NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI.

Company Appeal (AT) (Ins) No. 1035 of 2020

Mrs. Nidhi Rekhan,
W/o Navneet Rekhan,
R/o E-4/23, Model Town –I,
New Delhi-110009. ...Appellant/Financial Creditor

Versus

M/s. Samyak Projects Private Limited,
111, First Floor, Antriksh Bhawan,
22, Kasturba Gandhi Marg,
New Delhi-110001. ...Respondent/Corporate Debtor

Present

For Appellant:- Mr. Manish Kaushik, Ms. Mishal Johari, Mr. Ajit Joher, Advocates.

For Respondent:- Mr. Vivek Kohli, Sr. Advocate with Yeshi Rinchen, Purbhasha Panda, Mr. Sandeep Bhuraria, Mr. Aman Anand, Advocates

J U D G M E N T

(Date: 31.01.2022)

(VIRTUAL MODE)

[Per.: Dr. Alok Srivastava, Member (Technical)]

This appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short IBC), arises out of order dated

20.10.2020 in CP(IB) No. 784(ND)/2020 (in short the 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi).

2. The facts of the appeal in brief, as stated and argued by the Appellant, is that the Corporate Debtor M/s Samyak Projects Pvt. Ltd. accepted Rs. 1,00,00,000 (Rupees one crore only) as investment from Mrs. Nidhi Rekhan, the purported financial creditor, and allotted flat Nos. A–1201 on 12thfloor and E–1301 on the 13th floor, total area admeasuring 4476 sq. ft. in project "Ansal Heights 86" in Sector 86, Gurugram after executing an agreement dated 20.7.2016 (hereafter called "Agreement").The Corporate Debtor promised to pay the Mrs. Nidhi Rekhan an assured return @ 24% per annum on the amount deposited as 'down payment' by the financial creditor vide two cheques – one cheque bearing number 000031 for a sum of Rs. 50 lakhs dated 20.07.2016 and another cheque number 000032 for Rs.50 lakhs dated 20.07.2016 - against allotment of the said flats. It is claimed by the Appellant that the Corporate Debtor issued letter dated 15.6.2019, wherein it stated that it shall continue to pay assured returns, as per Agreement dated 20.07.2016 even after the surrender of the flats until the final repayment of the principal amount as well as the

assured returns has been made. It is claimed by the Appellant that it surrendered the booking of the said flats to the Corporate Debtor which was accepted and an amount comprising of the deposited principal amount of Rs.1 Crore and assured returns were to be refunded to the financial creditor. Consequently, the financial creditor issued forty cheques dated 20.11.2018 to 31.1.2020 for amounts detailed at pp.39 – 64 of the Appeal Paperbook. The Appellant has thus claimed that a total amount of admitted debt of Rs.2,19,56,000/- (Rupees Two Crores Nineteen Lakhs and Fifty Six Thousand only) is due from the corporate debtor and in default as on 10th February 2020. The Appellant filed petition under section 7 of the IBC seeking initiation of insolvency proceedings against the Corporate Debtor on 16.3.2020, which was dismissed vide impugned order dated 20.10.2020.

3. We heard the arguments of both the parties and perused the record.

4. In the arguments, the Learned Counsel for Appellant has claimed that the Learned Adjudication Authority has dismissed the section 7 application holding that the Appellant (applicant in section 7 application) is not a 'financial creditor' under section 5(7)

of the IBC and the amount, which the applicant has invested with the Corporate Debtor is not 'financial debt' under section 5(8) of the IBC and that the default in payment on the basis of settlement agreement is not a default of the financial debt.

5. The Learned Counsel for Appellant has further argued that vide an agreement dated 20th July 2016the Appellant had booked two flats bearing Nos.A-1201 and E – 1301 in project "Ansal Heights 86" by giving a down payment of Rs. 1,00,00,000/- against a total cost of the flats which is Rs. 1,11,90,000 and the remaining balance consideration of Rs.11,90,000 was to be paid by the allottee Nidhi Rekhan or her nominee to the Corporate Debtor at the time of the handing over possession of the allotted flats complete in all respects, and upon signing and registration of the sale deeds of the said flats in favour of the allottee or her nominee and an assured return of 24% per annum on the amount paid as down payment by the allottee. He has added that the said flats were surrendered by the Appellant to the Corporate Debtor and in accordance with the Agreement, the allottee is entitled to refund of principal amount and assured return from the Corporate Debtor. The Learned Counsel for Appellant has further argued that even though the flats have not been given to the Appellant the amount

of Rs. 1 crore is still with the Corporate Debtor. He has referred to the letter of Corporate Debtor(attached at pp. 67 – 68 of Appeal Paper Book) to claim that the Corporate Debtor has agreed that the surrender of flats will not stop the assured returns as per the agreement dated 20.7. 2016 and the corrigendum agreement dated 6.9. 2017 and 31 7.2018 in respect of the said flats and therefore, his amount deposited with the Corporate Debtor is earning assured return and in such a situation the principal amount is a financial debt and the Appellant is a financial creditor under the definitions in IBC.

