

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

C.P. (IB) No.377/BB/2019  
U/s 7 of IBC, 2016  
R/w Rule 4 of I&B (AAA) Rules, 2016

**BETWEEN:**

**Ms. Nupur Anchlia**  
B-703, Fortune Towers,  
Near Indian Oil Petrol Pump,  
Madhapur Road,  
Hyderabad – 500 081. & another - Petitioners/Financial Creditors

**AND**

**M/s. Mantri Developers Private Limited**  
41, Vittal Malaya Road,  
Bangalore- 560 011. - Respondent/Corporate Debtor

**Order Pronounced on: 24<sup>th</sup> March, 2021**

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

**Parties/Counsels Present:**

For the Petitioners : Mr. S. Vivekananda with  
Mr. Theerthesh B.S.  
For the Respondent : Mr. Uday Shankar

**ORDER**

***Per: Ashutosh Chandra, Member (Technical)***

1. C.P.(IB)No.377/BB/2019 is filed by Ms. Nupur Anchalia & another (hereinafter referred to as 'Petitioners/Financial Creditors') U/s 7 of the IBC, 2016, R/w Rule 4 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Mantri Developers Private Limited, on the ground that it has committed default for total amount of Rs.49,24,359/-

(Rupees Forty Nine Lakhs Twenty Four Thousand Three Hundred and Fifty Nine Only).

2. Brief facts of the case, as mentioned in the Company Petition, are as follows:
  - (1) M/s. Mantri Developers Pvt. Ltd. ('Respondent/Corporate Debtor'), having CIN: U70102KA1990PTC027924 incorporated on 06.12.1990. The Authorised Share Capital of the Company is Rs.1,10,00,00,000/- and Paid-up Share Capital is Rs.55,96,35,000/-.
  - (2) It is stated that the Financial Creditors are individuals who advanced money to the Corporate Debtor in pursuance of agreement for sale and agreement for construction executed on 05.09.2011 (herein referred as 'agreements'). The Financial Creditors have advanced a consolidated amount of Rs.49,24,359/- to the Corporate Debtor. The Corporate Debtor agreed to give the possession of the apartment as per the above agreements on 01.07.2013. The date of possession of the apartment was extended several times and ultimately the possession was promised to be given by August 2016. However, the Corporate Debtor has been dishonouring the terms of the agreement since July 2016 with respect to the apartment purchased by the Financial Creditors Nupur Anchlia and Abhishek Anchlia. An apartment bearing No. C-1907, Building Floor No. 19, Tower 'C' at Mantri Celestia was allotted to the Financial Creditors vide application for allotment letter dated 31.08.2011.
  - (3) It is stated that Financial Creditors and the Corporate Debtor entered into agreement for sale dated 05.09.2011 wherein, it was stated that the vendors are the absolute owners of the land situated at Survey Nos.126, 127, 130, 131, 132, 133 Nanakramguda (V), Serilingampally (M), Ranga Reddy District, Gachibowli, Hyderabad and entered an agreement for sale to purchase an undivided right, title and interest in the land. Pursuant to the agreement for sale, simultaneously an agreement for construction dated 05.09.2011 was also executed between the Financial Creditors and Corporate Debtor wherein, the Corporate Debtor has formulated a scheme for development of

commercial and residential constructions on the said land as stated in agreement for sale.

- (4) It is also stated that the Financial Creditors entered into a tripartite agreement with Mantri Developers Pvt. Ltd. (Corporate Debtor) and ICICI Bank Ltd. (banker) wherein, the Financial Creditor approached ICICI Bank Ltd. for a loan of Rs.44,80,000/- and were sanctioned a loan vide offer letter dated 21.09.2011 towards the purchase consideration of the apartment in the project. The banker disbursed the loan upon demand being raised by Financial Creditors on the basis of demand letters raised by Corporate Debtor from time to time.
- (5) As per the agreements, consideration for the apartment was to be paid in instalments according to the payment plan. The Corporate Debtor used to raise invoices/issue demand notices after which the same was duly paid by the Financial Creditors and later after the loan was sanctioned, the same was paid by the banker, which is an admitted position.
- (6) It is stated that initially, the said apartment was meant to be delivered for possession on 01.07.2013 but by virtue of a letter dated 21.11.2011, the Corporate Debtor stated reasons for delay in the progress and the completion of the apartment and also stated that the possession of the apartment will be delayed further till 31.12.2013. Again, on 31.01.2013, the Corporate Debtor sent a letter to the Financial Creditors intimating the completion of the said apartment. The Corporate Debtor yet again revised the date of possession till 30.06.2014. Thereafter, in the course of a meeting amongst a group of customers dated 03.07.2015, a date of delivery of possession of the apartment was agreed upon i.e., 30.11.2015. Finally, a fifth assurance date was also promised via letter dated 15.03.2016 for the possession of the said apartment to be given by August 2016.
- (7) It is further stated that as the possession of the apartment was not handed over by the Corporate Debtor to the Financial Creditors even after fifth promised date of handing over the apartment, the Corporate Debtor was not able to make good of its promises. Thereafter, the Financial Creditor sent a communication via registered AD and e-mail

