

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

**IA No. 3005 of 2021**  
**In**  
**CP (IB) 2517(MB) of 2018**

Under Section 60(5) of the Insolvency and  
Bankruptcy Code, 2016 read with Rule 11 of  
the N.C.L.T. Rules, 2016.

**IN THE MATTER OF**

**Mr. Vidyanand Mulik**

Residing at A-901, Shree Ganesh CHS Ltd,  
ICICI Bank, Plot No.09, Sector-1, Vashi,  
Navi Mumbai-400 703.

**... Applicant**

v/s.

**Mr. Arun Kapoor**

Resolution Professional of Monarch  
Brookefields LLP  
G-601, Army Co-operative Housing Society,  
Sector- 9, Nerul (East), Navi Mumbai,  
Maharashtra - 400706.

**... Respondent**

**IN THE MATTER OF**

**M/s. Capri Global Capital Ltd.**

502, Tower-A, Peninsula Business Park,  
Senapati Bapat Marg Lower Parel Mumbai,  
Maharashtra.

**... Financial Creditor**

v/s.

**M/s. Monarch Brookefields LLP**

Survey No. 113/O Akurli, Village Panvel,  
Raigarh, Maharashtra - 410206

**... Corporate Debtor**

**Order delivered on: - 10.04.2024.**

**Coram:**

**Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)**

**Hon'ble Shri Anil Raj Chellan, Member (Technical)**

*Appearances (Hearing in Physical Mode):*

For the Applicant : PCS. Mr. Nitish Vithal Bangera.

For the Respondent/RP : Counsel Mr. Amir Arsiwala a/w Ms.  
Nupur Shah a/w Vidit Divya Kumat.

## **ORDER**

*Per: - Coram*

1. The present Interlocutory Application has been filed by the Applicant praying for the following reliefs: (a) to include the name of the Applicant in the list of flat buyers; (b) to allot flat no. 202-Arizona along with covered car parking in the name of the Applicant; (c) to pass such other orders as the Tribunal deems fit.
2. Brief facts necessary for disposal of the present Application are as follows:

- a. The Applicant bought Flat No. 202 (being hereafter referred to as “**the flat in question**”) admeasuring 32.283 sq. mtrs. plus 9.187 sq. mtr. Terrace) in Wing name-Arizona by entering into a registered Agreement for Sale dated October 1, 2015 with the Corporate Debtor for a consideration of Rs.27,00,000/-. The Applicant had paid the consideration in full and the same is acknowledged in the receipt attached to the registered agreement for sale.
- b. Corporate Insolvency Resolution Process (CIRP) against M/s Monarch Brookefields LLP (the Corporate Debtor) was initiated vide Order of the Tribunal dated 27.09.2019 in the above-captioned petition and Mr. S Gopalakrishnan was appointed as Interim Resolution Professional (IRP).
- c. IRP issued a public announcement in Form ‘A’ inviting claim under Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the last date for submission of claim was 07.12.2019. The Applicant filed his claim on 24.11.2019. The claim of the Applicant was admitted and his name was reflected in the list of flat buyers at serial no.6. However, on 22<sup>nd</sup> November 2021, the Applicant received an email from the respondent stating that his claim has been rejected as the Resolution Professional (‘RP’) could not find the details of payments made by the Applicant to the Corporate Debtor.
- d. As per the order of Tribunal dated 03.08.2021, the IRP was replaced and Mr. Arun Kapoor was appointed as Resolution Professional (RP) of the Corporate Debtor. The erstwhile IRP

issued a public announcement dated 25.02.2021 for inviting Expression of Interest (EoI) from prospective resolution applicants. After receiving resolution plan from the prospective resolution applicants, two plans were considered and put to vote and the resolution plan submitted by Planet Builders and Developers was unanimously approved by the members of CoC. Hence, the Respondent filed an I.A. No. 70/2022 for approval of a Resolution Plan before the Tribunal. The said Application for approval of Resolution Plan is pending adjudication before this Hon'ble Tribunal.

