IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI

BENCH-VI

IB-785/ND/2020

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

Ms. Shivani Gupta
W/o Mr. Atul Gupta,
A-2/9, Model Town - I,
Delhi-110009

...Applicant/Financial Creditor

Versus

M/s. Samyak Projects Private Limited
At: 111, First Floor, Antriksh Bhawan,
22, Kasturba Gandhi Marg,
New Delhi - 110001

...Respondent/ Corporate Debtor

CORAM:

SHRI. P.S.N PRASAD, MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Counsel for Petitioner: Mr. Manish Kaushik

Counsel for Respondent: Mr. Sandeep Bhuraria

ORDER

PER: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 22.05.2023

1. This is an application filed by Ms. Shivani Gupta to initiate corporate insolvency resolution process ("CIRP") against M/s. Samyak Projects Private Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code") for the alleged default on the part of the Respondent in settling an amount of Rs. 71,15,000/- (Rupees Seventy One Lacs Fifteen Thousand). The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

i. That the Corporate Debtor is a Company engaged in construction of Residential and Commercial Complexes.

ii. That the Corporate Debtor accepted Rs. 50,00,000/- as investment from the Financial Creditor by allotting flat to the Financial Creditor bearing no. B1301 on 13th Floor having a total area admeasuring 1895 sq. ft. by showing a rosy picture of the Project "Ansal Heights 86", Sector - 86, Gurugram (herein referred to as "the

said project"). It was assured that the said project will be completed in stipulated time and that Financial Creditor will be provided Assured return at 24% per annum.

iii. That the Corporate Debtor was liable to pay the Financial Creditor assured returns amount at 24% per annum from 18.09.2017 till date.

iv. That the Corporate Debtor accepted to take back the rights over the flats and returned the invested amount and gave refund cheques dated 12.09.2019 for an amount of Rs. 50,00,000/- and also issued various cheques from time to time for assured returns however, the Corporste Debtor neither paid the assured returns nor the invested amounts and the cheques either got dishonoured or were replaced with fresh cheques which got dishonoured.

v. That the Corporate Debtor has failed to make payment of the assured returns at 24% per annum from the date of execution of the agreement till date, hence the Corporate Debtor

is liable to pay Compound Interest at 24% per annum on the assured returns at 24% per annum to the Financial Creditor and refund of the investment amount with interest at 24% to the Financial Creditor.

vi. That the Financial Creditor is no longer a Unit Buyer as the unit stands withdrawn by issuance of refund cheques.

vii. That upon the dishonour of cheques the Financial Creditor had tried to contact the Corporate Debtor several times about the fate of the above referred cheques but the Corporate Debtor continuously kept avoiding the Financial Creditor and even till date Corporate Debtor has failed to make the payment against the dishonoured cheques despite repeated requests which clearly show the dishonest and malafide intention of the Corporate Debtor from the very beginning.

viii. That the Corporate Debtor is liable to pay the Financial Creditor an amount of Rs. 71,15,000/-

being the refund amount invested alongwith interest and assured returns alongwith interest on assured returns.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions were made:

i. That as per the terms of the Agreement executed between the Applicant and the Respondent Company, a buyback option was provided to the Financial Creditor to secure refund of Rs. 50,00,0000/- ("Investment Amount") which was provided as consideration for the Unit allotted to the Applicant in the Project along with Assured Return. The said buyback option could be utilized by the Applicant by rescinding the allotment for any reason whatsoever after one year from the date of the execution of the Agreement.

ii. That the Applicant was interested in utilizing the buyback option for securing refund of the Investment Amount along with the assured return amounting to 24% per annum which was payable

from the date of execution of the Agreement dated 18.09.2017, rather than securing possession of the unit as prescribed in the Agreement. Furthermore, there is no document on record which showcases that the Applicant was genuinely interested in the status of the project much less securing the delivery of the said Unit. The Unit was only purchased to earn assured return on the Investment Amount, and hence the Applicant solely qualifies as speculative investor who was never interested in taking possession of the said Unit.

