

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB) No.49/BB/2020

U/s 7 of IBC, 2016R/w Rule 4 of I&B (AAA) Rules, 2016**In the matter of:****1. Mr. Rohit Tole,**

Son of Shri. Satish Chandra Tole
Residing at T-10, Golden Meadows,
Grace Town, 4th Cross,
Hennur Main Road,
Bengaluru – 560 045.

2. Mrs. Pragati Tole

Wife of Shri Rohit Tole
Residing at T-10, Golden Meadows,
Grace Town, 4th Cross,
Hennur Main Road,
Bengaluru – 560 045.

- Applicants/Financial Creditors

Versus**Mantri Developers Private Limited**

Having registered office at
No.41, Vittal Mallya Road,
Bengaluru – 560 001.

Union of India

Ministry of Corporate Affairs
Through its Secretary,
9th Floor, 'A' Wing, Shastri Bhawan Garage,
Dr. Rajendra Prasad Road,
New Delhi – 110 001.

- Respondent/Corporate Debtor

Order Pronounced on: 13th May, 2021**Coram:**

1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Petitioners : Adv. Harshavardhan B. Sharma
For the Respondent : Adv. Partyush Kalro



ORDER

Per: Ashutosh Chandra, Member (Technical)

1. This is a Petition being C.P. (IB) No.49/BB/2020, filed by Mr. Rohit Tole and Mrs. Pragati Tole, the Petitioners, against Mantri Developers Private Limited, the Respondent, under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process against the Respondent claiming a default of financial debt of Rs.39,81,993/- (Rupees Thirty Nine Lakh Eighty One Thousand Nine Hundred and Ninety Three only).
2. Brief facts of the case as stated in the petition are listed below:
 - (1) The Applicant booked an apartment bearing No. K-1605, 16th Floor, Tower – K, admeasuring 1105 Sq. Ft. (hereinafter referred to as 'The Apartment') in the project 'Mantri Webcity 2B', being developed by the Corporate Debtor at Bengaluru vide 'agreement for construction' dated 27.05.2014 for a total sale consideration of Rs.72,02,460/- for the Apartment purchased. As per clause 6 of the said Agreement, the Respondent had to handover the possession of the Apartment by 31.03.2017.
 - (2) It is submitted that the Petitioner borrowed loan to the tune of Rs.59,60,671/- for payment of sale consideration of the apartment purchased from Axis Bank vide a Tripartite Agreement dated 21.08.2014. As per the Agreement, Axis Bank disbursed loan to the tune of Rs.16,67,618/- directly to the account of the Corporate Debtor.
 - (3) The Applicants opted for the Construction linked plan and as per the plan the Applicants had to pay in accordance to the stages of construction of the Apartment. In furtherance of which the Financial Creditor had paid a total amount of Rs.21,94,222/- as and when the demands were raised from the Corporate Debtor.
 - (4) It is submitted that the Corporate Debtor extended the date of handing over the possession of the Apartment to the Applicants to April 2018 as against the March 2017 as agreed under the Agreement.



- (5) The Applicant initiated *denovo* loan agreement with the ICICI Bank dated 29.04.2017, whereby the loan from Axis Bank was taken over by ICICI. The Applicant borrowed loan to the tune of Rs.55,25,000/- from the ICICI Bank.
- (6) It is submitted that the Corporate Debtor in order to save itself from legal proceedings, offered and convinced the Applicants to change their Apartment from K 1605 to J 1807, as the Respondent informed that possession in the other apartment would be given soon. A transfer application was signed by the Applicants dated 02.09.2018, as per which the agreement to sell was to be executed within 30 days from the application. However, the Respondent charged higher price of the changed apartment than the earlier one, which was not accepted by the Applicants and hence no agreement was signed for the same. The Applicant therefore made numerous calls for possession of the apartment K-1605 purchased by them but no effective answer was received by them.
- (7) Being aggrieved of fraudulent conduct of the Corporate Debtor, the Applicant approached the Karnataka, RERA, Bengaluru Bench and filed a complaint under section 31 of the Real Estate (Regulation & Development) Act, 2016 against the Corporate Debtor for the possession of the above stated until vide Complaint No. CMP/190118/000907.
- (8) Ld. Karnataka, RERA, vide order dated 27.08.2019 directed the Corporate Debtor to refund the amount of Rs.21,94,222/- with interest @ 9% per annum on the respective amount paid on respective date prior to 30.04.2017 and interest @ 2% per annum above SBI marginal lending rate of interest commencing from 01.05.2017 till realization of the full amount. Refund the amount of Rs.8,04,794/- paid by the Complainants towards interest and other expenses. Further, to execute a deed of cancellation of agreement after the entire amount is realized. Lastly to pay cost of Rs.5,000/-.
- (9) The Corporate Debtor failed to comply with the order passed by the K-RERA. The accumulated amounts of default being a sum of Rs.39,81,993/- has been claimed in this petition. It is stated that the default has been



continuous since 31.03.2017. Corporate Debtor defaulted in April 2018 by not handing over the possession and on 12.10.2019 after a lapse of 45 days from the date of order dated 27.08.2019 when the Corporate Debtor failed to comply with the order passed by Ld. Karnataka RERA.

