

CASE DETAILS

VISHAL CHELANI & ORS.

v.

DEBASHIS NANDA

(Civil Appeal No. 3806 of 2023)

OCTOBER 06, 2023

[S. RAVINDRA BHAT AND ARAVIND KUMAR, JJ.]

HEADNOTES

**Issue for consideration:** The decision of the National Company Law Appellate Tribunal that the home buyer as beneficiary of a decree by the Uttar Pradesh Real Estate Regulatory Authority, the order of the Resolution Professional proposing that they be treated differently from other home buyers allottees, does not call for interference, is under challenge.

**Insolvency and Bankruptcy Code, 2016 – s.5(8)(f) explanation – Financial Creditor – Home buyers allottees in real estate project who secured the decree from the Real Estate Regulatory Authority for a refund of their investment, if could be treated as financial creditor:**

**Held:** Under explanation to s.5(8)(f) home buyers and allottees of real estate projects were included in the class of “financial creditors”, because financial debt is owed to them – No distinction is per se made out between different classes of financial creditors for drawing a resolution plan – Resolution Professional’s view 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, cannot be accepted – Distinction made by the Resolution Professional is artificial and fails afoul of Art.14 – 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 – 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 allottees as financial creditors – Furthermore, s. 238 IBC contains a

non obstante clause which gives overriding effect to its provisions, thus, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act – Thus, the impugned order is set aside – Home buyers are declared as financial creditors within the meaning of s. 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 – Real Estate (Regulation And Development) Act, 2016 – s. 18. [Para 6, 8,9]

#### **LIST OF CITATIONS AND OTHER REFERENCES**

*Mr. Natwar Agrawal (HUF) v. Ms. Ssakash Developers & Builders Pvt. Ltd.* in CP(IB) No.21/MB-IV/2023 dated 02.08.2023 – approved.

#### **OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3806 of 2023.

From the Judgment and Order dated 28.02.2023 of the National Company Law Appellate Tribunal, Principal Bench, New Delhi in Company Appeal (AT) (Insolvency) No. 991 of 2022.

#### **Appearances:**

Abhimanyu Bhandari, Ms. Nattasha Garg, Thakur Ankit Singh, Varun M., Ms. Shristy Singh, Ms. Rooh-e-hina Dua, Advs. for the Appellants.

Gunjesh Ranjan, Sidharth Sarthi, Anil Kumar, Shantanu Sagar, Prabhat R. Raj, Advs. for the Respondent.

#### **JUDGMENT / ORDER OF THE SUPREME COURT**

##### **JUDGMENT**

##### **S. RAVINDRA BHAT, J.**

1. The appellants challenge a decision of the National Company Law Appellate Tribunal, New Delhi<sup>1</sup> (hereinafter referred to as “NCLAT”) which ruled that as beneficiary of a decree by the Uttar Pradesh Real Estate Regulatory Authority (hereinafter referred to as “UPRERA”), the order of

<sup>1</sup> . Order dated 28.02.2023 by NCLAT, in C.A.(AT) No. 991/2022

the Resolution Professional (R.P.) proposing that they be treated differently from other home buyers allottees, does not call for interference.

2. The brief facts are that the appellants are home buyers, who had opted for allotment in a real estate project of the respondent company (hereinafter referred to as “Bulland Buildtech Pvt. Ltd.” or “the respondent”. Aggrieved by the delay in the completion of the project, the appellants approached the UPRERA which by its orders upheld this entitlement to refund amounts deposited by them, together with interest. In the meantime, proceedings under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC”) were initiated. In the course of proceedings after due consultations by the Committee of Creditors, a resolution plan was presented to the adjudicating authority. In that plan, a distinction was made between home buyers, who had opted or elected for other remedies such as i.e. applying before the RERA and having secured orders in their favor, and those who did not do so. Home buyers who did not approach authorities under RERA Act were given the benefit of 50% better terms than that given to those who approached RERA or who were decree holders. The appellants felt aggrieved; their applications were rejected by the adjudicating authority. Their appeals too were unsuccessful. Consequently, they have approached this Court.

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 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.

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.”

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.

5. Section 5 (7) & (8) defines “financial creditors” and “financial debt” in the following terms:

*“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 along with interest, if any, which is disbursed against the consideration for the time value of money and includes –*

*(A) money borrowed against the payment of interest;*

- (B) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (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; [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-clauses (a) to (h) of this clause;”

The amendment of 2018 introduced an explanation below. Sub-section 8(f) to Section 5 which reads as follows:

*"(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;"*

*[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);]*

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.

7. So far as the argument of the resolution professional is concerned, Section 18 of the RERA, Act reads as follows:

*"18. Return of amount and compensation – (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -*

*(a) In accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*

*(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

*he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such*

*rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*

*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.*

*(2) The promoter shall compensate the allottees in case of any loss cause to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this sub-section shall be not barred by limitation provided under any law for the time being in force.*

*(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.”*

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.

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.

**Headnotes prepared by:**  
**Nidhi Jain**

**Appeal allowed.**