

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

INTERLOCUTORY APPLICATION. No. 218/2021

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

Mahesh V. Chandwani

residing at: A-19, Indraprashth Society,
Sarvodaya Nagar, Jain Mandir Road,
Mulund (West), Mumbai-40080.

...Applicant

v/s

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

Having his address at: Kanchasobha Debt
Resolution Advisors LLP, 1507-Wing, One BKC,
Plot No. C-66, G Block, Bandra Kurla Complex,
Bandra East, Mumbai-400051.

...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. 218/2021

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, to exclude Shop Nos. 01 to 11 of the building known as Monarch Brookfields from the assets of the Corporate Debtor, as those properties

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 218/2021

In

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

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

Case of 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 Corporate Debtor was in the process of constructing a building known as 'Monarch Brookfields' on Plot bearing No. 3, admeasuring about 9999.81 square meters in sector 20, Kalamboli, Navi Mumbai. The Applicant was desirous of purchasing commercial premises and accordingly approached the Corporate Debtor for the purchase of Commercial Premises in Monarch Brookfields. In pursuance of the negotiations between the Applicant and the Corporate Debtor and after making the payment of earnest monies, the Applicant and the Corporate Debtor entered into the following registered Agreements for Sale:

Sr. No.	Agreement for Sale dated	Registration No.	Shop No.
1.	05 th September, 2014	6419 of 2014	01
2.	05 th September, 2014	6420 of 2014	02
3.	05 th September, 2014	6421 of 2014	03

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 218/2021

In

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

4.	05 th September, 2014	6423 of 2014	04
5.	05 th September, 2014	6425 of 2014	05
6.	05 th September, 2014	6427 of 2014	06
7.	05 th September, 2014	6428 of 2014	07
8.	05 th September, 2014	6418 of 2014	08
9.	05 th September, 2014	6429 of 2014	09
10.	05 th September, 2014	6430 of 2014	10
11.	05 th September, 2014	6422 of 2014	11

4. Under the above registered Agreements for Sale, the Corporate Debtor had agreed to sell and the Applicant had agreed to purchase Shop Nos. 01 to 11 (being the “shops in question”) for consideration of Rs.33,00,000/- (Rupees Thirty-Three Lakhs only) for each shop. The Applicant has paid the entire consideration as per the terms of the above Agreements for Sale. In pursuance of the payment of the consideration, the Corporate Debtor has issued payment receipts acknowledging the receipt of the consideration for Shop Nos. 01 to 11. Thus, the title with respect to the above-mentioned shops stands absolutely transferred in favour of the Applicant and as such the Applicant is absolutely seized and possessed of the abovementioned Shops in the building known as Monarch Brookfields. However, since the Corporate Debtor has not yet obtained occupation certificate with respect to the Building known as Monarch Brookfields, the Applicant has not occupied the same.

5. In view of the commencement of the Corporate Insolvency Resolution Process with respect to the Corporate Debtor, the Applicant through an advocate addressed a letter dated 16th December, 2019 to the Respondent /Resolution Professional bringing the above facts to the knowledge of the Resolution Professional and further calling upon the Resolution Professional to refrain from treating the above shops as assets of the Corporate Debtor. In reply to the above letter, the Respondent addressed an email dated 23rd December, 2019 requisitioning certain documents more particularly set out therein. In reply to the above email, the Applicant addressed a letter dated 30th December, 2019 enclosing therewith all the requisite documents. In reply, the Respondent addressed a letter dated 4th February, 2020 ("Impugned Letter") thereby wrongfully stating that the above mentioned shops are forming part of the assets of the Corporate Debtor for the following alleged reasons:
- i. That the real estate project of the Corporate Debtor has not yet been completed;
 - ii. That the Brihanmumbai Municipal Corporation ("BMC") has not granted either 'Completion Certificate' or Occupation Certificate with respect to the real estate project;
 - iii. That the entire property appears in the balance sheet of Corporate Debtor as its asset; and
 - iv. That as per RERA, the title with respect to the said Shops have not been transferred.

6. In the above circumstances, it is submitted that it is just and necessary to set aside the Impugned Letter dated 4th February, 2020 as null and void. It is also just and necessary to direct the Respondent/ Resolution Professional to exclude the abovementioned shops of the Applicant from the assets of the Corporate Debtor.
7. Hence, this Application.
8. The Applicant further states that irreparable harm and injury would be caused to the Applicant if the reliefs as prayed for are not granted.
9. **Reply of the Respondent:** The Respondent has filed his affidavit in reply dated 06th October, 2020 and an additional affidavit dated 02nd February, 2021. The main contentions of the Respondent herein are briefly summarised 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. The plan sanctioned by CIDCO at the time of execution of Agreement for Sale with the Applicant only permitted construction of residential premises and not commercial units. Therefore, any commercial unit constructed, and any sale agreement in respect thereof, are completely illegal and void ab initio. The Applicant has acted in contravention of Section 52 of the Maharashtra Regional and Town Planning Act, 1966 by the change of user of the said premises. Hence, the present application must fail.

10. **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) If the aforesaid submission of the Respondent is accepted, then, any builder would refuse to convey the building and land in favour of the society and continue to claim title on the properties already sold by him under the registered agreement after receiving entire consideration.