on 10.07.2016 to the Corporate Debtor seeking refund of amount paid and cancelling the booking of the abovementioned apartment. Further, the Financial Creditors also approached Grahak Suvidha Kendra, a non-governmental organization herein referred as 'NGO' based out of Jaipur, Rajasthan and subsequently, 'NGO' had written to the Board of Directors of Corporate Debtor vide an e-mail dated 24.08.2016 and also a letter dated 08.09.2016 to the Corporate Debtor complaining that a harassment had been caused to the Financial Creditors and thereby asking for a redressal.

- (8) It is stated that a reply dated 07.10.2016 by the Corporate Debtor to Grahak Suvidha Kendra, a non-governmental organization ('NGO') was served wherein they specifically said that *"In regard to the present matter, we are surprised to receive the notice since Mr. Abhishek Anchila and Ms. Nupur Anchila have never approached us with their concerns and instead chosen to approach you directly. We have been interacting with all our customers and addressing their concerns and there has been no harassment on our part as alleged. We request you to kindly inform them to approach us for any grievance that they may have, to enable us to resolve the issues, if any, within the framework of the arrangement entered between the parties. Needless to say, we assure you of our full corporation.*
- (9) Till date the Financial Creditors have not received the possession of the apartment while refund against the cancellation of the apartment, has also not been received. Meanwhile, a consumer complaint was also filed in April 2017 to crave for justice by the Financial Creditors, wherein the State Consumer Disputes Redressal Commission had passed an order dated 28.06.2019 (C.C. No. 69/2017) wherein, the Corporate Debtor has been directed to pay an amount of Rs.49,24,359/- with interest @ 18% p.a. along with a cost of Rs.5,000/- to the Financial Creditors within a period of 4 (four) weeks from the date of the order. However, no steps have been taken by the Corporate Debtor in this regard till date.
- (10) It is clear that there is no dispute whatsoever as regard to the legitimacy of the claim of the Financial Creditors towards the payment

of due amount, which has been duly acknowledged by the Corporate Debtor and the Corporate Debtor has repeatedly but in different manner, expressed its inability to honour the agreement and its commitments. The present petition is well within the period of limitation.

3. The Company Petition is opposed by the Respondent by filing Statement of Objections and Additional Statement of Objection dated 06.02.2020 & 25.08.2020, by inter alia contending as follows:

(1) It is stated that the Petitioner claims that the amount in default is 49,24,359/- only and date on which default is claimed to have occurred on 30.08.2016 on account of verbal commitment by the Respondent and the same is denied by the Respondent. The Respondent as per the agreement was to have delivered the apartment on 01/07/2013 as per Annexure B1 of the Construction agreement. If the Respondent claims that the cause of action has arisen due to this default, then the claim is time barred since this Petition was filed as on 17.09.2019 which is delayed and therefore is barred by Limitation.

(2) It is stated that the claim is hit by the principles of Res judicata, since the matter upon same subject matter is already been heard upon and adjudicated by the State Consumer Dispute Redressal Commission and National Consumer Dispute Redressal Commission. In view of pre-existing disputes before the State Commission and National Commission, the present Petition is not maintainable. The Petitioners herein had filed a Complaint before the State Consumer Redressal Commission, Telangana and the Respondent had preferred an Appeal before National Consumer Redressal Commission, New Delhi. The National Commission has passed an Order dated 06.01.2020 in First Appeal No.1567 of 2019. The Respondent has deposited an amount of Rs.35,000/- with the Registrar National Commission, Telangana while preferring an Appeal before National Commission and the said amount is at the disposal of the Petitioner herein. Since there exists an order in favour of the Petitioner, it is open

to the Petitioner to proceed to file execution against the same. However, the Petitioner has opted to approach this Court to arm twist the Respondent and to coerce and extract money from the Respondent of an amount which has not become due and payable.

