

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA**

C.P. (IB) No. 254/KB/2022

And

I.A. (IB) No. 1438/KB/2023

**IN THE MATTER OF:**

**C.P. (IB) No. 254/KB/2022**

*An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read  
with other provisions.*

**IN THE MATTER OF:**

**Prakash Beria,**

S/o Radhe Shyam Beria,  
Resident of Flat 8A Block B,  
Gangadeep Apartments, 493/B/2,  
GT Road (South), Shibpur -711102

... Financial Creditor/ Applicant No. 1

And

**Radhika Beria,**

W/o Prakash Beria,  
Resident of Flat 8A Block B,  
Gangadeep Apartments, 493/B/2,  
GT Road (South), Shibpur -711102

... Financial Creditor/ Applicant No. 2

**Verses**

**Aspirations Homes Pvt. Ltd.**

Having its registered office at 2B, Mahendra Road,  
Kolkata – 700025

... Corporate Debtor/ Respondent

And

**IN THE MATTER OF:**

**I.A. (IB) No. 1438/KB/2023**

*An application under Sections 60(5) and 65 of the Insolvency and Bankruptcy  
Code, 2016.*

**IN THE MATTER OF:**

**Aspirations Homes Pvt. Ltd.**

... Applicant/ Corporate Debtor

**Verses**

**Prakash Beria**

... Respondent No. 1/ Financial Creditor

And

**Radhika Beria**

... Respondent No. 2/ Financial Creditor

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**Date of Hearing: September 26, 2023**

**Date of Pronouncement: October 10, 2023**

**CORAM:**

**SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)**

**SHRI D. ARVIND, MEMBER (TECHNICAL)**

**Appearance:**

**For the Financial Creditor:**

1. **Mr. Anuj Singh, Adv.**
2. **Mr. Rishav Banerjee, Adv.**
3. **Mr. Supriyo Gole, Adv.**
4. **Ms. Madhuja Barman, Adv.**
5. **Ms. Prerna Shaha, Adv.**

**For the Corporate Debtor:**

1. **Mr. Shaunak Mitra, Adv.**
2. **Mr. Subodh Kumar Agrawal, CA**

**O R D E R**

**Per: D. Arvind, Member (Technical)**

1. This Court is congregated through hybrid mode.

**C.P. (IB) No. 254/KB/2022**

2. This instant application is filed jointly under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity “**I&B Code**”) by one **Prakash Beria**, S/o Radhe Shyam Beria, and one **Radhika Beria**, W/o Prakash Beria, Resident of Flat 8A Block B, Gangadeep Apartments, 493/B/2, GT Road (South), Shibpur - 711102 (WB), hereinafter referred to as **Applicant/ Financial Creditor/ FC** against **Aspirations Homes Pvt. Ltd. (CIN: U70102WB2010PTC153398)** having its registered office at 2B, Mahendra Road, Kolkata – 700025, herein after referred to as **Respondent/ Corporate Debtor/ CD** seeking direction from this Adjudicating Authority to initiate Corporate Insolvency Resolution Process (for

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brevity “CIRP”) under Section 7 of the IBC, in respect of Corporate Debtor, herein.

3. That, the Corporate Debtor was incorporated on September 24, 2010, having Authorized Share Capital of Rs. 5 Lakh in which Paid-up Capital is of Rs. 1 Lakh.
4. That, the amount claimed to be in default is **Rs. 3,58,82,555/-** (Rupees three Crores Fifty-Eight lakh Eighty-Two Thousand Five Hundred and Fifty-Five only) as on August, 2022 including interest @ 12.75% P.A., in which Rs. 3,03,82,568/- is the principal amount as on July, 2021.

**5. Brief Fact of the Case:**

- 5.1. Aspirations Homes Private Limited, the Corporate Debtor herein, is engaged in development and construction of real estate projects having its registered office is at Kolkata.
- 5.2. The applicants Mr. Prakash Beria and Mrs. Radhika Beria had made an “Agreement for Sale” with the Corporate Debtor on 28/11/2018 for purchase of an apartment in the project promoted by the Corporate Debtor which is called as “Aspirations Aloft”. The apartment booked by the applicant containing carpet area of 1479.176 square feet together with adjoining exclusive balcony area of 63.736 square feet on the 11<sup>th</sup> floor of the project “Aspirations Aloft”, which is under construction.
- 5.3. The applicant has stated that the total consideration of Rs.3,36,70,000/- plus GST additionally, of Rs. 40,40,400/-. As per clause 7.1 of the agreement for sale has been paid and the Corporate Debtor should complete the project and handover the possession of the said apartment along with ready and complete common areas with all specifications, amenities and facilities of the Project **on or before 30/06/2021** unless there is a delay due to *force majeure* conditions.

