

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-II

IA No. 745 of 2021

In

CP (IB) 2517(MB) of 2018

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the N.C.L.T. Rules, 2016.

IN THE MATTER OF

1. Mr. Manish P. Sidhwani

2. Mr. Girish P. Sidhwani

3. Mrs. Sakshi G. Sidhwani

All the above three residing at: B4/7, Basant Park, R.C. Marg, Chembur, Mumbai-400071

4. Mr. Hemant Hotwani

5. Mrs. Roshni Hotwani

Both residing at: Bungalow No.06, Vaikunth CHS, Near Swami Vivekanand Degree College, Sindhi Society, Chembur, Mumbai-400 071.

... Applicants

V/s.

Mr. S. Gopalkrishnan

Resolution Professional of Monarch Brookefields LLP, Having his address at:
R-2/202, Moraj Riverside Park, Taluka:
Panvel, PIN: 410206.

... Respondent

IN THE MATTER OF

M/s. Capri Global Capital Ltd.

502, Tower-A, Peninsula Business Park,
Senapati Bapat Marg Lower Parel Mumbai,
Maharashtra.

... Financial Creditor

V/s.

M/s. Monarch Brookefields LLP

Having its Registered Office at F. No. 701,
07th floor, Dheeraj Palace, Near Hira
Marriage Hall, Ulhasnagar, District: Thane,
PIN Code-421 001.

... Corporate Debtor

Order delivered on: - 24.04.2024.

Coram:

Mr. Kuldip Kumar Kareer, Member (Judicial)

Mr. Anil Raj Chellan, Member (Technical)

Appearances (Hearing in Physical Mode):

For the Applicant : Adv. Sheetal H. Pandya.

For the Respondent/RP : Counsel Mr. Amir Arsiwala a/w
Nupur Shah.

ORDER

Per: - Coram.

1. The Applicants in the present Interlocutory Application have prayed

for directions to the Respondent to admit the claim of the Applicants dated 06.12.2019 in respect of Flat allotted pursuant to the Deed of Settlement dated 24th September, 2016; or in the alternative, the Applicants have prayed that the Adjudicating Authority be pleased to consider and verify the claim of the Applicants afresh based on the aforementioned Deed of Settlement.

2. Brief facts necessary for disposal of the present Application are as follows:

- a. Monarch Brookfield LLP, Monarch Universal, Monarch Realty Management Services Ltd, Monarch Imperials and Monarch Lifescapes Pvt Ltd, all together forms the Monarch group of companies. All Monarch group of companies deal into real estate business and management of all companies is looked into by Mr. Gopal Thakur and Mr. Hasmukh Thakur as directors/partners (hereinafter referred to as “the said Promoters”). The said promoters were also the designated partners of the Corporate Debtor as on the insolvency commencement date.
- b. On 24.03.2012, the Applicant No.03 paid Rs. 15,00,000/- to M/s. Monarch Imperial on instructions of the promoter of Monarch group of companies. M/s. Monarch Imperial issued an allotment letter dated 10.01.2013 in favour of Applicant Nos. 02 and 03 whereby they were allotted Flat No. 204 in the building called ‘1st Avenue’ in the project named “Monarch Imperial”. On 05.07.2013, Applicant No.02 paid Rs. 25,00,000/- to Monarch Realty Management Services Pvt Ltd on instructions of the promoter of Monarch group of companies.

Thereafter, an allotment letter dated 11.07.2013 was issued whereby Flat No. 2201-A in the residential project named “Monarch Greenscapes” was jointly allotted to the Applicant Nos. 01 and 02. On 05.07.2013, Applicant No.01 paid Rs. 10,00,000/- to Monarch Realty Management Services Pvt Ltd on instructions of the promoter of Monarch group of companies. An allotment letter dated 11.07.2013 was issued whereby Flat No. 2204-A in the residential project named “Monarch Greenscapes” was jointly allotted to the Applicant Nos. 01 and 02. On 11.09.2013, Applicants No.04 and 05 paid Rs. 50,00,000/- to Monarch Realty Management Services Pvt Ltd on instructions of the promoter of Monarch group of companies. Two allotment letters dated 19.10.2013 were issued whereby Flat Nos. 2301-A and 2307-A in the residential project named “Monarch Greenscapes” were jointly allotted to the Applicant No.04.

