

IN THE SUPREME COURT OF INDIA

[SCR, Order XXI Rule 3(1)(a)]

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO.OF 2017

(From the final impugned Judgment & Order dated 4.9.2017 passed by the National Company Law Tribunal, New Delhi in C.P No. (IB)-121 (PB)/2017)

(WITH PRAYER FOR INTERIM RELIEF)

IN THE MATTER OF:

Amrapali Silicon City Flat Owners Welfare
Society &Ors

...Petitioners

Versus

Amrapali Silicon City Pvt. Ltd.

...Respondents

With

IA No. _____/2017

(Application for exemption from filing certified copy of impugned judgment /order)

IA No. _____/2017

(Application for permission to file SLP)

ADVOCATE FOR THE PETITIONERS: ASHWARYA SINHA

GROUND

Leave to appeal is sought for on the following grounds:

A. Because the Petitioner and many other similarly situated persons are consumers who entered into an agreement with the Respondent no. 1 for purchase of flat and accordingly, made an advance payment for it. The Respondent 1 have failed to give delivery and possession of the said apartments despite inordinate delay and have been using, inexplicably, the money provided by the Petitioner.

B. Because having been lured in by the real-estate companies with promises of hi-tech residential apartments delivered to them anywhere between 30 to 46 months, many persons invested their hard-earned money in projects such as the ones proposed and promoted by the Respondent no. 1. Most such purchasers of these properties belong to the middle income groups, who have had to obtained loans on interest to make timely payment to the builders. However, the builders have defaulted in delivering timely

possession of the apartment units to buyers by several years despite the buyers complying with all the terms and conditions and the payment schedule of the builder corporations.

C. Because the Flat Buyers are being exploited from every direction. By following strict payment schedules, the real-estate companies, such as the Respondent no. 1, have already pocketed around 90% of the Value of the Flat from them. Additionally, despite the possession not being handed over to them the consumers keep on paying EMI to the Banks from whom they have taken financial loans. Common people who have invested in such properties are paying through their nose, without any conformity about realisation of the end towards which they have been and continue to make the said payments.

D. Because the Petitioner and many others similarly situated persons are consumers as defined under section 2(d) of the Consumer Protection Act, 1986 who have paid to the Respondent 1 company in advance for purchase of flats/apartments. However, aggrieved by huge inordinate

delay in getting delivery and possession of the said apartment, they have initiated proceedings at different fora under the provisions of the Consumer Protection Act, 1986.

E. Because certain aggrieved consumers attempted to initiate insolvency proceedings against certain real-estate companies by moving the Ld. National Company Law Tribunal as well as the Hon'ble National Company Law Appellate Tribunal against them. However, the Ld. NCLT in the case of the *Col. Vinod Awasthy v. AMR Infrastructure Limited* C.P.No.(IB)10 (PB)/2017 while dismissing the Petition instituted under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) at the admission stage itself, decided that a flat purchaser would not fall within the definition of an '*Operational Creditor*' as defined under Section 5(20) of the IBC to whom an '*Operational Debt*' as defined under Section 5(21) of the IBC is owed.

F. Because the Insolvency and Bankruptcy Code, 2016 defines a "creditor" in section 3(10) as "*any person to whom a debt is owed and includes a financial creditor, an*

operational creditor, a secured creditor, an unsecured creditor and a decree holder". This definition is in keeping with the rationale in the Report of the Bankruptcy Law Reforms (Vol-I), which observes that liabilities of an entity fall into two broad sets, viz financial liabilities, and operational liabilities, which may in turn be secured or unsecured. The Code defines "debt" in section 3(11) as, "*a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.*" The definitions of financial debt and operation debt as provided in section 5(8) and 5(21) respectively indicate that these refer to specific kinds of borrowings undertaken by an entity and purely in the nature of creditor-debtor transactions.

G. Because by definition and interpretation of "Creditor" in the Insolvency and Bankruptcy Code, 2016, the consumers are ousted from the purview of the statute, in their capacity as creditors to corporate entities such as real-estate companies of the like of Respondent no. 1. Thus, the Petitioner and similarly situated consumers have been declared to have no locus standi to approach the

adjudicating authority under the Insolvency and Bankruptcy Code, 2016 to seek appropriate relief i.e. either the possession of the flat or refund of the amount along with interest , paid towards the purchase of the flats.