3. The Applicant has further contended as follows:

i. That the utilization of the buy-back option under clause 7 of the said agreement, cannot tantamount to categorizing the Applicant as a speculative buyer, as the Respondent was a signatory to the said agreement which clearly stipulates that the Respondent was in agreement to the said clause along with all the clauses present in the said agreement.

ii. That there was no settlement agreement with the Applicant, only exercise of the buy-back option.

4. The Respondent has further contended as follows:

i. That Clause 7 of the Agreement dated 18.09.2017 ('the Agreement') provides for exercise of the 'Buy-Back Option' at the instance of the Allottee or M/s Samyak Projects Private Limited ('Respondent Company') after a lock-in period of one year post the execution of the Agreement. Further, a bare perusal of Letter dated 20.01.2020, makes it sufficiently clear that the 'Buy-Back Option' was exercised at the instance of the 'Allottee'.

ii. That the Applicant is a "Speculative Investor" and not a genuine Allottee.

5. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. The present Application has been filed by the Applicant under Section 7, IBC, 2016 against the Respondent for an amount of Rs. 71,15,000/- (Rupees Seventy One Lacs Fifteen Thousand) in pursuance of Agreement dated

18.09.2017, allotting flat No. B-1301 to the Applicant in the Project "Ansal Heights 86", on the payment of the consideration of Rs. 50,00,000/- by the Applicant. The said Agreement provided for a buy-back option to the Financial Creditor to secure refund of Rs. 50,00,0000/- ("Investment Amount") which was provided as consideration for the Unit allotted to the Applicant in the Project. The Agreement also provided assured return of 24% p.a. The said buyback option could be utilized by the Applicant by rescinding the allotment for any reason whatsoever after one year from the date of the execution of the Agreement. The question before us to decide is whether the Applicant is a genuine allottee interested in resolution of the Corporate Debtor or a speculative investor. To understand the same, we need to read the relevant clauses of the Agreement i.e., Clause (5) & Clause (7) which are reproduced herein below for ready reference:

> *5. "That the FIRST PARTY hereby agrees and assures and undertakes to pay to the Allottee an assured return of 24% (twenty four) per annum on the amount paid by the Allottee. The assured return shall be paid*

annually commencing from the execution of this Agreement and the Allottee shall be entitled to the same till the termination of this Agreement.

7. Notwithstanding anything contained herein It is specifically agreed to between the parties that after a period of one year from the date hereto the Allottee or the FIRST PARTY without assigning any reason, in its absolute discretion, is fully entitled to cancel or rescind the allotment of the Flat/Unit herein booked Once the allottee exercises its/his option to cancel the booking after the specified period of one year, the Allottee shall send written intimation to FIRST PARTY upon receipt of which the FIRST PARTY shall forthwith refund the entire amount of consideration herein paid together with any outstanding amount of assured return accrued till the date of refund .... .. "

A perusal of the above clauses makes is clear that the said transaction was undertaken with an objective to provide returns to the tune of 24% on a yearly basis to the Applicant. Further, the Applicant also had the option to recover his Investment Amount after an initial lock in period of one year.

6. On a bare perusal of the Agreement, the Petition under reply and the documents filed by the Applicant it is

evident that the Applicant was interested in utilizing the buyback option for securing refund of the Investment Amount along with the assured return amounting to 24% per annum which was payable from the date of execution of the Agreement dated 18.09.2017, rather than securing possession of the unit as prescribed in the Agreement. The Applicant cannot be said to be genuinely interested in the status of the project much less securing the delivery of the said Unit. The Unit was only purchased to earn assured return on the Investment Amount, and hence the Applicant solely qualifies as speculative investor who was never interested in taking possession of the said Unit. Further, the Hon'ble Supreme Court, vide judgment dated 09.08.2019 in *Pioneer Urban Land and Infrastructure Ltd. Vs. Union Of India~ 2019 SCC Online 1005* held as follows:

