

IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI PRINCIPAL BENCH

C.P. NO. IB-923(PB/2018)

IN THE MATTER OF:

Mr. Sunil Handa
And others

...Financial Creditors/ Applicants

Versus

Today Homes Noida India Limited

...Corporate Debtor/Respondent

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

Judgment delivered on: 20.08.2019

Coram:

CHIEF JUSTICE (RTD.) SHRI MM. KUMAR
HON'BLE PRESIDENT

Dr. DEEPTI MUKESH, MEMBER (JUDICIAL)

PRESENTS:

For the Petitioner: Mr. Abhay Pratap Singh, Advocate

For the Respondent: Mr. Vivek Sibal, Mr. Sumesh Dhawan,
Ms. Vatsala Kak, Ms. Tulika Bhatnagar
& Ms Geetika Sharma, Advocates

MEMO OF PARTIES**SUNIL HANDA**

Resident of – L-126, Palikawasi,
Sarojini Nagar
New Delhi-110023

...Financial Creditor/Applicant no.1

VIKRAM TULI

Resident of A-90, Sector 23,
Noida-201301

...Financial Creditor/Applicant no.2

NARENDRA KUMAR GUPTA

Resident of sector III J69,
Nehru Nagar,
Ghaziabad UP-201001

...Financial Creditor/Applicant no.3

SUHIMATA BASU

Resident of C-506, C.R. Park
New Delhi-110019

...Financial Creditor/Applicant no.4

VIBHA GAURAV

Resident of Kohlapur House
Kamla Nagar
Delhi-110007

...Financial Creditor/Applicant no.5

SANDEEP VERMA

Resident of C2A-16/145
Jankapuri, New Delhi-110058

...Financial Creditor/Applicant no.6

ANIL NAGWANI

**Resident of C2A/147, PKT-16, Janakpuri
New Delhi-110058**

...Financial Creditor/Applicant no.7

KARAN SING

**Resident of 6024, Sector-B, Pocket-8,
Vasant Kunj, New Delhi-110070**

...Financial Creditor/Applicant no.8

SATYAVRAT CHAUDHARY

**Resident of BK-68 (west)
Shailmar Bagh, Delhi-110088**

...Financial Creditor/Applicant no.9

VIMALENDU BRAJESH

**Resident of House No. G-81,
First Floor South City 2, Sector 61
Gurugram-122018**

...Financial Creditor/Applicant no.10

VERSUS

M/S Today Homes Noida Private Limited

**Registered Office At- UGF 10-11,
Pragati Tower, Rajendra Place
New Delhi- 110008**

...Respondent/Corporate Debtor

JUDGMENT

Dr. Deepti Mukesh, Member(J)

1. The Present application is filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the 'Code'), read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') jointly by the Financial Creditors who are also 'home buyers' (for brevity 'Applicants'), with a prayer to trigger Corporate Insolvency Resolution Process in respect of M/s Today Homes Noida Private Limited (for brevity 'Corporate Debtor').
2. It is appropriate to mention that the Corporate Debtor - M/s Today Homes Noida Private Limited was incorporated on 11.09.2009, having CIN U70109DL2009PTC194189 and its registered office is situated at UGF 10-11, Pragati Tower, Rajendra Place, New Delhi- 110008. The authorised share capital of the company is Rs. 66,00,000/- (Rupees Sixty-Six Lakhs only) and the Paid-up share capital is Rs. 66,00,000/- (Rupees Sixty-Six Lakh), respectively.
3. As per averments made in the application, the financial creditors entered into a Flat Buyers Agreement dated 29.03.2012 with the corporate debtor and had paid almost 90% of the purchase value of the flats amounting to

Rs. 4,18,23,303/- in respect of the Ridge Residency housing project at Sector - 135, Noida, Uttar Pradesh, during 2011-13. According to the flat buyers agreement, the Applicants were supposed to make all the regular payments, towards the apartment allotted to them, as per the construction linked plan and the Corporate Debtor was obliged to deliver possession within the period of 30 months with a further grace period of 120 days, failing which the Corporate Debtor was to pay compensation, @Rs.5/- per sq. ft. per month for the area of each unit.

4. It is submitted by the Financial Creditors that as per the Agreement, the possession of the said flat had to be handed over latest by the year 2016. It is stated that despite having received the almost 90% of the purchase value of the flats, the Corporate debtor has till date neither handed over the possession of the said unit nor has refunded the amount paid by the Financial Creditors.
5. The Financial Creditors have given the details of the total amount of the financial debt and the transactions on account of which the debt fell due. The Total amount of financial debt as regards the financial creditors is Rs. 4,18,23,303/- along with the interest at the rate of 24% deposited on scheduled dates as per flat buyers' agreement.



