



ATLAS LAW
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THE EVERCHANGING BANKRUPTCY LANDSCAPE¹

Introduction

The Supreme Court of India has passed a landmark judgment² in respect of the Amrapali Group which though historic, has once again reset the landscape in the everchanging bankruptcy laws in India. While the judgment is path breaking in so much as it sets the interests of the home buyers as supreme, this may have far reaching implications for bankers and State owned land owning agencies.

To put things in perspective let's start with the facts. The Amrapali group of companies ("**Group**") began its operations in 2003 and is primarily engaged in the business of constructing residential projects, townships, offices, and commercial complexes. It successfully launched several residential/commercial projects in Noida, Greater

Noida and assured delivery of the apartments/ units, etc. within 36 months.

The Group collected money from home buyers towards booking amounts and borrowed from various banks/ financial institutions to fund the construction of its real estate projects and created mortgage over the project lands in favour of the lenders.

Interestingly, the Group did not own the lands on which the projects were being developed (and mortgaged), instead the land had been allotted by the Noida and the Greater Noida Authorities on leasehold basis for a period of 90 years and was subject to payment of premiums/ lease rents. The allotments/ leases were governed by the provisions of the U.P. Industrial Area Development Act, 1976 ("**UP Act**") which required the Authorities to monitor the implementation of the projects. What makes it curious is that the Authorities which allotted land to the Group did not collect the leasehold charges up-front. In fact, the Group only paid small deposits

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² *Bikram Chatterji & Ors. v. Union of India*, WP(C) No. 940/2017

as advance and was to pay the balance monies, over a period of time.

Problems arose when the Group failed to deliver its projects even after revising the dates for possession. Matters were further complicated for the Group when they started defaulting on their bank loans.

The homebuyers filed cases against the Group including before the National Consumer Disputes Redressal Commission for the delay in completion of the projects. Several banks also initiated cases against certain Group companies to recover their dues. The Group had also defaulted in making the premium/ lease payments to NOIDA and GNIDA.

In 2017, the Bank of Baroda filed a petition before the National Company Law Tribunal (NCLT) under Section 7 of the Insolvency and Bankruptcy Code. The NCLT admitted the petition and initiated insolvency proceedings³. The home buyers filed a writ petition before the Supreme court challenging the NCLT order.

The Supreme Court ordered a forensic audit to look into the affairs of the Group. The Court also ordered the attachment of

bank accounts, movable and immovable properties and other assets of the Group and its promoters/ directors.

The forensic report confirmed that there had been diversion of funds by the Group by incorporating shell/dummy companies. Other illegal practices were adopted by the companies for siphoning of the funds also by way of booking undervalued transactions in respect of the sale of flats as well. As per the findings of the forensic audit, the promoters had created a web of more than 150 companies for routing of funds and creating assets. The homebuyer's funds along with the loans from the banks were diverted to other companies/directors through the payment of professional fees to the directors, payment towards of bogus bills and selling flats at undervalued prices in books and receiving differential market value in cash. Such funds were used by the promoters to acquire personal assets, properties and applied towards other business ventures. The report also highlighted various transactions with third parties such as JP Morgan that were allegedly made in contravention of the provisions of Foreign Exchange Management Act, 1999 (FEMA), Reserve Bank of India (RBI), Companies Act, 2013, etc.

³ *Bank of Baroda V. Amrapali Silicon City Private Limited*, NCLT (IB)-121(PB)/2017.

The Supreme Court came down heavily on the Group. It did not even spare some of the financial institutions or the Noida, Greater Noida Authorities. Among its observations, the Apex Court stated that the real estate business and its promoters/ developers were answerable to the public and that housing infrastructure was a matter of utmost public importance. The following key issues were also discussed:

Doctrine of Public Trust:

The Hon'ble Court was of the view that the doctrine of public trust applied in the case of Noida and Greater Noida Authorities. It was the responsibility of these State agencies to take affirmative action and effectively manage the lands which had been acquired from the public. The Authorities were found to be grossly negligent in monitoring the progress of the projects being developed by the Group, as well as for not taking any appropriate action for non-payment of the dues and had continued to make further allotments to the Group despite failing to receive the outstanding payments. It was found that the Authorities had breached public trust by permitting the creation of sub-leases over the allotted lands in clear violation of the lease

terms. The Authorities had also failed to take action under the provisions of the UP Act.

