



**THE NATIONAL COMPANY LAW TRIBUNAL**

**COURT VI, NEW DELHI**

**I.A. 5045/2023**

**IN**

**Company Petition No. (IB) – 888/(PB)/2022**

*Under Section 60(5) of the Insolvency and Bankruptcy  
Code, 2016.*

**IN THE MATTER OF:**

**Neeraj Kumar Dubey & Ors**

.... Financial Creditor

**VERSUS**

**Rudra Buildwell Projects Pvt. Ltd.**

..... Corporate Debtor

**AND IN THE MATTER OF-**

**Rudra Buildwell Projects Pvt. Ltd**

.... Applicant

**VERSUS**

**Neeraj Kumar Dubey & Ors**

...Respondents



**CORAM:**

**SHRI. MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)**

**SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)**

**PRESENT**

**For the Applicant/ Corporate Debtor:** Mr. Akshat Gupta, Ms. Shambhavi Mishra, Advs.

**For the Respondents/ Financial Creditors:** Ms. Aarzoo Aneja, Ms. Shivani Jaiswal, Mr. Prateek Tanmay, Adv

**ORDER**

**PER- RAHUL BHATNAGAR, MEMBER (TECHNICAL)**

**Order Pronounced on: 11.03.2024**

1. This application has been filed under Section 60(5) read with section 65(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking dismissal of the captioned Petition CP (IB) 888/PB/2022.

2. The applicant in the present application has prayed for the following reliefs: -

*a) Delete Applicants 5, 85, 90 and 100 from the Memo of Parties for not being a part of the class of "allottees under a real estate project" since they had already withdrawn from the Project by approaching UPRERA for cancellation of their allotments, and which relief was duly granted by*



*UPRERA; and being guilty of concealment and suppression;*

- b) Delete Applicants 27, 37, 78, 81, 86 and 89 from the Memo of Parties for being guilty of forum shopping by initiating multiple remedies simultaneously and being guilty of concealment and suppression;*
- c) Consequently, dismiss the captioned Petition under Section 7 IBC, i.e., CP(IB) No. 888 of 2022 for not meeting the mandatory requirement of the minimum number of allottees under the second proviso to Section 7(1) IBC;*
- d) Impose costs upon the Applicants in terms of Section 65 IBC for fraudulently and maliciously instituting the present proceedings; and*
- e) Pass such order(s) that this Hon'ble Tribunal may deem fit and necessary in the interest of justice.*

3. Briefly stated the facts of the case as mentioned in the instant application, which are necessary for adjudication, are as follows:

- i. The main Company Petition has been filed by the homebuyers/ financial creditors, being allottees of the 'Rudra Palace Heights' Project (the "Project") under Section 7 of the Insolvency and Bankruptcy Code, 2016 ["IBC"] inter alia seeking initiation of corporate



insolvency resolution process against the Corporate Debtor/ Applicant herein.

ii. The present application is filed for dismissal of the main Company Petition on the following grounds: -

- a. The Financial Creditors are guilty of concealment and suppression;
- b. The Financial Creditors are guilty of forum shopping;
- c. The captioned Petition is an abuse of process of law, as the Financial Creditors have invoked multiple remedies simultaneously;
- d. The captioned Petition has been filed maliciously and fraudulently with a view to extort and harass the Corporate Debtor; and
- e. That the captioned Petition does not meet the mandatory requirement of the second proviso to Section 7(1) of IBC, 2016.
- f. That the Applicants have concealed and suppressed from this Adjudicating Authority that they had already approached other fora, including the National Consumer Disputes Redressal Commission (NCDRC) and the Uttar Pradesh Real Estate



Regulatory Authority (UPRERA) and that some of them have already been granted relief by such alternate fora or in some cases, the claim has already been dismissed.

g. That some of the Applicants have falsely and fraudulently claimed to be allottees under the real estate project, as these Applicants have withdrawn from the Project and have already approached the UPRERA and had their allotments cancelled, prior to filing of the captioned Petition, which was filed on 20.10.2022. These Applicants have concealed this material fact from this Adjudicating Authority and have fraudulently and maliciously initiated the instant proceedings, only with the oblique motive of extorting and harassing the Corporate Debtor.