H. Because, however, in the light of the insolvency resolution process initiated against Respondent no. 1 pursuant to order dated 04.09.2017 passed by the Ld. National Company Law Tribunal, New Delhi in the matter Bank of Baroda v. Amrapali Silicon City Pvt. Ltd.' C.P.No. IB-121-PB/2017, an order has been passed by the NCLT under Section 14(a) of the Insolvency and Bankruptcy Code. This order declares moratorium prohibiting "the institution of suits or continuing of pending suit or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal arbitral panel or other authority." This provision would consequently stay all proceedings against the Respondent company at courts and before all authorities.

I. Because such a blanket moratorium on proceedings as proposed under section 14(1)(a) of the Insolvency and

Bankruptcy Code, 2016 would inevitably affect the consumers who had earlier approached the National Consumer Dispute Redressal Commission and various State Commissions and/ or District Forum, under the Consumer Protection Act, 1986 to seek redress of their grievance against defaulting builders.

J. Because owing to such a restriction on proceeding against the Respondent no. 1, pending insolvency resolution process, the consumers are being pushed below corporate institutions including banks, as creditors despite the flat buyers making timely payments and fulfilling their obligations towards Respondent no 1. Because the provisions of the IBC, 2016 are further aiding the exploitation of the General Consumer and therefore the same are in violation of the fundamental right guaranteed under the Constitution.

K. Because the insolvency resolution process of the Respondent no. 1 company is a pure and simple case of collusion between Bank of Baroda and the builder Respondent no 1. Bank's debt Claim was for 72 crores

only, whereas the share of flat owners being thousands in number is 90% of the total project cost, which is much higher than the claim amount of the bank of the Board of Baroda. By taking undue advantage of the provisions of the Insolvency and Bankruptcy Code, 2016, the Respondent no. 1 company wants to escape the liabilities arising out of breach of contract on their part vis-à-vis consumers.

L. Because the provisions of the IBC 2016, in as much as they curtail the right of the consumers to approach the NCLT or the NCLAT, under section 6 of the Code, and put a blanket moratorium over the alternate remedy available to them, are in direct conflict with the provisions of the Consumer Protection Act, 1986. The effect of Section 14 of the IBC 2016 is that it suspends the right of the Consumer to seek redress even from the Consumer Forum. The Code has failed to carve out any provision for special cases like the real-estate companies, in which, apart from the financial and institutional investments, common citizens of this Country have made huge investments.

M. Because it is noteworthy that under provisions of section 10 of the Insolvency and Bankruptcy Code, 2016 where a corporate debtor has committed a default, he may himself file an application for initiating corporate insolvency resolution process with the Adjudicating Authority. This means that a Corporate Debtor may get his company declared insolvent to avoid addressing other legal obligations qua him. For instance, as in the present case, a real-estate developer may get insolvency resolution process initiated to avoid facing proceedings under Consumer Protection Act, 1986, against him for the deficiency in goods and services provided by him.

N. Because Section 238 of the Code gives an overriding effect to the provisions of the Code over all the existing statutes. It states, *"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."* As a result, a beneficial legislation like the Consumer Protection Act has been made subject to a financial/ special enactment

whose primary aim is maximisation of value of the assets of the corporate persons.

O. Because the moratorium under section 14(a) of the IBC creates a conflict between two special enactments, which operate in different fields. A bare perusal of the preamble to the Insolvency and Bankruptcy Code, 2016 indicates that it is an act to consolidate and amend laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. On the other hand, Consumer Protection Act, 1986 is an Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

P. Because the effect of conjoint reading of sections 14 and 238 of the IBC, 2016 is that the proceedings under the Code completely eclipse the proceedings under the Consumer Protection Act, 1986, without any constitutional sanction to do so. Such a provision of law falls foul of

article 14 of the constitution in that it is arbitrary and unreasonable; and therefore, violates fundamental rights of the citizens.

