

**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**  
**PRINCIPAL BENCH**

**C.P. NO. IB-355(PB)/2019**

**IN THE MATTER OF:**

**Rahul Singh & Another .....Financial Creditors/Petitioners**  
**v.**

**AVP Buildtech Private Limited**

**.....Corporate Debtor/Respondent**

**SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016**

**Judgment delivered on 05.11.2019**

**Coram:**

**CHIEF JUSTICE (RTD.) M.M. KUMAR**  
**HON'BLE PRESIDENT**

**S.K. MOHAPATRA**  
**HON'BLE MEMBER (T)**

**PRESENT:**

For the Petitioner:

Mr. Aditya Parolia, Mr. Piyush Singh,  
Mr. Akshya Srivastava, Mr. Kumar  
Pradyuman, Mr. Sumbul Ismail,  
Advocates

For the Respondent:

Mr. B. Patnaik, Mr. Subodh K. Pathak &  
Mr. Akash S., Advocates

**M.M. KUMAR, PRESIDENT**

**JUDGMENT**

The Petitioners claiming to be 'Financial Creditors' have filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of AVP Buildtech Private Limited, who is stated to be the

'Corporate Debtor'.

2. The Petitioners are an allottees of a real estate project. They are ex-facie financial creditors in terms of the provisions of Section 5(8)(f) and explanation inserted by the Second Amendment Act, 2018 w.e.f. 06.06.2018. The challenge to the aforesaid amendment has been repelled by Hon'ble the Supreme Court in the judgment rendered in the case of Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019, decided on 09.08.2019). Therefore, no doubt is left that the petitioners are Financial Creditors.

3. The Respondent company-the Corporate Debtor, AVP Buildtech Private Limited (CIN U45201DL2005PTC132095) was incorporated on 13.01.2005 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at B-63, First Floor, Flatted Factory Complex Okhla Mandi, New Delhi-110020.

4. The 'Financial Creditors'-Petitioners have proposed the name of Interim Resolution Professional, Shri Manish Kumar Gupta with the address 404, 4<sup>th</sup> Floor, Laxmideep Building, 9, Laxmi Nagar District Centre, Vikas Marg, Near V3S Mall, New Delhi-110092. His Registration number is IBBI/IPA-001/IP-

P00225/2017-18/10424. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

5. The case of the petitioners in nutshell is that they entered into an agreement dated 01.06.2012 (Annexure-B) with the respondent towards purchase of a residential apartment bearing no. B-1203 on 12<sup>th</sup> Floor of Tower-B admeasuring 1845 sq. ft. in super area in the project, AVS Orchard, G-H03C, Sector-77, Noida which was being developed by and promoted by 'the Corporate Debtor'. The total cost of the said residential apartment was Rs. 75,56,975/- inclusive of IFMS and one covered car parking. The petitioners have paid a total amount of Rs. 69,22,023/- vide two cheques bearing Nos. 540817 & 540818 (at pgs. 47 & 48) and the one namely Housing Loan facility availed from Housing Development Finance to the tune of Rs. 62,56,400/-. With respect to the Housing Loan facility a tripartite agreement dated 07.07.2012 (at pg. 37) was executed between the petitioners, the Corporate Debtor and the Housing Development Finance Corporation Limited. The petitioner has then placed



reliance on an allotment letter dated 07.07.2012 (Annexure-A) issued by the Respondent in favour of the petitioners.

6. According to clause 7(i) of the agreement dated 01.06.2012 (Annexure-B), the Respondent Company undertook to complete the construction of the said residential unit and hand over the possession of the same to the petitioners by March, 2014 with a grace period of three months. It is further postulated by the said clause that in case the Corporate Debtor is not able to handover the possession within the time as stipulated in the aforesaid agreement than the Financial Creditors are entitled to payment of compensation for delay @ Rs. 5/- per square feet per annum. At this stage it would be profitable to read clause 7(i) of the said agreement which is as under:

“7(i). The possession of the said apartment shall be delivered to the Allottee(s) on March, 2014 with a grace period of three months in case of delay Company will pay @ Rs. 5 Per Sqft Per annum. However, the time of possession shall be subject to the Force Major condition.”

