

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

CP No. (IB)- 55/7/JPR/2018

IN THE MATTER OF:

MS. VEENA PARAKH & ANR.

...FINANCIAL CREDITOR

VERSUS

PARTH INFRATECH PVT. LTD.

...CORPORATE DEBTOR

MEMO OF PARTIES

MS. VEENA PARAKH

C-44, Dev Nagar, Tonk Road,
Jaipur, Rajasthan- 302018

...Financial Creditor No. 1

MR. ANURAG JAIN

C-44, Dev Nagar, Tonk Road,
Jaipur, Rajasthan- 302018

...Financial Creditor No. 2

VERSUS

PARTH INFRATECH PVT. LTD.

CIN: U45201RJ2008PTC026340

Registered office at: 707, Paris

Point Bani Park, Jaipur- 302016


(Rajasthan)


...Corporate Debtor

FOR THE FINANCIAL CREDITOR(S) : Aditya Vijay, Adv.

FOR THE CORPORATE DEBTOR(S) : Naresh Kumar Sejvani, Adv.

Order Pronounced On: 22.12.2023





ORDER**Per: Shri Deep Chandra Joshi, Judicial Member**

1. The present application has been filed by *Ms. Veena Parakh & Mr. Anurag Jain*, through the Power of Attorney Holder *Ms. Shanti Modi* ('Applicants'/ 'Financial Creditors') against the Corporate Debtor namely *M/s Parth Infratech Pvt. Ltd.* ('Respondent'/ 'Corporate Debtor') under Section 7 of Insolvency and Bankruptcy Code, 2016 (the 'IBC'/ 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of the Corporate Insolvency Resolution Process ('CIRP'), pursuant to default in repayment of loan amount by the Corporate Debtor to the Applicants.
2. The Corporate Debtor is a Private Limited Company, incorporated under the Companies Act, 1956 on 11.04.2008 and duly registered with the Registrar of Companies, Jaipur, having CIN: U45201RJ2008PTC026340. The registered office of the company is situated at 707, Paris Point, Bani Park, Jaipur. The authorized share capital of the company is Rs.10,00,000/- (Rupees Ten Lakhs Only) and paid-up share capital of the Company is Rs. 1,00,000/- (Rupees One Lakh Only). The details have been verified from the online database maintained by the Ministry of Corporate Affairs.
3. The details of the transactions leading to the filing of this application averred by the Applicants is as follows:



- 3.1. The Applicants entered into Memorandum of Undertakings ('MoU') with the Corporate Debtor on 30.03.2015 for purchase of six Flats for a total sale consideration amount of Rs. 2,40,43,618/- (Rupees Two Crores Forty Lakhs Forty-Three Thousand Six Hundred and Eighteen Only). As per the terms of the MOU, the Financial Creditors were required to pay an advance token amount of Rs. 24,04,362/- (Rupees Twenty-Four Lakhs Four Thousand Three Hundred and Sixty Two Only) and the amount of Rs.1,73,97,069/- (Rupees One Crore Seventy-Three Lakhs Ninety-Seven Thousand and Sixty-Nine Only) was to be paid after taking loan from State Bank of India. Consequently, the Financial Creditors along with the Corporate Debtor and SBI entered into Tripartite Agreements.
- 3.2. After entering into the Tripartite Agreements, the Financial Creditors paid the aforesaid advance token money to the Corporate Debtor on 10.04.2015 and the loan amount of the respective flats was also disbursed to the Corporate Debtor from the loan account of the Financial Creditors. As per the terms of the MOUs, the Corporate Debtor was to pay all the monthly EMIs as well as Return on Investment ('RoI'). A minimum guaranteed return was to be paid to the Financial Creditors by the Corporate Debtor as per the 'buy back' clause of the aforesaid MOU dated 30.03.2015.



