

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II**

INTERLOCUTORY APPLICATION. No. 1670/2020

In

CP(IBC)No. 2517/MB/C-II/2018

*Application filed under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016.*

In the matter of

Bal Krishna Gupta,

residing at: 1501, A-Wing, Mount Alps,
Bhakti Park, Wadala (East),
Mumbai-400037.

...Applicant

v/s

**S. Gopalkrishnan, Resolution Professional,
Monarch Brookfields LLP,**

Having his registered address at:
R-2/202, Moraj Riverside Park, Takka,
Panvel, District-Raigad, Maharashtra-410206.

...Respondent

In the matter between:

Capri Global Capital Limited Petitioner

v/s

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 1670/2020

In
CP No. 2517/MB/C-II/2018

Monarch Brookfields LLP

...Corporate Debtor

Order Pronounced on: - 15.12.2023

Coram:

Shri. Anil Raj Chellan : Member (Technical)

Shri. Kuldip Kumar Kareer : Member (Judicial)

Appearances (in Physical Mode) :

For the Applicant : Adv. Pulkit Sharma a/w Adv. Abhishek Adke and Adv. Sagar Vichare.

For the Respondent : Adv. Amir Arsiwala.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member Judicial.

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 praying for directions to the Respondent, who is the Resolution Professional of the Corporate Debtor, inter-alia seeking exclusion of Flat No.802 of the building known as Monarch Brookefields from the assets of the Corporate Debtor, as the said

flat was purchased by the Applicant from the Corporate Debtor for adequate consideration prior to the commencement of CIRP.

Facts of the case as per the Applicant in brief:

2. Capri Global Ltd i.e., the Financial Creditor, had instituted a petition for Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor u/s 7 of the Code and the same was allowed by the Hon'ble Tribunal on 27th September, 2019 by way of an admission order as on that date. The Respondent has been appointed as a resolution professional of the Corporate Debtor vide order dated 19th November, 2019.
3. The Applicant had purchased a flat in the real estate project of the Corporate Debtor being Flat No. 802, Building name- Monarch Brookefields LLP, Wing-Florida, Kalamboli, Navi Mumbai (**'flat in question'**) for a total consideration of INR 49,80,000/- (Rupees Forty-Nine Lakhs and Eighty Thousand only) excluding the amount paid for stamp duty, registration and VAT & Service Tax. Pursuant to the payment of the consideration amount, the Applicants and the Corporate Debtor had executed and registered an Agreement of Sale on the same day i.e. on 31.03.2015.
4. The Applicant states that after the registration of above-mentioned agreement, the Applicant became the owner of the said flat and that the

right, title and interest of the said flat now belongs to the Applicant and not to the Corporate Debtor any more. When the agreement was executed and the construction was not complete, it was the sole responsibility of the Corporate Debtor to complete the balance construction of the building and handover the property to the Applicant.

5. In the meantime, a Company Petition captioned above, stood admitted against the Corporate Debtor under the provisions of the Code and the CIRP commenced against the Corporate Debtor. Accordingly, the IRP made a public announcement on 24th November, 2019 inviting claims from various creditors of the Corporate Debtor. Pursuant to the afore-stated public announcement, the Applicant had lodged his claim by way of a claim affidavit dated 07.12.2019 on 09.12.2019 along with the supporting documents and objections to the Resolution Professional ('RP') of the Corporate Debtor. The objections which were raised by the Applicants before the RP were that: a.) Vide Registered Agreement dated 03.07.2015 executed between the Applicants and the Corporate Debtor, the Applicants became absolute and undisputed owners of the right, title and interest in the Flat No. 801, Building name- Monarch Brookefields LLP, Wing-Florida, Kalamboli, Navi Mumbai; b) The Corporate Debtor/Builder was in custody/possession of the flat only to complete the project with no right, title and interest in the property; c) that the said flat cannot be treated as part of the Corporate Debtor's assets and hence, its value is immaterial; and