57. "At this stage also, it is important to point out, in answer to the arguments made the Petitioners, that under Section 65 of the Code, the real estate developer can also point out the resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of solvency. This the real estate developer may do by pointing out, for example,

that the allottee who has knocked at the doors of NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flatl apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat apartment under RERA, but wants to jump ship and really get back, by way of coercive measure, monies already paid by it.. .. "

7. In determining whether to entertain a petition at the instance of a real estate allottee, and in determining "default", this Tribunal will consider whether the allottee is "genuinely interested in purchasing the flat", This is because insolvency proceedings have serious consequences including potential corporate death. Such serious consequences cannot be triggered at the instance of a speculative allottee who is seeking refunds in relation to flats, and who has no real interest in the health and resurrection of the Respondent Company/ Corporate Debtor. The Hon'ble NCLAT in the matter of *Navin Raheja Vs. Shilpa Jain and Ors. [Company Appeal (AT) (Insolvency) No. 864 of 2019]* has held as follows:

"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."

Similar view was taken by the Hon'ble NCLAT in the matter of Shubha Sharma Vs. Mansi Brar and Anr. [Company Appeal (AT) (Insolvency) No. 83 of 2020]:

41. In such circumstances, we are of the considered view that the Respondent No.1 is a speculative investor and not a person who is genuinely interested in purchasing the apartments. Therefore, she cannot be termed as a allottee as per the explanation attached to clause (t) of Section 5(8) of the I&B Code and the light of observations of the Hon'ble Supreme Court in the case of Pioneer Urban Land & Infrastructure Ltd. The Respondent No. 1 is not a genuine allottee, therefore, the amount of Rs. 35 lacs paid to the Respondent No.2 is not a Financial Debt and the Respondent No.1 is not a Financial Creditor. We are unable to subscribe of the view of the Learned Adjudicating Authority that the Respondent No.1 is a Financial Creditor.

8. On a co-joint reading of the Agreement dated 18.09.2017 and the above referred judgements, we are of the view that the Applicant is merely a speculative buyer

and cannot be termed as a Financial Creditor in terms of the IB Code, 2016. Further, the Petitioner herself admits this fact that the Petitioner is no longer a unit buyer as the unit stands withdrawn by issuance of the refund cheques. As per Section 5 (8) of the lBC, 2016, any amount raised from the Allottee under a Real Estate Project shall be deemed to be an amount having the commercial affect of a borrowing. Since the Applicant herself admits this fact that she is no longer an Allottee, we are therefore of the considered view that the amount, which the Applicant has invested, does not come under the definition of Section 5 (8) of the lBC, 2016, and if the amount invested by the Petitioner does not come under the definition of Financial Debt then the Petitioner cannot be treated as a Financial Creditor under Section 5 (7) of IBC, 2016. A similar view has been taken by this Tribunal in the matter of *Mrs. Nidhi Rekhan vs M/s. Samyak Projects Private Limited [CP(IB) No. 784(ND)/2020]* wherein Section 7 Application, filed by the Applicant on similar set of facts, was dismissed by this Tribunal. The Hon'ble NCLAT while upholding the order of this

Tribunal in *Mrs. Nidhi Rekhan vs M/s. Samyak Projects Private Limited [Company Appeal (AT) (Ins) No. 1035 of 2020]* held as follows:

> *17. Thus, in our clear opinion, the Appellant, who is a speculative investor, 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 her investment and has come in the garb of an allottee. In such a situation, the Appellant is certainly not a financial creditor holding financial debt, which is in default of payment by the Corporate Debtor, and consequently we conclude that the Impugned Order does not require any interference. The appeal is, therefore, dismissed. There is no order as to costs.*

9. Accordingly, in our view the present Application is not maintainable. We hereby dismiss the present application filed under Section 7 of the IB Code, 2016.

SD/- SD/-

(RAHUL BHATNAGAR) **(P.S.N PRASAD)**

MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**