IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 6
(IB)-454(PB)/2023

IN THE MATTER OF:

Rahul Gyanchandani & ors. .... Petitioner/Applicant

v.

Parsvnath Landmark Developers Private Limited .... Respondent

Order Under Section 7 of Insolvency & Bankruptcy Code (IBC), 2016

Order delivered on 17.10.2023

CORAM:
SH. ASHOK KUMAR BHARDWAJ
HON'BLE MEMBER (JUDICIAL)

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

(HEARING THROUGH PHYSICAL MODE & VC)

PRESENT:

For the Petitioner	:	Mr. Rajat Juneja, Mr. Karan Rajpurohit, Advs.
For the Financial Creditor	:	Mr. Sataroop Das, Adv.

ORDER

1. Indubitably the captioned petition has been preferred by 4 Petitioners while the total number of allottees qua the CD is 488. As can be seen from the proviso under Section 7(1) of the IBC, 2016, a petition on behalf of the Homebuyers (as Financial Creditors in a class) is maintainable only if either 100 in number or 10% of the allottees join the petition. Apparently, the Petitioners before us are neither 100 in number nor are they 10% of the allottees. Thus exercise of the petition is not maintainable.

2. Nevertheless, Ld. Counsel appearing for the Petitioner relied upon the judgement of the Hon'ble Supreme Court in the matter of ***"Kotak Mahindra Bank Ltd. Vs. A. Balakrishnan & Anr."*** in **Civil Appeal No. 689 of 2021** to espouse that since the petitioner has a decree in its favour passed by RERA , they need to be treated as Financial Creditor and the amount payable by them being over Rs. 1 crore which is defaulted to be paid by the CD, the present petition is maintainable. A reference has been made to Para-53 of the judgement which reads thus:

"53. Having held that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the ambit of its definition under clause (8) of Section 5 of the IBC, as a natural corollary thereof, the holder of such Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. As such, such a "person" would be a "person" as provided under Section 6 of the IBC who would be entitled to initiate the CIRP."

3. On the contrary, the Ld. Counsel appearing for the CD relied upon the recent judgement passed by the Hon'ble Supreme Court in the matter of **"*Vishal Chelani & Ors. Vs. Debashis Nanda*"** in **Civil Appeal No. 3806 of 2023**. With reference to the judgement, he submitted that the petitioner could approach RERA only because they are Homebuyers, thus after the decrees passed by RERA, their classification/status cannot be changed from the Homebuyers to Financial Creditors. Para 8 & 9 of the judgement read out by Ld. Counsel for the CD are thus:

"8. The Resolution Professional's view appears to be that once an allotted 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.

9. In view of the foregoing reasons, the impugned order is hereby set aside; the appellants are declared as financial 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.

The appeal is allowed in the above terms."

4. As far as the reliance placed by the Ld. Counsel for the Petitioner on the judgement of the Hon'ble Supreme Court in the matter of "***Kotak Mahindra Bank Ltd. Vs. A. Balakrishnan & Anr."*** (Supra) is concerned, we find that in the said case the appellant had approached proceedings under the SARFAESI Act for recovery of debt. It was the plea of the appellant before the Hon'ble Supreme Court that once the recovery certificate had been issued in its favour, the amount qua which such certificate was issued was to be treated as Financial Debt in terms of sub-clause 1 of Section 5 of the IBC, 2016. In the said case, Kotak Mahindra Bank Limited was a Financial Creditor, when it approached the Debt Recovery Tribunal under the SARFAESI Act. Its status remained the same even after the issuance of a recovery certificate in its favour. The judgement in Kotak Mahindra Bank Limited was on distinct facts. As has been ruled by the Hon'ble Supreme Court in ***"Collector of Central Excise, Calcutta Vs. M/s Alnoori Tobacco Products and Anr."*** **in Appeal (civil) 4502-4503 of 1998**, a judgement cannot be read as an institution and can be relied upon only in such cases where the facts of the case report are para materia to the one in which the judicial precedent sought to be relied upon is given.

5. While the judgement in ***"Kotak Mahindra Bank Ltd. Vs. A. Balakrishnan & Anr."*** is distinct in facts, we find that the view taken by the Hon'ble Supreme Court in the case of ***"Vishal Chelani & Ors. Vs. Debashis Nanda"*** (SUPRA) applies to the issue arising in the present petition regarding maintainability. We are bound by the view taken by the Hon'ble Supreme Court in the matter of ***"Vishal Chelani & Ors. Vs. Debashis Nanda",*** we

have no option but to reject the petition as not maintainable; Ordered accordingly. It is made clear that the present order will not stand in the way of the Petitioners to avail such remedies as are available to them in accordance with law.

6. Accordingly, (IB)-454(PB)/2023 stands dismissed.

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(AVINASH K. SRIVASTAVA)	**(ASHOK KUMAR BHARDWAJ)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

17.10.2023 - Vinod Arora