

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)- 57/7/JPR/2018

IN THE MATTER OF:

MS. VEENA PARAKH & ANR.

...FINANCIAL CREDITOR

VERSUS

SNG REALESTATE PRIVATE LIMITED

...CORPORATE DEBTOR

MEMO OF PARTIES

MS. VEENA PARAKH

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

...Financial Creditor No. 1

MS. DOLLY JAIN

1345, Martin CT, Appartment,
325, Bethlehem, PA- 18018
2565, USA

...Financial Creditor No. 2

VERSUS

SNG REALESTATE PVT. LTD.

CIN: U45201RJ2008PTC027756

Registered office at: 707, Paris

Point Bani Park, Jaipur- 302016

(Rajasthan)

...Corporate Debtor

FOR THE FINANCIAL CREDITOR(S) : Anuroop Singhi, Adv.

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

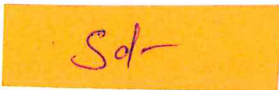
Order Pronounced On: 22.12.2023

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

1. The present application has been filed by *Ms. Veena Parakh & Ms. Dolly Jain*, jointly through their Power of Attorney Holder *Ms. Shanti Modi* ('Applicants'/ 'Financial Creditors') against the Corporate Debtor namely *M/s SNG Realestate Private Limited* ('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 Applicant.
2. The Corporate Debtor is a Private Limited Company, incorporated under the Companies Act, 1956 on 17.11.2008 and duly registered with the Registrar of Companies, Jaipur, having CIN: U45201RJ2008PTC027756. The registered office of the company is situated at 707, Paris Point, Bani Park, Jaipur. The authorized share capital of the company is Rs.10,00,00,000/- (Rupees Ten Crores Only) and paid-up share capital of the Company is Rs. 4,99,00,000/- (Rupees Four Crores Ninety-Nine Lacs 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:

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3.1. The Applicant No. 1 and Applicant No. 2 entered into two separate Memorandum of Undertakings ('MoU') with the Corporate Debtor on 01.08.2015 and 12.01.2016 respectively. The Applicant No. 1 via MOU dated 01.08.2015 purchased a flat bearing No. 202, 2nd Floor admeasuring 2217 sq. feet for an amount of Rs. 2,10,30,686/- (Rupees Two Crores Ten lakhs Thirty Thousand Six Hundred and Eighty-Six Only) and the Applicant No. 2 via MOU dated 12.01.2016 purchased a flat bearing number 203, 2nd floor admeasuring 2194 sq. feet for an amount of Rs. 2,06,96,117/- (Rupees Two Crores Six Lakhs Ninety-Six Thousand One Hundred and Seventeen Only) in the project of Corporate Debtor namely "SUNRISERS". Accordingly, both the Applicants were allotted one residential apartment each.

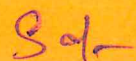
3.2. It has been submitted that as per the terms of the MoU dated 01.08.2015 executed with Applicant No. 1, a sum of Rs. 1,00,000/- (Rupees One Lakh Only) was to be paid as advance token amount and Rs. 1,46,32,000/- (Rupees One Crore Forty-Six Lakhs Thirty-Two Thousand Only) was to be paid after taking loan from the State Bank of India ('SBI'). Similarly, as per MOU dated 12.01.2016 executed with Applicant No. 2, a sum of Rs. 1,00,000 /- (Rupees One Lakh Only) was to be paid as advance token amount and Rs. 1,42,42,702 (Rupees One Crore Forty-Two Lakhs Forty-Two Thousand Seven Hundred and Two Only) was to be paid after taking loan from the



State Bank of India ('SBI'). For the purpose of availing the loan facility from SBI; the Financial Creditors along with the Corporate Debtor entered into a Tripartite Agreement with SBI. After entering into the Tripartite Agreements, the Applicants paid the advance token money of Rs. 1,00,000/- (Rupees One Lakh Each) to the Corporate Debtor on 17.12.2015 and 12.01.2016 and subsequently, the loan amount of respective flats was also disbursed to the Corporate Debtor from the loan account of the Applicants.