iii. That Section 65 of the IBC states that *“If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which*



shall not be less than one lakh rupees, but may extend to one crore rupees.”

iv. It is submitted that, prior to filing of the Petition, the following Applicants had already withdrawn from the Project in as much as they had approached the UPRERA for cancellation of their allotments, and which relief was duly granted by the UPRERA by way of an order directing the Corporate Debtor herein to pay a full refund of the amount paid by these Applicants along with interest

Applicant No.	Name of Applicant	Complaint Number before UPRERA	Date of Filing of Complaint	Date of Disposal/ Cancellation of Allotment	Date of issue of RC	Reference
90	Krishna Kumar	NCR1440305 50/ 2019	14.03.2019	04.10.2019	25.06.2021	Pg. 48-50 of Reply and Pg 20-25 of Addl. Docs.
5	Rakesh Kumar Singh	NCR144/ 08/ 57795/ 2020	08.08.2020	19.02.2021	06.09.2021	Pg. 42-44 of Reply and Pg 8-13 of Addl. Docs.
85	Anuj Verma	NCR144/ 04/ 74180/ 2021	26.04.2021	24.01.2022	11.08.2022	Pg. 45-47 of Reply and Pg 14-19 of Addl. Docs.
100	Jai Ram Sharan Singh	NCR144/ 03/ 72885/ 2021	28.03.2021	24.01.2022	13.09.2022	Pg. 34-41 of Reply



- v. That the abovementioned Applicants, having chosen/ elected to withdraw from the Project and after having their allotments cancelled under the relevant provisions of the RERA Act, 2016, cannot now claim to be “allottees under a real estate project” and approach this Adjudicating Authority.
- vi. In this regard, reliance is placed upon the judgment of the Hon’ble National Company Law Appellate Tribunal in *Sushil Ansal v Ashok Tripathi & Ors.*, 2020 SCC OnLine NCLAT 680:

*“23. We accordingly summarise our finding as under: (i) Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate dated 10th August, 2019 by ‘UP RERA’ directing recovery of Rs. 73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the ‘I&B Code’. Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.”*



vii. That the following Applicants have approached the UPRERA seeking possession of the very same flats that form the subject matter of the captioned Petition:

Applicant No.	Name of Applicant	Complaint Number before UPRERA	Date of Filing of Complaint	Date of Disposal	Date of issue of RC	Reference
86	Mukul Kumar Bhargava	NCR144/05/53648/ 2020	03.05.2020	18.11.2020	27.06.2022	<i>Pg. 51-53 of Reply and Pg 26-31 of Addl. Docs.</i>
78	Prabhat Mishra	NCR144/01/0476/ 2020	11.01.2020	21.11.2020	-	<i>Pg. 54-56 of Reply and Pg 32-55 of Addl. Docs.</i>

viii. That the following Applicants have also filed complaints before the UPRERA, and the said complaints of the following Applicants have been dismissed by the UPRERA, prior to the filing of the captioned Petition:

Applicant No.	Name of Applicant	Complaint Number before UPRERA	Date of Filing of Complaint	Date of Dismissal	Reference
81	Balbir Singh	ADJ/ NCR144/ 05/ 1181/ 2019	27.05.2019	22.08.2019	<i>Pg.56-57 of Addl. Docs.</i>
37	Vinay Kumar Dubey	NCR144/ 08/ 79053/ 2021	02.08.2021	02.02.2022	<i>Pg.58-59 of Addl. Docs.</i>



ix. That the following Applicants, along with other homebuyers, have filed a joint complaint on 12.07.2018 (i.e. prior to filing of the captioned Petition) under Section 12(1)(c) of the Consumer Protection Act, 1986 before the National Consumer Disputes Redressal Commission seeking 'possession' and other reliefs, which is currently pending adjudication before the Hon'ble Commission:

<b>Applicant No.</b>	<b>Name of Applicant</b>	<b>Complaint Number before NCDRC</b>	<b>Date of Filing of Complaint</b>	<b>Next Date of Hearing</b>	<b>Reference</b>
89	Raghu Nath Banerjee	CC/ 1573/ 2018	12.07.2018	09.10.2023	<i>Pg. 62-97 of the Reply; and see S.No. 19 and 22 of the Memo of Parties @ Pg 65</i>
27	Rajeev Shrivastava				

x. It is submitted that as per the Doctrine of Election, when there are two concurrent remedies available to a party, and the party chooses to exercise one remedy, the party loses its right to exercise the other. A litigant cannot be allowed to invoke two remedies simultaneously



