard to Pavilion, from which it can realise its dues. As per the Scheme of the Code, the mortgage rights of the Financial Creditors does not have any relevance for the purpose of Resolution Plan submitted for the revival of the projects of the Corporate Debtor. The Appellants also have personnel Guarantee of the Promoters of the Corporate Debtor. The units mentioned under the Mortgage, which

was executed by the Promoters in favour of the Appellants had already been soled through Conveyance Deed and BBA prior to execution of Mortgage Deed, hence, the liquidation value has to be treated as NIL.

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

11. The main thrust of arguments of the Appellants relate to the liquidation value to which Appellants are entitled in the resolution process. The CIRP Regulations defines the 'liquidation value' under Regulation 2(k), which is to the following effect:

“2(k) liquidation value” means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.”

12. Regulation 27, sub-regulation (1), requires appointment of two Registered Valuers to determine the 'fair value' and the 'liquidation value' of the Corporate Debtor. Regulation 27, sub-regulation (1) is as follows:

“27. Appointment of Professionals.— (1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.”

13. The RP appointed two Registered Valuers, namely – Adroit Technical Services Private Ltd. (“**Adroit**”) and Sapient Services Private Limited (“**Sapient**”). The Valuation Report submitted by both the Registered

Valuers have been brought on record in the reply filed on behalf of Respondent No.1. We may notice certain portion of the Report by the Adroit on the Project of Universal Business Park in Part G of the Report, where following has been stated:

***“G. Location 7 : Universal Business Park, Village Badshahpur, Tehsil & District Gugugram, Haryana
Address of Property***

The subject property is a commercial project in the name of “Universal Business Park” addressed as Universal Business Park, Village Badshahpur, Tehsil & District Gurugram, Haryana, Total land area underneath the Commercial project is 2.1625 Acres.

Ownership

As per copy of ownership documents, ownership 2.1625 Acres of land is in favor of M/s Blaze Promoters Private Limited. As per the license No.58 dated 19/03/08 & collaboration agreement dated 28 September 2008 between M/s Blaze Promoters Private limited (referred as owner of land) and M/s Universal Buildwell Private Limited (referred as developers). Companies have entered into an agreement under terms & conditions by which 80% of the total super built-up area of Universal Business Park is the ownership of the M/s Universal Buildwell Pvt. Ltd. and 20% of the total built-up area of Universal Business Park is under the ownership of M/s Blaze Promoters Private Limited.

No demarcation of the 80% of the share of super built-up area and sold/unsold area has been made on each floor therefore we cannot ascertain the exact location of the areas on each floor under the ownership of the company. For the purpose of valuation, we have relied upon the

information provided by the team of Resolution Professional via mail dated 2nd April 2019, 12:24 pm.

As per the information provided to us, out of the total super built-up area, 83706.03 sq. ft. of area has been sold to the respective companies/ individuals; where the company has sold 18,500 sq. ft on 13,014 sq ft of area on 7th Floor. We believe that there is an error in the sold area statements.

Hence for the purpose of valuation we have valued 89,025.97 sq ft of balance super built-up area left under the ownership of the company.

(For details refer Title Description)

It is advised that a legal opinion is taken thereto establish any legal encumbrances on the property. Any legal encumbrance, to the title, to part or whole of the property revealed upon scrutiny, may have detrimental effect on the value ascertained, which may lead to revision of our report.”

14. The Report indicates that the Valuers noticed that total super built-up area of 83,706.03 sq. ft. has been sold and for the purposes of valuation 89,025.97 sq. ft. area was taken. Further, the total super built-up area in sq. ft. from ground to 14th Floor has been noticed as 2,15,915 sq. ft. For the purposes of valuation 89,025.97 sq. ft. was taken and after adopting the Report, rate of INR 7850/- per sq. ft. was taken and the Valuer ascribed the value of INR 55,90,83,092/-.

