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

**Company Appeal (AT) (Insolvency) No. 309 of 2024**
**& I.A. No. 905, 1032 of 2024**

(Arising out of Order dated 17.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in (IB)-454(PB)/2023)

**IN THE MATTER OF:**

1. Shri Rahul Gyanchandani
   S/o Shri Murlidhar Gyanchandani
   At: Plot No.124, Sector -44, Gurugram, Haryana.

2. Shri Manoj Kumar
   S/o Shri Murlidhar Gyanchandani
   At: Plot No.124, Sector -44, Gurugram, Haryana

3. Shri Bimal Kumar
   S/o Shri Dayal Das Gyanchandani
   At: Plot No.124, Sector-44, Gurugram, Haryana

4. Shri Rohit Gyanchandani
   S/o Shri Bimal Kumar
   At: Plot No.124, Sector -44
   Gurugram, Haryana ... Appellants

Versus

Parsvnath Landmark Developers Pvt. Ltd.
Having Regd Office at:
Parsvnath Tower, Near Shahdara
Metro Station, Shahdara,
Delhi 110032 ... Respondent

**Present:**

**For Appellants:** **Mr. Rakesh Kumar, Mr. Sataroop Das, Ms. Akanksha Gupta, Advocates.**

**For Respondent:**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

**Interlocutory Application Nos. 905 and 1032 of 2024**

IA No.905 of 2024 has been filed by the Appellant for condoning the delay of 51 days in refiling the Memo of Appeal. IA No.1032 of 2024 has

been filed by the Appellant for condoning the delay of 9 days in filing of the Appeal. Sufficient cause being shown, the delay in refiling, as well as delay in filing of the Appeal is hereby condoned. IA Nos.905 and 1032 of 2024 are accordingly disposed of.

**Company Appeal (AT) (Insolvency) No. 309 of 2024**

This Appeal by Financial Creditor of the Corporate Debtor–Parsvnath Landmark Developers Ltd. (Respondent herein) has been filed challenging order dated 17.10.2023 passed by National Company Law Tribunal, New Delhi, Principal Bench rejecting Section 7 Application filed by the Appellant on the ground of non-compliance of Section 7, sub-section (1), 2nd Proviso.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

(i) The Respondent developed a Project 'La Tropicana Khyber Pass Delhi'. The Appellant made payment to the Respondent in the year 2007-2012 towards 4 units, which was allotted in favour of the Appellants by Respondent.

(ii) On 11.02.2019, the Appellant filed petition being CP No.IB-443(PB)/2019 titled as Rahul Gyanchandani & Ors. vs. Parsvnath Landmark Developers Pvt. Ltd. & Ors. under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**"), in which direction was issued by the Adjudicating Authority to comply with the changed provisions under Section 7, second amendment ordinance. The Appellant withdraw the Application on 03.01.2020.

(iii) As the developer failed to develop the Project and complete the same within the agreed time, the Appellant filed five different complaints under Section 31 read with Section 18 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "**RERA Act, 2016"**) being Complaint Nos. 77, 78, 79, 80 and 81 of 2020 seeking refund of the amount paid by them along with interest in terms of the Flat Buyer Agreement dated 21.08.2007. All the five complaints were disposed of by Delhi RERA on 21.10.2022 allowing the complaints and directing the refund of the amount with interest. The Respondent was under obligation to refund the amount within 45 days of the order, but no amount was paid by the Respondent.

(iv) On 03.08.2023, Appellants filed petition (IB) No.454(PB)/2023 under Section 7 praying for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor, it having committed default by not refunding the amount payable to all the four Appellants, along with interest. Each Appellant was required to be paid an amount of Rs.24.14,50,504/- along with interest @10% per annum.

(v) The Adjudicating Authority by the impugned order rejected Section 7 Application on the ground that the Appellants are only four in number, whereas total units allotted by the Corporate Debtor were 488. In paragraph-1 of the impugned

order, following has been noticed by the Adjudicating Authority:

> "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."