- xi. The abovementioned Applicants, having already chosen to avail a concurrent relief before other adjudicating authorities, i.e., the UPRERA and the NCDRC, are estopped from approaching this Hon'ble Tribunal.
- xii. That the instant proceedings have been fraudulently initiated only with a view to extort and harass the Corporate Debtor, and the captioned Petition ought to be dismissed on this ground alone.
- xiii. That the captioned Application is not maintainable, as the Applicants have failed to comply with mandatory requirement in the second Proviso to Section 7(1), IBC, which states 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.”*



xiv. That the second Proviso to Section 7(1) of the Code is clear that an application under the section shall be filed by not less than 100 allottees or 10 per cent of the total number of allottees of a real estate project, whichever is lesser. In the present case, the total number of allottees in the Project is 1002. Therefore, in order to fall within the mandate of the second Proviso of Section 7(1) of the Code, the captioned Application ought to have been filed by not less than 100 allottees.

xv. For the reasons stated above, it is evident that the captioned Application could not have been filed by the abovementioned Applicants, and the same ought to be deleted from the Memo of Parties.

Applicant No.	Name of Applicant	Reason for Deletion
90	Krishna Kumar	Applicants who have withdrawn from the Project by approaching UPRERA seeking refund, resulting in grant of relief and cancellation of allotment
5	Rakesh Kumar Singh	
85	Anuj Verma	
100	Jai Ram Sharan Singh	
86	Mukul Kumar Bhargava	Applicants who have approached the UPRERA seeking possession and the Complaints were allowed
78	Prabhat Mishra	
81	Balbir Singh	Applicants who have approached the UPRERA and the Complaints were dismissed
37	Vinay Kumar Dubey	
89	Raghu Nath Banerjee	Applicants who have filed a joint complaint before NCDRC seeking possession
27	Rajeev Shrivastava	
<b>REMAINING APPLICANTS</b>		<b>100 - 10 = 90</b>



xvi. In view of the above, the applicant prayed to dismiss the captioned Petition.

3. The submissions of the Respondent (Financial Creditors in the main matter) are as under

- i. That the Corporate Debtor has vaguely stated that total number of allottees are 1002. Therefore, in order to fall within the mandate, captioned petition ought to have been filed by not less than 100 allottees. However, the Corporate Debtor has not placed on record any document to indicate that there are actually 1002 allottees in project. That, as per Rule 14 of RERA Rules, and Manish Kumar Judgment, it is the duty of the promoter to publish on the UP Rera website status of apartments booked. However, the Corporate Debtor has failed to place on record any document. Thus, there was a duty on the Corporate Debtor to furnish the details of the allottees.
- ii. That without knowing the total number of the allottees in the project, the Application for dismissal filed by the Corporate Debtor cannot be entertained.



- iii. That, pertinently, admittedly, RERA complaints filed by the said allottees were not filed under Section 18 of the UPRERA Act, as per which the RERA Authority directs return of compensation only in cases where allottee wishes to withdraw from the project.
- iv. That, the complaints were filed seeking refund. There was no averment in the complaint or RERA Order that the allottees wishes to withdraw from the project as evident from the table below: -

Allottee	Name	Relief sought in the Complaint	Order of RERA
Allottee No 90	Krishna Kumar	No averment in the complaint that the he seeks to withdraw from the project	If the Corporate Debtor does not provide possession by end of March 2020 only then complaint is



			entitled to receive entire amount deposited with interest.
Allotee No.85	Anuj Verma	No averment in the complaint that the he seeks to withdraw from the project.	Nothing to indicate in the order that he seeks to withdraw from the project.
Allotee No. 100	Jai Ram	No averment in the complaint that the he seeks to withdraw	-



		from the project.	
Allotee No.5	Rakesh Kumar Singh	No averment in the complaint that the he seeks to withdraw from the project.	Nothing to indicate in the order that he seeks to withdraw from the project

Thus, these 4 allottees had not relinquished their rights under Section 18 of UP-RERA Act.

