NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-1116(ND)/2019

IN THE MATTER OF:

1. Brigadier Rajeev Varma
S/o Vijay Kumar Varma,
R/o-05, Sai Niketan,
Jasola Vihar, New Friends Colony,
New Delhi – 110025

2. Mrs. Anuradha Varma
W/o Brigadier Rajeev Varma,
R/o-05, Sai Niketan,
Jasola Vihar, New Friends Colony,
New Delhi – 110025 **... Petitioners/Financial Creditors**

VERSUS

TGB Reality Private Limited
Registered Office at :
207, 2nd Floor, Living Style Mall,
Jasola, New Delhi – 110025 **... Respondent**

Order Delivered on: 17.03.2023

SECTION: 7 of IBC, 2016

CORAM :

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner : Adv. Dushyant Yadav, Adv. Himanshu Leekha
For the Respondent : Adv. Jaspreet Singh

ORDER

PER: SHRI. ASHOK KUMAR BHARDWAJ (J)

Brigadier Rajeev Varma & Anr. (for brevity, the **'Petitioners/ Financial Creditors**') filed the present Petition under the Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency process against M/s. TGB Reality Private Limited (the '**Respondent**').

2. The Respondent/CD namely, M/s TGB Reality Private Limited is a Company incorporated on 21.03.2014 under the provisions of Companies Act, 2013 with CIN U70109DL2014PTC266673 having its registered office at 207, 2nd Floor, Living Style Mall, Jasola, New Delhi - 110025, which is within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.10,00,00,000/- and Paid-up Share Capital is Rs.10,00,000/- as per the master data annexed with the Petition.

3. As has been stated by the Petitioners the Respondent consists of Mr. Dalip Kumar Nagdev, Mr. Raman Kumar and Mr. Amit Handa as its Directors, who are managing the day-to-day affairs of the Respondent and are also in-charge and responsible to conduct the business of the Respondent. In addition, all dealings/activities, including but not limited

to financials qua the Respondent are carried out with the consent and concurrence of the above-named Directors. The Petition espouses thus:-

- The main objective of the Respondent inter alia as set-out in its Memorandum and Article of Association is development and construction of real estate projects in India.
- In the year 2015 the Respondent came up with a public invitation inviting general public to invest in BUYBACK Scheme of the Company and also buy apartments in their project TGB NEELGAGAN situated at Siddharth Vihar, NH-24, Ghaziabad, Uttar Pradesh which was yet to be developed and it's lay out was yet to be prepared.
- The Respondent, through its Directors and Employees, induced and convinced the Petitioners/Financial Creditors to purchase a Residential apartment in TGB NEELGAGAN, Siddharth Vihar, NH-24, Ghaziabad, Uttar Pradesh under buyback Scheme. The Financial Creditors made up their mind to invest their hard-earned savings in the Respondent's Project under Buyback Scheme.
- On 04.02.2015, the Petitioners signed a BUYBACK Agreement with TGB REALITY PVT. LTD. In terms of which after 36 months from the date of agreement the Petitioners had option to surrender the apartment and the Respondent could buy back the same. That as per the buyback agreement, after the expiry of 36 months from the date of signing of agreement the total amount /compensation given to Petitioners could be Rs. 11,11,000/-. Besides the loan amount along with interest @ 24% per annum was also to be paid by the

Respondent. The Respondent had no right of refusal to the buyback Scheme.

- The Petitioners/Financial Creditor signed the agreement for allotment on 17.08.2015 and accordingly made the advance payment amounting to the sum of Rs. 5,72,665/- to the Respondent. The Petitioners made the payment against the buyback scheme namely 'Paanch Ka Dus' for purchasing the residential apartment under buyback scheme against which proper receipt(s) were issued by the Respondent. A receipt bearing no. 117 dated 17.01.2015 was issued for Rs. 1,00,000/- and receipt no. 129 dated 25.02.2015 was issued for Rs. 4,66,572/-. The amount was paid towards Advance Registration.
- The Respondent also mortgaged the apartment and the mortgage letter dated 17.08.2015 was issued by the Respondent against the apartment allotted to Petitioners. That a Tripartite Housing Loan Agreement was also signed between ICICI BANK, TGB REALITY PVT. LTD. and Petitioners.
- The Petitioners made the regular payment as per the demand of the Respondent till the 35th month i.e., January 2018 as per the buyback agreement. Till then i.e., 35th month i.e., January 2018 the Petitioners had made more than 40% payment of the total sales price as mentioned in the buyback agreement.
- The Petitioners after expiry of 35th month i.e., on 24.01.2018 sent a notice/application exercising their option of Buyback under clause 8 of Buyback agreement dated 04.02.2015 thereby they

could opt for cancellation of allotment and surrender. That as per the clause 8 of the agreement the developer/ Respondent has to make the payment within 30 days after the buyback date i.e., 24.02.2018. Nevertheless, no payment has been made by Respondent till date.