6. The Learned Counsel for Appellant has referred to the judgment of NCLAT in the case **Nikhil Mehta & Sons vs AMR Infrastructure Ltd. [Company Appeal (AT)(Ins) No. 07 of 2017]** wherein it is held that there are two important ingredients for a debt to be categorized as a financial debt, which are (i) the debt should be disbursed against the consideration of time value of money; and (ii) the debt should arise from a transaction having the commercial effect of borrowing and moreover Section 5(8)(f) states that *"any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of borrowing"* to claim that since both the said ingredients are

present in the instant case, and the money was raised from an allottee, the money deposited by the Appellant should be categorized as financial debt. The Ld. Counsel for Appellant has also referred to the judgment of Hon'ble Supreme Court in **M/s Orator Marketing Pvt. Ltd. vs M/s Samtex Desinz Pvt. Ltd. [Civil Appeal No. 2231 of 2021]** in this regard to claim that the amount deposited by the Appellant with the Corporate Debtor is a financial debt.

7. The Learned Senior Counsel for the Respondent/Corporate Debtor has claimed that the Section 7 application filed by the Appellant does not contain any date of default; hence such an application is not maintainable. He has also claimed that the amount deposited by the Appellant was refunded through cheques given by the Corporate Debtor in refund were not realized and hence the debt does not materialize. Moreover, pointing to the agreement dated 20.7.2016, he has claimed that the purported Financial Creditor/Appellant is only a speculative investor and therefore she cannot enjoy the status of the financial creditor. Ld. Counsel of Respondent has also referred to the judgment of Hon'ble Supreme Court in **Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. vs Axis Bank Ltd. and**

Ors [(2020) 8 SCC 401] wherein it is held that *".....what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor ; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganization of corporate debtor's business when there is financial stress."*He has also claimed that the transaction is 'undervalued' as the interest rate @ 24% per annum which is an unusually high rate of interest. Therefore, the judgment held that the Appellant may be a creditor, but is certainly not a financial creditor. He has further referred to the judgment of Hon'ble Supreme Court in **Mansi Brar vs Sudha Sharma and Anr. [Civil Appeal No. 3826/2020]** and of this Tribunal in the matter of **Sudha Sharma vs Mansi Brar and Anr. [Company Appeal (AT) (INS) No. 83 of 2020]** to emphasize that a speculative investor is not a person who is genuinely interested in possessing the housing units/apartments and therefore cannot be termed as an allottee as per explanation attached to clause (f) of section 5(8) of the IBC and, hence will not be considered a financial creditor. He has further referred to paragraphs 38 and 41 of NCLAT's judgment in **Sudha Sharma vs Mansi Brar (supra)** to emphasise that money deposited/invested for speculative purpose does not entitle a

person to take advantage of clause (f) of section 5(8) and be considered a financial creditor by virtue of being an allottee of a housing unit/flat.

8. Furthermore, the Ld. Counsel for Respondent has also referred to the judgment of NCLAT in the case of **Ankit Goyat vs. Sunita Agarwal [Company Appeal (AT)(INS) No. 1020/2019]** wherein it is held that in a situation where the allottee seeks to benefit from a "lucrative agreement" when he is "securing" his money by way of the agreement which gives him a lien over the flat/s, he cannot be considered a financial creditor but is a speculative investor who cannot be given benefit as a financial creditor under section 5(8)(f) of the IBC.

9. Before moving further, we introduce some definitions, which are relevant for this appeal:

> *"**Section 3. Definitions**. –*
>
> *(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.*
>
> Xxx xxxxxx

Section 5

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e)receivables sold or is counted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction,

including any forward sale or purchase agreement, having the commercial effect of a borrowing.

Explanation. – for the purposes of this sub-clause, -

(i) Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) The expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d),(zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

10. The relevant clauses in the Agreement dated 20.7.2016 entered between the Corporate Debtor M/s. Samyak Projects Private Limited and Ms. Nidhi Rekhan (attached at pp. 33-36 of Appeal paperbook) which are relevant for our discussion are reproduced below:-

"(3) That the Allottee has opted down payment plan and the Allottee has paid to the FIRST PARTY a sum of Rs. 1,00,00,000/- each dated 20.07.2016 and drawn on Bank of Baroda which represents about 89% (Eighty Nine Percent)

price of the Allotted Flats/Units and the receipt of which is admitted and acknowledged by the FIRST PARTY.

