

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT)(INS) No.74 of 2024

(Arising out of the Judgement dated 20.10.2023 passed by the National Company Law Tribunal, New Delhi Bench in CP No.105/ND/2023).

In the matter of:

Naman Infradevelopers Pvt Ltd
56, Rajpura Road,
Behind HDFC Bank,
Dehradun 248001

Appellant

Vs

Metcalfe Properties Pvt Ltd,
KH No.154/470, V&PO Pooth Khurd,
Delhi-110039.

Respondent

For Appellant: Mr Rishi Sood, Mr Gurjot Singh, Mr Tushar Rathee, Advocates.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

1. This is an appeal filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 against the impugned order dated 20.10.2023. The brief facts as narrated in the Memo of Appeal and the impugned order are as under;-

- a) The Appellant had approached the Corporate Debtor and had shown its interest to buy residential plots in the PUDA approved colony named Metcalfe Nirvana License No.LDC/DA/2011/5 dated 19.07.2011 situated at Village Bishamber Pura/Manawala/Jhitan Kalan, Metcalfe Nirvana at Distt Amritsar. The agreement to sell was executed between the parties on 10th March, 2012 and as per Clause 10 of the Agreement the sale deed was to be executed on or before March, 2013. It was one of the conditions in case the seller fails to execute the sale deed in favour of the purchaser, then the seller shall

be liable to return the entire amount received alongwith interest @ 24% per annum from the date of payment of the amount till the actual payment.

- b) It is alleged by the Appellant he had made advance payment of Rs.5 crores through two cheques drawn on State Bank of India and the balance payment was to be made by the purchaser when the seller would be ready for registry of the plots. He paid some further amounts too. Further the Appellant give him an option to effect the registry of land project in their name and transferred a sum of Rs.50 lakhs on 21.10.2021. However, the Corporate Debtor failed to effect the Registry and vide letter dated 25.02.2022 showed its inability to transfer the land project and proposed to convert the outstanding amount as loan and to repay the same with interest within four months after entering into the Settlement agreement.
- c) The Corporate Debtor allegedly agreed to pay Rs.14,91,57,539/- alongwith 24% interest on or before 22.07.2022 and if the repayment gets delayed then penal interest of 12% was also to be paid by the Corporate Debtor. However, the default occurred and a petition was filed by the Financial Creditor under Section 7 of the I&B Code, 2016.

2. The question which arose before the Adjudicating Authority (NCLT) was if the Appellant was a Financial Creditor or Financial Institution as per definition of the IB Code and if the petition was maintainable. . The Learned Adjudicating Authority (NCLT) had passed an impugned order stating interalia the debt owed to the Appellant is not a **financial debt** per Section

5(8) of the Code as the money was not disbursed as a loan with consideration for the time value of money but was paid as an advance for purchase of residential plots in the PUDA approved colony namely Metcalfe Nirvana. Further it held the Appellant is not an allottee under Section **5(8)(f)** but would be a speculative buyer.

3. The Learned counsel for the Appellant, however, relied upon Venkat Rao Marpina Va Vamuri Ravi Kumar and others Company Appeal (AT)(CH)(Ins) No.134/2022 which in para 7 held as under:-

“7. Further, interpreting the Explanation added to Section 5(8) (f) of the Code, the Court further held that allottees/homebuyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code. The advances given by Property buyers to real estate developer will be considered as a ‘borrowing’ and such amounts raised from allottees falls within the scope of Section 5(8)(f) of the Code. The contention of the Learned Senior counsel that the allottee is a speculative investor is unsustainable keeping in view that the ‘interest’ payable as per Clause 3 of the Agreement of Sale is ‘conditional’ to not obtaining the approval of HMDA.”

4. Heard.

5. The judgement relied upon by the Appellant does not relate to the facts of the case as the Appellant was never an allottee or a home buyer but was a speculative buyer, hence would not fall within the purview of Section **5(8)** of the Code, hence we are in agreement with the order passed by the Adjudicating Authority as it had rightly relied upon **Mansi Brar Fernandes**

Versus Sudha Sharma and Anr (Civil Appeal No.3826/2020) which affirms the order of the Appellate Tribunal in the matter of **Nidhi Rekhan Vs M/s Samyak Projects Pvt Ltd, Company Appeal (AT)(Ins) No.1035/2020** wherein it was held that

“where the appellant is a speculative investor, he cannot claim status and benefits as financial creditor under Explanation (i) of Section 5(8)(f) of the IBC and is not interested in the financial well-being growth and vitality of the Corporate Debtor but is just interested in investment and has come in the garb of an allottee, such petition needs to be dismissed.”

6. We are in agreement to say the status of ‘Financial Creditor’ cannot be accorded to the Appellant, it being a speculative investor and had filed an Application under Section 7 of the Code for recovery of its money with profit and interest.

7. There is no merit in the Appeal. It is accordingly dismissed.

(Justice Ashok Bhushan)
Chairperson

(Justice Yogesh Khanna)
Member (Judicial)

(Mr. Barun Mitra)
Member (Technical)

Dated: 22-02-2024

BM