7. There was apparently inordinate delay in delivering the possession of the said residential unit as well as in making payment towards compensation by the Respondent. As a result,



two emails both dated 07.12.2018 (at pgs. 49-50) and thereafter a letter dated 11.12.2018 (at pg. 51) were sent by the petitioners terminating the agreement dated 01.06.2012 and seeking refund of the entire amount paid by them but all in vain. The petitioners have availed the remedy under Section 7 by filing the instant petition.

8. The Petitioners have thus claimed that the total amount in default due to the Petitioners as on 30.11.2018 is Rs. 69,65,073/- inclusive of compensation in delay.

9. Learned counsel for the Corporate Debtor has advanced numerous arguments to resist the admission of the petition by arguing as under: -

1. The Respondent due to the prolonged litigation in the High Court of Allahabad, UP in the Writ Petition No. 50190/2014 (Annexure-2) were not in position to resume the work of the construction in the said area which was completely beyond its control.
2. The Respondent was not in a position to complete the project due to the site being illegally occupied and captured by the villagers and cultivators who from time

to time created various hindrances in the construction work undertaken by it and reliance has been placed on a complaint (Annexure-3) made by it to the New Okhla Industrial Development Authority.

3. The agreement dated 01.06.2012 entered between the parties specifically contained the schedule for payments to be made to the Respondent but same was defaulted by the Petitioners on various occasions despite raising the demand letter by the Corporate Debtor.
4. The Respondent has then placed heavy reliance on a letter dated 26.08.2019 (Annexure-5) by arguing that it had offered an alternate apartment of similar size, location and in same floor to the Petitioners and sought acceptance from them. Hence, there is no default on its part and the claim raised by the Petitioners is grossly unfair, untenable, inconsistent, misconceived and not maintainable under the law. The relevant terms mentioned in the said letter read as under:

“ .....



Since you have approached the Hon'ble National Company Law Tribunal and have filed a complaint regarding delay in possession of your apartment no. B-1203 we hereby offer you on alternate apartment bearing no. D-1204 in tower D in the same project. Please note that we are offering you an apartment of similar size, location and same floor to avoid any inconvenience. Kindly communicate your acceptance for alternate offer of possession for the apartment bearing no. D-1204. This is to further inform you that we have already applied for completion/occupancy certificate for tower D & A and in a position to offer the possession upon completion of formalities & clearance of dues/payment from your side. We are pleased to offer you the flat in the same floor i.e. 12<sup>th</sup> floor, flat no. D-1204 in Tower D of similar area but with servant quarter. Please send your consent to freeze the booking and accordingly we can send you the offer of possession and details of dues to be paid if any."

5. The Respondent has been diligently working for obtaining the required necessary legal compliances from the respective authorities for the completed constructions. For giving strength in such argument,

reliance has been placed on a letter dated 16.09.2019 (Annexure-6) wrote by it to the CAP, Noida seeking issuance of completion/occupancy certificate.

6. The Petitioners have illegally raised a demand/claim of Rs. 69,65,073/- against the Respondent without any authenticity.

10. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor has succeeded in establishing a case for triggering the Corporate Insolvency Resolution Process.

11. Before discussing the legal issues raised, we deem it appropriate to first refer to the material clauses of the agreement. According to clause 7(i) of the agreement the Corporate Debtor had proposed to complete the construction of the aforesaid residential unit and hand over the possession of the same to the petitioners by March, 2014 with a grace period of three months. It is further postulated by the said clause that in case the Corporate Debtor is not able to handover the possession within the time as stipulated in the aforesaid agreement than the Financial Creditors are entitled to payment of compensation for delay @ Rs. 5/- per square feet per annum.



