
(2025) 03 NCLAT CK 0663

In the National Company Law Appellate Tribunal

Case No : Comp. App. (AT) (Ins) No. 225 of 2024 & I.A. No. 762 of 2024

Nirmal Jain

APPELLANT

Vs

Indirapuram Habitat Centre Pvt. Ltd

RESPONDENT

Date of Decision : 10-03-2025

Acts Referred:

Insolvency and Bankruptcy Code 2016 — Section 7,60

Citation : (2025) 03 NCLAT CK 0663

Hon'ble Judges : Rakesh Kumar Jain, Member (T); Indevvar Pandey, Member (T)

Bench : Division Bench

Advocate : Rishi Sood, Prafull Singh Chandel, Sumesh Dhawan, Praful Jindal, Shaurya Shyam, N.K. Sharma

Final Decision : Allowed

Judgement

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 21.11.2023 by which an application filed by the Appellant bearing I.A No. 4809 of 2022 before the National Company Law Tribunal, New Delhi Bench has been dismissed.

2. The case set up by the Appellant is that M/s Indirapuram Habitat Centre Pvt. Ltd. (Respondent/CD) floated a project, namely, M/s. Indirapuram Habitat Centre situated at plot no. 16, Ahinsa Khand-1, Indrapuram Gaziabad, UP in which the Appellant purchased a studio apartment admeasuring 595 sq.ft. on 15th floor in the year 2016.

3. It is alleged that the Respondent represented the Appellant that if she agrees to purchase the said unit, in the said project, it will give 12% annually as an assured return against the said allotment till possession of the apartment. The Appellant entered into a Builder Buyer Agreement dated 22.11.2016 and also executed a memorandum of understanding dated 30.12.2016 pursuant to which Unit No. 1606 (Studio Apartment) was allotted to the Appellant.

4. It is alleged that the possession was to be given within 24 months with 6 months grace period.
5. It is alleged that in the month of March, 2017, the Respondent informed the Appellant through a letter that possession of the studio apartment will be offered in the month of April, 2017 and thus no further assured return shall be paid but till September, 2017 the possession was not offered. As a result thereof, the Appellant sent a legal notice dated 18.09.2017 to the Respondent following which the Respondent cleared all the arrears of the assured return in the month of November, 2017.
6. Since, there was failure on the part of the Respondent in offering the possession, therefore, the Appellant approached the Respondent for recalling her total investment. Upon which the Respondent offered a commercial shop unit no. F-445A measuring 363.94 sq.ft. against some more investment and with assured return of 18% per annum.
7. The Appellant accepted the proposal and allotment was shifted from Studio Apartment to Commercial Shop in the same project. A fresh BBA alongwith fresh Article of Agreement was executed on 02.01.2018.
8. The Appellant has allegedly paid the total amount of Rs. 54,62,000/- for the said unit.
9. It is the case of the Appellant that the Respondent paid the assured return till May, 2018 but thereafter the post-dated cheques started getting dishonoured. The Appellant came to know that the Respondent is a big defaulter and feeling helpless, registered FIR No. 0031 dated 01.02.2019 under Section 406 and 420 of IPC at. PS Mayur Vihar against the CD and its directors.
10. It is alleged that since the Respondent neither refunded the amount paid by the Appellant alongwith assured return against the booking of the said unit nor complied with the agreement, therefore, the Appellant filed an application under Section 7 of the Insolvency and Bankruptcy, 2016 (in short 'Code') before the Tribunal bearing CP No. (IB) – 1725/PB/2018 against the CD/Respondent.
11. It is further alleged that during the pendency of aforesaid application, the Respondent approached the Appellant for settlement and undertook to refund the amount. Resultantly, a settlement agreement was executed between the parties on 05.03.2019 as per which the Respondent undertook to pay the principal amount of Rs. 55,12,000/- on or before 05.11.2019 and also issued seven post dated cheques which were to be realized on monthly basis without any default and breach.
12. Apropos, the petition filed by the Appellant under Section 7 of the Code before the Tribunal bearing. CP No. (IB) 1725/PB/2018 was withdrawn on 05.03.2019 but the Tribunal granted liberty to the Appellant to file an application for revival of the CP in case of any default is committed by the CD.

