NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1141 of 2019

[Arising out of Order dated 26th September 2019 passed by the Adjudicating Authority/ National Company Law Tribunal, New Delhi in C.P. No. IB-10/(ND)/2019 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

Parvesh Magoo
W/o Mr Naresh Magoo
R/o KP-168, Second Floor
Pitampura, New Delhi – 110034 **...Appellant**

Versus

IREO Grace Realtech Private Limited
having its registered office at:
C-4, 1st Floor, Malviya Nagar
New Delhi – 110017 **...Respondent**

Present:

For Appellant : Shri Piyush Singh, Shri Aditya Parolia and Ms Sumbul Ismail, Advocates

For Respondent : Shri Saurabh Kalia, Shri Sameer Choudhary and Ms Saloni Purohit, Advocates

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the order passed by the Adjudicating Authority /National Company Law Tribunal, New Delhi in C.P. No. IB-10/(ND)/2019, whereby the Adjudicating Authority has rejected the Application filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short '**I&B Code**'). Parties are represented by their original status in the company petition for the sake of convenience.

2. Brief facts of the case are as follows:

The Applicant/Appellant being a Financial Creditor made a booking of a unit, No. 203 in Tower No. A6, having a super area of 1726.91 sq. ft., in the Real Estate project, being developed by the Respondent under the name of "The Corridors" situated at Sector 67A, Gurgaon, Haryana. The Respondent after collecting Rs.17,00,000/- (Rupees Seventeen Lacs Only) from the Appellant issued an Allotment Letter dated 07th August 2013 and subsequently after a delay of almost a year executed an 'Apartment Buyer's Agreement' on 03rd June 2014. As per the Clause 13.3 of the terms of Agreement, the Respondent was to deliver the possession of the unit by July 2017 (i.e. 42 months from the date of approval of building plans), which the Respondent had grossly failed to deliver. Despite assurances to deliver possession by July 2017 the Respondent, failed to fulfil its obligation within the stipulated time. Thus the Appellant claimed refund of the amount as paid by them along with interest, till the date of refund. The Appellant, as per terms of the agreement, made prompt payment of all the instalments, as and when demanded by the Respondent. The Appellant adhered to the payment schedule and paid a total sum of Rs.1,59,29,016/- (Rupees One Crore Fifty Nine Lacs Twenty Nine Thousand and Sixteen only) to the Respondent and despite receiving timely payments failed to deliver the possession of the allotted unit.Thus the Appellant/Financial Creditor terminated the Agreement vide e-mail dated 08th December 2018 and sought a refund of the total amount already paid, along with interest, which she was legally entitled to as per the Agreement. The Appellant contends that the Respondent corporate debtor owes Rs.2,07,57,385/- (Rupees Two Crores

Seven Lacs Fifty Seven Thousand Three Hundred and Eighty-Five only) as financial debt. Therefore, Applicant/Financial Creditor filed an Application under Section 7 of the I&B Code for initiation of the Corporate Insolvency Resolution Process (in short 'CIRP'), which was rejected by the Impugned Order.

The Appeal has been filed mainly on the ground as under:

(a) The Adjudicating Authority, while rejecting the Application has ignored the fact that the default occurred on 10th July 2017 and the project, i.e. being developed by the Respondent, is still incomplete.

(b) The Adjudicating Authority, while rejecting the Application has completely overlooked the well-settled Principle of Law as laid down by Hon'ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan in Civil Appeal No. 12238 of 2018 that a homebuyer cannot be made to wait for years after the due date of possession and the homebuyer cannot be forced to take possession of the allotted unit if the real estate developer has completely failed to construct the project within the promised period.

(c) The Adjudicating Authority has completely ignored the settled Principle of Law laid down by the National Consumer Disputes Redressal Commission in the case of Abhishek Khanna Vs. Ireo

Grace Realtech Private Limited in Consumer Complaint No.38 of 2017.

(d) The decision of the Adjudicating Authority that default has not occurred on the part of the Respondent is erroneous.

(e) The Adjudicating Authority has ignored the fact that the possession was due in July 2017. The purpose of the Builder Buyer Agreement got completely frustrated due to delay in delivery of possession.

(f) The finding of the Adjudicating Authority that the Appellant had terminated the said Agreement dated 08th December 2018, when the Respondent had not even received the Occupation Certificate, is erroneous.

3. We have heard the arguments of the Learned Counsel for the parties and perused the record.

4. The Adjudicating Authority has rejected the Application mainly on the ground that the building approval is of Dt. 23rd July 2013, which was subject to several preconditions required to be satisfied. The last precondition was regarding Fire Safety Scheme approval, which was granted only on 27th November 2014. Therefore, the proposed time for handing over the possession, i.e. five years from 27th November 2014, was to expire on 27th November 2019.