3.3. It has been contended that as per the terms and conditions of the MoUs, the Corporate Debtor was to pay all the monthly EMIs as well as Return on Investment ('RoI') to the Applicants every year as per the RoI Clause of the respective MoUs. For the same, the Corporate Debtor had given 5 cheques in total to each Applicant, 3 postdated cheques were for the RoI for each year and 2 cheques for the purpose of Bank Loan Amount and Token Amount respectively. Further, the Corporate Debtor was to pay the compensation to the second party @ 24% p.a. along with the total amount paid by Applicants in case of consequent default by not paying the EMI for the third time.

3.4. When the advance token money and loan amount was granted to the Corporate Debtor, the Corporate Debtor paid some of the EMIs to SBI but later on it stopped making payments towards the EMIs to SBI after few instalments. After repeated request to the Corporate Debtor, no



EMIs were paid by the Corporate Debtor to SBI. Since no payments were made by the Corporate Debtor, the Applicants under false assurance of the Corporate Debtor that it will make the payments towards EMIs to the Applicants at a later stage started making payments towards the loan account which were to be paid by the Corporate Debtor. The Corporate Debtor neither made the payments towards the EMIs nor made payments towards the RoI of the first and second year to the Applicants when the same became due and payable.

3.5. It is submitted that when the Applicants strongly followed up with the Corporate Debtor to make payment towards the RoI as well as the EMIs, the Corporate Debtor convinced the Applicants to jointly purchase a new property from the Corporate Debtor in lieu of the RoIs. Accordingly, the Corporate Debtor and Applicants entered into an agreement wherein another flat was jointly given to the Applicants instead of the RoI of the first two years. After the adjustment of the aforesaid amount, it was assured by the Corporate Debtor that it will make regular payments towards the EMIs. However, the same did not happen and the Corporate Debtor again defaulted in making the payments.

3.6. The Applicants made payments towards the EMIs till 07.03.2018 only and since EMIs are not being paid, SBI charged interest upon the loan amount. As per the terms and condition of the MoU, the Corporate

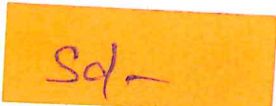
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Debtor is liable to discharge the entire liability towards SBI. The entire interest which SBI levied upon the loan amount has not been included in the claim for it cannot be quantified by the Applicants at the stage, hence, the Applicants reserved their right to claim the same. As per the penalty clause mentioned in the terms and conditions of the MoU, the Corporate Debtor is liable to pay compensation @ 18% p.a. of the EMI amount to the Applicants.

3.7. The Applicants have been following up with the Corporate Debtor for making payment of RoI as well as the Bank EMIs, however the Corporate Debtor has been delaying the same on one pretext or other. Since no payments were made by the Corporate Debtor, the Applicants presented the EMIs security cheques issued by the Corporate Debtor in favour of the Applicants which were dishonoured and duly intimated to the Corporate Debtor but no payment was made by the Corporate Debtor towards the same. Therefore, the Applicants cancelled the MoUs entered upon by them with the Corporate Debtor vide email dated 31.07.2018 and 03.08.2018.

3.8. The Applicants filed an Affidavit submitting Additional Documents vide Diary No. 650/2018 dated 16.01.2018 annexing the Affidavit of Power of Attorney Holder i.e. *Mrs. Shanti Modi* along with the copy of the e-mails sent by the Applicant to its banker dated 15.10.2018 and 22.10.2018.



3.9. 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 Date(s) of disbursement	Rs. 2,89,74,000/- (Rs. Two Crores Eighty- Nine Lacs Seventy- four thousand Only) 17.12.2015
2.	Amount claimed to be in default and the date on which the default occurred	Rs. 3,75,03,929/- (Rupees Three Crore Seventy five Lacs Three Thousand Nine Hundred Twenty-Nine only) along with pro rata interest and future interest liabilities of the Bank. The Date of Default is as stated to be 09.04.2018.

4. The Respondent has filed its reply, *vide* Diary No. 489/2019 dated 25.03.2019, stating the following:

4.1. The Applicants have suppressed the fact of subrogation of rights by way of Tripartite Agreement executed between the parties therein. the deal for purchase of the Residential Apartment in *SUNRISERS* was undertaken after the Tripartite Agreement was entered into between the parties. Copy of the Tripartite Agreement of the Applicant No. 1 has been annexed with the Reply. It has been contended that

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consequent to execution of the Tripartite Agreements and MOUs, the Corporate Debtor acceded to the request of the Applicants and agreed to provide the receipt of the discounted amount towards both the flats for the purpose of disbursement of Bank Loan. Such relaxation was peculiar to given situation i.e. disbursement of bank loan only or adjustments at the time of buy-back or resell the said apartments; aside from these situations the full amount was due and payable towards the apartments.