3. The Respondent filed statement of objections and the contentions are listed below:

(1) It is submitted that as per amendment to section 7 by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, an individual homebuyer alone cannot file an application before NCLT seeking the initiation of insolvency proceedings against a Developer. That a minimum of 100 Homebuyers or 10% of the total number of homebuyer in a project have to jointly file the preferred petition together in order to initiate Corporate Insolvency Resolution Process against a Developer. That the petition is liable to be dismissed on this ground alone. The Respondent has placed reliance on the decision of this Bench in *C.P. (IB) No.01/BB/2021, Mr.David John Jebarsingh and Ors. Vs. M/s. Buoyant Technology Constellations Private Limited*, in which similar petition by Homebuyers was dismissed relying on the amendment to section 7 of IBC, 2016.

(2) Further, the Respondent has placed reliance on the decision of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* in support of its contention that IBC is not intended to be a replacement for a recovery forum and this petition deserves to be dismissed as the petitioner is seeking to execute the order passed by Ld. Karnataka, RERA.

4. Heard Mr. Harshavardhan B. Sharma, learned Counsel for the Applicant and Mr. Pratyush Kalro, learned Counsel for the Respondent. We have carefully perused the pleadings of the Petitioners and the extant provisions of the Code. The relevant documents annexed with the respective submissions have been examined.

5. At the outset, it is made clear that as per the Insolvency and Bankruptcy Code, (Amendment) Ordinance, 2019 dated 28.12.2019 the financial creditors who

are homebuyers of Real Estate Project can file a petition under section 7 of the Code, 2016, jointly only if there are 100 of such homebuyers or if they are 10% of total homebuyers whichever is less. However, in the instant petition, only 2 Homebuyers have filed the case which neither amounts to 10% of the total class of financial creditors or 100 Financial Creditors and therefore this petition cannot be entertained.

6. We may further clarify that it is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*¹, has inter alia, held that I&B Code, 2016 is not intended to be substitute to a recovery forum.
7. In the instant case, we see that the Petitioners have already obtained order from the relevant forum under the RERA Act and the same can be executed before relevant forum. A case under the Code, 2016 is not made out as the petition is clearly an attempt to substitute the recovery mechanism and amounts to forum shopping. Further, since the Petitioner does not meet the minimum threshold of 10% of Financial Creditors of the same class, the petition fails and deserves to be dismissed.
8. Being aware of the above disqualification, the Petitioner has made out a case that it is before this Tribunal basically to seek execution of a decree passed by the Karnataka, RERA, Bengaluru. It is pertinent to mention that the Hon'ble NCLAT in a recent decision in its order dated 14.08.2020 in the matter of *Sushil Ansal Vs. Ashok Tripathi & Ors.*², held, after analysing the provisions of sections 5(7) and 5(8) of the Code, that a Decree Holder though covered under the definition of creditor under Section 3(10) of the Insolvency and Bankruptcy Code would not fall within the class of financial creditors and therefore, a decree holder cannot initiate a CIRP against a corporate debtor with an object to execute a decree. It cannot file an application U/s 7 of IBC as the amount

¹(2018) 1 SCC 353

² Company Appeal (AT) (Insolvency) No.452 of 2020.



claimed under a decree being an adjudicated amount was not a consideration for time value of money, and therefore, does not fall within the realm of Section 5(8) of the IBC. In giving this decision, the Hon'ble NCLAT also considered its earlier decision in its order dated 07.02.2020 in the matter of *G. Eswara Rao Vs. Stressed Assets Stabilization Fund & Ors.* where also it had held that a Decree cannot be executed by filing an Application U/s 7 of the IBC. In the instant case the Petitioner is before this Tribunal mainly to execute its decree and hence would not be eligible to file a Petition for execution of the decree received from the Karnataka, RERA. We may add that if home buyers who obtain decrees from other fora also, such as from RERA, are permitted to file petitions under the IBC, that would defeat the purpose of the above referred amendment in section 7 of the Code laying down the threshold of 100 or 10% home buyers, whichever is less. Hence, as per the decision in the case of *Sushil Ansal (supra)* while remedies are available to a home buyer elsewhere, as also under IBC (with the aforesaid threshold), once he receives a decree, the same cannot be brought for execution by invoking Section 7 of the IBC.

9. In view of above facts and circumstances of the case, C.P. (IB) No.49/BB/2020 is hereby dismissed. However, this Order will not come in the way of Petitioner to invoke any other remedy available under any other law so as to get its grievance redressed. No order as to costs.



**ASHUTOSH CHANDRA
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**

Aparna