Q. Because the cumulative effect of Section 14 r/w/ section 53 and 238 of the Code, is that the Banks and financial institutions who have invested in the Respondent companies are the real beneficiary from the Real Estate sector's insolvency process. The banks continue to get EMI along with interest and at the same time they have preferential rights over the assets of the Company in case of liquidation, considering they fall within the category of a Secured Creditor. It is not out of place to mention that in most of the cases the Bank which provides "financial help" to the Petitioners/ flat buyers are also the Banks which finance the Housing Project.

R. Because the case of an Infrastructure Company cannot be dealt in isolation from the rights of the consumers of such a company. However, a beneficial legislation protects these consumers, namely the Consumer Protection Act. This Hon'ble Court in *Ludhiana Improvement Trust v. Shakti*

Coop. House Building Society Ltd. reported in (2009) 12 SCC 369 has held that the Consumer Protection Act, is a benevolent piece of Legislation intended to protect the consumers from exploitation and the provisions of the Act are required to be interpreted broadly.

S. Because Section 3 of the Consumer Protection Act states that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force.

T. Because this Hon'ble Court in the Case of *KSL Industries Ltd v. Arihant Threads Ltd.* reported in (2015) 1 SCC 166, while interpreting the meaning of the clause "in addition to and not in derogation" as used in section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 vis-à-vis Sick Industries Companies (Special Provisions) Act, 1985 has held,

"There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the Legislature intends that such an enactment shall co-exist along with the other Acts. It is clearly not the intention of the Legislature, in such a case, to annul or detract from the provisions of other laws. The term "in derogation of" means "in abrogation or repeal

of.” The Black’s Law Dictionary sets forth the following meaning for “derogation”: “The partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force.” It is clear that sub-section (1) contains a non-obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. The SICA is undoubtedly one such law.”

U. Because more recently, in *Madras Petrochem Ltd. v. BIFR* reported at (2016) 4 SCC 1, this Hon’ble court per Nariman, J. reiterated the doctrine of harmonious construction of two apparently conflicting provisions in special statutes (SARFAESI Act, 2002) and held,

“According to us, the two apparently conflicting sections can best be harmonized by giving meaning to both. This can only be done by limiting the scope of the expression “or any other law for the time being in force” contained in Section 37. This expression will therefore have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial

Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market.”

V. Because this Hon'ble court has had the occasion of interpreting the provision in section 3 of the Consumer Protection Act, 1986, which provides that the Consumer Protection Act is in addition and not derogation of any other law for the time being in force. This Hon'ble court in the matter of *Fair Air Engineers Pvt. Ltd. & Anr. v. N K Modi*, reported at (1996) 6 SCC 385 had to determine whether proceedings under the consumer protection act would be stayed by operation of section 34 of the Arbitration and Conciliation act, 1996. Relying upon its judgment in *Lucknow Development Authority v. MK Gupta* (1994) 1 SCC 243, this Hon'ble court held,

“It would thus be clear that, by invocation of Section 34, the party to the proceedings does not get an automatic right to have the proceedings pending before the judicial authorities stayed...it must be held that the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. The Parliament is

aware of the provisions of the Arbitration Act and the Contract Act and the consequential remedy available under Section 9 of the CPC, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy. It would, therefore, be clear that the Legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act or the civil action in a suit under the provisions of the CPC. Thereby, as seen, Section 34 of the Act does not confer and automatic right nor create an automatic embargo on the exercise of the power by the judicial authority under the Act.”

W. Because even though the consumers have been asked to fill one of the claimant forms i.e. Form F issued pursuant to notification dated 16.08.2017 notifying Regulation 9A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, to establish their claim vis-à-vis the Respondent no. 1 company, the Code in its scheme does not contemplate anywhere compensation to the consumers. It is apposite to mention here that Regulation 9A very broadly covers the category of “other creditors” which has not been defined in the Code. The parties of interest as envisaged in the

scheme of the code are ones who are in a relationship of the kind of creditor-debtor. On the other hand, Consumer Protection Act, 1986 specifically provides the platform for consumers to voice their grievances.