- e. Being aggrieved by the rejection of his claim, the Applicant herein has filed this application before the Hon'ble Tribunal impugning the rejection of claim by the Respondent.

3. **Reply of the Respondent:** The Respondent has filed his reply on affidavit dated 05<sup>th</sup> April, 2022. The reply of the respondent is briefly summarized hereinbelow:

- a. The present application is not maintainable as the Applicant cannot be considered as "financial creditor" of the Corporate Debtor.
- b. The Respondent states that there is absolutely no proof of any amount paid to the Corporate Debtor. The Respondent further submits that the books of accounts as well as the bank statements of the Corporate Debtor do not show the receipt of any amount from the Applicant. Therefore, the Applicant could not be considered as "financial creditor" of the Corporate Debtor and thus, his name was removed from the list of creditors.

- c. The resolution plan submitted by one M/s. Planet Builders and Developers was approved by the CoC in its 13<sup>th</sup> meeting held on 15.11.2021. Therefore, if this Tribunal considers granting any relief to the Applicant at this belated stage, then the same would derail the CIRP of the Corporate Debtor thereby causing grave prejudice to the other genuine allottees.

4. **Submissions on behalf of the Applicant:**

- a. Counsel for the Applicant submits that this Tribunal in the case of Prakash Matlani & Anr. v/s. Arun Kapoor in I.A. No. 1128 of 2022 in the above-captioned petition, vide Order dated 13.01.2023 had allowed the application wherein the payment was made to the third party which is exactly similar to the facts of the present case. Learned Counsel for the Applicant further submits the aforesaid order has been upheld by the Hon'ble NCLAT in CA(AT)(Ins.) No. 240 of 2023 vide Order dated 28.02.2023.
- b. Counsel for the Applicant submits that the Applicant is an allottee/homebuyer and it is well settled position in statute law as well as the case laws decided by the Apex Court that an allottee/homebuyer is a financial creditor under the provisions of the Code.
- c. Counsel for the Applicant states that the Corporate Debtor has perpetrated fraud upon the homebuyers by selling flats for cash, selling one flat to two buyers, taking sale consideration in group companies and mortgaging the flat which have already been sold, without the knowledge and consent of the buyers, etc. It is

the contention of the learned Counsel for the Applicant that the home buyers are made to lose their flat in the resolution plan for no fault of theirs.

5. **Submissions of the Respondent:**

- a. Counsel for the Respondent contended that the Respondent/RP was neither able to trace the payments allegedly made by the Applicant to the Corporate Debtor in the bank statements nor in the books of accounts. Counsel for the Respondent argues that since no money has been raised by the Corporate Debtor in relation to the real estate project from the Applicant, the Applicant, in the absence of disbursal of debt, cannot be classified as a financial creditor under the provisions of the Code and hence, the Applicant was rightly removed by the Respondent from the list of creditors.
- b. Counsel for the Respondent has objected to the maintainability of the application on the ground that the Applicant is not a financial creditor and hence, he has no locus. Counsel for the Respondent further avers that the reliefs sought by the Applicant for allotment of flat and covered car parking in his name cannot be granted by this Tribunal under the jurisdiction of Section 60(5) of the Code as the same has no nexus with the insolvency of the Corporate Debtor.

