

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No.1336 of 2023
& I.A. No.4741 of 2023**

IN THE MATTER OF:

Dheeraj Raikhy

...Appellant

Versus

Raheja Developers Ltd.

...Respondent

Present:

For Appellant: Mr. Sonal Anand, Ms. Surbhi Singh, Advocates.

For Respondent: Mr. Gaurav Mitra, Ms. Suditi Batra, Mr. Adit Singh, Ms. Manmeet Kaur, Mr. Abhishek Rana, Ms. Gaurangi Khanna, Advocates.

O R D E R

17.10.2023: Heard learned counsel for the parties. This Appeal has been filed against the order dated 08.08.2023 by which the application filed by the Appellant under Section 7 has been rejected. The Adjudicating Authority relying on the judgment of this Appellate Tribunal held that the decree-holder does not change its original character of being a Real Estate Allottee and this being a case of a single allotment, does not meet the threshold requirement as per second proviso to Section 7(1) of the I&B Code.

2. Learned counsel for the Appellant challenging the order of the Adjudicating Authority has placed reliance on judgment of this Appellate Tribunal in **“2020 SCC OnLine NCLAT 680, Sushil Ansal vs. Ashok Tripathi & Ors.”**. He has relied on Para 19 of the judgment, which is to the following effect:

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“19. Sub-clause (f) of sub-section (8) of Section 5 provides that any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing would fall within the ambit of ‘financial debt’ and the explanation added to sub-section by Act No. 26 of 2018 provides that 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. Thus, the relevant consideration for determination of ‘financial debt’ would be whether the debt was disbursed against the consideration for the time value of money which may include amount raised from an allottee under a Real Estate Project, the transaction deemed to be amount having the commercial effect of a borrowing. Since the initial transaction was an allotment under a Real Estate Project, there can be no doubt that such transaction has the contours of borrowing as contemplated under Section 5(8)(f) of the 1&B Code. However, the case set up by the Respondent Nos. 1 and 2 before the Adjudicating Authority is not on the strength of a transaction having the commercial effect of a borrowing, thereby clothing them with the status of Financial Creditors’ but on the strength of being decree-holders’. It having been noticed that before the Adjudicating Authority Respondent Nos. 1 and 2 staked claim in their capacity as ‘decree-holders’ and they having approached ‘UP RERA with complaints for refund of money culminating in issuance of a Recovery Certificate by the ‘UP RERA’ in terms of order dated 10th August, 2019, it cannot lie in their mouth that they

are the allottees and the amounts raised from them as allottees under the Real Estate Project deemed to be having the commercial effect of a borrowing would clothe them with the capacity of being Financial Creditors'. Such argument being absurd and incompatible with their plea before the Adjudicating Authority and the events following filing of complaints before the 'UP RERA' and leading to passage of Recovery Certificate needs to be rejected outright. Respondent Nos. 1 and 2 neither asserted nor sought triggering of Corporate Insolvency Resolution Process in a purported capacity as allottees of Real Estate Project but sought initiation of Corporate Insolvency Resolution Process against the Corporate Debtor on the strength of being 'decree-holders' which owed its genesis to the Recovery Certificate issued by the 'UP RERA. It is, therefore, required to be determined whether in their projected capacity as 'decree-holders' Respondent Nos. 1 and 2 could maintain an application under Section 7 as 'Financial Creditors'."

3. Learned counsel for the Respondent relying on the judgment of Hon'ble Supreme Court in **"Civil Appeal No.3806 of 2023, Vishal Chelani & Ors. vs. Debashis Nanda"** submits that now the issue is covered by judgment of the Hon'ble Supreme Court decided on 06.10.2023.

4. Learned counsel for the Appellant submits that the judgment of **'Vishal Chelani'** is distinguishable from the facts of the present case.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. Learned counsel for the Respondent has relied on judgment of Hon'ble Supreme Court in '**Vishal Chelani**', where in Para 8 following has been held:

“8. The Resolution Professional's view appears to be that once an allottee 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.”

7. In view of the law laid down by the Hon'ble Supreme Court, it is now well settled that the status of the party i.e. allottee does not change and therefore the Adjudicating Authority has rightly concluded that threshold being not met one allottee cannot trigger the insolvency. We are of the view that rejection of Section 7 application cannot be faulted.

8. In view of the above, we do not find any merit in the Appeal. Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

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