- d) since the construction cost, which is the liability of the Corporate Debtor is not determined, the value of claim cannot be ascertained until and unless the cost of completion of the project is determined.
6. The Resolution Professional ('RP') of the Corporate Debtor had sent a letter dated 03.02.2020 to the Applicant accepting the claim made by the Applicant and made the Applicant a part of the Committee of Creditors. However, the RP rejected that the flat unit belongs to the Applicants. According to the RP, the flat unit belongs to the Corporate Debtor. The RP had rejected the claim of ownership over the flat on the ground that as per Section 17 of the Real Estate (Development and Regulation) Act of 2016, the title in the property can be transferred from the promoter to the allottee only after the building is complete and the occupation certificate is obtained.
7. Since the RP had refused to exclude the asset (i.e. Flat No. 802) from the assets of the Corporate Debtor in CIRP and instead treated the same as the part of the assets belonging to the Corporate Debtor, the Applicants herein are constrained to file the present application.
8. **Contentions of the Respondent:** The main contentions of the Respondent are summarily captured below:

- I. Mere execution of Agreement for Sale and payment of entire consideration does not transfer and convey the title in the said properties in favour of the Applicant. The transfer can be effectuated only once the building is completed and the land and building is conveyed by the Corporate Debtor as per section 11 of MOFA and section 17 of RERA.
- II. Without Occupation Certificate, the properties purchased by the Applicant cannot be formally conveyed by the Corporate Debtor and hence, the same forms the asset of the Corporate Debtor.
- III. Section 54 of the Transfer of Property Act, 1882 clearly and in unambiguous terms states that the Contract for Sale does not, of itself, create any interest in or charge on such property.
- IV. Flat in question has already been mortgaged by the Corporate Debtor with the Financial Creditor even prior to the execution of the Agreement of Sale with the Applicant. Hence, there is already a claim of the Financial Creditor holding secured charge over the flat in question. Therefore, the application of the Applicant should be dismissed.

9. **Rejoinder of the Applicant:**

- a) The contention of the Respondent that the title in the property can be conveyed only when the building is completed and the land and building is conveyed/transferred in favour of the society is completely misplaced

and based on misunderstanding of the provisions of RERA, MOFA and TOPA.

- b) The Insolvency Professional has to distinguish between assets owned by the Company and the assets in possession of the Corporate Debtor in the capacity of trustee.
- c) The Applicants in their rejoinder have placed reliance upon the judgment of Hon'ble Supreme Court of India in the matter of Bikram Chatterji v/s Union of India in W.P.(C) No. 940 of 2017 dated 23.07.2019. The Applicants submit that the said matter relates to the insolvency proceedings of Amrapali Group in which identical questions arose before the court. In Para 116 at page 239 of the above-quoted judgment, the Court has stated that it is apparent that after transfer of conveyance deed, the title vests in the allottee and of the common area in association of allottees. No title remains with the promoter. Hence, the interpretation done by Insolvency Professional in Para 10 of the Reply stands demolished as interpretation of Supreme Court is totally opposite that of the Insolvency Professional.
- d) It is submitted that RERA is restricted to protect the rights and interest of the allottees of the flat purchasers. It does not, in any manner, take away the rights under the existing statute like Transfer of Property Act. It creates further rights in favour of the purchasers and any interpretation so as to overrule the rights of purchasers and provisions of Transfer of Property Act in favour of any creditors who have created rights on

receivable post the agreement being registered would ultimately kill the soul of the provision of RERA.

- e) The Hon'ble Court made it clear in the above stated judgment that the rights and interest of the home buyers are to be safeguarded and fraud cannot be perpetrated against them by selling the flats and depriving them of hard-earned money and savings of their entire life.
- f) The plea of the Respondent that the title to the property cannot be conveyed without occupation certificate is again completely misplaced, as the occupation certificate only allows the allottees to legally occupy the property and the same has nothing to do with the title to the property. Further, the obligation to obtain O.C. is upon the builder and buyers cannot be deprived of their legitimate ownership rights, if the builder fails to obtain O.C.

ANALYSIS AND FINDINGS

- 10. We have heard the Counsel for the parties and have gone through the record, pleadings and submissions.
- 11. During the course of arguments, it has been contended by the Counsel for the Applicant that the flat in question was purchased by the Applicant from the Corporate Debtor on the basis of registered sale agreement executed on 31.03.2015 and the entire sale consideration also stands paid to the

Corporate Debtor and nothing remains to be paid. The RP has not challenged the validity of the sale agreement nor has he denied the fact that the entire sale consideration stands paid. Therefore, the flat in question cannot be treated as an asset of the Corporate Debtor, as for all intents and purposes the same stands transferred to the Applicant.