- The Petitioners consistently inquired from the Respondent about the status of the payment, however, the Petitioners failed to receive any response much less to say about getting any reply from the Respondent.
- Despite required 40% payments of the sales price, as per the buyback agreement i.e., amounting to a sum of Rs. 27,77,500/- out of total sale price of Rs. 55,55,000/- by the Petitioners to the Respondent against the Buy Back Scheme, Respondent failed to pay total amount of Rs 54,43,900/- (including interest) despite various reminders sent by the Petitioners. The agreement for allotment is a paper formality as the apartment is neither ready nor was ever handed over to Petitioners.
- The Financial Creditor/Petitioners did neither receive any payment nor any response from the Respondent even after passage of long time from the date of expiry of 30 days after the buyback date.

4. The particulars of the total unpaid financial debt and the date of default as mentioned in of Part IV of the petition reads thus: -

Part – IV

PARITCULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED ALONG WITH DATE(S) OF DISBURSEMENT	As on date the total default amount is Rs. Rs.54,43,900/- (Rupees Fifty four Lakh Forty Three Thousand Nine Hundred Only).
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	A fact sheet/ ledger account has been attached along with the present application, enumerating the facts in relation to the debt incurred by the Corporate Debtor. The same may be read as a part and parcel of the present application.

5. From the perusal of the Part IV of the Petition, it is observed that the Petitioners have claimed Rs.54,43,900/- as the unpaid financial debt. Further, as can be gathered from the amended petition, the date of default in discharging the financial liability is 24.02.2018.

6. The Financial Creditors has relied on the following documents to prove the existence of financial debt.

a) Copy of buy back agreement dated 04.02.2015.

b) Copy of agreement of Allotment dated 17.08.2015 for allotment of Apartment bearing no. F-2002, 20th Floor, Tower F at TGB Neelgagan, Siddharth Vihar, NH-24, Ghaziabad, Uttar Pradesh.

c) Copies of the payment receipt issued by TGD Reality Pvt. Ltd. against the payment by the Petitioners.

d) Copies of the payment receipt issued by TGB Reality Pvt. Ltd.

e) Copy of Mortgage Letter dated 17.08.2015 issued by TGB Reality Pvt. Ltd. to ICICI Bank alongwith Tripartite Home Loan Agreement.

f) Copy of Buy Back letter dated 24.01.2018.

g) Original stamped & signed Bank Account Statement of the Petitioners in showing entries of payment made to the Corporate Debtor.

7. In the wake of the aforementioned, the Financial Creditors/ Petitioners have prayed for initiation of CIRP against the Respondent.

8. This Adjudicating Authority issued notice to the Respondent on 07.05.2019. Nevertheless, as the CD did not enter appearance in the matter, it was proceeded against ex-parte in terms of the order dated 17.05.2019. As can be seen from the order dated 29.05.2019, this Adjudicating Authority could be apprised regarding pending CIRP qua the Respondent/CD, thus the present petition was disposed of. However, on 10.12.2019, it could be brought out that the CIRP referred to in the order dated 29.05.2019 (ibid) stood terminated. In the wake, notice was issued to Respondent/CD for 08.01.2020. Subsequently, on 31.01.2020, Ld. Counsel for the CD pointed out that Hon'ble Supreme Court had directed status quo to be maintained regarding the ordinance dated 28.12.2019, pertaining to the real estate projects. Thus, the hearing in the present petition could be adjourned to 20.03.2020. The Writ Petition No. (C) 26/2020, in which Hon'ble Supreme Court had passed the order of status

quo was disposed on 19.01.2021 with certain directions, therefore, this Adjudicating Authority viewed that the parties could take steps as per the order passed by Hon'ble Apex Court. On 05.04.2021, Ld. Counsel for the Financial Creditor brought to the fore that as per the directions issued by Hon'ble Supreme Court, he had filed appropriate application before the registry. Later, in consideration of IA. No. 4760/2021, the FC/Petitioners were allowed to file amended application. To keep the facts straight, it may be pertinent to capture that the Petitioners in W.P.C. No. 26 of 2021 had approached Hon'ble Supreme Court under Article 32 of Constitution of India, questioning Section 3, 4 and 10 of the IBC (Amendment) Act, 2020. Hon'ble Supreme Court upheld the amendment (ibid), subject to certain directions issued under Article 142 of the Constitution of India. Para 372 and 373 of the Judgement reads thus: -