12. It is not disputed that the agreement dated 01.06.2012 (Annexure-B) was signed and executed between the parties. With respect to the Housing Loan facility taken by the Petitioners, a tripartite agreement dated 07.07.2012 (at pg. 37) was also executed between the petitioners, the Corporate Debtor and the Housing Development Finance Corporation Limited. True copies of statement of bank accounts (Annexure-E) in respect of the petitioners as well as receipts (at pgs. 47-48) issued by the Respondent clearly speak about the acceptance of money by the Respondent. The Financial Creditors-allottees have not been paid any amount of compensation @ Rs. 5/- per square feet per annum as agreed by the Respondent in aforesaid clause 7(i) of the agreement nor the possession has been offered.

13. A reasonable period of delay of six months to one year might be acceptable. However, the facts in the present case shows that the project is not complete. Even when the principles of reasonableness are implied in this case. There is unreasonableness prevailing all through. There is extraordinary delay of about 5 ½ years in delivering the possession. In fact, there is a fundamental breach of the terms of the contract by not delivering the possession within the reasonable period even after

expiry of stipulated time carved out in the agreement i.e. March, 2014 plus grace period of three months. The default has occurred because the payment made for the allotment of residential unit has the commercial affect of borrowing within the meaning of Section 5(8)(f) of the Code. The amount in fact becomes due and payable on the completion of period by March, 2014 plus grace period of three months and; a maximum period of further one year could be granted. The possession should have been offered by June, 2014 and therefore, the principal amount along with compensation and interest becomes payable.

14. As a matter of fact, each of the petitioner waited to the maximum time postulated in the agreement and the possession was not delivered till January, 2019 i.e. date of filing of the petition.

15. It is pertinent to mention here in the case in hand notice to the Respondent was issued on 14.02.2019. The Respondent through its counsel put in appearance on 11.03.2019 and thereafter despite granting as many as five opportunities and after saddling a cost of Rs. 10,000/-, respondent has filed the reply only on 23.09.2019. Since 11.03.2019 i.e. after putting in appearance before this Tribunal the Respondent has not made

any attempt to offer the possession to the Petitioners. It has proposed to offer the possession vide letter dated 26.08.2019 (Annexure-5) filed with the reply that too offering a different residential unit.

16. Even assuming that the aforesaid residential unit is now ready for occupation (as asserted by the respondent), the delay of almost 5 ½ years is a crucial factor. It is also relevant to mention that the effective possession of the property to the Petitioners have not been given by the Respondent, however, it wants to consider exclusion of time of delay as beyond its control coupled with other factors, which plea also cannot be entertained.

17. For Corporate Insolvency Resolution Process Part-II (chapter-I) has been carved out and in Section 5 (8) (f) of the Code the expression 'financial debt' has been defined to mean a debt along with interest, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction including the sale or purchase agreement, which has commercial effect of a borrowing. The explanation has clarified that any amount raised from an allottee under a 'real estate project' was to be considered as an amount having the commercial effect of a borrowing and the expression 'allottee' and



the 'real estate project' are to have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016. It is the aforesaid provision which was subject matter of challenge before Hon'ble the Supreme Court in a bunch of petitions. In the lead case titled as Pioneer Urban Land and Infrastructure Limited (supra) the conclusion of detailed discussion has been recorded in para 86 by Hon'ble the Supreme Court which reads as under:-

**“Conclusion**

- i. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.
- ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.
- iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the

deeming fiction added by the Amendment Act is only clarificatory of this position in law.”

A perusal of conclusion (i) shows that the explanation added to Section 5 (8) (f) by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 w.e.f. 06.06.2018 has been upheld by holding that it does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India. Conclusion (iii) further shows that Section 5 (8) (f) as originally incorporated in the Code was a residuary provision and always subsumed within it allottees of flats/apartments and the Amendment Act is only clarificatory of the position of law.

18. We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our order dated 27.11.2018 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt. Ltd. (IB-1039(PB)/2018).

19. After a reading of Section 7 of the Code along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is

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complete. The IRP proposed does not have any disciplinary proceedings pending against him.

20. As a sequel to the above discussion, this petition is admitted and Mr. Manish Kumar Gupta is appointed as an Interim Resolution Professional.

21. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code.

22. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.



23. We direct the Financial Creditors to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditors. The amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.

24. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

25. Before parting we must notice the complaint made against Financial Creditors in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the