15. Similarly, when we look into the Report of Sapient with regard to Universal Business Park, the Valuer has also taken the total built-up area as 2,15,915 sq. ft. and has noticed that Conveyance Deed has been

executed for the area equivalent to 83,706.03 sq. ft. The observations of the Valuer is to the following effect:

“Observation:

- 1. There are total 13 floors in the tower.*
- 2. The tower consist of 3 basement floors for parking.*
- 3. Ground floor is well constructed.*
- 4. Remaining all the floors were in the condition of about to complete.*
- 5. Multiple banks are also present in the ground floor.*
- 6. Staircase leading to 4th floor is well constructed.*
- 7. There was no electricity facility.*
- 8. During our inspection, it was found that 75% work has been done satisfactorily in respect of construction.*
- 9. The total super built-up area is 2,15,915 sq. ft. out of which conveyance deed was found for the area equivalent to 83,706,03 sq. ft. Therefore, to arrive at the value of building, we have considered the remaining area for the purpose of valuation.*
- 10. For the calculation of land, value is calculated proportionately after considering the conveyance deed.*
- 11. We have given the combined value of Land and building as its work completion stage is more than 50% and some offices are also present there during our physical verification.*
- 12. To arrive at the liquidation value, we have considered a distress factor of 30% on Fair Value.”*

16. The Sapient has thus fixed the valuation accordingly.

17. Before we proceed further, we may notice the caveat, which was put by both the Valuers regarding the valuation. The Adroit under the heading 'Introduction' in para-F 'Assumptions and limiting conditions' has made following observations:

- “• *For the purpose of this valuation exercise, we have assumed that the subject property has a clear and marketable title and is free from any legal and physical encumbrances, disputes, claims and other statutory liabilities. Further we have assumed that the area of the subject property is as per the revised drawings and suggest for a legal opinion on its requisite approvals and clearances from appropriate local authorities and complies with local development control regulations.*
- *Any matters related to legal title and ownership are outside the purview and scope of this valuation exercise. Further, no legal advice regarding the title and ownership of the subject property has been obtained while conducting this valuation exercise. The client/ bank is hereby advised to take an appropriate legal opinion on the matter while taking any decision based on this report.”*

18. Similarly, Sapient in paragraph 2.10 'Legal Title' has stated as follows:

“2.10 Legal Title

We have assumed that the ownership of the subject fixed belongs to the client and is free from all encumbrances. We cannot accept any responsibility for its legal validity.”

19. The Valuation Report of both the Valuers, thus, indicate that they have valued the super area available in the project Universal Business Park excluding the area which was covered by Conveyance Deed. The Valuers proceeded on the assumption that areas, which have been conveyed no title is left with the Corporate Debtor and rest of the area can be included in the valuation. The RP in its reply in the Appeal as well as in the reply before the Adjudicating Authority has brought the facts on the record, indicating that apart from conveying of the super area, the Corporate Debtor has also entered into Builder Buyer's Agreement with the allottees and the BBA with the allottees with regard to super area in Universal Business Park was 1,65,115 sq. ft. In the reply filed by RP in the Appeal in paragraph 8, detailed facts have been reported, which is to the following effect:

“8. As per the records of the Corporate Debtor, Builder Buyer's Agreements (“BBA”) have been executed in respect of 165,115.53 sq. ft. in the said Project prior to September 2010 i.e., date of creation of mortgage in favour of Kotak Prime (i.e. 20.01.2011). In addition to this, an area of 90,606 sq. ft. has been conveyed by the Corporate Debtor by way of conveyance deeds. Therefore, the area covered under the Agreements to Sell taken together with Conveyance Deed exceeds the total saleable area and therefore, no realizable value can be attached to the Corporate Debtor from the Universal Business Park project. A table capturing details of the total available Super Built Up Area in Universal Business Park and area sold under conveyance Deeds and BBAs is annexed herewith as ANNEXURE R-1.”

20. In the rejoinder affidavit filed by the Appellants, paragraph 8 of the reply has not been specifically answered and in paragraph 42 of rejoinder affidavit, reply of paragraph 2 to 22 has been given in following words:

“42. That the contents of Para 2 to 22 are misplaced, misconceived and vehemently denied. The Appellant No.1 and Appellant No.2 relies on the submissions made in preliminary submissions and is not repeating herein for the sake of brevity.”