- v. Furthermore, these allottees have till date not yet received any refund from the Corporate Debtor. In fact, Corporate Debtor has admitted that no payment has been made towards the RERA decree.
- vi. That availing of alternate remedies does not bar the homebuyers from filing a joint petition under Section 7 of the Insolvency and Bankruptcy Code. Reliance was placed on the judgement of the Hon'ble Supreme



Court in the matter of *Pioneer Urban land and Infrastructure Limited and Anr. Vs. Union of India and Ors, (2019) 8 SCC 416*, wherein the apex court held that remedies under IBC, Consumer Protection Act and RERA are concurrent remedies, and can be availed simultaneously.

vii. That in the present case, it is not the case that 6 of the allottees have simultaneously availed both the remedies under UPRERA and NCDRC. They have either availed for UPRERA or NCDRA as evident from the table below the contents of which are extracted from the Written Submissions filed by the Corporate Debtor itself.

Sr. No.	Applicant No.	Remedy
1.	86	UP RERA
2.	78	UP RERA
3.	81	UP RERA
4.	37	UP RERA
5.	89	NCDRC
6.	27	NCDRC

viii. That, the threshold requirement for maintainability has to be seen at the time of presentation of Application under Section 7 of the Code. Reliance was



placed on the judgement of Hon'ble Supreme Court of India in the matter of *Manish Kumar v. Union of India and Anr.* [WP(C) No. 26 of 2020

ix. Thus, the Application of the Corporate Debtor for challenging the threshold requirement should not be sustained and ought to be dismissed

4. The applicant (CD in the main matter) has filed its written submissions and made following submissions: -

1) That the FC has relied upon various judgments, each of which are distinguishable from the present case. The reason why the judgement of *Vishal Chellani & Ors. v Debashis Nanda (2023) 10 SCC 395* does not apply to the present case is as under: -

<b>Vishal Chellani &amp; Ors. v Debashis Nanda (2023) 10 SCC 395</b>	<ul style="list-style-type: none"><li>• The homebuyers had approached the SC alleging differential treatment of the homebuyers who had approached RERA and those who had not approached RERA, by the RP.</li><li>• The Supreme Court had held that there can be no distinction between the different classes of financial creditors <u>for the purpose of drawing a resolution plan</u> [see para 9].</li><li>• It was only to this extent</li></ul>
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	that the reasoning in Natwar Agrawal was affirmed by the SC
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2) The judgment in *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416 clearly states that the IBC is not supposed to be a debt recovery mechanism. The concealment of the RERA orders by the homebuyers makes it apparent that the present proceedings have been instituted maliciously, and the objective of the homebuyers is not to see effective CIRP of the CD for timely delivery of their flats but to seek recovery of their monies through coercive measures. For this reason, 4 out of these 100 Applicants can no longer approach this Tribunal as part of the class of allottees, since they have withdrawn from the Project and have ceased to be allottees.

3) The Financial Creditors, at a belated stage, have sought to contend that the total number of allottees in the project is not 1002, as claimed by the Corporate Debtor because the CD has made a categorical statement in para 16 of its Reply to the Sec. 7 Petition that the total number of allottees in the Project is 1002. This



statement was not denied by the FC in its Rejoinder to the Reply, and this objection is only being raised by the FC at a belated stage;

5. We have gone through the application, reply and documents on record. The orders of UPRERA u/s 31 of RERA referred to in RCs in respect of 4 allottees in respect of whom RCs were issued were sought by way of clarification. We have heard the arguments of both sides.

6. The key issues in the present matter which are to be adjudicated are as under: -

I. Whether the allottees are barred to file application under section 7 of IBC, if they have already approached the concerned authority to avail alternate remedies under Real Estate (Regulation & Development) Act, 2016 (RERA) Consumer Protection Act, 2019?

II. Whether this petition should be dismissed on account of failure of the Financial Creditor to disclose that 4 out of the 100 allottees who had filed this petition had withdrawn from the project and that RCs had already been issued by UP Real Estate Regulatory Authority (UPRERA) in respect of them.



III. Whether the Allottees in respect of whom Recovery Certificates (RC) have been issued by RERA have already withdrawn from the project and whether they shall be treated differently from other allottees for whom no RC has been issued by RERA at the pre admission of section 7 petition when no moratorium was in force?