13. The Appellant was not aware of the proceedings being carried out against the Respondent by some other Financial Creditor. She came to know from Financial Express on 27.08.2019 that CIRP has been commenced against the CD from 22.09.2019 and Mr. Pawan Kumar Goyal was appointed as IRP of the CD. The Appellant thus filed the claim of Rs. 59,21,650/- in form CA alongwith all the documents in order to prove the existence of their claim through email to the IRP on 04.09.2019 who provisionally admitted the amount of Rs. 63,31,330/- towards claim of the Appellant under the category of homebuyer/allottee (Financial Creditor). The IRP admitted the claim with interest as per the BBA.

14. Meanwhile, the Tribunal vide its order dated 06.11.2019, appointed Narender Kumar Sharma as the RP of the CD while disposing of CA No. 2398/PB/2018. The RP also kept the claim of Rs. 63,31,330/- of the Appellant as Provisionally Admitted under the category of homebuyer/allottee (Financial Creditor) and allotted 0.0470 voting share to the Appellant as on 20.11.2019 and uploaded a list of class of financial creditors (Real Estate Investors i.e. Shop & Homebuyers) (unsecured) of Indirapuram Habitat Centre Pvt. Ltd. as on 07.03.2020 stating that the claims are collated and verified, based on the documents submitted with the declaration under the Code. The Appellant came to know that the RP has subdivided the class of Financial Creditors into allottees and collateral. The Amount of admitted claim of Rs. 63,31,330/- which was provisionally admitted by the IRP was reduced by RP to an amount of Rs. 59,02,524/- and the Appellant was put in the category of collateral. The Appellant further found from the list of homebuyers that the same unit i.e. 445-A has been allotted to some Ms. Nirupama Sharma and Mrs. Suprita Sharma who have been categorized as allottees while the appellant has been categorized as collateral.

15. According to the Appellant, the RP again reduced the provisionally admitted amount from Rs. 58,52,524/- to Rs. 26,64,923/-.

16. The Appellant filed an application under Section 60(5) of the Code for a direction to the RP to admit the entire amount of claim of Rs. 59,21,650/- with interest. The Application filed by the Appellant bearing I.A No. 3342 of 2021 was disposed of by the Tribunal on 11.05.2022 with the following observations "instead of deciding these claims on a general proposition, it will be appropriate, if the RP decides the claims individually, giving cogent reasons justifying why he is admitting or rejecting or partially admitting or partially rejecting the claims. This would enable (The Appellants) to either accept it or agitate their grievances. Before this AA. In light of above, we are of considered view that all these applications are disposed of, with a direction to the RP to consider the claim in each application within a period of one month from the date of this order."

17. Thereafter, the RP passed an order on 25.06.2022 holding that reduction in the claim of the Appellant is in accordance with law. The Appellant filed another application under Section 60(5) of the Code bearing I.A No. 4809 of 2022 for setting aside the order dated 25.06.2022 passed by the RP and for a direction to him to admit the entire amount of claim of Rs. 59,21,650/- with interest under

the category of homebuyers/allottee and declare the sub-division of Financial Creditor in a class as illegal and void ab initio. It was also prayed that the RP be directed to reconstitute the CoC with the Financial Creditors in a class (homebuyers/allottees).

18. The said application has been dismissed by the Tribunal by the impugned order on 21.11.2023. Hence, the present appeal.

19. On the other hand, case of the Respondent is that the Appellant submitted her claim in Form CA on 06.09.2019 for sum of Rs. 59,21,650/- out of which Rs. 55,12,000/- was towards principal and Rs. 4,09,650/- was the interest amount. It is also alleged by the Respondent that to substantiate her claim the Appellant supplied the following documents (i) copy of one builder buyer agreement dated 02.01.2018 in respect of shop no. 445A (ii) copy of one article of agreement dated 02.01.2018 in respect of shop no. 445A (iii) copy of two receipts both dated. 02.01.2018 for Rs. 24,87,100 and Rs. 29,74,900 respectively. (iv) copy of settlement agreement dated 05.03.2019 (v). copy of order dated 26.02.2019 passed by Ld. MM, Karkardooma District Courts, Delhi (vi) copy of order dated 05.03.2019, passed by NCLT in CP (IB) No. 1725 of 2018 and (vii) seizure memo dated 27.05.2019 issued by P.S Mayur Vihar.

20. Case set up by the Respondent is that at the time of collation and verification of claims by the IRP, the audited financial account/bank statements of the CD for the period from 01.04.2017 onwards was not made available to the IRP.