- (3) It is also stated that the Petitioner has taken a loan from ICICI Bank and entered into a Tripartite Agreement with the ICICI Bank Ltd. and the loan amount is disbursed by ICICI Bank Ltd. The Petitioner has subrogated his rights in favour of ICICI Bank Ltd. Clause 'e' of the Tripartite MOU between the Respondent, Petitioner and ICICI bank stipulates that the Petitioner should not cancel the allotment without obtaining a NOC from ICICI bank which has not been done by the Petitioner. Further Clause 'g' of the Tripartite MOU stipulates that any amounts payable would be payable to ICICI bank, and not to the Petitioner. Keeping the above in view, the Petition filed herein without arraying ICICI Bank as a party is bad for non-joinder for proper and necessary Party; rights of Petitioner have been subrogated to ICICI Bank, and since amounts if payable are payable to ICICI Bank and not to the Petitioner, the Petitioner does not fall within the definition of a Financial Creditor.
- (4) As per the amendment of Section 7 by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, an individual homebuyer alone cannot file an application before this NCLT seeking the initiation of insolvency proceedings against a Developer. That a minimum of 100 Homebuyers or 10% of the total number of homebuyers in a project have to jointly file the preferred Petition together in order to initiate CIRP against a Developer.
- (5) Clause 10 of the Agreement for Sale dated 05.09.2011 provides for settlement of dispute through Arbitration. In case the Petitioner herein has any grievance the recourse would be to have preferred a Petition under the Arbitration Act, since the parties herein have agreed that to resolve any disputes, the same would have to be referred to Arbitration. Hence the matter shall be referred to arbitration.
- (6) The Hon'ble Supreme Court of India while dealing with *Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.* has

very clearly pointed out that the allottee who has knocked at the doors of the NCLT as a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment shall not be entitled to any remedy under this Code. The Respondent herein reserves the right to make an Application under Section 65 of the IBC 2016 against the Petitioners for having fraudulently initiating these proceedings. The principle laid down by Supreme Court as mentioned herein supra has been re-iterated by the Hon'ble National Company Law Appellate Tribunal, New Delhi in *Navin Raheja Vs. Shilpa Jain and others*<sup>1</sup> and held that that '*if the delay is not due to Corporate Debtor but due to Force Majeure, it cannot be alleged that the Corporate Debtor defaulted in delivering possession.*' Reference on this issue has been made to the decision of the Hon'ble Allahabad Bench of NCLT in CP (IB) 11/ALD /2018 in matter of *Ajay Walia and Sunworld Residency Pvt. Ltd.*

4. The Petitioners has filed Rejoinder on 09.03.2021, by inter alia stating as follows :
- (1) The Petitioners are decree holders and they are eligible to maintain this Petition U/s 7 of IBC, 2016. Section 5(10) makes it clear that the decree holder too is treated as Creditor for all purpose. The relevant portion of Section 3(10) is extracted hereunder for quick reference of this Adjudicating Authority:

*'3(10) 'creditor' means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.'*
  - (2) The Petitioner has taken support from the decision of the Hon'ble NCLAT in Company Appeal (AT)(Insolvency)No.984 of 2019 in the matter of *Ugro Capital Ltd. Vs. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)*.
  - (3) Based on the decree of the court this Petition was filed U/s 7 of the Code. Since, the definition of word creditor in IBC includes decree

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<sup>1</sup> Company Appeal (Insolvency) No.864 of 2019

holder, therefore if a petition is filed for realisation of decretal amount, then it cannot be dismissed on the ground that Applicant should have taken steps for filing execution case in civil court. The Petitioner herein is a decree holder and not a home buyer.

5. The Respondent has filed his Written Arguments on 10.03.2021, by inter contending that the Petitioners being a Decree Holder cannot approach NCLT by triggering Section 7 of the IBC. As the amount claimed in the decree is an adjudicated amount and not a debt. An adjudicated amount does not fall within the ambit of the definition of 'financial debt' U/s 5(8) of the IBC covers decree, Section 5(7) the home buyer who has a decree does not fall within the definition of a Financial Creditor as a Financial Creditor is defined as a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred and neither is the amount stated in the decree falls in the definition of a financial debt as per Section 5(8) of the IBC. Hence, the Petitioner who holds a decree cannot file a Petition U/s 7 to enforce the execution of a decree. Support has been taken from the decided cases of the Hon'ble NCLAT dated 14.08.2020 in the matter of *Sushil Ansal Vs. Ashok Tripathi & Ors.*<sup>2</sup>, and order dated 07.02.2020 in the matter of *G. Eswara Rao Vs. Stressed Assets Stabilization Fund & Ors.*
6. Heard Mr. S. Vivekananda along with Mr. Theerthesh B.S., learned Counsels for the Petitioners and Mr. Uday Shankar, learned Counsel for the Respondent. We have carefully perused the pleadings of the parties and the extant provisions of the Code and the law.
7. As per the Insolvency and Bankruptcy Code, (Amendment) Ordinance, 2019 dated 28.12.2019 Financial Creditors who are homebuyers of Real Estate Project can file a Petition U/s 7 of the Code, 2016, jointly only if there are 100 of such homebuyers or if they are 10% of total homebuyers, whichever is less. However, in the instant Petition, only one Homebuyer has filed the case which neither amounts to 10% of the total class of Financial Creditors nor 100 Financial Creditors. The Petitioner, therefore, fails at the very