**Analysis and Decision:**

6. We have heard the Counsels appearing for their respective parties and we have gone through the records.

7. The execution of the registered Agreement for Sale dated 01<sup>st</sup> October, 2015 is not disputed by the Respondent. It is the case of the Respondent that the Applicant has not paid any money to the account of the Corporate Debtor and therefore, the claim of the Applicant cannot be entertained and hence, according to the Respondent, the removal of the Applicant was fully justified in facts and law.
8. On perusal of the application and the documents annexed thereto, we find that the clause 1.4 of the aforesaid agreement states that the sale consideration for the flat is Rs. 27 lakhs and the allottee has paid Rs. 27,00,000/- (Rupees Twenty-Seven Lakhs only) being the Full and Final amount as per the receipt attached to the agreement. We have also perused the copy of the aforementioned receipt. The receipt states that Rs. 27,00,000/- has been received from the Applicant in full and final towards the sale of Flat No. 202 on or before the date of execution of the agreement for sale. We wish to add that the aforesaid receipt forming part of the registered agreement has been signed by the partner (viz. Mr. Gopal Thakur) on behalf of the Corporate Debtor and by the two witnesses. Therefore, it would not be correct for the Respondent to say that no payment has been made by the Applicant to the Corporate Debtor in respect of the said flat as the agreement for sale itself states that the amount has been paid by the Applicant in full and final towards the sale of the flat specified therein.
9. Further, the Applicant has placed on record the bank statement evidencing the payments made by him towards the discharge of sale consideration by way of an affidavit dated 20<sup>th</sup> November, 2023. On perusal of the bank statements annexed to the above-mentioned affidavit, it is evident that the Applicant has made the payment of Rs.

21,50,000/- through his Abhudaya Bank Account to Monarch Realty on 06.08.2013 and Rs. 5,50,000/- through his Axis Bank Account to Monarch Realty on 16.05.2013. This evidence, when read in tandem with the registered Agreement for Sale dated 01<sup>st</sup> October 2015, will lead to a conclusion that the sale consideration has been paid in full by the Applicant and the payments referred-to-above have been made at the behest of and/or as per the directions of the Corporate Debtor towards the sale consideration. Hence, it is not correct to say that that the Corporate Debtor is not in receipt of the sale consideration from the Applicant. If at all the amounts transferred to Monarch Realty have been misappropriated by the Corporate Debtor or the sale consideration was not utilized for the real estate project in which the Applicant had booked a flat, then it is for the Respondent to take appropriate steps against the concerned persons responsible for such misappropriation or non-utilisation, as the case may be, of the money belonging to the Corporate Debtor for which no fault or blame can be ascribed to the Applicant.

10. In the present case, the execution of the agreement and the registration of the same as well as the payments towards the discharge of sale consideration by the Applicant to the Corporate Debtor were made long before the commencement of the CIRP of the Corporate Debtor. Therefore, the Applicant acquired the right, title and interest over the flat in question much prior to the commencement of CIRP of the Corporate Debtor. It would be a travesty of justice if the Applicant is denied and deprived of his legitimate rights over the flat in question when the sale consideration as per the agreement has been paid in full, though the payments may not have been directly credited to the account of the Corporate Debtor but were made in good faith by the

Applicant at the behest of or as per the instructions of the person(s) acting on behalf of the Corporate Debtor towards the discharge of sale consideration for acquisition of the flat in question. We also clarify that we have no jurisdiction to order the allotment of car parking space by the Corporate Debtor to the Applicant as the same has no connection/nexus, whatsoever, with the insolvency of the Corporate Debtor. If at all the Applicant is eligible to the allotment of the car parking space, he is entitled to avail his legal remedies in accordance with law.

11. In the factual matrix of the case and in view of the foregoing discussions and assessment, we are inclined to partly allow this application and hence, we hereby pass the following orders:

**ORDER**

- i. **I.A. No. 3005 of 2021 is partly allowed;**
- ii. The Resolution Professional of the Corporate Debtor shall exclude the flat in question from the assets of the Corporate Debtor;
- iii. The Respondent/Corporate Debtor is hereby directed to allot the flat in question to the Applicant;
- iv. All other prayers of the Applicant stand rejected; and
- v. This I.A. is accordingly disposed of to the extent indicated above

**Sd/-**

**ANIL RAJ CHELLAN**  
**Member (Technical)**

**Sd/-**

**KULDIP KUMAR KAREER**  
**Member (Judicial)**