X. Because inspite of having sufficient bank guarantee against the loan agreement between Respondent 1 and Respondent 2, corporate insolvency resolution process was initiated against Respondent 1. It is pertinent to note that the same was done without even affording an opportunity to the home buyers such as the Petitioner to object to the insolvency resolution process before it was initiated, in spite of the fact that the Respondent no 1 herein has defaulted in paying a much larger amount to the home buyers.

Y. Because in a similar writ petition titled 'Chitra Sharma vs. Union of India' W.P.(C) No 744/2017 was filed before this Hon'ble Court by numerous flat buyers against defaulting company namely, M/S Jaypreet Infratech Limited. This Hon'ble Court keeping in mind the interest of the buyers was pleased to direct the following

“a) The IRP shall forthwith take over the Management of JIL. The IRP shall formulate and submit an Interim Resolution Plan within 45 days before this Court. The Interim Resolution Plan shall make all necessary provisions to protect the interests of the home buyers;

b) Mr.ShekharNaphade, learned senior counsel along with Ms.ShubhangiTuli, Advocate-on-Record, shall participate in the meetings of the Committee of Creditors under Section 21 of the Insolvency and Bankruptcy Code, 2016 to espouse the cause of the home buyers and protect their interests;

c) The Managing Director and the Directors of JIL and JAL shall not leave India without the prior permission of this Court;

d) JAL which is not a party to the insolvency proceedings, shall deposit a sum of Rs.2,000 crores(Rupees two thousand crores) before this Court on or before 27.10.2017. For the said purpose, if any assets or property of JAL have to be sold, that should be done after obtaining prior approval of this Court. Any person who was a Director or Managing Director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present Directors/Managing Director shall also not leave the country without prior permission of this Court. The foregoing restraint shall not apply to nominee Directors of lending institutions (IDBI/ICICI/SBI);

e) All suits and proceeding instituted against JIL shall in terms of Section 14(1)(a) remain stayed as we have directed the IRP to remain in Management.

Be it clarified that we have passed this order keeping in view the provisions of the Act and also the interest of the home buyers”

Z. Because by allowing the creditors to stake their claim against a defaulting corporate entity by barring the consumers from seeking redress of their grievance against the faulting corporate person is discriminatory, arbitrary and devoid of reason, especially in the real estate sector wherein there is mass-investment.

AA. Because even if the Petitioners/ flat buyers do not own any shares of the Companies yet, in addition to the finance as provided by the Financial Institutions it is the investment of the Flat Buyers that facilitates the construction of the Project. Therefore, insofar as the IBC, 2016 does not equate the Flat Buyers with the Financial Institutions the same is violative of Article 14 of the Constitution of India, as equals have been treated unequally.

BB. Because it is trite position of law that an individual's rights are always superseded by the right of the public at large. However, the provisions of the IBC prioritises the

right of the Financial Institution over the Right of the public at large and therefore the same are liable to be held ultra vires.

CC. Because issuing a complete moratorium against institution of a new suit or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority is contrary to the law laid down by this court.

DD. Because Insolvency and Bankruptcy Code, 2016 was preceded by the Sick Industries Companies Act, 1985. Section 22(1) of that statute provided that if an inquiry or reconstruction scheme against a sick industry company is pending, then all legal proceedings, contracts etc. against it would stand suspended. Nevertheless, that provision stipulated an exception in that such suspension could be avoided with the permission of the board. However, in the present statute there is no such exception carved out and a party not covered under the

IBC, 2016 is rendered remedy-less because of moratorium u/s 14.

EE. Because this Hon'ble Court has repeatedly held in a number of cases including *Tashi Delek Gaming Solutions Ltd & Anr. v. State of Karnataka & Ors* reported at (2006) 1 SCC 442; *Bhagubhai Dhanabhai Khalasi & Anr. v. State of Gujarat & ors.* reported at (2007) 4 SCC 241 that access to justice is a human right.

FF. Because in TamilNadu *Mercantile Bank Shareholders Welfare Association Ltd. v. SC Sekar & Ors* reported at (2009) 2 SCC 784 has held,

"An aggrieved person cannot be left without a remedy. Access to justice is a human right. In certain situations it may also considered to be a fundamental right."