- c) 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.
- d) As regards, the properties being shown in the books of accounts of the Corporate Debtor, the Applicant submits that once the registered agreement for sale is executed and entire consideration is received by the Corporate Debtor from the Applicant, the Corporate Debtor could not show the said properties in its books as the title in the said properties is already conveyed and stands transferred in favour of the Applicant. Further, the Respondent has failed to produce the books of accounts to show that the said properties are recorded in the books of Corporate Debtor as its assets.

ANALYSIS AND FINDINGS

11. We have heard the Counsel for the parties and have gone through the record.

12. During the course of arguments, it has been contended by the Counsel for the Applicant that the shops in question were purchased by the Applicant from the Corporate Debtor on the basis of the Registered Sale Agreements executed on 05th September, 2014 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 agreements nor has denied that the entire sale consideration stands paid. Therefore, the shops in question cannot be treated as assets of the Corporate Debtor as for all intents and purposes as the same stands transferred to the Applicant.

13. On the other hand, the Counsel for the RP has argued that the shops 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. The Counsel for the RP has further contended that as per the changed approved plan, there is no provision in

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 218/2021

In

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

the building for any commercial space/unit and therefore, the very legitimacy of the shops in question is under dispute. Apart from that, the Applicant cannot treat himself to be the absolute owner of the shops in question in the absence of any conveyance deed which was admittedly never executed in his favour. The Counsel for the RP has prayed for the dismissal of the instant Application.

14. We have weighed the contentions raised by the Counsel for the parties and have gone through the records.

15. By way of this IA, the applicant is seeking exclusion of Shop Nos. 01 to 11, which are the part of buildings are known as Monarch Brookfields out of the assets of the Corporate Debtor on the ground that the Applicant has purchased the shops from the Corporate Debtor on the basis of registered agreements for sale, as disclosed para 3.3 of I.A. and the entire consideration in respect of the shops also stands already paid at the rate of Rs. 33 Lakhs per shop. These facts have not been disputed by the RP.

16. The primary objection raised by the IRP is that with the execution of sale agreements in question, the title cannot be said to have been conveyed to the Applicant nor he can claim to have become the owner of the shops. 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 shops in question. The Counsel for the RP has further contended that even otherwise in the approved site plan of the building in question, there does not exist any commercial units and therefore, the shops in question cannot be said to be the property of the applicant as the very construction of the shops is illegal and the applicant cannot be possibly conferred with any right so far as the shops in question are concerned. The Counsel for the RP has prayed for the dismissal of the application.

17. Having thoughtfully considered the contentions raised on behalf of the RP, we are of the considered view that merely because no conveyance deed executed in respect of the shops in question, it cannot be said that the applicant has no right in the same. More so, when it is not disputed that

the registered sale agreements were executed in favour of the applicant in respect of the shops and the entire sale consideration also stands paid. Once the entire sale consideration was received and the registered documents were executed, it was incumbent upon the Corporate Debtor to have executed the conveyance deed 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.

18. It has been pointed out that the occupancy certificate in respect of shops 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 something which is attributable to the Corporate Debtor.

19. It has also been argued by the RP that the plan approved by CIDCO does not provide for any commercial units and it provide only for residential unit which means that the very construction of the shop is illegal being beyond the approved license/permission given by CIDCO. Even this contention raised by the applicant is not tenable. In this connection, a reference can be made to the commencement certificate issued by the CIDCO on 05.04.2011 which is annexed in the rejoinder filed by the applicant which shows that there are 264 residential units and 26 commercial units. A further reference can be made to letter dated 18.10.2011 addressed to the Corporate Debtor wherein there is reference to 26 commercial shops. In this connection, a further reference can be made to Exhibit (D) annexed with the rejoinder again issued by Maharashtra Coastal Zone Management Authority dated 05.02.2013 wherein there is also reference to as many as 336 residential units and 26 commercial units. In addition to this, the Counsel for the Applicant has referred to Exhibit (G) attached with the rejoinder which is a document submitted to CIDCO and in this document there is also a reference to 264 residential units and 26 commercial units. The Counsel for the Applicant

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 218/2021

In

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

has further referred to possession letter dated 23.09.2016 issued by the Corporate Debtor to the Applicant wherein it is mentioned that the peaceful and vacant possession of the shops from the ground floor in Monarch Brookfields has been handed over to the applicant upon receipt of the agreed sale consideration. In the given facts and circumstances of the case, we are of the considered view since the entire sale consideration in respect of shops in question stood paid to the Corporate Debtor long back and the possession was also delivered, merely because the conveyance deed has not been executed or on account of the fact that the occupancy certificate has not been issued or that some issues are pending with regard to the approval of the CIDCO, it cannot be said that the shops in question are liable to be treated as properties/assets of the Corporate Debtor. Further, in our view, it will be a travesty of justice if the shops in question are allowed to be included in assets of the Corporate Debtor even though for all intents and purposes, the same have been transferred to the Applicant.

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 218/2021

In

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

20. As a result of the above discussion, we deem it appropriate to allow the application and accordingly, **we allow I.A. No. 218 of 2021** on the terms stated hereunder:

ORDER

- a. The Resolution Professional of the Corporate Debtor shall exclude the shops in question from the assets of the Corporate Debtor;
- b. This IA is accordingly disposed of to the extent indicated above.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)