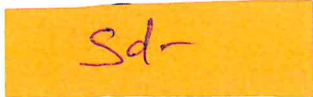
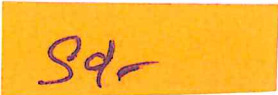
4.2. The Corporate Debtor contended that an amount of Rs. 63,53,415/- (Rupees Sixty-Three Lakhs Fifty-Three Thousand Four Hundred and Fifteen Only) is outstanding against the payment of consideration for the Flat No. 203 and an amount of Rs. 63,98,686/- (Rupees Sixty-Three Lakhs Ninety-Eight Thousand Six Hundred and Eighty-Six Only) is still outstanding against Flat No. 202. Hence, the total consideration amount to the tune of Rs. 1,27,52,101/- (Rupees One Crore Twenty-Seven Lakhs Fifty-Two Thousand One Hundred and One Only) is outstanding against both the residential flats purchased by the Applicants/Financial Creditors. The brief particulars of the payments have been tabulated as below:

<i>Flat No.</i>	<i>Sale Consideration</i>	<i>Amount Received</i>	<i>Outstanding Amount</i>
202	Rs. 2,10,30,686	Rs. 1,46,32,000	Rs. 63,98,686
203	Rs. 2,06,96,117	Rs. 1,43,42,702	Rs. 63,53,415
TOTAL	Rs. 4,17,26,803	Rs. 2,89,74,702	Rs. 1,27,52,101

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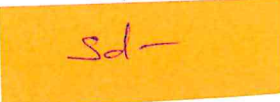
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- 4.3. Apart from the abovesaid, further co-operation by way of Lock-in-period was also acceded upon the request of the Financial Creditor/Applicant and the Lock-in-Period of 2 years was agreed between the parties from 06.10.2015 i.e. the date from transferring the above initial funds, within which the said Residential Apartments could not be sold to any Third Party. It was agreed that the Corporate Debtor may Buy Back the said Flats/Residential Apartments subject to payment in accordance with ROI clause after Lock In Period.
- 4.4. The Applicants have concealed the fact that the Corporate Debtor on behalf of Applicants deposited an amount of Rs. 21,67,275/- (Rupees Twenty-One Lakhs Sixty-Seven Thousand Two Hundred and Seventy-Five Only) & Rs. 24,36,504/- (Rupees Twenty-Four Lakhs Thirty-Six Thousand Five Hundred and Five Only) against the Flat No. 202 & 203 respectively, in order to save the entire project from rigor actions of the SBI and its stringent liabilities, penalties and fines under the provisions of SARFAESI.
- 4.5. It is stated that apart from the remaining dues, the Applicants are liable to pay an amount of Rs. 46,03,779/- (Rupees Forty-Six Lakhs Three Thousand Seven Hundred and Seventy-Nine Only) against both flats. The said amount was deposited by the Corporate Debtor on behalf of the Applicants and thereby total outstanding till date comes to the tune



of Rs. 1,73,55,880/- (Rupees One Crores Seventy-Three Lakhs Fifty-Five Thousand Eight Hundred and Eighty Only). In order to save from such liability, this is an attempt made by the Applicants in garb of the partial interpretation of clause of RoI, which is a gross violation and abuse of process of law, as it is amply clear that the Applicants instead of paying the outstanding dues want to cancel the sale transaction only, which is not permissible.