> *"372. We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India:*
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> *i. If any of the petitioners move applications in respect of the same default, as alleged in their applications, within a period of two months from today, also compliant with either the first or the second proviso under Section 7(1), as the case may be, then, they will be exempted from the requirement of payment of court fees, in the manner, which we have detailed in the paragraph just herein before.*
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> *ii. Secondly, we direct that if applications are moved under Section 7 by the petitioners, within a period of two months from today, in compliance with either of the provisos, as the case may be, and the application*

would be barred under Article 137 of the Limitation Act, on the default alleged in the applications, which were already filed, if the petitioner file applications under Section 5 of the Limitation Act, 1963, the period of time spent before the Adjudicating Authority, the Adjudicating Authority shall allow the applications and the period of delay shall be condoned in regard to the period, during which, the earlier applications filed by them, which is the subject matter of the third proviso, was pending before the Adjudicating Authority.

iii. We make it clear that the time limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay caused by the applications pending before the Adjudicating Authority. In other words, it is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under Section 5 of the Limitation Act, in regard to the period, during which, the applications were pending before the Adjudicating Authority, which were filed under the unamended Section 7, as also thereafter.

373. The Writ Petitions and the Transferred Case will stand dismissed subject to the aforesaid directions and the observations contained in the Judgment, and we only make it clear that the benefits of the directions, under Article 142, will be available also to the petitioners in the Transferred Case."

9. Though, the Respondent/CD had not filed any reply to the Company Petition (IB), but it filed written synopsis, espousing that the Petitioners/FCs had given letter as per clause 8 of the Agreement, only

after expiry of 35 months, thus, they are not entitled to any payment from the CD, in the name of "Buy Back Consideration". The further plea espoused on behalf of the CD/Respondent is that the 10% of booking amount of total sale price could be received only after execution of the buyback agreement, thus clause 3 of agreement could be violated. According to the CD, the total amount required to be paid by the FCs/Petitioners is of Rs. 16,66,500/-, while they paid only Rs. 12,29,637/- i.e., less than 30%, thus failed to comply with the terms and conditions of the buy-back agreement. The further plea espoused on behalf of the CD is that the buy-back proposal given by the FCs/Petitioners was never acted upon by the CD, thus nothing turns on the same. Referring to a catena of Judgements viz. Shubha Sharma Vs. Mansi Brar Fernandes and Ors. (Company Appeal (AT) Insolvency No. 83 of 2020); Prafulla Purushottamrao Gadge Vs. Naranyan Mangal and Ors. (Company Appeal (AT) Insolvency No. 498 of 2022); K.S. Sreenivasan Vs. Landmark Housing Projects (India) Pvt. Ltd. (Company Appeal (AT) (Ins.) No. 97 of 2020); Vidarbha Industries Power Limited Vs. Axis Bank Limited (Civil Appeal No. 4633 of 2021); Ankit Goyat Vs. Sunita Agarwal and Ors. (Company Appeal (AT) (Ins.) No. 1020 of 2019, Ld. Counsel for the Respondent tried to espouse that:- (i) the allottee being himself a defaulter shall not be entitled to any relief including payment of compensation or refund; (ii) the amount of default being less than threshold requirement, the petition deserves to be dismissed; (iii) it is not object of IBC to penalise the solvent companies; (iv) in such cases, where the clauses of the agreement specify buyback, the purported allottee, who seeks the benefit from a lucrative agreement, the agreement has to be

perceived only a camouflage of actually financing the construction of the flat and in view of the Judgement of Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Limited Vs. Union of India, would fall in the category of speculative investor and not a person who is genuinely interested in purchasing a flat or an apartment.