(vi) The Adjudicating Authority relying on the judgment of the Hon'ble Supreme Court in ***Vishal Chelani & Ors. vs. Debashis Nanda in Civil Appeal No.3806 of 2023***, dismissed Section 7 Application. In paragraph 5 of the judgment, following has been noted:

> "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."

Aggrieved by the above order, this Appeal has been filed by the Appellants.

3. The learned Counsel for the Appellants challenging the impugned order submits that Adjudicating Authority committed error in not adverting to the provisions of Section 3, sub-section (10) of the Code. It is submitted that Section 3, sub-section (10), itself makes it clear that decree-holder is class of Financial Creditor. It is submitted that Section 18 read with Section 2(d) of the RERA Act, 2016 makes it clear that person, who is granted refund of entire amount paid to the promoter for allotment of a real estate unit, does not remain allottee as the refund order is preconditioned by withdrawal from the Project. It is submitted that the Appellant are not Financial Creditors in the category of real estate allottees, but are Financial Creditor in the category of Decree Holders and therefore, they are not required to meet the threshold/ eligibility under Section 7, sub-section (1), 2nd Proviso. The learned Counsel for the Appellant also submits that judgment of ***Vishal Chelani & Ors. vs. Debashis Nanda*** is distinguishable, since the said judgment was delivered in different context, i.e. granting benefit to the real estate allottees, who are holders of order by RERA. It is further submitted that above judgment of the Hon'ble Supreme Court has not dealt with the three judges bench judgment of ***Kotak Mahindra Bank vs. A. Balakrishnan***.

4. We have considered the submissions of learned Counsel for the Appellant and have perused the record.

5. Section 3 of the Code, defines 'creditors' in Section 3, sub-section (10), which is as follows:

> "**3(10)** "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"

6. Section 5, sub-section (7), defines 'Financial Creditor and Section 5, sub-section (8) defines 'Financial Debt'. Section 5(7) and Section 5(8) are as follows:

> "**5(7)** "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;
>
> **(8)** "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–
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> (a) money borrowed against the payment of interest;
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> (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
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> (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
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> (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
>
> (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
>
> (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
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> **Explanation.** -For the purposes of this sub-clause, -

(i) 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; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;"

7. By Explanation to Section 5(8), expression 'allottee' has the same meaning as assigned to it under Clause (d) of Section 2 of RERA Act, 2016. Section 2(d) of RERA Act, is as follows:

"**2(d)** "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

8. In Section 7 Application, the Appellants themselves have pleaded that complaints filed by them were allowed on 21.10.2022 and Corporate Debtor was directed to refund the amount, but the Corporate Debtor failed to make the payments. It is useful to notice following pleadings of the Appellant in their Section-7 Application:

> "The Applicants upon realisation of the fact that Corporate Debtor is not going to hand over the possession of the units, initiated various legal actions (details thereof are separately attached), including one of filing complaint before the Real Estate Regulatory Authority, Delhi and the Delhi RERA vide its order dated 21.10.2022 held that the Corporate Debtor has committed default and directed the Corporate Debtor to refund the entire amounts paid to it along with interest at the rate of 10% per annum (i.e. MCLR + 2%) from the date of payment of each sum until the date of its actual return. The amount in terms of said orders was payable within 45 days from the date of the orders i.e on or before 05.12.2022. But despite demands by the applicants the Corporate Debtor has failed to make the due payment of the amount therefore has committed default of financial debt. Hence this petition seeking initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor."

9. According to own case of the Appellants, the order passed by RERA asking the Corporate Debtor to refund the amount along with interest has not been complied with and the default has been committed by the Corporate Debtor, due to which default, the Appellants filed Section 7 Application. The mere facts that order has been passed by RERA on the complaints by the Appellants, Appellants do not cease to be allottee within the meaning of RERA Act, 2016. If it is accepted that merely by passing order by the RERA, they cease to be allottee, their right to recover the aforesaid amount cannot be prosecuted any further as allottee. Admittedly,

the orders for refund has not been complied with, hence the Appellants continued to be allottee within the meaning of the Code and the RERA Act, 2016.