GG. Because provision of the Insolvency and Bankruptcy Code, 2016 in section 14 and 238 are unconstitutional insofar as they discriminate against the consumers of a corporate entity undergoing Insolvency Resolution Process by neither taking their claim against the corporate entity into account at the time of initiating the

corporate insolvency resolution process and by not allowing them to proceed against the corporate entity at an alternate forum to seek redress of their grievance.

HH. Because even the forms which have been issued, after public uproar, inviting the claims from all the interested persons under the Insolvency Proceedings are not consumer specific and are general in nature.

II. Because in order to safeguard the interests of the Consumer at large it is essential that an exception be carved out under Section 14 which permits continuation of a proceeding under the Consumer Protection Act, 1986, and to recognise a Decree Holder as a Secured Creditor. It is respectfully submitted that the effect of the said provision will secure the interest of the consumers at large and will also not conflict with the restructuring or insolvency proceedings.

JJ. The Hon'ble Supreme Court in *Institute of law, Chandigarh & Ors. v .Neeraj Sharma & Ors.*, reported at 2015 (1) SCC 720 has clearly held that any member of the public having sufficient interest can maintain an action

for judicial redress for public injury arising from breach of public duty or from violation of some provisions of the constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provisions.

KK. Because as the mechanism of bankruptcy is to deal with dispensing of what was owed to the creditors in an event of an insolvency proceeding. The mechanism lays out the know-hows of the apportionment scheme to various creditors. In the given facts and circumstances the homebuyers have paid up over 90% of the amount of the flats as well as the project cost. The act of receiving prepayment before the actual product/service is handed/rendered over to the homebuyers in consonance with the express terms and conditions of the contract. The Respondent no.1 have retained the amount willingly even after falling short on their contractual obligations within the stipulated frame can be construed as they have with intentionally held on to the monies of the homebuyers in the form of a trust for the homebuyers. As the project was to be developed and delivered within a

set time frame and the failure of the respondent no. 1 in carrying out the same and still continuing to issue demand letters and refusing to give timely possession of the flat or refund the amount to the homebuyers clearly elucidates the intention of the respondent no. 1 to hold on to their kitty. Therefore, by interpreting that the amount was held by the respondent 1 no. in the form of a constructive trust elevates the claim of the Petitioner association from bottom of the pile to the very top of it.

LL. Because it is an admitted fact that 95% of the payments have been received by the construction companies, and in effect a charge has been created on the flats in question. It is therefore submitted that Third Party Rights have been created in favour of the Petitioner and similarly situated individuals. Therefore, the flats in which charge has been created in favour of a buyer cannot be made subject to the liquidation process.

MM. Because as the mechanism of bankruptcy is to deal with dispensing of what was owed to the creditors in an event of an insolvency proceeding. The mechanism lays out the

know-hows of the apportionment scheme to various creditors. In the given facts and circumstances the homebuyers have paid up over 90% of the amount of the flats as well as the project cost. The act of receiving prepayment before the actual product/service is handed/rendered over to the homebuyers in consonance with the express terms and conditions of the contract. The Respondent no. 1 have retained the amount willingly even after falling short on their contractual obligations within the stipulated frame can be construed as they have with intentionally held on to the monies of the homebuyers in the form of a trust for the homebuyers. As the project was to be developed and delivered within a set time frame and the failure of the respondent no. 1 in carrying out the same and still continuing to issue demand letters and refusing to give timely possession of the flat or refund the amount to the homebuyers clearly elucidates the intention of the respondent to hold on to their kitty. Therefore, by interpreting that the amount was held by the respondent no. 1 in the form of a constructive

trust elevates the claim of the Petitioner association from bottom of the pile to the very top of it.

NN. Because sub-section 4 of Section 36 of the Code. It states that the assets owned by a third party which are in possession of the corporate debtor, including— (i) assets held in trust for any third party shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

OO. Because establishing a constructive trust relationship between the Petitioner Association and the respondent no.1 would aid in adopting harmonious construction by balancing rights of the consumers qua other creditors under the insolvency code. This interpretation would make sure that justice is not only done but is also seen to be done. Additionally, it is most humbly submitted that by adopting such an interpretation, there won't be any radical overhaul of the scheme.

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