21. In the rejoinder, however, the Appellants have given certain details in paragraph 12 to 14, which are as follows:

“12. From a bare perusal of the working provided by the Respondent No.1, the following emerges:

<i>Universal Buildwell Private Limited- Universal Business Park Project</i>	
<i>Total Saleable Area assumed by the Resolution Professional based on the mortgage deed provided by the Objector</i>	<i>2,15,915 Sq. Ft.</i>
<i>Blaze Promoters Private Limited share of 20% in the total area not to be included</i>	<i>43,183 Sq. Ft</i>
<i>Balance Area</i>	<i>1,72,732 Sq. Ft.</i>
<i>Total area averred to be sold through conveyance deed</i>	<i>89,706 Sq. Ft.</i>
<i>Net remaining area</i>	<i>89,025 Sq. Ft.</i>

13. The Respondent No.1 has although averred that the conveyance deed in favour of the allottees aggregated to 89,706 Sq. Ft., however, no documentary evidence has been presented by the Respondent No.1 with the CoC members to end the controversy, in absence of any documentary evidence, the liquidation value payable to the Appellant No.1

and the Appellant No.2 cannot be treated as 'NIL' as claimed by the Respondent No.1 and Respondent No.2.

14. *Further the Appellant No.1 and the Appellant No.2 holds 46% percent charge over the Universal Business Park Project, therefore, any alleged conveyance deed that has been issued by the Corporate Debtor shall not include the 46% percent of the charged assets belonging to the Appellant No.1 and the Appellant No.2. Furthermore, without in any manner admitting the averments made by the Respondent No.1 in respect of liquidation value of the Appellant No.1 and the Appellant No.2, if the working sheet provided by the Respondent No.1 is taken into consideration, in any event 89,025 Sq. Ft. area available with the Corporate Debtor has not been legally transferred as execution of Builder Agreement does not amount to transfer/sale under the provisions of the Transfer of Property Act, 1882 read with the provisions of the Registration Act, 1908. Therefore, averment of Respondent No.1 and Respondent No.2 that the security interest of the Appellant No.1 and the Appellant No.2 does not have any liquidation value on account of alleged sale of all area, is on the fact of it is misconceived and untenable."*

22. From the materials brought on record, it is clear that area which is covered by Conveyance Deed was 89,706 sq. ft., whereas total saleable area of the Universal Business Park was 2,15,915 sq. ft. Pleadings of RP was categorical that by BBA, area of 165,115.53 sq. ft. was allocated, which facts have not been disputed by the Appellants. The Appellants case rather is that execution of BBA does not amount to transfer/ sale under the provisions of the Transfer of Property Act, which plea has been specifically

taken in paragraph 14 as extracted above. There can be no doubt about legal position that title is conveyed when Conveyance Deed is executed, but certain rights accrue to homebuyers under the BBA, which rights have been recognized by law Courts including the Hon'ble Supreme Court. Promoter, who has entered into a BBA with allottee and allotted a particular flat and received the payment has no right to transfer the same. Hence, the said unit is not available for the Corporate Debtor to again transfer and realise its value. From the pleadings on record, we thus, are of the view that allocation area of 165,115.53 sq. ft. is a matter of record and has to be accepted, since no other facts or material come on record.

23. We have noticed that in the Valuation Report, both the Valuers have proceeded to value the super area, which was left after deducting the area conveyed. The Valuers proceeded on the premise that the Corporate Debtor has no ownership with respect to the area, which has been conveyed and rest of the area can be valued for the purpose of valuation of the Corporate Debtor. On the record, the RP has given details of name of allottees, which were given BBA with the date of BBA. Annexure R-1 to the reply contains the details of BBA of Ground Floor and other Floors with the name of allottees and the date of BBA. All the BBA, which have been captured in Annexure R-1 are prior to September 2010. The details of areas sold through Conveyance Deed has also been given, which areas have already taken note by the Valuers. The stand taken by the RP and Resolution Applicant is that liquidation value of the Appellant has been treated as NIL, since on the date, the valuation was done, there was no super area left,

which could be monetized for the Corporate Debtor. The Corporate Debtor has sold excess area both by Conveyance Deed and BBA. We are satisfied that by the BBA, executed prior to September 2010, when the charge and mortgage was created by Promoters in the project Universal Business Park, all areas were sold. The Valuers, technically were right in taking a view that those areas, which has been conveyed by Promoters, they do not have ownership, however, the Valuers proceeded to take into consideration the areas with regard to which no Conveyance Deed was executed to be the assets of the Corporate Debtor.