6. The Financial Creditors further submitted that the applicants had repeatedly requested the Corporate debtor to deliver possession of the said apartment and the Corporate debtor has failed to hand over the possession of the flat. It is further submitted by the financial creditors that more than 60 months have elapsed and the possession of said apartment has not been given to the applicant till date. Therefore, the applicant had asked the Corporate debtor for compensation for the delayed possession of the said apartment as per the rules and provisions laid down under the RERA Act,2016. But there is deafening silence.
7. The Respondent-Corporate Debtor has filed its reply and it is asserted that the provisions of Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as RERA) came into force on 1.05.2016 and in terms of Section 3 of RERA, the Respondent filed application for registration of its project namely Ridge Residency as an ongoing project before the Real Estate Regulatory Authority, Uttar Pradesh. Thereafter, in terms of Section 5 of the RERA, the said project was accorded registration and further time of four years has been granted to the Corporate Debtor for the completion of the project. Therefore, for the completion of the project the time is extended till 30.06.2021.

8. The Corporate Debtor further asserted that the Applicants have purchased the unit in question in 2011/2012 and that 5 out of 11 Applicants have also filed their Application under section 12(1)(c) of the Consumer Protection Act bearing No. 76/2017, before the Hon'ble National Consumer Disputes Redressal Commission, thereby seeking possession of their respective Units/refund of the amount paid by the Allottee.
9. The Financial Creditors sought the compensation from the respondent on the basis of the clause 7.2 of the allotment letter, however the applicant has failed to point out that the payment of compensation for delay in possession is subject to various other conditions including the conditions provided in clause itself. As per the same clause the period of completion was subjected to various conditions such as timely payment by the applicant, force majeure conditions, change in law, availability of the raw material, the circumstances beyond the reasonable control of the respondent.
10. The Applicants has filed rejoinder controverting the averments made in the reply and reiterating the one made in the application. Reliance has been placed on the following observations of the Hon'ble Supreme Court in "*Innoventive Industries Ltd v. ICICI Bank*" (2018) 1 SCC 507, which are follows:

“28. When it comes to a financial creditor triggering the process, section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default

from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. Thus it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 admission or rejection of such application, as the case may be".

11. The Financial Creditors in their rejoinder also submitted that the Corporate Debtor has not only admitted the fact that the Applicants herein had paid the amount claimed by them to the Corporate Debtor herein in lieu of

purchase of units in a residential project called, "Ridge Residency" in Sector 135, Noida Expressway, but has also admitted the fact that the CD has miserably failed to deliver possession of the said residential units, even though as per the builder buyer agreement the possession was to be delivered within a time of span of 30 months from the date of agreement with a further grace period of 120 days. Thereby admitting the existence of a 'financial debt' and a 'default'.

12. Further, Section 88 of RERA provides that RERA shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. Further, Section 89 of RERA provides that the provisions of RERA shall have effect, notwithstanding anything inconsistent contained in any other law for the time being in force. Likewise both statues operates in different fields and in any case section 238 has a non-obstante clause which would prevail over the provision of RERA, Section 238 of the IBC provides that the provisions of the IBC are to have effect, notwithstanding, anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. The admission of an application under the IBC results in the commencement of the corporate insolvency resolution process while a complaint under RERA could result in the adjudicating authorities imposing penalties on the

promoter and an order for return of money to the home buyer with interest and compensation.

13. It was also contended by the Financial Creditors that the main contention advanced by the Corporate Debtor in its reply is that on account of the coming into force of The Real Estate (Regulation and Development) Act, 2016 ("RERA"), the Application of the Applicants herein is not maintainable before this Hon'ble Tribunal, on account of the existence of an alternative remedy. It is submitted that section 5 (8)(f) which reads as under:

"5. Definitions

.....

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

.....

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation:- For the purposes of this sub-clause'

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016;

14. The Financial Creditors have further relied on the judgment of the Hon'ble Supreme Court of India "*Chitra Sharma & Ors V. Union of India & Ors*", W.P. (Civil) No. 744 of 2017 decided on 09.08.2017. The observations of the Supreme Court supports the case of the Financial Creditor and the same reads as under:

"27As a result of the amendment brought about in the definition of 'financial debt', amounts raised from allottees under real estate projects are deemed to be amounts "having a commercial effect of a borrowing". Hence outstandings to allottees in real estate projects are statutorily regarded as financial debts. Such allottees are brought within the purview of the definition of financial creditors."



Further, the Section 2(d) of RERA is as under:

"allottee", person to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent"

15. The said period having elapsed and the Corporate Debtor having failed to deliver possession of the said flats, there is a clear default committed by the Corporate debtor which is correct position taken by the financial creditor to put in statutory slot and we may refer to Section 3(12) of the Code and the same is reproduced hereunder:

"(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

16. The Financial Creditors have rightly argued that the period of default has commenced from the date when the Corporate Debtor was required to deliver possession of the respective units. In the present case, the flat buyer

agreements in respect of all the applicants was executed between 2011-13. Accordingly, as per the Clause 7.1 of the agreement, the Corporate Debtor was required to deliver possession of the respective units latest by the year 2016-17. Thus, the period of default has commenced latest by the year 2016-17 for the applicants and is still subsisting whereas the present application was filed in July 2018.

