

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT)(Insolvency) No. 762 of 2021

[Arising out of Order dated 06th July, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench, Allahabad) in C.P. (IB) No. 227/ALD/2019]

IN THE MATTER OF:

1. **Neha Khanna**
W/o Mr. Dinesh Khanna
6A/40, WEA, Karol Bagh
New Delhi – 110005 ...Appellant

2. **Mr. Dinesh Khanna**
6A/40, WEA, Karol Bagh
New Delhi – 110005 ...Proforma Appellant

Versus

M/s Tybros Infratech Pvt. Ltd.
Village Micholi, P.O. Seem
Tehsil Bhikyasen
Almora – 263680
Vivek.tyagi@tybrosindia.com

Also at:

5/54, 3rd Floor
Main Shankar Road
Old Rajinder Nagar
New Delhi - 110060 ...Respondent

Present:

For Appellant : **Mr. Akshat Bajpai and Mr. Shobhit Trehan,**
Advocates.

For Respondent : **Mr. Rishabh Jain, Advocate for Corporate Debtor.**

J U D G M E N T
(03rd March, 2023)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (for short 'I&B Code') against the Order dated 06th July, 2021 passed by the Adjudicating Authority (National Company Law
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Tribunal, Division Bench, Allahabad) in C.P. (IB) No. 227/ALD/2019, whereby the Adjudicating Authority rejected the Application filed by the Appellant.

Brief Facts:

Appellant's Submissions:

2. Aggrieved by the aforesaid order, the Appellant preferred the present Appeal. The Learned Counsel appearing for the Appellant submitted that the Appellant purchased two cottages at the Holiday Resort developed by the Respondent in the name & style of "EON Resort" situated at Midway Corbett Ranikhet, Near Maa Bhonadevi Temple, Ghatti – Basot Road, Village Jihad, District – Almora for a total consideration of Rs.76,33,000/- for each cottage. Accordingly, two separate Agreement to Sell dated 15.04.2016 were entered into and the Appellant paid a sum of Rs. 22,55,000/- inclusive service tax of Rs. 78,814/- at the time of signing the agreement. The balance of Rs.54,61,814/- was to be paid at the time of possession of the cottages. The Appellant paid a total sum of Rs. 45,00,000/- towards purchase two cottages at the time of executing the agreement dated 15.04.2016.

3. It is submitted that due to non-delivery of cottages within stipulated time, the Appellant approached the Respondent for full refund of already paid amount which was agreed by the Respondent and on its solicitations the Appellant paid an additional amount of Rs. 5,00,000/- which was subsumed into earlier paid amount and a loan agreement was entered into on 20.11.2018 for full amount of Rs. 50,00,000/- to be repaid to the Appellant within 3 to 6 months alongwith interest @ 18%. It is submitted

that two cancellation agreements were signed by the both the parties cancelling the Agreement to Sell dated 15.04.2016.

4. It is submitted that the having no other alternate the Appellant filed Section 7 Application before the Adjudicating Authority and the Respondent filed a Reply to the said Application on 19.08.2019 whereby it admitted all the concerns raised by the Appellant. However, the Respondent filed 2nd Reply dated 17.01.2020 without the leave of the Tribunal violating the NCLT Rules and in the 2nd Reply, the Respondent made contradictory and false statement made on affidavit by denying the existence of any loan due to the Appellant. However, in the Respondent / Corporate Debtor admitted the due amount in its 1st Reply affidavit.

5. It is submitted that by virtue of two cancellation agreements dated 20.11.2018 the allotment of two cottages provided through agreement dated 15.04.2016 and assured the return agreement dated 22.07.2016, providing assured return @ 16% per annum came to an end thereby changing the status of the Appellant from investor to that of lender.

6. It is submitted that the Learned Adjudicating Authority rejected the application by holding that the Appellant is a homebuyer and do not fall under the category of lender, who lent the money to the Corporate Debtor on the understanding that the amount which was paid to be treated as loan amount and not as homebuyer.

7. In view of the reasons as stated above the Learned Counsel has prayed this Bench to allow the Appeal by setting aside the impugned order.