10. The submission that Appellants are no more allottees and their category has been converted as a Decree Holder as referred in Section 3, sub-section (10) also need to be considered. Section 3, sub-section (10) as quoted by us in preceding paragraph, defines the 'creditor', which includes Financial Creditor, Operational Creditor, Secured Creditor, Unsecured Creditor or a Decree Holder. Application under Section 7 can be filed only by Financial Creditors. A Decree Holder unless it is a Financial Creditor cannot institute Application under Section 7. We may notice the judgment of the Hon'ble Supreme Court in ***"Kotak Mahindra Bank Ltd. Vs. A. Balakrishnan & Anr – (2022) 9 SCC 186"***, in which case Kotak Mahindra Bank assignee of Financial Creditor has filed Section 7 Application, relying on Recovery Certificate dated 07.06.2017 and 20.10.2017 issued by Debts Recovery Tribunal against the borrower entities. The Application under Section 7 was filed on 05.10.2018 by the Kotak Mahindra Bank Ltd., which Application was admitted by Adjudicating Authority against which an Appeal was filed by the Borrower, which Appeal was allowed by this Tribunal on 24.11.2020, holding the Application as barred by time. An Appeal was filed in the Hon'ble Supreme Court by Kotak Mahindra Bank Ltd., which Appeal was allowed and order passed by this Tribunal was set-aside, restoring the order admitting Section 7 Application. The Hon'ble Supreme Court in Kotak Mahindra Bank has also relied on its earlier

judgment in **Dena Bank vs. C. Shivakumar Reddy and Anr. (2021) 10 SCC 330**. Paragraph 141 of the Dena Bank was quoted in paragraph 27 of the judgment, which is as follows:

> "**27.** This Court further went on to observe thus : (Dena Bank case [Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330] , SCC pp. 387-88, paras 136 & 141)
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> > "136. A final judgment and order/decree is binding on the judgment-debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of recovery is also issued authorising the creditor to realise its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the recovery certificate.
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> > * * *
> >
> > 141. Moreover, a judgment and/or decree for money in favour of the financial creditor, passed by the DRT, or any other tribunal or court, or the issuance of a certificate of recovery in favour of the financial creditor, would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under Section 7 IBC for initiation of the corporate insolvency resolution process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the certificate of recovery, if the dues of the corporate debtor to the financial debtor, under the judgment and/or decree and/or in terms of the certificate of recovery, or any part thereof remained unpaid."
> >
> > (emphasis supplied)"

11. The Hon'ble Supreme Court noticed the scheme of the Code and held that a person, who holds a recovery certificate is a Financial Creditor within the meaning of Clause (7) of Section 5 of the Code. In paragraph 41, while noticing the scheme of the Code, following was observed:

> "**41.** It is a settled principle of law that the provisions of a statute ought to be interpreted in such a manner which would advance the object and purpose of the enactment."

12. In paragraphs 53, 54, and 55, the Hon'ble Supreme Court held that liability in respect of 'claim' arising out of a recovery certificate would be a "financial debt". Paragraphs 53, 54 and 55 of the judgment are as follows:

> "**53.** Applying these principles to clause (8) of Section 5 IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various Categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes", the legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a "claim" arising out of a recovery certificate from the definition of the term "financial debt", when such a liability in respect of a "claim" simpliciter would be included in the definition of the term "financial debt".
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> **54.** In any case, we have already discussed hereinabove that the trigger point for initiation of CIRP is default of claim. "Default" is non-payment of debt by the debtor or the corporate debtor, which has become due and payable, as the case may be, a "debt" is a liability or obligation in respect of a claim which is due from any person, and a "claim" means a right to payment, whether such a right is reduced to judgment or not. It could thus be seen that unless there is a "claim", which may or may not be reduced to any judgment, there would be no "debt" and consequently no "default" on non-payment of such a "debt". When the "claim" itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a "claim" being fructified in a decree, the same would be outside the ambit of clause (8) of Section 5 IBC, is accepted, then it would be

> inconsistent with the plain language used in the IBC. As already discussed hereinabove, the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of the IBC, the legislature could never have intended to keep a debt, which is crystallised in the form of a decree, outside the ambit of clause (8) of Section 5 IBC.
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> **55.** 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 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 IBC. As such, such a "person" would be a "person" as provided under Section 6 IBC who would be entitled to initiate the CIRP."

