

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

INTERLOCUTORY APPLICATION. No. 1259/2020

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

- 1. Shanawaz Mulla**
- 2. Amir Mulla**

Both residing at: Rekha Sai Camellia CHS,
Flat No. 504, Plot No. 171, Canara Bank, Owe,
Sector 30, Kharghar, Navi Mumbai- 410210.

...Applicants

v/s

- 1. S. Gopalkrishnan, Resolution Professional,
Monarch Brookefields LLP,**

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

2. Indrajit Mukherjee, Authorised Representative
For Class of Creditors-Homebuyers,
IBBI Reg. No. IBBI/IPA-001/IP-P01533/2018-
2019/12450, Residing at: Flat No. 705, A-Wing,

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 1259/2020

In

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

Deep C.H.S. Ltd, D.N. Nagar, J.P. Road,
Andheri West, Mumbai-400053.

...Respondents

In the matter between:

Capri Global Capital Limited Petitioner

v/s

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 Applicants : Adv. Niraj Shah i/b Law Chamber of
Siddharth Murarka.

For the Respondents : Adv. Amir Arsiwala a/w Adv. Vedit
Divya Kumar.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member Judicial.

1. This is an application filed by the Applicant under Section 60(5) read with Section 36(4)(a) of the Insolvency and Bankruptcy Code, 2016 praying for directions to the Respondent, who is the Resolution Professional of the Corporate Debtor, to inter-alia exclude the Applicant's home premises, being immovable properties, from the common pool of the assets of the Corporate Debtor and to treat the Applicant's share in the cost of completion of real estate project of the Corporate Debtor as the claim amount of the Applicant.

Case of the Applicant in brief:

2. The Applicants had purchased a flat in the real estate project of the Corporate Debtor being Flat No. 601, Building name- Monarch Brookefields LLP, Wing-Georgia, Kalamboli, Navi Mumbai (being the "**flat in question**") for a consideration of INR 38,00,000/- (Rupees Thirty-Eight Lakhs 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 an Agreement of Sale on 30.10.2013 and it was registered on the same date.

3. The Applicants state that after the registration of above-mentioned agreement, the Applicants became the owner of the said flat and that the right, title and interest of the said flat now belongs to the Applicants and not to the Corporate Debtor any more. When the agreement was executed, the construction was not complete and it was the sole responsibility of the Corporate Debtor to complete the balance construction of the building and handover the property to the Applicants.
4. 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 Applicants had lodged their claim by way of a claim affidavit on 12.12.2019 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 30.10.2013 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. 601, Building name- Monarch Brookefields LLP, Wing-Georgia, 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.

5. The Resolution Professional ('RP') of the Corporate Debtor had sent a letter dated 03.02.2020 to the Applicants. The RP accepted the claim made by the Applicants and included them in the CoC, but rejected the contention of the Applicants that the unit belongs to the Applicants. According to the RP, the unit belongs to the Corporate Debtor. The RP had rejected the above contention of the Applicants 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.
6. Since the RP had refused to exclude the asset (i.e. Flat No. 601) from the 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.
7. **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.

8. 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

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

10. During the course of arguments, it has been contended by the Counsel for the Applicants that the flat in question was purchased by the Applicants from the Corporate Debtor on the basis of sale agreement executed and registered on 30.10.2013 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 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.

11. On the other hand, the Counsel for the RP has argued that the flat in question cannot be treated as the property of the Applicants merely on the basis of the sale agreement as till date no conveyance deed has been executed in favour of the Applicants. 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 Applicants. Apart from that, the Applicants cannot treat themselves to be the absolute owner of the flat in question in the absence of any conveyance deed which was admittedly never executed in their favour. The Counsel for the RP has prayed for the dismissal of the present Application.

12. We have weighed the contention raised by the Counsel for the parties and have gone through the records and submissions.

13. By way of this IA, the Applicants are seeking exclusion of Flat No. 601, which is the part of buildings are known as Monarch Brookfields, out of the assets of the Corporate Debtor on the ground that the Applicants have

purchased the said 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 the rate of INR 38,00,000/- only (Rupees Thirty Eight Lakhs Only) excluding taxes. These facts have not been disputed by the RP.

14. 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 Applicants nor can the Applicants 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 Applicants as the occupancy certificate has also not been issued yet in respect of the building in which the flat in question is situated. The Counsel for the RP has prayed for the dismissal of the application.

15. 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 Applicants have no right in the same. More so, when it is not disputed that the registered sale agreement was executed in favour of the Applicants in respect of the flat 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 Applicants.

16. It has been pointed out that the occupancy certificate in respect of flat has not been issued and therefore, the Applicants 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 Applicants cannot be penalized for the fault which is attributable to the Corporate Debtor.

17. In the given facts and circumstances of the case, we are of the considered view 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 Applicants 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 for the reason that some issues are pending with regard to the approval of the CIDCO, it cannot be said that the flat in question is liable to be treated as the property/asset of the Corporate Debtor. In our view, it will be a travesty of justice if the flat in question is allowed to be included in assets of the Corporate Debtor even though for all intents and purposes, the same has been transferred to the Applicant.

18. As a result of the above discussion, we deem it appropriate to allow the application and accordingly, **we allow the I.A. No. 1259 of 2020** in CP(IB) No. 2517/MB/C-II/2018 on the terms stated hereunder:

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 1259/2020

In

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

ORDER

- a. The Resolution Professional of the Corporate Debtor shall exclude the flat 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)