



18th Surana & Surana National Corporate Law
Moot Court Competition
JSS Law College, Mysuru
7 – 9 February 2020



**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
AT BENGALURU
IBC Application No. 1000/2020**

*Association of Flat Owners of
Paradise Homes, Bengaluru*

... Financial Creditor

vs.

*Dream Home Builders Pvt Ltd,
Bengaluru*

... Corporate Debtor

1. Dream Home Builders Pvt Ltd. (DHB or the Company or the Corporate Debtor) is a company registered under the Companies Act, 2013 having its registered office in Bengaluru and has corporate offices in 5 major cities of Bengaluru, New Delhi, Mumbai, Chennai and Kolkata. Though the company was incorporated on April 01, 2014, it had rapid growth in the beginning years itself due to its attractive and successful projects. The shareholding of the company was such that 61% of its equity shares were held by its parent company namely, Dream Homes Builders Holding Company Private Limited (DHBHC or the holding company) which was registered and situated at Mumbai, remaining 39% equity shareholding was held by three individual builders holding 13% shares each namely A, B & C. The shareholders of the holding company were several private equity investors, high networth individuals and the three individual shareholders in DHB i.e. A, B & C. A, B & C held 5% shares each in the holding company.
2. The holding company invested hundreds of crores in the company out of which the company purchased several lands in various cities, especially in Bengaluru. The modus operandi (MO) of the company in constructing high rise residential and commercial apartments was such that it will create a partnership firm for each project. Each project means each high rise construction. The partners in each partnership firm were the company itself and each of the individual builders i.e. A, B & C. All of them held 25% each interest in the partnership firm.
3. Bengaluru was a key city for the company for its upcoming projects and therefore, with the use of its land banks in prime localities, the company started couple of high value projects. One such project in Bengaluru was 'Paradise Homes' which was high rise residential apartments with 30 floors with 30 apartments in a posh locality. The project was well advertised and was about to commence from April 01, 2017. Given the reputation and successful marketing of the company, many homebuyers were interested in the project. As per the advertisement, each apartment would cost approximately Rs. 3 crores and would be completed on or before March 31, 2019. The payment terms were that at the time of booking an advance amount of Rs. 60

lakhs has to be paid to the company. Thereafter, on completion of every six months an amount of Rs. 60 lakhs has to be paid so that the amount can be used for construction. On March 31, 2019 both the Completion Certificate (CC) and the Occupancy Certificate (OC) will be provided to the homebuyers on payment of the last installment of Rs. 60 lakhs. The construction would be made in the lands owned by the company and the total payment made by each buyer would be for their respective UDS and the constructed apartments. Based on this, each homebuyer entered into a separate agreement with the partnership firm which was mentioned as the builder in the agreement.

4. As per the MO of the company, a partnership firm was constituted under the name 'Paradise Homes and Co.' and the company and the individual shareholders of the company owned 25% interest each in the partnership firm. The firm was constituted on January 02, 2017 for the project to commence from April 01, 2017. Since all the 30 apartments were booked before the commencement of the project, the project was well funded and the necessary approvals to commence the projects were obtained. The construction process happened on war footing during the first year and the buyers also promptly paid their first and second installments including the advance paid as per the agreement. However, unfortunately for the company, some of its other prime projects could not be completed as per its schedule due to sluggish demand and due to the demonetization impact. In order to immediately meet those projects' working capital requirements, the funds given for the Paradise Homes project were used only with the intention to revive the choked projects. Due to this mix up of funds, the milestone completion of Paradise Homes took a back seat. The completion of the project took a beating and the milestone completion for the second year could not be met. This delay in completion of the milestone as agreed did not go well with the Paradise Homes' buyers and they stopped making the payments for the 3rd and 4th installments of Rs. 60 lakhs each. This severely aggravated the financial constraint of the company as the money it had was used for other projects and the stoppage of payments from Paradise Homes' buyers completely choked its payables to various suppliers with whom purchase orders for supply of materials were placed.
5. The completion at the end of the first year i.e. as on March 31, 2018 was 40% where the bare skeleton of the structure was completed and the interiors were not started. After repeated requests of the company to make the subsequent payments so that the project could be completed, the buyers made a payment of Rs. 60 lakhs on January 01, 2019 since they were apprehending that this payment may also be diverted for other projects and their project may not be completed. However, even after receipt of this payment, as on March 31, 2019 only 60% of the project was completed.
6. The homebuyers made an unregistered association among themselves and on April 30, 2019 met the company directors who were also the partners of the firm which did the construction work to discuss about the way forward. The partners informed that the delay in the payments of 3rd installment and non-payment of the last installment by the homebuyers was the reason for non-completion on time because his earlier purchase orders for the equipments were cheap orders and since they were not paid for and procured on time, the prices of the various products escalated significantly and hence, it was not feasible for him to complete the project as expected. The builders informed the buyers that in any case if the last installment is also paid, then he can complete the project in next three to four months without any further delay. Believing his promise and keeping in mind the situation in which the buyers were left, they immediately paid