Respondent's Submissions:

8. Learned Counsel appearing for the Respondent submitted that the order passed by the Learned Adjudicating Authority need no interference for the reason that the Appellant being a homebuyer has not met the mandatory threshold limit i.e. 10% allottees of the real estate project should jointly be filed the petition under Section 7(1) of the I&B Code, 2016.

9. It is submitted that the Appellant entered into two separate agreements to sell with the Respondent dated 15.04.2016 for two cottages in Phase-II at the Holiday Resort being developed by the Corporate Debtor. In the aforesaid project 97 cottages have been allotted including the Appellants out of 124 cottages. Therefore, the Appellants have not met the requisite qualification for filing application under Section 7(1) of the I&B Code, 2016.

10. The Appellants have entered to various lucrative agreement such as Agreement to Sell and Assured Return Agreement with the Corporate Debtor, therefore, the Appellants are speculative investors and not Financial Creditor within the meaning of Section 5(8) of the I&B Code, 2016. As per Clause (3) of Agreement to Sell and Assured Return Agreement, the Corporate Debtor has agreed the Appellant to pay the Assured Return as per negotiated amount. The Assured Return would be 16% of BSP received or Rs. 28,949/- per month for a period of 30 months from the date of receipt of earnest money.

11. As per Clause (4) of Agreement to Sell, the Appellant will lease back a property immediately at the time of possession to the Corporate Debtor and the Corporate Debtor shall pay the assured monthly rental at the rate given

in Annexure-A of the Agreement to Sell. Further, as per Clause (14) of Agreement to Sell, the Corporate Debtor has given an option to buy back the property from the Appellant under different rates after the expiry of different period.

12. The Learned Counsel further submitted that the case of the Appellant's is in the nature of speculative investors and covered by judgment of this Tribunal in the matter of Anikit Goyal vs. Sunita Agarwal (2021) 131 taxmann.com 219(NCLAT) para 18. Also relied upon the judgment of this Tribunal in the matter of Nidhi Rekhan Vs. Samyak Projects Pvt. Ltd. (2022) 138 Taxmann.com 236 NCLAT para 17.

13. It is submitted that the Appellants at the time of signing the agreement dated 15.04.2016 paid a consideration of Rs. 22,50,000/- for each cottage totalling to a sum of Rs. 45,00,000/- for two cottages. Further, the Appellants themselves did not want to complete the sale and has not shown the readiness and willingness in getting the possession and transfer of the said cottages. The Appellants are due payment of balance sale consideration of Rs.1,07,66,000/- for both cottages. The Appellants instead of paying the balance due amount, came forward with a proposal that they wanted to sell their rights to a buyer, which has been refused by the Company to void any confusion. Further, the Appellants proposed the post-dated cheques is to be given by the Corporate Debtor as a Security and they will bring the buyer who will pay the current market rates of the cottages to the Corporate Debtor and the amount given by the new buyer will be deposited in the Corporate Debtor bank account and after securing the balance sale consideration of

the Appellant, the Corporate Debtor will return the amount paid by the Appellants. It is submitted that the Appellants got executed the loan agreement with the aforesaid assurance that they will deposit Rs.45,00,000/- through new buyer and get their allotment cancelled. However, the Appellants have not come forward and has not paid Rs.45,00,000/- to the Corporate Debtor and the cheques given by the Appellant were dishonoured.

14. It is submitted that the cancellation agreements dated 20.11.2018, it is specifically stated that both the agreements are false fabricated and were never executed by any of the person of the Corporate Debtor.

15. In view of the reasons as stated above the Learned Counsel has prayed this Bench to dismiss the Appeal as devoid of any merit.

Analysis / Appraisal:

16. Heard the Learned Counsel appeared for the respective parties perused the pleadings, documents relied upon by them. After analysing the pleadings, the moot point for consideration is whether the Appellant has made out any case to be interfered with, the order passed by the Adjudicating Authority.