17. The contention of the Corporate Debtor is that it has been granted time till 2021 to complete the said project. We find that the argument is completely fallacious, in as much as the same would not absolve the CD of its liability to honor the commitment made to the applicants herein as per the builder buyer agreement for the purposes of the Code. Merely because the builder has been provided a different time-line for completion of the project to the RERA would not cut any ice because IBC override RERA and secondly the financial creditor is not a party to any such transaction. Moreover, there is contravention of clause 7.1 of the agreement and has also not paid refund or any compensation to the unit holders as agreed in the builder buyer agreement.
18. It is settled principle of law that wherever time is the essence of a contract in such types of construction contracts, the builder is required to adhere to the date of delivery mentioned in the builder-buyer agreement despite the

presence of similar reservations in the contract. We are supported by the observations of Hon'ble National Consumer Disputes Redressal Commission in the case of *Pradeep Narula v. Granite Gate Properties Pvt. Ltd.*, 2016 SCC Online NCDRC 1050. The learned commission has negated a similar contention and held as under:

"5. Despite use of the words "the company shall endeavor to complete the construction", I am of the view that unless prevented by reasons beyond its control, the opposite party was under a contractual obligation to complete the construction and hand over possession of the apartments to the complainants within 39 months from the date of allotment"

19. We are further of the view that the Corporate Debtor has proceeded on incorrect premise of Section 89 of RERA. The provisions of RERA cannot override the non-obstante clause laid down under Section 238 of IBC which reads as under:

"238. Provisions of this Code to override other laws- The provisions of this Code shall have effect, notwithstanding anything inconsistent therein contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

It is a settled principle of law that a non-obstante clause has effect only in case of a conflict between two statutes. It is submitted that RERA and IBC work in two different fields, while the former has been enacted with a view to regulate and promote the real estate sector while ensuring the protection of consumer interest; the latter seeks to consolidate the law relating to insolvency and bankruptcy and ensure resolution of insolvency of corporate persons, firms and individuals in a time bound manner. Thus, there is no question of a conflict between the two enactments and both will have an overriding effect in the fields exclusively assigned to them. Moreover, RERA was notified on 1st May, 2016 and IBC was notified later on different dates commencing from 05.08.2016. The provisions of Section 238 were enforced with effect from 1.12.2016. It is well settled that the later statutes would override the earlier one on account of its overriding provisions as the law maker are supposed to have knowledge of all existing laws.

20. We are also not impressed by the reliance placed by the corporate debtor on the judgment of the Hon'ble NCLAT in *Krishna Enterprises V. Gammon India Pvt Ltd.* in Company Appeal No. 144 of 2018 is misplaced in as much as the said judgment arose from a case where no interest was provided for in the agreement and the principal amount had already been paid.

21. Under sub-section 5(a) of section 7 of the code, the application filed by the applicant financial creditor has to be admitted on satisfaction that:
- (i) Default has occurred,
 - (ii) Application is complete, and
 - (iii) No disciplinary proceeding against the proposed IRP is pending.
22. The Judgment in this matter could not be pronounced earlier as the issue concerning constitutional validity of explanation to sub section 8 (f) of Section 5 of the Code, 2016 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 and Another V. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) the order has now been pronounced on 09.08.2019. we have gone through the order and find that the directions issued by the Hon'ble Supreme Court do not in any manner advance the case of the Corporate Debtor and the petition deserves to be admitted. It may also be noticed that at no stage possession has been offered and the denial of possession does not arise.
23. Learned Counsel for the applicant has rightly argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the application is complete as per the requirements of Section

7 (2) of the Code and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is overwhelming evidence to prove default. The applicant has specified the name of the resolution professional and has annexed Form 2, the consent of the proposed IRP to the application accordingly.

24. As a sequel to the above discussion, this petition is admitted and Mr. Rabindra Kumar Mintri with registration number IBBI/IPA-001/IP-P00707/2017-18/11194 and (email: mintri_ca@rediffmail.com, Mobile No. 9811173846) is appointed as the Interim Resolution Professional and specific consent is filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 herein.

25. In pursuance of Section 13 (2) of the Code, this Tribunal direct that Interim Insolvency Resolution Professional shall immediately make public announcement with regard to admission of this application under Section 7 of the Code. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

- a) *the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- b) *transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- c) *any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
- d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”*

However, during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder:

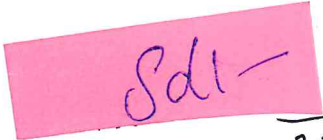
- (2) *The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*
- (3) *The provisions of sub-section (1) shall not apply to—*
- a. such transaction as may be notified by the Central Government in consultation with any financial sector regulator.*

b. a surety in contract of guarantee to a Corporate Debtor.


17. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *inter alia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation by the ex-management or its ex-directors the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.
18. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim

Resolution Professional namely Mr. Rabindra Kumar Mintri to meet out the expense to perform the functions assigned to him 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 for the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

18. A copy of the order shall be communicated to the Applicant as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Further the IRP above named and the Register of Companies be also furnished with copy of this order forthwith by the Registry.


(M.M. KUMAR) 20.8.2

PRESIDENT


DR. DEEPTI MUKESH
MEMBER (JUDICIAL)