the last installment thereby completing their full payment of Rs. 3 crores each apartment. However, at the end of the August 2019, the builder could complete only 80% of the project. In the sense, all the structural specifications were built but the external constructions such as the fire safety requirements, elevators, sewage, water connections, electricity connections, interiors such as the wardrobes, kitchenettes, etc. were not even started. The completion was such that while possession of the apartment could be taken, no buyer can move in to start their life in their dream homes. Under such circumstances, the builder sent the CC by post to the unregistered association. Obviously, the OC was not sent since the external constructions as mentioned above were not completed.

7. The unregistered association through its representatives sent a notice to the company on September 30, 2019 asking it to complete the fixtures inside the apartments and the exteriors such as sewage, elevators, drainage, interiors, etc. However, the company replied during October first week stating that the privity of contract by the homebuyers was only with the partnership firm and the company cannot respond anything. The company further added that in any case the delay in making the payments by the homebuyers of the 3rd and 4th installments was the main reason for the delay and disrupted the originally planned cost of construction as the partnership firm had agreed for good quality yet cheap products from China for the project and because there was a delay in making the payments, the Chinese sellers sold the products to other builders and the Government of India also, increased the customs duty on most of the products which compelled the builder to buy the products domestically which were also good quality but expensive products. Hence, it was not feasible for it to complete within the same budget as planned and that the builder completed the project to the extent possible with the funds given by the homebuyers. Interestingly, the company further mentioned that the partnership firm, Paradise Homes and Co. has already been dissolved in early September 2019 since as per the firm's books and records it is a done and dusted the Paradise Homes project and hence its chapter is closed. Finally, the company informed the homebuyers not to contact the company anymore regarding this project.
8. The homebuyers were appalled to receive such a reply from the company since it was the company which advertised the project. Though taking legal recourse was very much in their minds, the members of the association thought it is better to take possession of their apartments first and then do the interiors and exteriors by themselves so that they can at least save the rents that they are already paying for their current houses and the interests being paid to the banks, financial institutions and the individuals who funded them to purchase the apartments. Hence, the homebuyers took possession of the apartments and created a registered society namely, 'Association of Flat Owners of Paradise Homes, Bengaluru' and majority of the homebuyers moved into their respective apartments.
9. Thereafter, the president, the secretary and many other members of the association ran pillar to post to get the necessary approvals from various departments in Bengaluru and met all the requirements for the issuance of the OC. In this venture, each apartment owner spent around Rs. 20 lakhs to complete the 'process' especially because they moved in without the OC. After having completed all the requirements and obtaining the OC, a meeting of the members was convened to take to task the company/ builder/ partnership firm for the fiasco created by them which turned their dream homes to nightmare homes. However, there was no unanimity in which legal recourse has to be taken. One-third felt that the consumer forum should be

approached. Another one-third felt that they should approach under the Real Estate (Regulation and Development) Act, 2016 (RERA) specially enacted for this purpose and the remaining one-third felt that the Insolvency and Bankruptcy Code, 2016 (IBC) based on the recent amendment should be invoked which was also blessed by the Hon'ble Supreme Court of India in protecting the homebuyers. Based on the different legal advices, all the three forums were approached by the homebuyers. Couple of them filed a consumer complaint before the State Consumer Commission at Bengaluru. The remaining owners approached both the adjudicating authority under RERA and also filed an application before the National Company Law Tribunal at Bengaluru under section 7 of the IBC.