- c. Thus, the Applicants had purchased the flats as described hereinabove for an aggregate consideration of Rs. 1 crore paid by them in 2012-2013. The Applicants had purchased the said flats by depositing the consideration amounts in favour of different Monarch companies managed and controlled by the Monarch Group. However, despite issuance of the allotment letters, no agreements for sale were either executed or registered in favour of the Applicants. The Applicants further learnt that the aforesaid flats, which were originally allotted to them, were subsequently illegally sold to third parties thereby cheating the Applicants.

- d. Around December 2014, the promoters offered the allotment of alternative flats to the Applicants as follows in satisfaction of their claims since the Monarch group was in dire straits not able to refund the money of the Applicants:
- i. The Applicant Nos. 01 and 02 were allotted Flat Nos. 401-B and 404-B in the project called Monarch Solitaire and Flat Nos. 2202 & 2203 in the project called Monarch Greenspaces. However, in spite of repeated requests by the Applicants No. 01 and 02, the Agreement for Sale was not registered.
 - ii. By Letter of Allotment dated 13th February 2015, Flat No. 1401 was jointly allotted to Applicant Nos. 01 and 02, and Flat No. 1402 was jointly allotted to Applicant Nos. 02 and 03.
 - iii. The Applicant Nos. 01, 02 and 03 were allotted Flat Nos. 2401-D, 2202-B and 2203-B in the project called Monarch Greenspaces. However, in spite of repeated requests by the Applicants, the Agreement for Sale was never registered.
 - iv. The Applicant Nos. 04 and 05, both were allotted Flat No. 1403-A in the project called Monarch Greenspaces. However once again, the Agreement for Sale was never registered.

The Applicants accepted the allotment of the aforesaid flats having regard to their market value of Rs. 1.5 crores at that point of time. It is also pertinent to note that the above projects were initiated by Monarch Brookefields LLP.

- e. The Applicants learnt that the promoters were persistently faltering in their commitments and several illegalities were being committed by them again and again as a result of which the Applicants were yet again defrauded. This led the Applicants to filing a police complaint dated 17.07.2015 to the Additional Commissioner of Police, CBD Belapur, District: Navi Mumbai, alleging the offence of cheating as defined u/s 419 of IPC and punishable u/s 420 of IPC. The Economic Offences Wing, CBD Belapur, Navi Mumbai issued a Notice dated 12.04.2016 to the Applicants No. 01 and 02 *inter-alia* recording that the investigation was in progress. Amid the ongoing investigation by the Economic Offence Wing, the Promoters of Monarch Group once again approached the Applicants to allot certain alternative flats in full and final settlement of their claims. Applicant Nos. 03 to 05 had authorized the Applicant Nos. 01 and 02 to accept the settlement offer put forth by the promoters.
- f. Accordingly, after a long round of negotiations, a Deed of Settlement dated 24.09.2016 came to be executed between M/s. Monarch Universal and all Monarch Group of Companies as the 'Developer' through Mr. Gopal Thakur and Mr. Hasmukh Thakur, and Applicant Nos. 01 and 02 acting for themselves as well as the 'Beneficiary' for Applicant Nos. 03 to 05. Under the Deed of Settlement, it was agreed that eight flats, as specified in Annexure 'K' to the Deed of Settlement, have been offered to the Applicants against them withdrawing the EOW complaint. The details of the eight flats is given in the table below:

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<u>Project</u>	<u>Building</u>	<u>Flat No.</u>	<u>Type</u>	<u>Carpet Area (in sq. mtrs)</u>	<u>Terrace Area (in sq. mtrs)</u>	<u>Allotted to</u>
Monarch Imperial	Avenue 2	1005	1 BHK	32.336	4.972	Not available
Monarch Brookefields	Virginia	103	2 BHK	56.324	4.525	Applicant No. 02
Monarch Brookefields	Arizona	203	1 BHK	32.283	4.522	Applicant No. 03
Monarch Brookefields	Vermont	804	1 BHK	32.283	4.522	Applicant No. 05
Monarch Brookefields	Vermont	206	1 BHK	32.283	4.522	Applicant No. 04
Monarch Brookefields	Arizona	503	1 BHK	32.283	4.575	Applicant No. 04
Monarch Brookefields	Arizona	1001	1 BHK	32.283	4.522	Applicant No. 01
Monarch Brookefields	Arizona	1002	1 BHK	32.283	4.522	Applicant No. 01