24. When we look into reality, which is apparent from the materials on record, it is clear that with regard to Universal Business Park, entire area was sold by Conveyance Deed and by BBA to the allottees and the Promoters have received the money through the Conveyance Deed and BBA and after execution of the BBA, the allottees acquired the right to receive possession of the units for which payments have been made.

25. In this context, we may notice the judgment of the Hon'ble Supreme Court, where the Hon'ble Supreme Court had occasion to consider the nature of right, which accrue through a BBA to allottee and the protection, which homebuyers are required from the Courts of Law. We may refer to the judgment of the Hon'ble Supreme Court in ***Bikram Chatterji v. Union of India (2019) 19 SCC 161***, where the Hon'ble Supreme Court had occasion to consider housing and real estate allotment, Sale Deed, transfer of flats by builders/ developers to homebuyers. The Hon'ble Supreme Court was considering the real estate Project namely – Amrapali Group.

Writ petitions under Article 32 were filed by homebuyers praying for various reliefs from the Hon'ble Supreme Court. In the above context Hon'ble Supreme Court while considering the BBA made following observation in paragraph 133 and 134 of the judgment:

*“**133.** The agreement initially executed in favour of homebuyers to purchase flats may not create any right in the property in praesenti, it will be only on the execution of the registered document that title is going to be perfected, but investment in project is only of homebuyers. In this case, as they have paid money invested in projects, it is for the courts to do complete justice between the parties and to protect the investment so made and interests of homebuyers and to ensure that they get the perfect title and the fruits of their hard earned money and lifetime savings invested in the projects.*

***134.** On behalf of Bank of Baroda, learned Senior Counsel submitted that the agreement of promoter/ builder with homebuyers is unregistered as such, no right has been created in the immovable property in view of the provisions contained in Section 49 of the Registration Act. The submission ignores and overlooks the provisions of RERA which intends to prevent such frauds on homebuyers and ensure completion of projects and that of the agreement between promoters and buyers. There are various rights under the agreement as well as under RERA. The agreement entered into at the time of allotment is the basis of the investment in the projects made by homebuyers, it cannot be said to be a scrap of paper. It is their valuable investment which is required to be protected and cannot be permitted to be*

taken away by builder or secured creditors in an illegal manner. The provisions of Section 17 of the Registration Act no doubt provide that a document of title requires compulsory registration, no doubt registered document has to be executed that also has to be taken care of by the Court so as to protect the interest of homebuyers.”

26. In the above case before the Hon’ble Supreme Court, the Banks, who had security interest contended that they have agreements with the Promoters. In reference to the claim of the Banks regarding mortgage, Hon’ble Supreme Court had observed that in the facts and circumstances of the case, rights or interest of the allottees are not affected by the mortgage created by the Bankers. In paragraph 136 of the judgment, following has been held:

“136. The learned Senior Counsel on behalf of Bank of Baroda submitted that the provisions of Section 11(4)(h) of RERA provides that the promoter, after he executes an agreement for sale for any apartment, plot or building, cannot mortgage or create a charge on such an apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be. The provision has a non obstante clause. As the provision has given an overriding effect by non obstante clause, the provision is of no help to the banks as the agreement had been by promoters with homebuyers entered into earlier in point of time to the creation of the mortgage. There could not have been any mortgage created subsequently and even if validly

created, it would not affect the right and interest of the allottee as intended by RERA. Thus, the right and interest of the allottee are safeguarded by virtue of the provisions contained in Section 11(4)(h). As the project was pending, the provision intends to confer a right on the allottee and save the allottees and also their interests from such liability. Even if the provision is held not applicable on the ground that RERA came into force later, since there was no valid mortgage as held by us, it was incapable of affecting the right or interest of the allottee. Had it been ensured that the money due to Noida and Greater Noida Authorities was paid by the promoters to the authorities, the fraud of siphoning of money would not have taken place to the extent it has been done. Moreover, the money borrowed from banks has not been invested in the projects. In fact, projects required no funding. It would be iniquitous to charge the allottees with the bankers' money. Thus, in the peculiar facts and circumstances of the case, we hold that rights or interests of the allottees are not at all affected by the mortgage created by the bankers or by the dues of the Noida or Greater Noida Authorities."