4.6. The Applicants with the Corporate Debtor entered into a Tripartite Agreement with the SBI who actually disbursed the loan amount of Rs. 1,42,42,702/- (Rupees One Crore Forty-Two lakhs Forty-Two Thousand Seven Hundred and Two Only) (i.e., 69.30% of the total consideration amount) and Rs. 1,45,32,000/- (Rupees One Crore Forty-Five Lakhs Thirty Two Thousand Only) against the payment of the consideration of Flat Nos. 202 & 203 respectively. It is clear from the Tripartite Agreement, the Applicants are not Financial Creditors as per Section 5(7) of IBC and the Applicants subrogated it's rights including the enforcement of security interest, in favour of the SBI. There is no liability to pay the amount either cancellation or whatsoever. In the circumstances, the Applicants cannot be treated as Financial Creditors. The relevant extracts of the Tripartite Agreement is reproduced by the Corporate Debtor in the reply. Moreover, SBI has already invoked the provisions of SARFAESI Act, 2002 by filing an



Original Application 917/2018 before the Debt Recovery Tribunal, Jaipur Bench.

4.7. The Corporate Debtor has relied upon the Judgment of NCLT, Allahabad in the matter of *Ajay Walia vs. M/s Sunworld Residency Private Limited* and the Judgment of the Hon'ble NCLAT in *Ramesh Kumar Suneja vs. Brij Mohan Sahni*. The Corporate Debtor is liable to recover the amount of Rs. 43,43,300/- (Rupees Forty-Three Lakhs Forty-Three Thousand Three Hundred Only). It has also been submitted that the RoI clause shall be read in consonance along with Buy-Back Clause and Lock-In-Period Clause. There is a clear existence of dispute between parties herein relating to interpretation of clauses of MoU entered between the parties and the tripartite agreement, which shall be settled only in accordance with the provisions of the Arbitration & Conciliation Act, 1996.

4.8. With respect to the defects in the Application filed, the Corporate Debtor has relied upon the judgment of the Hon'ble Appellant Authority in the case of *Ravi Mahajan vs. Sunrise 14 A/S, Denmark*. The content of Authorisation of *Ms. Shanti Modi*, relates to the Applicants and it is subject to proof to explain its sanctity as the same has been executed in USA and unstamped and therefore cannot be relied upon subject to payment of its required duty, more so such power of attorney seems to be executed in USA whereas the petition

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has been filed by the Applicants in Jaipur clearly shows that such power of attorney in original has not been received and the present power of attorney is a fake and fabricated document.

5. Earlier, in this matter, certain defects were pointed out by the registry and an Application bearing *IA No. 18/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. 456/JPR/2023* to place certain documents on record. This Authority vide Order dated 14.09.2023 allowed the Application to the extent of taking Annexure-3 i.e. Tripartite Agreements both dated 31.07.2015 and Annexure-5 i.e. Sale Agreement dated 07.05.2017 on record. It is seen that Two Tripartite Agreements dated 31.07.2015 were executed between the Applicants separately with the Corporate Debtor and SBI. The Tripartite Agreement states that the Applicants and Corporate Debtor have requested SBI to disburse Home Loan to the Applicants to purchase the flats in the project of the Corporate Debtor namely *SUNRISERS* and the Applicants agreed to create charge over the said flat along with the proportionate undivided share in the land in favour of SBI. The Sale Agreement dated 07.05.2017 has been executed

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between *Mr. Anurag Jain (s/o Mrs. Veena Parakh i.e. Applicant No.1)* and the Corporate Debtor with respect to Flat No. 501 in the property of the Corporate Debtor named *SUNRISERS* for consideration of Rs. 2,25,00,000/- (Rupees Two Crores Twenty-Five Lakhs Only) in lieu of the EMI and RoI of the Applicants.

6. The Petitioner has filed Written Submissions vide Diary No. 2897/2032 dated 07.12.2023 submitting that the Applicants had entered into MOUs with the Corporate Debtor for Flat No. 202 and 203 on 01.08.2015 and 12.01.2016 in the project *SUNRISERS* for an aggregate sale amount of Rs. 2,10,30,686/- (Rupees Two Crores Ten Lakhs Thirty Thousand Six Hundred and Eighty-Six Only) and Rs. 2,06,96,117/- (Rupees Two Crores Six Lakhs Ninety-Six Thousand One Hundred and Seventeen Only). The Applicants have reiterated the points mentioned above and additionally submitted that they were investors in view of the Investment Clause of the MOUs and hence, does not fall within the definition of allottee.
7. 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.
8. This Adjudicating Authority having perused all the relevant papers and found them in order is passing this order as below. The Registered Office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this

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matter is within the purview of Laws of Limitation, as the debt fell due in 2018, 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.