13. The judgment of the Hon'ble Supreme Court in Kotak Mahindra Bank itself clearly provides that a person, who has a recovery certificate, which is akin to Decree, is entitled to file Section 7 Application as Financial Creditor. Whether the debt is fructified in a Decree or not, if debt is a financial debt it gives right to Financial Creditor to initiate proceedings under Section 7. The judgment of the Hon'ble Supreme Court in **Vishal Chelani** has been relied by the Adjudicating Authority. It is relevant to notice the facts and ratio of the judgment of Vishal Chelani, which has been relied by the Adjudicating Authority. Vishal Chelani and other were Homebuyers, who had filed their claim on the basis of order passed by UPRERA. They filed claim in Form-CA in the category of Homebuyers. The RP informed the Appellants that they should file their claims in Form-C as a Financial Creditor. The Appellants filed an Application before the Adjudicating Authority, claiming that they should be treated as Homebuyers and they be permitted to file claim in Form-CA, which

Application was rejected. It is useful to note paragraph-7 of the order of this Tribunal in ***Company Appeal (AT) (Insolvency) No.991 of 2022 filed by Vishal Chelani & Ors. vs. Debashis Nanda Resolution Professional Bulland Buildtech Pvt. Ltd.***, where order of Adjudicating Authority was noticed, which is as follows:

> "**7.** The said application was contested by the RP before the Tribunal in which the Tribunal has taken the following view:-
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> > *"We are unable to accept the contention of the applicants that they may be permitted to file a claim in Form-CA and direction be given to the RP to consider the claim in Form-CA. In our considered view, once the Ld. UPRERA has passed a decree directing the Corporate Debtor to refund the amount and in pursuant of that, all the applicants had submitted their claim in Form C, which were duly considered by the respondent/ R.P, and only on the ground that the entire claims of the applicants are not admitted and applicants are treated as a Financial Creditor on the basis of that decree and not as a Creditors of Class, we are unable to accept the submission of the applicants to direct the Resolution Professional to admit their claim in Form – CA.""*

14. Against the order rejecting their Application permitting them to file the Claim in Form-CA, Appeal was filed in this Tribunal, which Appeal was dismissed on 28.02.2023. This Tribunal, rejecting the Appeal of Vishal Chenali & Ors. observed following in paragraphs 8 to 21:

> "**8.** Aggrieved from the order of the Tribunal dated 08.06.2022 all the five Applicants have preferred this appeal.
>
> **9.** Counsel for the Appellant has vehemently argued that the Tribunal has committed a patent error in holding them as Financial

Creditor on the ground that the Appellants had already obtained a decree from the UPRERA regarding refund of their amount.

**10.** He has argued that the status of the Appellant would remain the same as Homebuyers within a class and should not change even if there is a decree passed in their favour by the UPRERA. In support of his submissions, he has relied upon a decision of the Hon'ble Supreme Court rendered in Civil Appeal No. 689 of 2021 in the case of **Kotak Mahindra Bank Limited vs. A. Balakrishnan & Anr.** decided on 30.05.2022. Para 51 of the said decision read as under :-

> *"51. Applying these principles to clause (8) of Section 5 of the IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes", the Legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a "claim" arising out of a Recovery Certificate from the definition of the term "financial debt", when such a liability in respect of a "claim" simpliciter would be included in the definition of the term "financial debt"*

**11.** On the other hand, Counsel appearing on behalf of the RP has submitted that there is no error in the 'impugned order' which may require any interference by this Tribunal. It is submitted that as per scheme of the Act and the 'Regulations' the Appellant after obtaining a decree from the UPRERA regarding refund of their amount, invested for the purpose of purchase of the flat, shall fall within the definition of a Financial Creditor and not in a class of creditor for the purpose of putting up their claim as such before the RP.