21. After the appointment of the Respondent/RP on 06.11.2019, the CoC of the CD in its 3rd meeting held on 14.12.2019 directed the RP to appoint Financial Auditors for the purpose of audit of accounts of the CD for the period from 01.04.2017 till 22.08.2019 (i.e. the date of commencement of CIRP). It is also submitted that as per customer relationship management software (CRM), the unit claimed by the Appellant has been found to have been allotted to a third party, namely, Ms. Nirupama Sharma and Mrs. Suprita Sharma vide agreement dated 29.01.2018. It is also the case of the Respondent/RP that in terms of the order passed on 11.05.2022, the Respondent had passed speaking order on 25.06.2022 admitting only sum of Rs. 24,87,100/- out of the total claimed amount of Rs. 54,62,000/- because the amount of Rs. 24,87,100/- has been received in the bank account of the CD and since shop/unit no. 445A stood allotted to a third party, the claim of the Appellant was categorised as collateral.

22. Further, it is the case of the Respondent/RP that the Appellant has submitted two receipts, both dated 02.01.2018, but there was a material / vital difference in both the receipts because the receipt of Rs. 29,74,900/- is pertaining to the cash transaction about which the Respondent has no information.

23. The Tribunal dismissed the application of the Appellant by the impugned order on the ground that books of account of the CD has no record regarding payment of Rs. 29,74,900/- and has also doubted the veracity of receipt pertaining to Rs. 29,74,900/-.

24. Aggrieved against the impugned order, the present appeal has been filed by the Appellant in which Counsel for the Appellant has submitted that speaking order dated 25.06.2022 passed by the RP, challenged by the Appellant by way of application bearing I.A No. 4809 of 2022 and the impugned order dated 21.11.2023 are patently erroneous. It is submitted that the Tribunal has not taken into consideration other documents on record except the receipt and report of the RP. In this regard, it is submitted that having failed to deliver possession of studio apartment, the CD had offered shop no. F-445A measuring 363.94 sq. ft. situated on the first floor of the project and entered into a BBA on 02.01.2018. The Appellant has pointed out from clause 3.1 of the BBA about the basic sale price which is reproduced as under:-

25. He has further submitted that in the same BBA, the CD had admitted the receipt of amount of Rs. 54,62,000/- which is also reproduced as under:-

26. Counsel for the Appellant has thereafter referred to the article of agreement dated 02.01.2018 which was entered into between the parties in which there is a reference of payment of Rs. 24,87,100 /- by way of cheque dated 02.01.2018 and Rs. 29,74,900/- dated 02.01.2018 by way of a receipt. The reference in this regard read as under:-

27. It is pertinent to mention here that the amount of Rs. 24,87,100, which is not in dispute, if added to Rs. 29,74,900/- then it comes to Rs. 54,62,000 as claimed by the Appellant. Clause 3 and 4 of the said agreement are also highlighted by the Appellant which are reproduced as under:-

28. Counsel for the Appellant has further submitted that while the application under Section 7 of the Code was pending before the Tribunal, the Respondent thought that the application may be admitted and there may be more claims filed against it by other financial creditors, therefore, in order to avoid the said situation, entered into a settlement agreement on 05.03.2019. It is submitted that the settlement has a reference of the BBA dated 02.01.2018. It has further reference to the petition filed under Section 7 and that the Respondent undertook to pay the entire amount including the amount in dispute by way of seven post dated monthly cheques. In lieu of the settlement, the Appellant assured the Respondent to cooperate in compounding of FIR bearing number 0031/2019 registered in PS Mayur Vihar on getting the payment of interest. It was also agreed that the parties shall be bound by the agreement and any breach thereof will result into reinstatement of all the withdrawal /compounded cases and for all the legal recourses taken therein would make the respondent liable thereby cancelling the agreement. The said agreement is reproduced as under:-

29. It is further submitted that in pursuance of the settlement arrived at between the parties, the application filed by the Appellant under Section 7 was withdrawn on 05.03.2019 but liberty was granted to the Appellant to revive the proceedings in case of default. The said order is also reproduced as under:-

30. Counsel for the Appellant has submitted that the Tribunal has only referred to receipt dated. 02.01.2018 pertaining to cash transaction and that the amount of Rs. 29,74,900 does not reflect into books of account of the CD but has failed to look into the other documents which were executed by the Respondent/CD and has become part of record of the Tribunal.

31. It is also submitted that RP has also committed an error in declaring that the Appellant as collateral because the unit has been allotted to some other person without looking into the fact that the unit was allotted to the Appellant by way of BBA and article of agreement dated. 02.01.2018 whereas it has been allotted to Ms. Nirupama Sharma and Mrs. Suprita Sharma by virtue of agreement dated 29.01.2018.