- 3.3. It is submitted that the 'buy back' clause stated that an appreciation @ 15% or 30% would be paid if the purchaser intimates the builder about the buy back within first year from the date of MOU. The Financial Creditors intimated the same, however, the Corporate Debtor did not make the payment towards the same and based on the verbal understanding between the parties, the said buy back was extended to 36 month arrangement as provided in the MOU. Thus, the Financial Creditors are entitled to receive the appreciation @30% of the total invested amount.
- 3.4. After the advance token amount and loan was granted to the Corporate Debtor, the Corporate Debtor stated making payments towards the EMIs. However, the Corporate Debtor did not make regular payments towards the EMIs and after December 2016, the Corporate Debtor stopped making payments towards the EMIs. Since no payments were made by the Corporate Debtor, the Applicants made all payments towards the EMIs from January 2017 till February 2018. It has been submitted that the Financial Creditor has reserved the right to claim the interest after quantification of the claim at appropriate stage.
- 3.5. Later, when the Corporate Debtor failed to make payment towards the RoI for both the flats, the Financial Creditor pressured the Corporate Debtor to honour the same. Then, the Corporate Debtor made a payment of Rs. 85,00,000/- (Rupees Eighty-Five Lakhs Only)

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towards the minimum guaranteed returns as well as the EMIs to the Financial Creditors. Since no response was received from the Corporate Debtor, the Applicants stopped making payments towards the EMIs after February 2018.

- 3.6. The Applicants have filed an Affidavit for submitting Additional Documents vide Diary No. 648/2018 dated 16.11.2018 annexing the copy of e-mails dated 15.10.2018 and 22.10.2018.
- 3.7. As a consequence of the aforementioned default, this Application has been filed seeking initiation of CIRP against the Corporate Debtor under Section 7 of the Code. The aforementioned details as reflected in Part IV of the Application is reiterated as below:

PART IV

| S. No. | PARTICULARS OF FINANCIAL DEBT | |
|--------|--|--|
| 1. | Total amount of debt granted | Rs. 1,98,01,430 (Rupees One Crore Ninety-Eight Lakhs One Thousand Four Hundred and Thirty Only) |
| | Date(s) of disbursement | 10.04.2015 |
| 2. | Amount claimed to be in default and the date on which the default occurred | Rs. 3,39,68,454/- (Rupees Three Crores Thirty-Nine Lakhs Sixty-Eight Thousand Four Hundred and Fifty-Four Only) The default occurred on 10.12.2016. |

4. On 22.02.2019, the Adjudicating Authority had closed the opportunity to file reply by the Corporate Debtor. Thereafter, the Corporate Debtor filed

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an Application to take the reply on record which was rejected vide Order dated 28.03.2019. Hence, the reply of the Corporate Debtor was not taken on record. Thereafter, an Application bearing *IA No. 119/JPR/2019* was filed seeking recalling of the order dated 22.02.2019 and 28.03.2023; the Application was rejected vide Order dated 25.04.2019.

5. Earlier, in this matter, certain defects were pointed out by the registry and an Application bearing *IA No. 16/JPR/2019* was filed seeking exemption from certain documents. The said Application was disposed off with the direction to produce the documents within 10 days, failing which adverse inference may be drawn against the Petitioners in case the documents withheld had any relevance while disposing of the Application under Section 7 of the Code. Thereafter, the Corporate Debtor moved an Application bearing *IA No. 469/JPR/2023* to place certain documents on record. This Authority vide Order dated 22.11.2023 allowed the Application to the extent of taking Annexure-2 & 6 i.e. Agreements to Sale in favour of the Applicants for purchasing and Annexure-3 & 7 i.e. Tripartite Agreements, on record.
6. We have heard the Ld. Counsels for the parties and perused the averments made in the Petition, Reply, Written Submissions and Applications along with the documents enclosed therein.
7. This Adjudicating Authority having perused all the relevant papers and found them in order is passing this order as below. The Registered Office

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of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the debt fell due in 2016, and the Application was filed before this Adjudicating Authority in 2018. Hence, the period of three years after the default occurred had not exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.