17. The Appellant filed the Application under Section 7 of I&B Code, 2016 before the Adjudicating Authority praying for Initiation of Corporate Insolvency Resolution Process against the Respondent / Corporate Debtor on the grounds of inability to pay its financial debt. Part-IV of Form-1 of the Application filed before the Adjudicating Authority in Column-1, the amount of debt disbursed shown as Rs.50,00,000/- and in the very same column it

has been mentioned that “in 2016, the Applicant and her husband purchased two cottages at the Holiday Resort being developed by the Corporate Debtor in the name & style of “EON Resort” situated at Midway Corbett Ranikhet, Near Maa Bhonadevi Temple, Ghatti – Basot Road, Village Jihad, District – Almora for a total consideration of Rs. 76,33,000/- for each cottage”.

18. Further, in the very same column, it has been stated that the two separate Agreements to Sell dated 15.04.2016 were executed between the Corporate Debtor and the Appellant, and in pursuance thereof a sum of Rs.45,00,000/- for the two cottages were paid. In Column-2, the Appellant claimed an amount of Rs.52,70,000/-, however, the said amount claimed to be under cancellation agreement dated 20.11.2018.

19. We have perused the Agreement to Sell dated 15.04.2016 from the preamble, it is clear that the Corporate Debtor in the capacity as seller and developer and the Appellant being the purchaser entered the said agreement. The covenant of the agreement emphasises that the project / cottages will take approximately 30 months to complete and the same will be delivered after completion of construction. The total consideration of each cottage mentioned as Rs. 76,33,000. /-. In Clause 14 of the Agreement to Sell, the Corporate Debtor / Seller has given a buy back option to the Appellant/ Buyer for the said property as per the terms mentioned there at. The Appellant and the Corporate Debtor also entered Assured Return Agreement dated 22.07.2016, whereby it is stated that the Corporate Debtor will pay @ 16% per annum of BSP received or Rs. 28,949/- as Assured Return rate for

a total period of 30 months or till possession whichever is later. There is no doubt that the Appellant had purchased two cottages and to that effect entered Agreement to Sell and also entered an agreement for Assured Return dated 22.07.2016. From the perusal of the said document, it is crystal clear that the Appellant is a homebuyer and paid an amount of Rs.45,00,000/- pursuant to the agreement and terms & conditions as mentioned there at.

20. The bone of contention of the Appellant is that the Appellant cancelled the Agreement to Sell by a Cancellation Agreement dated 20.11.2018. Per contra the Respondent / Corporate Debtor in its Reply Affidavit specifically stated that the said Cancellation Agreement was not signed by the Corporate Debtor nor any of its authorised person / representative on behalf of the Corporate Debtor, therefore, the said Cancellation Agreement is invalid in the eye of law. From the perusal of the said Cancellation Agreement dated 20.11.2018 annexed as Annexure A-11 at pages 152 to 155, we find that the only signature of the buyer affixed on each page of the said document, however, there is no signature affixed by the Corporate Debtor and there are no signatures of the witnesses. Therefore, this Tribunal reluctant to decide its authenticity and validity.

21. The Adjudicating Authority rejected the Application by observing that the Appellant being single homebuyer cannot maintain the petition for the reason that the minimum threshold for Financial Creditors in the case of homebuyers as per Section 7(1) proviso as amended by act one of 2020 which read as under:

“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.”

22. The Hon’ble Supreme Court in the matter of **Manish Kumar Vs. Union of India & Anr. (W.P. (C) No. 26 of 2020)**, whereby the Hon’ble Supreme Court upheld the above amendment and therefore, the Adjudicating Authority need to follow the provision of law scrupulously while entertaining the petitions of this nature.

23. As stated supra, it is unequivocal that the Appellant is a homebuyer and there is no such documentary evidence to establish that the Appellant is a Financial Creditor, who lent the money to the Corporate Debtor within the meaning of Section 5(7) of the I&B Code, 2016.

Conclusion:

24. Having considered the rival submissions, this Tribunal comes to an irresistible and inescapable conclusion that the order passed by the Adjudicating Authority dated 06.07.2021 need no interference.

25. Resultantly, the Appeal sans merit and the same is liable to be dismissed. Accordingly, the Appeal is dismissed. No orders as to cost.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Mr. Kanthi Narahari]
Member (Technical)**

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