12. On the other hand, the Counsel for the RP has argued that the flat in question cannot be treated as the property of the Applicant merely on the basis of the sale agreement as till date no conveyance deed has been executed in favour of the Applicant. The Counsel for the RP has further contended that even the occupancy certificate has also not been issued by the concerned authority i.e. RERA and therefore, physical possession cannot be said to be with the Applicant. Apart from that, the Applicant cannot treat herself to be the absolute owner of the flat in question in the absence of any conveyance deed which was admittedly never executed in her favour. Counsel for the RP further submits that the flat in question has been mortgaged by the Corporate Debtor to the Financial Creditor and hence, it is the Financial Creditor who has a claim over the flat in question

and not the Applicant herein. In view thereof, the Counsel for the RP has prayed for the dismissal of the present Application.

13. We have carefully scrutinized the rival submissions made by the counsels for the Applicant and the Respondent and we have given our thoughtful consideration to the submissions, as above.

14. By way of this IA, the applicant is seeking exclusion of Flat No. 802, which is the part of buildings are known as Monarch Brookfields, from the assets of the Corporate Debtor on the ground that the Applicant has purchased the aforesaid flat from the Corporate Debtor on the basis of registered agreement for sale, as disclosed para 4.2 of IA and the entire consideration in respect of the said flat also stands fully paid at INR 49,80,000/- only (Rupees Fourty-Nine Lakhs and Eighty Thousand only). These facts have not been disputed by the RP.

15. The primary objection raised by the IRP is that with the execution of sale agreement in question, the title cannot be said to have been conveyed to

the Applicant nor can he claim to have become the owner of the flat. The Counsel for the RP has further contended that the physical possession is also not with the Applicant as the occupancy certificate has also not been issued yet in respect of the building in which the flat in question is situate. The RP further alleges that the flat in question has already been mortgaged by the Corporate Debtor with the Financial Creditor/Petitioner in the above-captioned matter prior to selling it to the Applicant. Therefore, the learned Counsel for the RP submits that there is already a claim of a secured financial creditor over the flat in question. Thus, in view of the aforesaid, the Counsel for the RP has prayed for the dismissal of this application.

16. Having thoughtfully considered the contentions raised on behalf of the RP, we are of the considered view that merely because no conveyance deed has been executed in respect of the flat in question, it cannot be said that the Applicant has no right over the same. More so, when it is not disputed that the registered sale agreement was executed in favour of the Applicant in respect of the flat in question and the entire sale consideration also stands

fully disbursed. Once the entire sale consideration was received by the Corporate Debtor and the registered documents were executed, it was incumbent upon the Corporate Debtor to have executed the deed of conveyance subject of course to completion of some other formalities. If the conveyance deed was not executed, it was due to something which was required to be done on the part of the Corporate Debtor. Therefore, the Corporate Debtor cannot be allowed to take advantage of its own wrongs to defeat the valuable rights of the Applicant.

17. It has been pointed out that the occupancy certificate in respect of flat has not been issued and therefore, the Applicant cannot be said to be in possession of the same. Here again, it needs to be observed that it was duty of the Corporate Debtor to have obtained the occupancy certificate and if it was not obtained, the Applicant cannot be penalized for the fault or blame which is attributable to the Corporate Debtor alone.

18. In the given facts and circumstances of the case, we are of the considered view that since the entire sale consideration in respect of the flat in question

stood paid to the Corporate Debtor long back as per the agreement for sale executed between the Applicant and the Corporate Debtor, merely because the conveyance deed has not been executed on account of the fact that the occupancy certificate has not been issued due to some issues being unresolved with the town planning authority viz. CIDCO pertaining to the real estate project, it cannot be said that the flat in question is liable to be treated as the property/asset of the Corporate Debtor.

19. In so far as the question of mortgage of the flat in question by the Corporate Debtor in favour of the Financial Creditor prior to the execution of sale agreement is concerned, we leave it open to the Applicant to pursue his legal remedies against the Corporate Debtor and/or the Mortgagee to perfect his right, title and interest in the flat in question as free, clear and marketable.

20. As a result of the above discussion, we deem it appropriate to partly allow the application and accordingly, **we partly allow the I.A. No. 1670 of 2020** in CP(IB) No. 2517/MB/C-II/2018 on the following terms:

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 1670/2020

In

CP No. 2517/MB/C-II/2018

ORDER

- a. Prayer in terms of Para 11(i) of the application of the Applicant is **allowed**.
- b. The Resolution Professional of the Corporate Debtor shall exclude the flat in question from the assets of the Corporate Debtor;
- c. All other prayers of the Applicant stand rejected; and
- d. This IA is accordingly disposed of to the extent indicated above.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)