Mortgage:

The mortgage created in favour of the lenders required an NOC from the Noida, Greater Noida Authorities which was issued subject to certain conditions such as full/ timely payment of the lease rents/premiums to the authorities and was subject to renewal. Further, there was a provision that the Authorities had the first charge/ priority over all other charges. The Court held that in the eyes of law, no valid mortgage had been created in favour of the banks on account of the conditional NOC which had not been fulfilled. The banks and financial institutions had not only failed to create a valid mortgage but did not monitor the utilisation of the loans given to the Group.

RERA:

The Group was found to be in blatant violation of several provisions of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**"). RERA provides for revocation of the registration in the event of default of the provisions, non-compliance of the terms of the regulator, commits

fraudulent practices, or involved in any unfair trade practices⁴. RERA further provides that upon revocation, the developer shall be debarred from accessing the project website and that development of the projects will be facilitated by the regulator in terms of Section 8.

Ruling

In light of the observations made and the findings of the forensic report, the Apex Court issued the following orders:

- The RERA registrations of the various projects of the Group were cancelled and the National Building Construction Corporation (NBCC) was assigned the task of completing the projects. The NBCC has been directed to handover the possession to the homebuyers while fixing their commission at 8 percent.
- Further, the lease deeds in respect of the projects lands have been cancelled alongwith the right to sell the flats or the leased land to recover their dues. The rights to the lands have been placed with the Court Receiver, Mr. R. Venkataramani. The Court Receiver has been given the right of the lessee and is

authorised to execute the tripartite agreement and ensure that the title is passed on to the home buyers, free from any encumbrances.

- The Supreme Court further directed that the Authorities and the banks will have to recover their dues from other properties and assets of the Group which have been attached.
- The homebuyers have been directed to deposit the outstanding amount as per the payment schedule under the builder buyer agreement with the promoters/developers in a court administered bank account within three months. The amount deposited by the homebuyers will be disbursed by the Court order as per the stage-wise completion by NBCC.
- Further, the Court advised appropriate action to be taken against the leaseholders of similar projects not only in Noida and Greater Noida but in other cities as well. Central Govt. Ministries and State Govt. Agencies have been further directed to ensure completion of other projects in a time-bound manner as contemplated in RERA and ensure that the home buyers are not defrauded.

⁴ Section 7 of RERA.

- In view of the violations committed under FEMA, RBI, the Apex Court ordered the Enforcement Directorate and other concerned authorities to investigate the matter and fix liability on the persons responsible for such violation including submit the progress report in the Court of the investigation made so far.
- The Institute of Chartered Accountants of India has also been asked to take appropriate action against the chartered accountants involved in the affairs of the Group within 6 months. In pursuance of the forensic report, the Court has also asked the companies/directors of the Group to deposit the money defrauded from home buyers in the bank account administered by the Court within one month.
- Lastly, the Noida and Greater Noida Authorities were further directed to issue completion certificate and registered conveyance deed to be executed within one month concerning the projects where the homebuyers were already residing.

Implications

The verdict of the Supreme Court came as a new ray of hope for the homebuyers.

However, a few questions remain. The NBCC has been directed to complete the construction of the unfinished projects while fixing their commission at 8 percent but the Apex Court is silent on who will be responsible for funding the construction. Neither will the balance receivables from the home buyers be adequate to cover the cost of construction nor does NBCC have enough of its own funds to meet the costs. Further, the pressure on NBCC will only increase given that it is becoming the default developer for incomplete projects in other cases such as Unitech⁵. There is a serious concern on whether NBCC will be able to complete the construction or will there be a further delay in delivering possession to home buyers in light of these issues.

Secondly, the banks and the Noida/Greater Noida Authorities have been stripped of all rights in relation to the project and/or the lands on which they are situate. The Court has clearly held that the neither the Authorities nor the banks can come in the way of occupation of the flats by the home buyers. By cancelling the lease and invalidating the mortgage, the Authorities and banks have been left with selling

⁵ *Bhupinder Singh v. Unitech Ltd.*, Order dated July 29, 2019.

other properties and assets of the Group and that of its promoters which have been attached by the Court, to recover their dues. This ruling will most likely act as a precedent in other real estate cases which are pending before the Supreme Court. The Apex Court has now listed August 9, 2019 as the next date for further hearing in respect of Amrapali as well as Unitech matters.

As regards the insolvency proceedings initiated by the banks against the Group and other developers, a question will be raised over the fate of such proceedings and the priority placed on buyers over lenders as far as real estate sector is concerned.

Conclusion

The Supreme Court has taken a stand in protecting the rights of home buyers. This is a landmark verdict which has upheld the primacy of RERA and will serve as a deterrent to all builders.

However, its impact on banks may act as a disincentive not only in financing real estate projects in the future but also pursuing insolvency cases against the developers.