32. On the other hand, Counsel appearing on behalf of the answering Respondent/RP has reiterated its stand taken before the Tribunal referring to the receipts dated 02.01.2018 as well as the receipts no. 11455 and 11454 of the same date 22.11.2016 which has been doubted are reproduced as under:-

33. It is also the case of the Respondent that amount in question alleged to have been received on 02.01.2018 does not reflect in the accounts of the CD, therefore, it is submitted that there is no error committed by the Tribunal in passing the impugned order because the Respondent has to pass the order on the basis of the record available with him.

34. We have heard counsel for the parties and perused the record with their able assistance

35. The facts are not much in dispute except for receipt dated. 02.01.2018 pertaining to the alleged cash transaction but when the Appellant submitted Form CA for sum of Rs. 59,21,650/-, she had also submitted the supporting documents / proof, namely, (i) copy of one builder buyer agreement dated 02.01.2018 in respect of shop no. 445A (ii) copy of one article of agreement dated 02.01.2018 in respect of shop no. 445A (iii) copy of two receipts both dated. 02.01.2018 for Rs. 24,87,100 and Rs. 29,74,900 respectively. (iv) copy of settlement agreement dated 05.03.2019 (v) copy of order dated 05.03.2019, passed by NCLT in CP (IB) No. 1725 of 2018. Not only that the Respondent had overlooked the BBA, article of agreement dated 02.01.2018, settlement agreement dated 05.03.2018 and the order dated 05.03.2018 but also the Tribunal has also not taken these documents into consideration while passing the impugned order.

36. Undoubtably, the BBA dated 02.01.2018 was executed between the Appellant and the CD / Respondent in which the Respondent had accepted the application of the Appellant for the allotment of the unit having the reference of the basic sale price of the said unit as Rs. 54,62,000/- and acknowledgement of the receipt of the said amount that the Appellant had paid the amount of Rs.

54,62,000 at the time of the application. Similarly, it has also been admitted by the Respondent / CD in the article of agreement dated 02.01.2018 that the amount of Rs. 24,87,100 and 29,74,900 has been paid by the receipt dated 02.01.2018 and in this regard, the CD had issued the acknowledgement. The relevant part of this acknowledgement has already been reproduced earlier in this order. The CD assured the Appellant that it shall give possession of the unit within three years and in this regard, issued post dated cheques dated 02.01.2021 of both the amounts bearing 673501 of Rs. 24,87,100 and 673502 of Rs. 29,74,900 total amounting to Rs. 54,62,000/- with an assurance that the Appellant shall have the option to cancel the aforesaid booking at any time after three years and security cheques without any deduction whatsoever on its due dates shall be honoured by the CD, however, when the Appellant came to know about the financial status of the CD that it has to pay dues of various entities, statutory or non-statutory, she filed the application under Section 7 for the resolution of the amount in question. In order to avoid order of CIRP, CD invoked Rule 8 for the purpose of settling with the Appellant which was reduced into writing on 05.03.2019 and as per which the CD undertook to pay the entire amount including the amount in question to the Appellant by way of post-dated cheques and lieu thereof, the Appellant agreed not only to compound the FIR registered by her but also to withdraw the application under Section 7 of the Code. Consequently, on the basis of the settlement agreement dated 05.03.2019 the order was passed on the same day i.e. on 05.03.2019 by the Tribunal and the application filed under Section 7 was dismissed as withdrawn, however, liberty was granted to get it revived in case of default. Before the Appellant could have filed the application for revival she came to know that the CD had already gone into CIRP in some other matter, therefore, she filed her claim in Form CA before the IRP. The RP has committed an error in not taking into consideration all these factors which are admitted facts about which there is no dispute that the BBA and article of agreement dated. 02.01.2018 was not executed between the CD and the Appellant and there is no dispute that the settlement agreement dated. 05.03.2019 was also executed between CD and the Appellant because of which CD wanted to wriggle out of rigours of CIRP which could have happened if the application under Section 7 was admitted. In the presence of all these facts, the Tribunal has committed a patent error in holding that receipt dated. 02.01.2018 which is not a printed receipt, is not executed by the CD or its directors.

37. Thus, in the aforesaid facts and circumstances, we are of the considered opinion that the impugned order is patently erroneous and hence, the present appeal is hereby allowed and the impugned order is set aside. No costs.

I.As, if any, are hereby closed.