The Applicant Nos. 01 and 02 accepted the allotment of the aforesaid flats on behalf of the Applicants including them, having regard to their market value of Rs. 2.5 crores at that point of time. Under the Deed of Settlement, it is specifically clarified that the flats referred to in the table above are free from all encumbrances, not mortgaged and freely marketable. Pursuant to the Deed of Settlement, the Applicant Nos. 01 and 02 withdrew the police complaint filed by them.

g. In the meantime, Corporate Insolvency Resolution Process

(CIRP) against M/s Monarch Brookefields LLP (the Corporate Debtor) was initiated vide Order of the Tribunal dated 27.09.2019 and Mr. S Gopalakrishnan was appointed as Interim Resolution Professional (IRP). IRP issued a public announcement in Form 'A' on 24.11.2019 inviting claim under Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the last date for submission of claim was 07.12.2019. In response to the publication dated 24.11.2019, the Applicants filed their claim in Form CA as financial creditors in a class by virtue of being the allottee of flats in the project Monarch Brookefields being implemented by the Corporate Debtor as mentioned in the Deed of Settlement.

- h. It is further clarified that the allotment made in favour of the Applicant Nos.01 and 02 is disclosed by the Affidavit dated 19.04.2017 filed by the Corporate Debtor before the Hon'ble Bombay High Court in Commercial Arbitration Petition No. 172/2017 filed by the Financial Creditor against the Corporate Debtor. Despite the same, the Resolution Professional has erroneously rejected the Applicant's claim by observing that the consideration amount of Rs. 1,00,00,000/- was paid by the said purchasers to other group companies and therefore, the transaction appears to be a money lending transaction.
- i. Hence, the Applicants herein are constrained to file this application. The aforesaid Affidavit dated 19.04.2017 filed by the Corporate Debtor before the Hon'ble Bombay High Court, as discussed above, has been placed on record by the Applicants

vide Additional Affidavit dated 02.02.2023 filed before this Tribunal.

3. **Reply of the Respondent:**

- a. It is an admitted position that the Applicants had not advanced or paid any sum of money into the account of the Corporate Debtor. Admittedly, the Applicants originally sought allotment of units in projects belonging to other group entities of the Corporate Debtor, but not of the Corporate Debtor itself.
- b. The correct position of law is that an allottee of real estate project being undertaken by the Corporate Debtor (and not its group companies) will only be entitled to be a financial creditor of that Corporate Debtor to the extent of amounts raised from that particular allottee. In the present case, since the Corporate Debtor has not raised any amount from the present applicants, the Applicants cannot be considered as financial creditors of the Corporate Debtor.
- c. Further, it is also worth noting that the Applicants do not have any registered agreements in their favour from the Corporate Debtor. It is not even the case of the Applicants that the Corporate Debtor had entered into any agreement for sale with the Applicants. The entirety of the case of the Applicants is based upon certain purported letters of allotment as well as certain purported settlement deeds. It is humbly submitted that these documents cannot be the basis of a claim filed by the Applicants against the Corporate Debtor as a financial creditor belonging to the class of home buyers.

Analysis and Decision:

4. We have heard the Counsel appearing for the parties and perused the records.
5. This is an application filed by the Applicants u/s 60(5) of the Code since the Respondent has rejected their claim on the ground that the Applicants are not financial creditors of the Corporate Debtor as admittedly neither any money has been paid by the Applicants to the Corporate Debtor nor the agreement for sale has been executed, much less registered, between the Applicants and the Corporate Debtor.
6. Counsel for the Applicants submits that a Deed of Settlement dated 24.09.2016 was executed between M/s. Monarch Universal and all Monarch Group of Companies as the 'Developer' through Mr. Gopal Thakur and Mr. Hasmukh Thakur, and Applicant Nos. 01 and 02 acting for themselves as well as the 'Beneficiary' for Applicant Nos. 03 to 05, wherein it was agreed that the Applicants will be allotted flats in the project belonging to the Corporate Debtor. Counsel for the Applicants further submits that even in the affidavit filed before the Bombay High Court in Commercial Arbitration Petition No. 172/2017, the designated partner Corporate Debtor had, *inter-alia*, mentioned the details of allotments to be made to the Applicants in the real estate project of the Corporate Debtor. Therefore, according to the learned Counsel for the Applicants, the Applicants are the allottees of the Corporate Debtor and the rejection of their claims by the Respondent was not justified in facts as well as in law.
7. Per contra, Counsel appearing for the Respondent submitted that since the Applicants had neither paid any money to the Corporate Debtor

towards the allotment of flats nor any agreement for sale was executed by the Corporate Debtor, the Applicants cannot be treated as financial creditors of the Corporate Debtor and therefore, the claim rejection by the Respondent was in accordance with law.