**12.** It is further submitted that the Hon'ble Supreme Court in the same decision in the case of Kotak Mahindra (Supra) has decided that in case the Recovery Certificate is issued, the holder of the

Recovery Certificate would be a Financial Creditor. He has referred to the Para 84 of the said decision which is reproduced as under :-

> *"84. To conclude, we hold that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning of clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate."*

**13.** We have heard Counsel for the Parties and perused the record with their able assistance.

**14.** There is no dispute that the Appellant had applied for Unit (Flat) in the project called Bulland Elevates floated by the Corporate Debtor.

**15.** There is also no dispute that the Appellant being the Home Buyers filed a complaint before the Uttar Pradesh Real Estate Regulatory Authority, Gautam Buddha Nagar (in short UPRERA). The said application filed at the instance of the Appellants was allowed by the UPRERA on 04.10.2019. The complaint No. NCR/144/04/0045/2019 was filed by Vishal Chelani against Bulland Buildtech Pvt. Ltd. under Section 31 of the UP Real Estates (Regulation & Development Act, 216). Pursuant to the order dated 04.10.2019 passed by the UPRERA, a Recovery Certificate was also issued on 21.09.2020 under Section 40 of the Act, 2016 qua the refund of the amount with interest, invested by the Appellant for the purchase of the Flat. It has also come on record that execution was also filed on the basis of the Recovery Certificate.

**16.** During the course of hearing, Counsel for the Appellant categorically submitted that the Appellants are no more interested in the refund of money but are interested only in the allotment of the Flat which has been three times priced in the Resolution Plan and are now beyond their reach.

**17.** The question would thus arise as to whether after obtaining the decree for Recovery of amount infused at the instance of the Appellant for which Recovery Certificate has been issued, the Appellant would stand in the category of the class of creditor or is a Financial Creditor for the purpose of filing an application claiming it in Form C instead of Form CA.

**18.** In this regard, we are guided by the decision of the Hon'ble Supreme Court in the case of Kotak Mahindra (Supra) in which in Para 84, while concluding the discussion in the entire judgment, it has been held that once the Recovery Certificate has been issued, the party in possession of the Recovery Certificate is to be considered as a Financial Creditor.

**19.** The submission made by the Counsel for the Appellant in regard to the observations made in Para 51 of the aforesaid decision would not be of any help to him because ultimately conclusion has been drawn in Para 84 of the aforesaid judgment.

**20.** No other point has been raised.

**21**. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is hereby dismissed. No cost."

15. Against the dismissal of their Appeal, Visahl Chelani & Ors. filed an Appeal before the Hon'ble Supreme Court being Civil Appeal No.3806 of 2023. The Hon'ble Supreme Court in the aforesaid case noticed the rival submissions of the parties. The RP before the Hon'ble Supreme Court reiterated its view that the Appellants were only 'Financial Creditor' and not 'creditors' of a class. The learned Counsel for the Appellants before the Hon'ble Supreme Court relied on judgment of NCLT, Mumbai Bench-IV in ***Mr. Natwal Agrawal (HUF) vs. Ms. Ssaksh Developers & Builders Pvt. Ltd.*** The arguments of the Appellants have been noted in paragraph 3 of the judgment, which is as follows:

"**3.** Mr. Abhimanyu Bhandari learned counsel argued that having regard to the definition of financial debt [Section 5(8)(f)] which was amended in 2018 after which home buyer allottees in real estate projects also fell within the broad description of financial creditors, a distinction cannot be made between one set of such home buyer allottees and another. He relies upon a decision of the NCLT, Mumbai Bench-IV, [Mr. Natwar Agrawal (HUF) vs. Ms. Ssakash Developers & Builders Pvt. Ltd.] in CP(IB) No.21/MB-IV/2023 dated 02.08.2023, which inter alia held as follows:

> *"3.2. Accordingly, this bench is of the considered view that decree would be categorized as either financial or operational debt depending on the nature of the underlying claim which stands*
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> *crystallized through the arbitral or court the nature of the debt due under decree would depend on the nature of transaction from which the decretal debt has arisen. In the present case the applicant had obtained a decree from RERA in capacity of allottee in a Real Estate Project and allottee in Real Estate Project is covered under the definition of Financial Debt contained in under Explanation to Section 5(8)(f) of the Code. Accordingly, the applicant, being holder of a decree in capacity of allottee is a Financial Creditor.*
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> *3.3. At this juncture, this bench considers appropriate whether an allottee holding a decree from RERA would fall under the class of Home Buyers within the category of Financial Creditor or it would cease to be an allottee under the class of Home Buyers, but shall remain a Financial Creditor, to determine whether the threshold limit prescribed under section proviso to section 7(1) of the Code or under section 4 of code would apply. This bench finds that second proviso to section 7(1) prescribes the threshold limit specifically in relation to Home Buyers Class so as to discourage multiple applications being filed by the allottees in a Real Estate Project. This bench feels that an allottee in Real Estate Project, who subsequently becomes a*

*Decree Holder under RERA Act, continues to be a creditor in the class of Home Buyers and shall continue to be governed by the threshold limit prescribed under second proviso to section 7(1) of the Code.""*

16. The arguments of RP is noted in paragraph-4, which is as follows:

> "**4.** Mr. Gunjesh Ranjan appearing for the resolution professional resisted the appeal and contented that the appellants cannot be permitted to secure two benefits. Having approached the UPRERA, they fell into a different sub-class of home buyers, who were entitled to specified amounts and, therefore, were unsecured creditors, as compared with allottees who had not invoked RERA remedies. It is submitted that such home buyers relinquished their rights under Section 18 of the RERA Act."

17. The Hon'ble Supreme Court after noticing the amendment of 2018 in sub-section 8(f) of Section 5, laid down following in paragraph-6, which is as follows:

> "**6.** It is thus evident that with the introduction of the explanation home buyers and allottees of real estate projects were included in the class of "financial creditors" - because financial debt is owed to them. On a plain reading of Section 5 (8)(f) no distinction is per se made out between different classes of financial creditors for the purposes of drawing a resolution plan. Consequently, the reasoning of the Mumbai Bench of NCLT "Mr. Natwar Agrawal(HUF)" is correct in the opinion of this Court."

18. The view of RP was disapproved by the Hon'ble Supreme Court and it was held that when underlying claim of an aggrieved party specifically in the form of a Court order or decree, that does not alter or disturb the status

of the converted party. Following was held in paragraphs 8 and 9 of the judgment:

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

19. The allottees in Vishal Chelani's case were Applicants, who had also got order in their favour from RERA, but it was held by the Hon'ble Supreme Court that their status as a 'Financial Creditor' does not change and they were entitled to file their claim in Form-CA as a 'Financial Creditor'. The above judgment of the Hon'ble Supreme Court, which was relied by the Adjudicating Authority, clearly supports the submission of learned Counsel for the Appellant. The Appellant cannot be said to go out of the definition of 'allottees' merely because they have an order in their favour by RERA and the Appellants' submission that they should be treated in a different category, i.e., category of 'Decree Holder' and are not required to comply with Section 7, sub-section (1), 2nd Proviso cannot be accepted. The Appellants even after order of the RERA, directing for refund by the Corporate Debtor, continued to be allottees and they have filed Section 7 Application as Financial Creditor of the Corporate Debtor. They are mandatorily required to comply with Section 7, sub-section (1), 2nd Proviso. In paragraph 8 of the judgment of the Hon'ble Supreme Court, distinction sought to be made by the RP between the Decree Holder and Homebuyers, who do not have order of RERA, was held to be artificial. Thus, Homebuyers, whether they have an order or Decree from the RERA or who do not have any Decree or order from RERA, belong to same category of allottees and no distinction can be made on the said ground.

20. We, thus, are of the considered opinion that Appellants are 'allottees' within the meaning of the Code and as a Financial Creditor, when they

have filed the Application under Section 7, they were required to comply with Section 7, sub-section (1), 2nd Proviso and Adjudicating Authority did not commit any error in rejecting their Application due to non-compliance of Section 7, sub-section (1), 2nd Proviso. There is no merit in the Appeal, the Appeal is dismissed. No order as to costs.

**[Justice Ashok Bhushan]**
**Chairperson**

**[Barun Mitra]**
**Member (Technical)**

**[Arun Baroka]**
**Member (Technical)**

**NEW DELHI**

**9th April, 2024**

Ashwani