8. The first thing which has to be determined is the nature of the transactions which undertook between the Corporate Debtor and the Applicants. It is an admitted fact the as per chronology, first, the Tripartite Agreements dated 24.03.2015 were executed between the Applicants, the Corporate Debtor and SBI. After the execution of the Tripartite Agreement, the Applicants entered into MOUs dated 30.03.2015 with the Corporate Debtor, the details of which are tabulated as below:

| <i>Name of Allottee</i> | <i>Flat No.</i> | <i>ATS date</i> | <i>TPA date</i> | <i>MOU date</i> |
|-------------------------|-----------------|-----------------|-----------------|-----------------|
| <i>Anurag Jain</i> | 711,902, 903 | 05.03.2015 | 24.03.2015 | 30.03.2015 |
| <i>Veena Parakh</i> | 108,113,909 | 25.05.2015 | 24.03.2015 | 30.03.2015 |

9. The Applicants have submitted that they are not homebuyers and to substantiate the same, reliance has been placed upon the clauses mentioned in the MoUs. For reference, the relevant clause as mentioned in the MOU dated 30.03.2015 is reiterated as below:

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“E. The Builder has offered a residential space in there said Project in the form of allotting a residential apartment bearing No. 108, 113, 909, 711, 902, 903 measuring 1520, 1471, 1452.42, 1993, 1519.14, 1473.01 square feet respectively, all @ Rs. 2550/- per sq. Ft. (i.e. Rs, 2,40,43,618./- in words Rs. Two Crore Forty Lakhs Forty Three Thousand Six Hundred Eighteen Only) which was constructing on the basis of approval of JDA norm, on sale on minimum guaranteed returns (as decided hereinafter) basis to purchaser/ investor on minimum guaranteed return @ 15 % and 30% as the case may be and decided hereinafter. The sale agreement of above flat Nos. 108, 113, and 909 is executed in favour of Mrs. Veena Parakh and the payment of Rs. 1133702/- (vide three cheques) and Rs. 8498041/- has been through SBI Bank loan via RTGS transfer and sale agreement of rest of the flat nos. 711,902,903 is executed in favour of Mr. Anurag Jain and the payment of Rs. 1271289/- (vide six cheques) and Rs. 8899028/- has been paid through SBI bank loan via RTGS transfer.”

“Buy Back Clause

1. At first, first party to this MOU will buy back the property @ 15 % appreciation on the total invested amount (Rs. 19801430/-) in words Rs. One Crore Ninety Eight Lakhs One Thousand Four Hundred Thirty only/- along with the total amount of sale consideration (i.e. the total amount given by second party to the first party by way of cheque/ RTGS/ NEFT/ Bank Loan), payable to the second party. This condition is valid only if second party to this MOU will give his consent to the first party for the buy back within first year, starting from the date of signing of MOU.”

10. To determine the nature of the transaction executed between the parties, it is relevant to refer to the terms of the MOUs entered between the parties on 30.03.2015. The MOUs state that the Sale Agreement has been executed in favour of the Applicants for the purchase of the respective Flats in the project of the Corporate Debtor *SHREE ENCLAVE* for which advance

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payment has been made through themselves and the Home Loan availed from the State Bank of India via the Tripartite Agreements. Besides the MOUs, it is an undisputed fact that the Applicants have confirmed that they have purchased the flats in question in the project of the Corporate Debtor. It is important to refer to Section 2(d) of The Real Estate (Regulation And Development) Act, 2016 ('RERA 2016'), which reads as under:

"2(d) "allottee" in relation 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;"

11. Bare perusal of the provision and the matter at hand, shows that the Applicants fall within the definition of allottee as mentioned under the provisions of the RERA Act, 2016. The MOU executed on 30.03.2015 between the Applicants and the Corporate Debtor for the sale of the flats in the project of the Corporate Debtor *SHREE ENCLAVE* have referred to the Applicants as allottees.
12. From the above-noted paras, it is determined that the Applicants are allottee in the Real Estate Project of the Corporate Debtor named *SHREE ENCLAVE* . As per the provisions of the IBC, 2016, an allottee is covered under the definition of a Financial Creditor under Section 5(8)(f) of the Code. Now that it is established that the Applicants are allottees under the