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<sup>2</sup> Company Appeal (AT) (Insolvency) No.452 of 2020

threshold. It is also seen that in the instant case, as per the Construction agreement, the default has occurred on 01.07.2013. The CP is filed on 17.09.2019, i.e. almost 6 years after the cause of action and default.

8. Being aware of the above disqualification, the Petitioner has made out a case that it is before this Tribunal basically to seek execution of a decree passed by the National Consumer Redressal Commission, New Delhi. It has taken support from the decision of the Hon'ble NCLAT in Company Appeal (AT)(Insolvency)No.984 of 2019 in the matter of *Ugro Capital Ltd. Vs. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)* of 22.01.2020, to state that a decree holder was entitled to file a petition under the IBC. However, we find that this decision was considered by the Hon'ble NCLAT in a subsequent and recent decision in its order dated 14.08.2020 in the matter of *Sushil Ansal Vs. Ashok Tripathi & Ors.*<sup>3</sup>, where it held, after analysing the provisions of sections 5(7) and 5(8) of the Code, that a Decree Holder though covered under the definition of creditor under Section 3(10) of the Insolvency and Bankruptcy Code would not fall within the class of financial creditors and therefore, a decree holder cannot initiate a CIRP against a corporate debtor with an object to execute a decree. It cannot file an application U/s 7 of IBC as the amount claimed under a decree being an adjudicated amount was not a consideration for time value of money, and therefore, does not fall within the realm of Section 5(8) of the IBC. In giving this decision the Hon'ble NCLAT also considered its earlier decision in its order dated 07.02.2020 in the matter of *G. Eswara Rao Vs. Stressed Assets Stabilization Fund & Ors* where also it had held that a Decree cannot be executed by filing an Application U/s 7 of the IBC. Both these decisions are subsequent to the decision in *Ugro Capital* cited by the Petitioner, which was not followed in these two cases. In the instant case the Petitioner is before this Tribunal mainly to execute its decree and hence would not be eligible to file a Petition for execution of the decree received from the NCRC. We may add that if home buyers who obtain decrees from other fora also, such as from RERA, are permitted to file petitions under the IBC, that would defeat the purpose of the above referred amendment in section 7 of the Code laying

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<sup>3</sup> Company Appeal (AT) (Insolvency) No.452 of 2020

down the threshold of 100 or 10% home buyers, whichever is less. Hence, as per the decision in the case of Sushil Ansal (supra) while remedies are available to a home buyer elsewhere, as also under IBC (with the aforesaid threshold), once he receives a decree, the same cannot be brought for execution by invoking Section 7 of the IBC.

9. We are also in agreement with the Respondent that since there is a Tripartite Agreement with the ICICI Bank Ltd. and the loan amount was disbursed by ICICI Bank Ltd., not only the cancellation can be done by the ICICI Bank but also the repayment can be done only to the ICICI Bank which would be the Financial Creditor in the instant case and not the Petitioner, as the Petitioner has handed over this right to this Bank as per the tripartite agreement. The ICICI Bank has not been made a party in the CP and the Petition suffers from non-joinder. The decision of the NCLT, Allahabad Bench in CP (IB) 11/ALD /2018 in matter of *Ajay Walia and Sunworld Residency Pvt. Ltd.*, supports the view that where the Allottee/Applicant has subrogated its rights in favour of a Bank by way of Tripartite Agreement, the liability to make payment to the Allottee cannot be saddled upon the Corporate Debtor and the Applicant cannot be treated as a Financial Creditor.
10. In view of above facts and circumstances of the case, C.P.(IB)No.377/BB/2019 is hereby dismissed. However, this order will not come in the way of Petitioners to invoke any other remedy available under any other law so as to get its grievance redressed. No order as to costs.



**ASHUTOSH CHANDRA  
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA  
MEMBER, JUDICIAL**

Puja