5. The Respondent /Corporate Debtor submitted that the question of delay in delivery of possession could not arise, before the time for the proposed delivery of possession starts. The Respondent further contends that it had applied for the Occupational Certificate on 05th July 2018, but it was received on 31st May 2019, and the E-mail for the termination of the Agreement is of 08th December 2018, which is just five months after the Occupational Certificate was obtained by the Corporate Debtor. The Corporate Debtor had fulfilled its obligation by applying for the Occupational Certificate within the time frame.

6. The Respondent – Corporate Debtor further contends that the letter was sent to the Appellant/financial creditor, stating that Apartment No. CD-A6-02-203, Type 3 BHK, Floor-2, Tower A-6, The Corridors, Sector – 67A, Dhumaspur, Gurgaon is ready for possession. In the circumstances, the Adjudicating Authority has held that the Corporate Debtor has not committed any default. Therefore the Application for Initiation of CIRP has been rejected by the Impugned Order.

7. The Respondent further contends that the Petition, filed under Section 7 of the I&B Code, is only to harass the corporate debtor and to extract a huge amount of money. As per Clause 13.3 of the Apartment Buyers Agreement (from now on referred to as "the Agreement"). The Respondent had fulfilled its obligation in applying for the "Occupational Certificate" within the time frame and had even offered possession to the Appellant within the stipulated time. It is further contended that the Respondent had completed construction of 1356 Apartments (approximately out of which

700 Apartments in Tower A6 to A10, B1 to B4, C3 to C7, EWS, convenient shopping, two-level basement are ready to move in, and Occupational Certificate for the same has been obtained on 31st May 2019. The notice of possession was given to the Applicant on 14th June 2019, and the possession of units have been offered to 381 allottees, out of which 62 allottees have already taken possession, and some of the allottees are also residing in the said group housing society.

8. The Respondent further contends that as per Section 3(12) of the I&B Code, no debt was ever due and payable as per Section 3(11) of the I&B Code. Given the 'Agreement' dated 3rd June 2014, allottees had agreed that the offer for possession for the concerned apartment in terms of provisions of Clause 13.3, 13.4, and 13.5 of Agreement. The date of the offer for possession about a unit of the apartment depended on the approval of the building plan, and fulfilment of the conditions imposed by the said approval. Accordingly, the Respondent undertook to handover the possession of the apartment within the stipulated period of 60 months, i.e. 42 months commitment period plus six months "Grace Period" and six months extended "delay period" from the date of approval of plan and fulfilment of the preconditions imposed thereunder.

9. In the present case, the Respondent emphatically contends that it could not commence construction despite approval of the building plan dated 23rd July 2013, as the said approved imposed certain pre-conditions including but not limited to (a) obtaining grant of approval by Ministry of Environment and Forest, (ii) Fire Safety Approval before the commencement

of construction. The Respondent obtained environmental approval on 12th December 2013, and the said approval reiterated the requirement for approval of the Fire Department. Therefore, the Respondent applied for Fire Safety Approval on 23rd October 2013, before starting any construction. It is further elucidated that the approval of the Fire Department in terms of Section 15 of the Haryana Fire Safety Act, 2009 was material for the fulfilment of the obligations of the Respondent and commencement of construction. Accordingly, the date of handing over of the possession is to be computed from the date of Fire Safety Approval, i.e. 27th November 2014, which expired on 27th November 2019. In the circumstances, Respondent emphasised that there was no default on their part and letter for the handover of the possession was sent within the timeline as stipulated under Agreement.

10. The Adjudicating Authority accepted the contention of the Respondent and held that there was no default on the part of the Corporate Debtor and further observed that the financial Creditor has also failed to prove that any debt was due and payable by the Corporate Debtor.

11. The Learned Counsel for the Appellant placed reliance on the order passed by the Hon'ble Supreme Court in the case of M/s Ireo Grace Realtech Private Limited Vs. Subodh Pawar Etc. (Diary No.48148 of 2018) , order dated 28th January 2019, wherein the date of handing over the possession has already been determined as 27th May 2018.

It is further noted in the said order that;

"Mr Mukul Rohatgi, Learned Senior Counsel upon instructions from Mr Manjeet Singh, the authorised representative of the Appellant, states that the money which is due and payable under the Impugned Order of the National Consumer Disputes Redressal Commission to the three purchasers namely, Subodh Pawar, Ritu Bansal and Geeta Bansal shall be refunded within four weeks from today together with interest @ 10% per annum w.e.f. 27th May 2018 until the date of payment."