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RERA Act, 2016, it is relevant to determine whether the transactions fall under the nature of a Financial Debt under the provisions of the Code. To conclude the same, it is pertinent to refer to the definition of 'Financial Creditor' and 'Financial Debt' as envisaged under Section 5(7) and Section 5(8) of the Code respectively, which are being reproduced as under:

"Section 5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"

"Section 5(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (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*

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(d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank of financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

13. Therefore, an allottee in a real estate project is a Financial Creditor. Hence, the nature of transaction falls within the scope of a financial debt as envisaged under the provisions of the Code. Now we come to Section 7 of the Code, under which for the purpose of initiation of the CIRP, a threshold limit is specified with respect to the number of allottees, who can jointly file a petition to initiate CIRP of the Corporate Debtor. The Insolvency and Bankruptcy (Amendment) Act, 2020 ('Amendment') added certain provisos to Section 7 of the Code; whereby special conditions were included for real estate allottees to qualify as Financial Creditors under the provisions of the Code. The amendment included is as under:

"Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

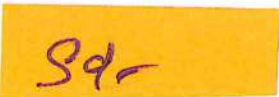
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Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.”

14. Accordingly, an Application filed under Section 7 of the Code shall be modified to comply with the requirements of the first or second proviso within 30 days of the commencement of the IBC Amendment Act, 2020 failing which the Application shall be deemed to be withdrawn before its admission. The present Application was filed in the year 2018 which is prior to the *Insolvency and Bankruptcy Code (Amendment) Act, 2020*. The said amendment came into force w.e.f. 28.12.2019. Even then, the Applicants have not modified the present Application in accordance with the amended provisions of the Section 7 of the Code.
15. In view of the foregoing, there is no iota of doubt that the Applicants in the case, who are allottees, have applied for commencement of the CIRP against the Corporate Debtor, do not meet the benchmark mentioned under Section 7 of the Code. The Applicants has failed to amend the Application




to meet the benchmark of either jointly filing of the Application by 100 allottees or jointly filing by not less than 10% of the number of allottees, whichever is less. Therefore, this Petition filed by applicant homebuyers, does not qualify the threshold in accordance with Section 7 of the Code, as amended from time to time, so as to make it fit to be considered for CIRP.

16. The Hon'ble Supreme Court in the matter of *Manish Kumar vs. Union of India, Writ Petition(C) No.26 of 2020* has held the following:

"135.in terms of the Explanation in sub-Section 7(1), a financial debt need not be owed to the applicant, and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under section 7, provided that they are financial creditors and there is a default in a sum of Rs. 1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants."

17. Therefore, it is pertinent to state that Section 7(1) of the Code, 2016 mandates the Financial Creditors, who are allottees under a Real Estate Project, to file an Application for initiating CIRP against the Corporate Debtor jointly by not less than 100 of such allottees under the same Real

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Estate Project or not less than 10% of the total number of such allottees under the same Real Estate Project, whichever is less.

18. Keeping in view the ratio of the aforementioned Judgment and having regard to the terms and conditions of the Memorandum of Understandings along with the Tripartite Agreement entered between the parties, this Adjudicating Authority is of the considered view that the present Petition filed by the Applicants cannot be admitted and therefore, is liable to be rejected.
19. The Order in the present matter is made in terms of Section 7 of IBC, 2016 based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority. This order shall not act as a bar to the Applicants in pursuing any other remedies available to it, under the prescribed provisions of law.
20. Accordingly, in the circumstances, CP No. (IB) 55/7/JPR/2018 is dismissed as rejected. Any other Applications, if any, also stand disposed off in terms of the order in the main Application.
21. The registry is directed to provide a copy of this Order to the parties to the case.



**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**



**RAJEEV MEHROTRA,
TECHNICAL MEMBER**