8. We have heard the Counsel for the Applicants and the Counsel for the Respondent. We have also examined the case on its merits and have given due weightage to the aforesaid submissions.
9. It is an admitted fact that the neither any money has been paid into the account of the Corporate Debtor nor any agreement for sale was executed by the Corporate Debtor towards the allotments of flats to the Applicants. Further, the initial allotments of the flats in favour of the Applicants herein were not made by the Corporate Debtor, but by the other entities of the Monarch Group. We also observe that the Deed of Settlement dated 24.09.2016 was not executed by the Corporate Debtor as the deed does not bear any name, stamp or seal of the Corporate Debtor.
10. Under section 5(8) of the Code, “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money; and under section 5(7) of the Code, “financial creditor” means any person to whom a financial debt is owed. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that there ought to be a disbursement against the consideration for time value of money. In other words, the essential element of disbursement and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it

may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. The term "disburse" is comprised of two elements, namely (i) the departing of money from the creditor and (ii) its availability, upon such departure, to the corporate debtor for utilisation. In the factual matrix of the present case, admittedly, there has been no disbursement of money by the Applicants to the Corporate Debtor. Thus, the Applicants cannot be considered as "financial creditors", much less "financial creditors in a class" under the provisions of the Code read with Regulation 8-A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Merely on the basis of a settlement deed in which the Corporate Debtor was not even a party, it cannot be said that the Applicants have become the financial creditors of the Corporate Debtor. Therefore, the rejection of the claims of Applicants No. 01 to 05 by the Respondent vide E-mail dated 23rd August, 2020 is fully justified in facts as well as in law. Hence, we are not inclined to pass any order directing the Respondent to admit the claims of the Applicants.

11. Before parting with the order, we observe that the Applicants have simultaneously filed their claims on 06.12.2019 in Form CA and Form F under Regulations 8A and 9A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 respectively. This practice of the Applicants is deprecated as the Applicants can either claim themselves to financial creditors in a class or other creditors, but not both at the same time and the same is evident upon plain reading of Regulations 9A (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
12. Though in the Affidavit filed by the Corporate Debtor before the

Hon'ble Bombay High Court, the Corporate Debtor has shown the allotment of flats as against the amounts received, but it is a matter of record as also an admitted fact that neither any money has been paid by the Applicants into the account of the Corporate Debtor nor any agreement for sale of flats has been executed between the Applicants and the Corporate Debtor. On account of the fraud perpetrated by the Monarch Group companies against its homebuyers including the Applicants herein, there was a settlement between the Applicants and the Corporate Debtor pursuant to which the promoters of the Corporate Debtor had agreed to allot the flats in the projects that are constructed or to be constructed by the Corporate Debtor. Therefore, in that factual context, the Corporate Debtor filed an Affidavit before the Hon'ble Bombay High Court showing the allotments made by it project-wise. It is also pertinent to note that the Corporate Debtor while admitting the allotments made to the Applicants, has made no reference to the cheque numbers along with the dates corresponding to the payments, which proves that the allotments were made only pursuant to a settlement between the parties and not for monetary consideration received by it from the Applicants.

13. In the present matter, we are only concerned with the question as to whether the Applicants can be considered as financial creditors/financial creditors in a class of the Corporate Debtor so as to maintain their claim filed before the Respondent in Form CA under Regulation 8-A of the CIRP Regulations, 2016. Even though the Applicants may be the allottees as per the Deed of Settlement or as per the Affidavit filed before the Hon'ble High Court, however, they cannot be considered as financial creditors of the Corporate Debtor for the only reason that there was no disbursement against the consideration

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for time value of money.

14. In the facts and circumstances of the case and in view of the foregoing findings and aforesaid observations, we are not inclined to admit the claims of the Applicant Nos. 01 to 05 and hence, **we reject I.A. 745 of 2021** with no order as to costs.

**Sd/-
ANIL RAJ CHELLAN
Member (Technical)**

**Sd/-
KULDIP KUMAR KAREER
Member (Judicial)**