(4) That the remaining balance consideration of Rs. 11,90,000/- (Rupees Eleven Lacs Ninety Thousand only) with other charges, if any, shall be paid by the Allottee or their nominee(s) to the FIRST PARTY at the time of handing over possession of the Allotted Flats/Units complete in all respects, by the FIRST PARTY and upon signing and registration of sale deed(s) and/or title documents in favour of the Allottee or their nominee (s) of the said Unit/Flat.

(5) Since the Allottee has opted for DOWN PAYMENT PLAN, the FIRST PARTY hereby agrees and assures and undertakes to pay to the Allottee an assured return of 24% (twenty four percent) per annum on the amount paid by the Allottee. The assured return shall be paid annually commencing from the execution of this Agreement and the Allottee shall be entitled to the same till the termination of this Agreement.

(6) That the Allottee has made it clear to FIRST PARTY and FIRST PARTY hereby agrees, that the Allottee shall after

obtaining written consent of FIRST PARTY, be fully entitled to assign their Allotted Flats/Units or any part thereof in favour of any of their nominee(s)/purchasers at any consideration and FIRST PARTY and the Developer, upon receiving written intimation from the Allottee to that effect, will be obliged to register such Units/Flats as may be desired by the Allottee in the name of their nominated nominee without charging any transfer charges. However, the nominee (s) of the Allottee shall be under obligation to sign and execute the necessary documents/papers in respect of the said Flats/Units which would be registered in their name, PROVIDED ALWAYS it is agreed to by the Allottee that he/it shall not assign or transfer its rights in the Allotted Flats/Units or any part thereof in favour of any third person or in favour of its nominee(s) before the expiry of one year period from the date hereof.

(7) Notwithstanding anything contained herein it is specifically agreed to between the parties that after a period of one year from the date hereof, the Allottee or FIRST PARTY without assigning any reason, in its absolute discretion, is fully entitled to cancel or rescind the Allotment of the Flats/Units herein booked. Once the Allottee exercises its/his

option to cancel the booking after the specified period of one year, the Allottee shall send written intimation to FIRST PARTY upon receipt of which the FIRST PARTY shall forthwith refund the entire amount of consideration herein paid together with any outstanding amount of assured return accrued till the date of refund. Similarly, in the event, FIRST PARTY decides to cancel this arrangement/allotment, it shall be at liberty to do so by refunding the money received from the Allottee forthwith together with any outstanding amount of assured return accrued till the date of refund. Upon receipt of the refund from FIRST PARTY in the manner stated herein, the Allottee shall be left with no interest or claim or lien on the Allotted Flats/Units or any part thereof and FIRST PARTY shall be free to deal in the same in any manner in its discretion and the Allottee undertakes to execute any documents/papers in favour of FIRST PARTY or its nominee in order to surrender his/her/their claim/lien from the said allotted Flats/Units.

11. The Ld. Counsel for Appellant has referred to **Pioneer Urban Land & Infrastructure Ltd. & Anr. Vs. Union of India &Ors [(2019) SCC Online SC 1005]** Hon'ble Supreme Court has held as

follows:-

> *"50. It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, prima facie at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely*

interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death."

12. We, therefore, now examine the various clauses of the Agreement entered between the Corporate Debtor Samyak Projects Private Limited and Mrs. Nidhi Rekhan who purports to be an allottee. The above-mentioned clauses 3, 4, 5 and 6 of the Agreement are primarily concerned with the "Down Payment" and an assured rate of return of 24% p.a. and the right of the First Party/Mrs. Nidhi Rekhan, to assign the flat to any of her nominees. Clause 7 is about the right of the allottee to cancel the booking after the specified period of one year. There is no clause in the agreement which relates to the construction/completion of the flats, the time stipulated for completion of construction, any penalty to be imposed on the developer/builder for delaying

construction and other such provisions that are pertinent and germane to a housing development project and which are necessary for protecting the interest of the allottee. All such provisions are usual and necessary elements of a Builder-Buyer Agreement. We find from the said agreement that there is a "Down Payment" of Rs. 1 Crore with remaining balance of Rs. 11,90,000/- (Rupees Eleven Lakhs Ninety Thousand only) and an assured rate of return @ 24% per annum. In addition, the allottee is given the right, in its absolute discretion, to cancel or rescind the allotment of the flats/units booked through the agreement. The assured rate of return of 24% per annum is a very high rate of interest that a builder would not offer to an allottee even when she is making down payment. The Agreement in this case does not, therefore, have the necessary elements of a Builder-Buyer agreement. On the contrary, it is an agreement which is more in the nature of detailing and protecting an investment made by Mrs. Nidhi Rekhan, who is coming in the garb of an allottee. As has been held by this tribunal in the matter of **Sudha Sharma versus Mansi Brar & Anr. [Company Appeal (AT) (INS) No. 83 of 2020]** and the subsequent order of Hon'ble Supreme Court in **Mansi Brar Fernandes versus Sudha Sharma and Anr. [Civil Appeal No. 3826/2020]** which affirms the order of this Tribunal in Company