9. 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 31.07.2015 were executed between the Applicants, the Corporate Debtor and SBI. After the execution of the Tripartite Agreement, the Applicants entered into MOUs with the Corporate Debtor, the details of which are tabulated as below:

<i>Applicant No.</i>	<i>Flat No.</i>	<i>Document</i>	<i>Consideration</i>
Applicant No. 1	202	MOU dated 01.08.2015	Rs. 2,10,30,686/-
Applicant No. 2	203	MOU dated 12.01.2016	Rs. 2,06,96,117/-

10. The Applicants have submitted that they are not homebuyers and to substantiate the same, reliance has been placed upon the RoI Clause of the MOU. For reference, the RoI clause as mentioned in the MOUs is reiterated as below:

Relevant Portion of the RoI clause with respect to the Flat No. 202 of the Applicant No. 1 as mentioned in MOU dated 01.08.2015:

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“1. That first party to this MOU will pay the return on investment on the above mentioned residential flats @ 27% p.a. (i.e. Rs. 3950640/-) on yearly basis continuing till three years on the total invested amount (Rs. 14632000/-) payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly Bank EMI.

Calculation of yearly return on investment amount is as under: -

- a) 27% on Invested Amount i.e. Rs. 3950640 – Bank Instalment i.e. Rs. 1650072/- p.a. = Net Return on investment amount i.e. Rs. 2300568/-
- b) Bank instalment means:-
EMI of SBI Bank Rs. 137506 X 12 months = Rs. 1650072/- p.a. (Bank Instalment)”

Relevant Portion of the RoI clause with respect to the Flat No. 203 of the

Applicant No. 1 as mentioned in MOU dated 12.01.2016:

“1. That first party to this MOU will pay the return on investment on the above mentioned residential flats @ 27% p.a. (i.e. Rs. 38,72,530/-) on yearly basis continuing till three years on the total invested amount (Rs. 1,43,42,702/-) payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly Bank EMI.

Calculation of yearly return on investment amount is as under: -

- a) 27% on Invested Amount (Rs. 1,43,42,702) i.e. Rs. 38,72,530 – Bank Instalment i.e. Rs. 15,77,928 p.a. = Net Return on investment amount i.e. Rs. 22,94,602/-.
- b) Bank instalment means:-
EMI of SBI Bank Rs. 1,31,494 X 12 months = Rs. 15,77,928/- p.a. (Bank Instalment).”

11. 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 01.08.2015 and 12.01.2016. 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 *SUNRISERS* for which advance payment has been made through Home Loan availed from the State Bank

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of India via the Tripartite Agreements. Besides the MOUs, it is an undisputed fact that the Applicants have confirmed that they had purchased two flats 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;”

12. 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 separate MOUs executed on 01.08.2015 and 12.01.2016 between the Applicants and the Corporate Debtor for the sale of the flats in the project of the Corporate Debtor *SUNRISERS* have referred to the Applicants as allottees.
13. From the above-noted paras, it is determined that the Applicants are allottees in the Real Estate Project of the Corporate Debtor named *SUNRISERS*. 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 RERA Act, 2016, it is relevant to determine whether the transactions fall

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

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- (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;*
14. 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:

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

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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.”

15. 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 Applicant shall be deemed to be withdrawn before its admission. The present Application was filed on 30.08.2018 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.
16. In view of the foregoing, there is no iota of doubt that the Applicants in the case, who are allottees, have applied jointly for commencement of the CIRP against the Corporate Debtor, do not meet the benchmark mentioned under Section 7 of the Code. The Applicants have failed to amend the Application to meet the benchmark of either jointly filing of the Application by 100

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allottees or jointly filing by not less than 10% of the number of allottees, whichever is less. Therefore, this Petition filed by two 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.

17. 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.”

18. Therefore, it is pertinent to state that Section 7(1) of the Code, 2016 mandates for 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.

19. 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.
20. 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 Applicant in pursuing any other remedies available to it, under the prescribed provisions of law.
21. Accordingly, in the circumstances, CP No. (IB) 57/7/JPR/2018 is dismissed as rejected.
22. 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**