27. When we revert to the facts of the present case, it is clear that the entire super area of Universal Business Pak was conveyed by Sale Deeds and by BBA, rather, the facts indicate that total area conveyed/ allotted was more than total area of Ground Floor and all the Floors. When area has been allotted to homebuyers, who have also paid the amount as per the agreement, homebuyers get an interest to receive the possession of the unit.

28. The Adjudicating Authority after considering the facts in the impugned order has considered all aspects of the matter and has noted the facts and circumstances, which were brought by the parties on record. The Adjudicating Authority has also noticed and extracted the summary of the Resolution Plan in its order. In paragraph 41 of the impugned order, following has been observed:

“41. So far as the Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited are concerned, they are proposed to be paid Rs.3 crores on the ground that the entire area under the Universal Business Park project has been sold and there are no assets belonging to the Corporate Debtor left under this project. Accordingly, the liquidation value of the assets belonging to the Corporate Debtor under this project is shown as Nil in the Part-I of the Resolution Plan. It is also mentioned that they have mortgage right over the land, on which the project namely, “the Pavillion” is situated in Sector 70A, Mauza Palra, Tehsil & Distt. Gurugram, Haryana. As shown in the Part-II of the Resolution Plan, the project is yet to be started and they will get realization of the amount in the manner as stated in Part-II of the Plan.”

29. We have also noticed the caveats given by the Valuers in their Report. The valuation of the different projects including project Universal Business Park was with the caveats as noted above. The Valuers did not enter into issue of encumbrance over the assets. The finding has been recorded by the Adjudicating Authority in paragraph 49 that since the units have already been sold, are no longer the asset of the Corporate Debtor, hence,

the liquidation value of the Universal Business Park project is NIL. The Adjudicating Authority has rightly come to the above conclusion after considering the facts and circumstances of the present case. We fully concur with the observations made by the Adjudicating Authority in paragraph 49.

30. Now, we come to the submission of the learned Counsel for the Appellants that the Adjudicating Authority committed error in directing the CoC to re-examine the issue of significant differences between the liquidation value submitted by the two Valuers . As per statutory scheme under the CIRP Regulations and the IBC Code, the liquidation value arrived by the valuers serves an important factor in the entire resolution process. The liquidation value fixed by the Valuers cannot be ignored in the resolution process. It is true that CoC on any valid reason can take a call to ask for any fresh valuation due to any relevant circumstances, but the valuation done by the Registered Valuers and average of liquidation value taken up by the Valuers serves the specific purpose and cannot be allowed to be disregarded by the CoC. In event, it is accepted that the CoC can change the liquidation value on its own, that may lead to unsatisfactory results. We, thus, are of the view that liquidation value found by the Registered Valuers cannot be allowed to be changed by the CoC. We, thus, are satisfied that direction by Adjudicating Authority to CoC to re-examine the issue of significant differences between liquidation value submitted by two Valuers was uncalled for. We may however, hasten to add that in the present case, liquidation value, which was to be ascribed to the Appellant

was an issue, which cannot be said to have determined by the Valuers in their Valuation Report. Valuers in their Valuation Report has added a caveat, which we have already noticed, which clearly left the issue to be determined while allocating the amounts to be paid to the dissenting Financial Creditors. Thus, in the facts of present case, we having concurred with the finding of the Adjudicating Authority that liquidation value of the Appellant was NIL, we see no reason to maintain the direction issued in paragraph 50.

31. In view of the foregoing discussions, we are of the view that observations and directions in paragraph 49 needs to be affirmed, whereas directions issued in paragraph 50, deserves to be deleted. We are further of the view that relief (b) and other reliefs claimed in the Appeal by the Appellants cannot be granted.

32. In result of the foregoing discussions, we dismiss the Appeal subject to deletion of paragraph 50 of the impugned order dated 11.06.2021. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

11th April, 2023

Ashwani