Appeal (AT) (INS) No. 83 of 2020, we find that the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A–1201 and E–1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a 'financial creditor' as defined under explanation (i) of section 5(8)(f) of the IBC. The facts in the matter of **Pioneer Urban Land and Infrastructure (supra)**support the facts of this case as in this case the Appellant is not a genuine allottee but an investor who has come as allottee with no intention of possessing the flats. The Ld. Counsel for Appellant has also referred to **Pioneer Urban Land and Infrastructure (supra)**, particularly paragraph 67 wherein it is held that "…The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers." It is noted by us that the Appellant in the instant case is not a genuine home buyer but someone who has invested a certain amount but is coming before us as a home buyer. We distinguish the above observation made in the Pioneer Urban Land and Infrastructure (supra)

judgment as the Appellant is not a genuine home buyer and hence he cannot claim benefit as an "allottee" in a real estate project and hence will not be considered a financial creditor by taking recourse to Explanation (i) of section 5(8)(f) of the IBC.

13. The Ld. Counsel for Appellant has also cited the judgment of this tribunal in **Ashok Agarwal vs Amitex Polymers Pvt. Ltd. [Company Appeal (AT(INS) no. 608 of 2020]** in support of his claim that she is a financial creditor. We find that in this judgment the NCLAT has merely classified financial and operational creditors as all belonging to the category of "creditors" and hence there is nothing specific in this judgment regarding speculative investors coming in as home buyers and yet getting the benefit of financial creditor.

14. Moreover, in the present case, where an unduly high rate of interest of 24% p.a. on the deposited amount has been assured by the Corporate Debtor, coupled with the fact that after one year of booking the flats the first party (the allottee) can cancel or rescind the agreement and take back refund along with assured interest, the depositor cannot be considered a person who is genuinely interested in purchasing of flats/apartments and can therefore get

the status of financial creditor being an allottee in accordance with Explanation (i) of section 5(8) of IBC We are of the view that the status of Financial Creditor cannot be provided to a person who, in the garb of an allottee comes in the project as a speculative investor and for no reason cancels the allotment, which is the case in the present appeal. Therefore, the benefit of section 5(8)(f) of IBC will not enure in her favour. We are of the view that the facts in the matter of **Mansi Brar Fernandes versus Sudha Sharma and Anr. (supra)** are akin to the facts of the instant case and therefore the related order squarely applies to this case.

15. In the matter of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited versus Axis Bank Limited and Ors. (2020 8 SCC 401)**, Hon'ble Supreme Court has held as follows :–

> *"42.3 The enunciation aforementioned illuminates the reasons as to why at all a financial creditor is conferred with a major, rather pivotal, role in the processes contemplated by Part II of the Code. It is the financial creditor who lends finance on a term loan or for working capital that enables the corporate debtor to set up and/or operate its business; and who has specified repayment schedules with default consequences. The most important feature, as this Court has said, is that a financial creditor is, from the very beginning, involved in assessing the viability of the corporate debtor who*

can, and indeed, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress. Hence, a financial creditor is not only about in terrorem clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically interwoven with the well-being of the corporate debtor."

16. We find that in the Agreement dated 20th July 2016 that the Appellant is relying on, there are no specified repayment schedules or consequences in the event of default. The assurance mentioned by the Appellant, and also claimed in the Corporate Debtor's letter dated 15.06.2019 are not in the nature of consequences in the event of default in payment of debt. It is also noted by us is that this letter dated 15.6.2019 was issued almost three years after the original Agreement dated 20.7.2016 was executed, and is certainly part of the agreement. We also find that neither there is a date of default in the section 7 application, nor any repayment schedule has been outlined in the said agreement. We therefore, are constrained to view the agreement not as an agreement between a homebuyer and builder, but relating to an investment made by the Appellant. The judgment in **Anuj Jain (supra)** supports such a conclusion. Therefore, we are of the clear view that the Appellant cannot claim the status and benefits as a financial creditor by

virtue of being an allottee/homebuyer under explanation (i) to section 5 (8)(f) of the IBC.

17. Thus, in our clear opinion, the Appellant, who is a speculative investor, cannot claim status and benefits as financial creditor under Explanation (i) of 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 her investment and has come in the garb of an allottee. In such a situation, the Appellant is certainly not a financial creditor holding financial debt, which is in default of payment by the Corporate Debtor, and consequently we conclude that the Impugned Order does not require any interference. The appeal is, therefore, dismissed. There is no order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
31st January, 2022.

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