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- 5.4.** However, the development of the project got delayed owing to COVID-19 pandemic, for nearly 2 years and the corporate debtor claims that the project is almost complete and it is in the final stage of completion as on date.
- 5.5.** Aggrieved by the delay in handing over the possession of the apartment, the applicant herein has been corresponding with the Corporate Debtor from 20/12/2021 till date. According to the petitioner, no valid reasons have been mentioned by the Corporate Debtor in response to such correspondences except delay on account of COVID-19 and hence this application has been filed by the applicants seeking CIRP of the Corporate Debtor under section 7 of the IBC.
- 5.6.** This application came up for hearing before us on September 26, 2023.
- 6. Submissions of the Ld. Counsel for the applicants**
- 6.1.** Ld. Counsel for the applicant contended that the Corporate Debtor has delayed in handing over the possession of the apartment which is supposed to be handed over on or before 30/06/2021. He submits that the applicants are financial creditors in terms of explanation to section 5(8)(f) of IBC. He also submits that applicants satisfy the criteria provided in section 7 of the IBC which states that for initiating CIRP against the Corporate Debtor the same shall be filed jointly by not less than 100 of such allottees under the same real estate project or not **less than 10%** of the total number of such allottees under the same real estate project business. He submits that the applicants are covered under the clause which states that “**not less than 10%**” and therefore they are eligible to initiate CIRP in terms of section 7 of the IBC.
- 6.2.** It is further submitted that the application has been made within the time frame provided under the Act as “date of default” is 30/06/2021 as per clause 7.1 of the Agreement for Sale. Since the amount claimed including

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interest is Rs.3,58,82,555/-, which includes Rs.3,03,82,568/- as principal amount and balance amount of Rs. 54,99,987/- as interest till August, 2022, the debt according to the petitioner more than meets the threshold limit. The applicant mentioned that the “date of default” is 30/06/2021 in Part IV of Form 1 submitted under sub-rule (1) of rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016.

**6.3.** Ld. Counsel for the applicants submits that since all the ingredients are present such as default of a financial debt, debt in excess of threshold limit, application under section 7 of IBC filed within the limitation period and application is complete in all respects this is a fit case for initiating CIRP under section 7 of the IBC and contended that the application must be admitted.

**7. Submissions of the Ld. Counsel for the respondent**

**7.1.** Ld. Counsel for the respondent submitted that that the developer is a reputed company, who has been undertaking real estate projects successfully on time and only this project got delayed due to COVID Pandemic for nearly two years and consequent thereto due to a few other unavoidable reasons.

**7.2.** It is submitted that however, other apartment owners were handed over their apartments for starting interior work. Most of the allottees have started interior work and the same is being carried out. Ld. Counsel for the respondent submitted photos of the apartments to demonstrate that the project is nearing completion and in a matter of few more months possession will be handed over, duly completed in all respects.

**7.3.** He also pointed out that none of the other allottees have come forward before this Adjudicating Authority seeking such a drastic step of initiating insolvency proceedings against the Corporate Debtor which is a **solvent company**.

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- 7.4. He further submitted that in terms of clause 9 of the “Agreement for Sale” allottee shall option of terminating the Agreement in case of default by the promoter, in which case the promoter shall be liable to refund the entire money along with interest within 45 days of termination of the Agreement.
- 7.5. In case, the allottee does not intend to terminate, corporate debtors shall pay interest as prescribed in the rules for every month of delay till the handing over of the apartment to the allottee.
- 7.6. Ld. Counsel for the respondent submitted that in the given case, the applicants did not terminate the Agreement for Sale till date and, therefore, he is only entitled to a rate of interest from 30/06/2021, i.e., from the date of default in terms of clause 9 of the “Agreement for Sale “Ld. Counsel for the respondent further submitted that the petition is barred by estoppel, waiver, acquiescence and/or principles analogous thereto.
8. The Ld. Counsel for the Corporate Debtor has filed an Interlocutory Application being **I.A. (IB) 1438/KB/2023** claiming that on behalf of the Corporate Debtor, an offer was given in writing to the Financial Creditors. The crux of the offer was an immediate refund of the entire principal amount paid by the Financial Creditors excluding the GST amount of Rs. 3,09,76,400.00/-. In addition, the Corporate Debtor had indicated that if the Financial Creditors claimed refund of the GST from the appropriate authority, the Corporate Debtor would extend necessary support for such purpose. Additionally, since the scheduled completion date of the project as extended by HIRA was 31.03.2022, the Corporate Debtor offered to pay upfront, interest calculated at the rate of 14% per annum on the principal amount on and from April 1, 2022, till the date of settlement. In short, the said offer essentially amounts to paying back the Financial Creditors the entire amounts claimed in the section 7 petition together with interest, meaning there can be no outstanding debt, let alone default. This offer was made in the interest of an amicable settlement and strictly without prejudice to the rights and

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contentions of the Corporate Debtor in the section 7 petition, including that the petition ex-facie was not maintainable.

9. Ld. Counsel for the Financial Creditor, however, has denied the claim of the Corporate Debtor pleaded in the interlocutory application.