10. Indubitably the claim espoused in the Company Petition No. (IB)-1116/ND/2019 includes the return of buyback agreement. The proposition is squarely covered by the Judgement dated 12.08.2021, passed by Hon'ble NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No. 1020 of 2019. The relevant excerpt of the Judgement reads thus:

> *"10. Clauses 2(f) & (g) specify the 'buy-back option' at the end of 24 months. These two clauses are relevant to ascertain whether the Allottee is a 'speculative investor':-*
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> *"Clause 2 (f) and (g) provide for the buy-back option under the MoU. That at the end of the 24 months period from the date of the MoU no option was exercised by the Respondent No. 1.*
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> *(f) The Applicant shall, at the end of 24 Months or the issuance of the final LTC by the Competent Authority, whichever is earlier, exercise in writing the option of either selling the Earmarked Units or can choose to retain the same.*
>
> *(g) In the event if the Applicant, chooses to retain the apartment, then there will be no obligation on the part of the Company to return the investment along with the assured return and he will adhere to the payment plan given by the company."*
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> *XXXXXX*
>
> *12. Section 5(7) of the Code defines a 'Financial Creditor':-*

"(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"

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17. Hence, in the instant case, we need to see if the allottee has entered into any 'lucrative Agreement' based on the facts of this case. The clauses of the Agreement clearly stipulate that there is a buy-back Agreement, there is an assured return of 25% per annum at the end of 24 months or at the issuance of the final LTC by the Competent Authority (whichever is earlier). Right from the date of receipt of the booking amount from the Applicant, the word "investment" is consistently used. It is also stated that in consideration for the investment, the Company has agreed to earmark a unit in the project, give an assured return of 25% per annum and at the end of 24 months which is the minimum period of investment, it is also stated that the return assured would be given through the re-sale of apartment only. The 24 months period expired on 28.07.2017 and the Allottee issued a Notice on 01.02.2019 seeking the refund of the entire amount together with interest at 25% per annum, from 08.07.2015 till 31.01.2019 amounting to Rs. 47,31,164.38/-. The assured rate of interest offered at 25% per annum indicates that the Allottee had invested, seeking interest in the form of high assured returns. The Hon'ble Supreme Court in Para 50 of 'Pioneer Urban Land and Infrastructure Ltd.' (Supra) has held as follows: -

> *"50. .....It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided Under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided*

by the promoter or real estate developer itself, on the basis of which, prima facie at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that Under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/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 this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death."

(Emphasis Supplied)

18. We are of the considered view that the facts and circumstances peculiar to the attendant case indicate that the Allottee sought benefit from a 'lucrative Agreement' as he is 'securing' his money by way of this Agreement which gives him a lien over the flat. In Clauses 2(f) & (g) of the Agreement, the Home Buyer herein is given a choice to retain the apartment or to sell the earmarked unit. In a regular Builder Buyer Agreement, the Home Buyer does not have this option of exercising his choice of taking or not taking the possession of the subject unit. In a normal Builder Buyer Agreement if the Buyer does not accept the possession, the EMD is forfeited. In this case, the Buyer gets his money plus 25% assured return even if he chooses not to retain the apartment. This Agreement is only a camouflage of actually financing the construction of the flat. Hence, we hold that the Home Buyer sought to benefit from this 'lucrative Agreement' and is squarely covered by the ratio of the Hon'ble Supreme Court in 'Pioneer Urban Land and Infrastructure Ltd.' (Supra). The I&B Proceedings is not a recovery proceeding and we place reliance on the ratio of the decision of this Tribunal in ***'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.' Company Appeal (AT) (Insolvency) No. 82 of 2018*** *wherein it is observed that the IBC is not a recovery proceeding. In fact, the I&B Code prohibits and discourages recovery in several ways.*

19. Though the Respondent has denied that the Respondent's son had entered into a Settlement Agreement with the 'Corporate Debtor' for return of the principal amount, we note that the Learned Counsel on instructions has submitted that they are ready to settle the matter and return the principal amount.

20. For all the aforenoted reasons, the Order of Admission under Section 7 is set aside. The 'Corporate Debtor' is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect. Keeping in view the peculiar facts of the attendant case, the IRP fees is to be borne by the 'Corporate Debtor'.

21. This Appeal is allowed and the Impugned Order is set aside however with the aforenoted directions."

11. Being bound by the aforementioned Judgement of Hon'ble NCLAT, **we have no option but to dismiss the petition**. Ordered accordingly.

Sd/-

(L. N. GUPTA)
MEMBER (T)

Sd/-

(ASHOK KUMAR BHARDWAJ)
MEMBER (J)