12. The Appellant also placed reliance on the law laid down by Hon'ble Supreme Court in case of Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan in Civil Appeal No. 12238 of 2018. In this case, it is held that a homebuyer cannot be made to wait for years after the due date of possession and the homebuyer cannot be forced to take possession of the allotted unit if the real estate developer has completely failed to construct the project within the promised period. Learned Counsel for the Appellant further contends that the Occupational Certificate is only for some towers, and not for the project as a whole. Therefore, there is an admitted default of two years by the Respondent.

13. The Counsel for the Appellant further emphasised on the judgement of the in the case of M/s Ireo Grace Realtech Private Limited (supra). The Corporate Debtor herein had stated in the case of Subodh Pawar M/s Ireo Grace Realtech Private Limited before the National Consumer Disputes Redressal Commission that 27th May 2018 was the date of possession. Therefore, the promised date of possession as per the allottee could be latest

by 27th May 2018. Therefore, the Appellant contended that default had occurred on the date of termination of the agreement by an e-mail dated 08th December 2018.

14. It is pertinent to mention that Coordinate Bench of this Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 864 of 2019 in Navin Raheja Vs. Shilpa Jain & Ors., has held that:

> *"50. Taking into consideration the fact that many of the allottees are filing applications under Section 7 fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, the Hon'ble President of India has recently promulgated an Ordinance further amending the 'Insolvency and Bankruptcy Code, 2016' by published in the Gazette of India Extraordinary Part II- Section 1 dated 28th December 2019.*
>
> *51. In Section 7 of the principal Act, in sub-section (1), before the Explanation, the following provisos have been inserted:—*
>
> > *"Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less:*
> >
> > *Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:*

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission."

52. The provisos above inserted in sub-section (1) of Section 7 came into force since 28th December 2019 though not applicable in this appeal, the Adjudicating Authority is required to notice the said provisions.

53. Before admitting such case, it will be desirable to find out whether the allottees have come for refund of the money or to get their apartment/ flat/ premises by way of resolution. If the intention of the allottees only for refund of money and not possession of apartment/ flat/ premises, then the 'Corporate Debtor' may bring it to the notice of the Adjudicating Authority as held by the Hon'ble Supreme Court.

54. The Adjudicating Authority before admitting an application under Section 7 filed by allottee(s) will take into consideration the decision of the Hon'ble Supreme Court in "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors" (Supra), as noticed in Paragraph 33 of this Judgment."

15. Thus, given the law laid down by this Hon'ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited Vs. Union of India (2019) 8 SCC 416 (para 36 of this Judgment) it is held that the Adjudicating

Authority has to see whether the delay is due to the Corporate Debtor and in case the delay is not due to the Corporate Debtor, but force majeure as noticed above, it cannot be alleged that the Corporate Debtor defaulted in delivering the possession.

16. In this case, it is on record that the Corporate Debtor/Respondent was to handover the possession of the apartment within 60 months, i.e. 42 months (commitment period) + 6 months grace period + 12 months extended period from the date of approval of building plan and on fulfilment of the pre-conditions imposed thereunder as per Clause 13.3 to 13.5 of the Agreement.

17. It is noticed that the despite the approval of building plan on 23rd July 2013 project could not be started due to the certain pre imposed conditions, including but not limited to obtaining the grant of approval by Ministry of Environment and Fire Safety approval, before the commencement of construction. The Respondent obtained the environmental approval on 12th December 2013 and the said approval reiterated the requirement of approval by the Fire Department. Therefore, the Respondent applied for the Fire safety Approval on 23rd October 2013, and before starting any construction, approval from the Fire Department, in terms of Section 15 of the Haryana Fire Safety Act, 2009 was material for the fulfilment of the obligations of the Respondent and commencement of construction. Accordingly, the date of handover of possession is to be computed from the date of grant of Fire Safety Approval, i.e. dated 27th November 2014. Before that, the letter for handing over possession was already issued to the Appellant. It is also clear

that the Coordinate Bench of this Hon'ble Tribunal has also held that the proviso inserted in sub-Section (1) Section 7 of the I&B Code, which comes to be force since 28th December 2019, though not applicable in this Appeal, but the Adjudication Authority is required to take notice of the said provision and this Tribunal also holds that it will be desirable to find out whether the allottees has come to claim the money or to get their apartment by way of resolution. If the intention of the allottees is only for recovery of the money and not for resolution for possession by apartment, then the Corporate Debtor may bring to the notice of the Adjudicating Authority, as held by the Hon'ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors (supra). Thus, in the circumstances as aforesaid, we do not find any justification for the interference with the Impugned Order and Appeal is liable to be dismissed. Accordingly, Appeal dismissed. No order as to costs.

[Justice Venugopal M.]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
26th FEBRUARY, 2020

pks/md