**10. Analysis and findings**

10.1. During the course of hearing before us, Ld. Counsel for the applicant relied upon the judgment of *DLF Home Developers Limited v. Capital Greens Flat Buyers Association*, reported in (2021) 5 Supreme Court Cases 537, wherein the Hon'ble Apex Court has held that in addition to refund of the amount taken from the allottee with interest; they are also entitled to compensation for the substantial delay.

10.2. In this application, during the course of hearing, the applicants claimed compensation should be in the form of interest from the date of payment by the allottee to till date.

10.3. We have gone through the Hon'ble Apex Court judgment in paragraph 7, which dealt with "*force majeure*" defense and ultimately came to the conclusion that *there is no cogent evidence in regard to the nature of the delay and the reasons for the delay is the approval of the building plans. Quite apart from this finding of fact, it is evident that a delay in the approval of building plans is a normal incident of a constructions project.*" The delay in this case is merely due to delay in the approval of building plan which according to the Apex Court is a normal incident of a construction project, and therefore granted relief including refund along with interest. In the given case there is no denying of the fact that the COVID-19 Pandemic that prevailed for two years, is the main reason for the delay though there were few other reasons for consequential delays.

10.4. However, the learned Counsel for the Corporate Debtor submitted that CD has offered to make full payment of the total consideration received by

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them from the allottee for purchase of the apartment along with applicable interest from the date of default which is 30-6-2021.

- 10.5.** We are of the view that the Hon'ble Supreme Court Case in relation to the Consumer Court dispute will not come to the rescue of the applicant as in the case in hand, we are required to see the defaulted amount and cannot decide on the compensation payable over and above (which can be decided by the consumer courts) what is there in the "Agreement for Sale" made between the parties dated 28/11/2018.
- 10.6.** Ld. Counsel for the Corporate Debtor during the course of hearing before us agreed to settle the amount mentioned in Part IV Form 1 filed by the Applicant, with interest till date, and such an offer is on record, we find that no case has been made out by the applicants for initiating CIRP under Section 7 of IBC.
- 10.7.** Even otherwise we find that in the absence of termination of "Agreement of sale" in terms of clause 9 of the Agreement for Sale, the applicant is entitled to only interest as stated in clause 9 of the said agreement and not the principal amount. When that being the case, the interest amount being less than the threshold limit of Rs. One Crore, the application does not survive. Even on this ground, the application is liable to be dismissed.
- 10.8.** Further, without terminating the Agreement for Sale, the applicant is claiming not only interest from the date of payment but also on the entire sum paid by him, which in our view is not appropriate and the applicant is acquiesced. We rely upon the judgment of the Hon'ble Apex Court in the case of *Prabhakar v. Joint Director Sericulture Department*, reported in MANU/SC/1041/2015: (2015) 15 SCC 1, that:

**"This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong."**

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**(Emphasis Added)**

Further, we rely upon the judgment passed in the case of *State of U.P. v. Sudhir Kumar Singh*, reported in MANU/SC/0773/2020: [2020] 13 SCR 571, that:

“No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.”

**(Emphasis Added)**

Further, we rely upon the order passed by this Tribunal in *Annapoorani Textiles Pvt. Ltd. Vs. Anup Kumar Singh, RP of ER Textiles Ltd.* IVN.P.(IB) No. 4/KB/2023 In I.A. (IB) No. 1539/KB/2022 In C.P. (I.B.) NO.482/KB/2019 reported in (2023) ibclaw.in 395 NCLT that:

“...Once he failed to succeed, he cannot turn volta face to challenge the extensions granted as he acquiesced into the alleged wrongful act/ violation of regulations/ timelines in granting such extensions and allowed a right to be created...”

**(Emphasis Added)**

- 10.9.** Considering the facts and circumstances of the case, we are of the view the Application filed under Section 7 is liable to be dismissed.
- 10.10.** In the given case, we find that none of the allottees of the same project have come before this Adjudicating Authority to initiate such a proceeding. Moreover, without terminating the Agreement for Sale, the applicant is claiming not only the interest from the date of payment but also the entire sum paid by him, though in his application he has claimed the principal amount and interest only from the date of default, i.e., from 30-6-2021. Thus, the application is devoid of any merit.

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**10.11.** However, considering the fact that application has been filed by an allottee of a Housing Project, who has filed this application out of frustration arising out of delay, we refrain from invoking section 65 of the code which deals with fraudulent or malicious initiation of proceedings.

**10.12.** We dismiss the petition filed as it is not legally sustainable.

- 11. In terms of the order above, this Company Petition being C.P. (IB) No. 254/KB/2022 along with I.A. (IB) No. 1438/KB/2023 is dismissed and disposed of accordingly.**
- 12.** Certified copies of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

**D. Arvind**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

**This Order is signed on the 10th Day of October, 2023**

Bose, R. K. [LRA]/ hb.