

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 12
(IB)-477(PB)/2017

IN THE MATTER OF:

Au Small Finance Bank Ltd. Petitioner/Applicant
Vs.	
Prabhu Shanti Real Estate Pvt. Ltd. Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016 CIRP

Order delivered on 01.05.2024

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

HYBRID HEARING (PHYSICAL & VC)

PRESENT:

For the Applicant	:	Mr. Ashish Aggarwal, Mr. Gurcharan Singh, Advs. in IA-6287/2023
For the Tamilnad mercantile bank	:	Mr. Kamal Kant, Adv.
For the RP	:	Mr. Sunil Fernandes, Sr. Adv., Mr. Abhishek Parmar, Ms. Diksha Dadu, Mr. Rajshree Chardhary, Advs. along with Mr. Devender Umrao, RP in person
For the Suspended Board	:	Mr. Abhishek Anand, Mr. Ishaan Dhingra, Advs.

ORDER

IA-6287/2023

1. This application is filed by a group of Homebuyers seeking the following reliefs:

“a. direct the Resolution professional to admit the interest amount @ 8% of the 144 Home Buyers of the Corporate Debtor (as detailed in Annexure A-1 herein);

b. pass any such orders as this Hon'ble Tribunal deem fit.”

2. In the above circumstances, Ld. Counsel relied upon the two decisions of the Hon'ble Supreme Court in the case of “**Wing Commander Arifur Rahman Khan and Aleya Sultan and**

Others Vs. DLF Southern Homes Private Limited”, (2020) 16 SCC 512, the relevant para is extracted below:

25. *The only issue which then falls for determination is whether the flat buyers in these circumstances are constrained by the stipulation contained in Clause 14 of ABA providing compensation for delay @ Rs 5 per square feet per month. In assessing the legal position, it is necessary to record that the ABA is clearly one-sided. Where a flat purchaser pays the instalments that are due in terms of the agreement with a delay, Clause 39(a) stipulates that the developer would “at its sole option and discretion” waive a breach by the allottee of failing to make payments in accordance with the schedule, subject to the condition that the allottee would be charged interest @ 15 per cent per month for the first ninety days and thereafter at an additional penal interest of 3% p.a. In other words, a delay on the part of the flat buyer attracts interest @ 18% p.a. beyond ninety days. On the other hand, where a developer delays in handing over possession the flat buyer is restricted to receiving interest at Rs 5 per square feet per month under Clause 14 (which in the submission of Mr Prashant Bhushan works out to 1-1.5% interest p.a.). Would the condition which has been prescribed in Clause 14 continue to bind the flat purchaser indefinitely irrespective of the length of the delay? The agreement stipulates thirty-six months as the date for the handing over of possession. Evidently, the terms of the agreement have been drafted by the developer. They do not maintain a level platform as between the developer and purchaser. The stringency of the terms which bind the purchaser are not mirrored by the obligations for meeting timelines by the developer. The agreement does not reflect an even bargain.*

69. *For the above reasons we have come to the conclusion that the dismissal of the complaint by NCDRC was erroneous. The flat buyers are entitled to compensation for delayed handing over of possession and for the failure of the developer to fulfil the representations made to flat buyers in regard to the provision of amenities. The reasoning of NCDRC on these facets suffers from a clear perversity and patent errors of law which have been noticed in the earlier part of this judgment. Allowing the appeals in part, we set aside the impugned judgment and order of NCDRC dated 2-7-2019 [Rasheed Ahmad Usmani v. DLF Ltd., 2019 SCC OnLine NCDRC 84] dismissing the consumer complaint. While doing so, we issue the following directions:*

69.1. *Save and except for eleven appellants who entered into specific settlements with the developer and three appellants who have sold their right, title and interest under the ABA, the first and second respondents shall, as a measure of compensation, pay an amount calculated @ 6 per cent simple interest per annum to each of the appellants. The amount shall be computed on the total amounts paid towards the purchase of the respective flats with effect from the date of expiry of thirty-six months from the execution of the respective ABAs until the date of the offer of possession after the receipt of the occupation certificate.*

69.2. *The above amount shall be in addition to the amounts which have been paid over or credited by the developer @ Rs 5 per square feet per month at the time of the drawing of final accounts.*

69.3. *The amounts due and payable in terms of Directions 69.1 and 69.2 above shall be paid over within a period of one month from the date of this judgment failing which they shall carry interest @ 9% p.a. until payment.*

and “Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Others” in Civil Appeal No. 5785 of 2019. The relevant para is extracted below:

“19.7 We are of the view that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.

In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement.

iv) We are cognizant of the prevailing market conditions as a result of Covid-19 Pandemic, which have greatly impacted the construction industry.

In these circumstances, it is necessary to balance the competing interest of both parties. We think it would be in the interests of justice and fairplay that the amounts deposited by the Apartment Buyers is refunded with Interest @ 9% S.I. per annum from 27.11.2018 till the date of payment of the entire amount.”

3. Ld. Sr. Counsel Mr. Sunil Fernandes appearing on behalf of the RP seeks and is granted time to consider these said claims in light of the said decisions and also on Regulation 16A (7) of the Insolvency and the Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4. Accordingly, the IA-6287/2023 stands disposed of.

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At request and with consent of the parties, list the matter along with all the other pending applications for a physical hearing **on 15.07.2024.**

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**(RAMALINGAM SUDHAKAR)
PRESIDENT**

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**(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)**

Vinod Arora – 01.05.2024