10. The case filed before the NCLT came up for admission and the NCLT was pleased to order notice to the company/ corporate debtor. The company during the next hearing appeared through its counsels. The case has been posted for arguments on whether the case has to be admitted or not on all counts.

11. The following arguments were advanced by the respective parties:

On behalf of the Homebuyers / Financial Creditor

- i. It is the company which is liable to pay the money paid by the homebuyers since the advertisement, initial discussions and the payments were all made to the company and not to the partnership firm and hence the debtor is actually the company which was liable to deliver the completed apartments with the OC. The creation of the partnership firm and sudden dissolution of it is a camouflage to avoid any liability by the company and the firm.
- ii. The applicants argued post the 2018 Amendment to the IBC they are to be treated as 'financial creditors' and hence their case has to be admitted automatically within the time stipulated.
- iii. The act of diverting the funds to other projects without the consent and knowledge of the homebuyers was unfair trade practice and was illegal. The fear that the remaining hard earned money may also be diverted to other sources created panic to the homebuyers which prevented them from paying the other two installments as per schedule, which in any case, was eventually fully paid.
- iv. The company is liable to pay Rs. 20 lakhs to each homebuyer since they had to spend this amount in addition to the full payment made to the company which included upto the issuance of OC by the company to the buyers. The definition of 'financial debt' should be interpreted broadly to include such dues to innocent homebuyers also. Alternatively, the applicants sought for refund of the last installment of Rs. 60 lakhs to each buyer since only 80% of the project was completed.
- v. The filing of applications before RERA and consumer forum is only complimentary to filing of application under IBC which is line with the recent amendments to IBC. If the argument of the company that both RERA and IBC cannot be approached simultaneously then the amendment to IBC becomes infructuous.

On behalf of the Company / Corporate Debtor

- i. The application is not maintainable against the company since the agreement made by the applicants was only with the partnership firm in which the corporate debtor only had 25% interest and they were fully aware of the dual structure which was not questioned. A corporate partner cannot be made vicariously responsible for the acts of the partnership firm for the purpose of the IBC. Further, newly registered association has no locus standi to file the case since there was no registered association at the time the contract was entered and when the payments were made by the various homebuyers.
- ii. Strictly speaking, the company owes no money to the homebuyers since with the money they paid, the firm constructed the apartments to the extent possible. Hence, the homebuyers do not fall within the definition of 'financial creditors' at all. The company is protected by the guidelines framed by the Supreme Court before treating a builder as a 'defaulter' under IBC.
- iii. The homebuyers did not make the payments promptly which led to many complications and hence there was a breach first on the part of the 'so-called' financial creditors who cannot now take advantage of their mistake. Had the payments been made promptly the project would have been completed as per schedule.
- iv. There is no 'financial debt' by the company since the objective of the homebuyers is to recover the money or to claim compensation which can be made only under the RERA or before a consumer forum. By seeking refund of an unfair amount of Rs. 60 lakhs to each homebuyer, the company argued that the homebuyers acted like 'speculative investors' as laid down by the Supreme Court.
- v. Since a complaint has already been filed before the consumer forum and under RERA, there is a 'dispute' at least with regard to quantum of amount to be refunded, if any and hence the current application is not maintainable. Though the aspect of dispute relates only to operational creditors, in this specific circumstance, the desired result of the homebuyers could be met only through a consumer forum or under RERA.

The Adjudicating Authority permitted the parties to raise such other issues and arguments as the above arguments were only illustrative.