**ISSUE NO 1 & 2**

7. In respect of the first and second issues, the Corporate Debtor has alleged that some homebuyers have concealed from this Adjudicating Authority that they have approached the UPRERA or National Consumer Dispute Redressal Commission (NCDRC) for a refund of the entire principal amount. It is observed that in a section 7 petition it is not required to disclose whether the party has approached some other forum for alternative remedy because the proceedings under the IB Code are independent in nature. Further the parties have liberty to approach any forum and relief(s) before different forums can be availed simultaneously. Reliance can be placed upon the judgement of Hon'ble Supreme Court in the matter of *Pioneer Urban land and Infrastructure Limited and Anr. Vs. Union of India and Ors, (2019) 8 SCC 416*



wherein it was held that remedies under IBC, Consumer Protection Act and RERA are concurrent remedies, and can be availed simultaneously.

8. The CD has relied on the doctrine of election. The doctrine of election was discussed in the judgement of Hon'ble Supreme Court in the matter of *A.P. State Financial Corporation v. M/s GAR Re-rolling Corporation*,<sup>10</sup> in the following words: -

*15 The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them **but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different.** To hold otherwise may lead to injustice and inconsistent results.”*

Since, IBC proceedings are independent proceedings and in *Pioneer Urban land and Infrastructure Limited and Anr. Vs. Union of India and Ors*, (2019) 8 SCC 416 it was clearly held that the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the Corporate Debtor. On the other hand, RERA protects the interests of the individual



investor in real estate projects by requiring the promoter to strictly adhere to its provisions. Relevant paras are reproduced below: -

*29. “As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the Corporate Debtor. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, or at least get back monies that they had advanced towards the project with interest. If, however, the allottee wants that the Corporate Debtor’s management itself be removed and replaced, so that the Corporate Debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognized by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, he being given the choice to withdraw such complaint and file an application before the Adjudicating Officer under RERA read with Section 88.”*

It is therefore clear that the petitioner could have approached this Adjudicating Authority for seeking a different remedy



even after approaching RERA provided, he was not otherwise ineligible to do so.

9. So far as the issue regarding non-disclosure by the petitioners in their section 7 petition that RCs had been issued in respect of 4 out of 100 allottees by UPRERA before filing of Section 7 petition is concerned, we are of the view that the FC should have disclosed this fact in their petition, however, now that the CD has brought out the fact that RCs have been issued by UPRERA in respect of the 4 allottees and the petitioners have admitted to the same, the fact of non-disclosure need not be dwelt upon and we may proceed to adjudicate the main issue involved.

### **ISSUE NO 3**

10. Coming to the third issue, the Corporate Debtor (CD) has alleged that out of the 100 allottees, four of them have withdrawn from the project and Recovery Certificate (RC) have been issued by UPRERA, hence these allottees can no longer claim to be eligible to file section 7 petition along with other allottees in respect of whom no RCs have been issued by UPRERA. The CD had relied upon a judgment of the Hon'ble NCLAT in the matter of *Sushil Ansal v Ashok Tripathi & Ors.*,



2020 SCC OnLine NCLAT 680. The judgment categorically held that after the issuance of a Recovery Certificate by UP RERA, an application under Section 7 of the 'I&B Code' by the Decree holder is not maintainable as allottees. The relevant extract of the aforementioned judgment is reproduced below: -

*23. We accordingly summarise our finding as under: (i) **Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate** dated 10th August, 2019 by 'UP RERA' directing recovery of Rs. 73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the 'I&B Code'. **Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.***

11. The Hon'ble NCLAT in the above referred judgement has further gone on to remark as under: -

*20. .... As already stated elsewhere in this Judgment, Respondent Nos. 1 & 2 instead of pursuing the matter before the Competent Authority sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor resulting in passing of the impugned order of admission which has been assailed in the instant appeal. **The answer to***



***the question whether a decree-holder would fall within the definition of 'Financial Creditor' has to be an emphatic 'No' as the amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5(8) of the 'I&B Code'.***

*24. In view of the conclusion reached and findings on the issues recorded hereinabove, we are of the considered view that the impugned order dated 17th March, 2020 initiating Corporate Insolvency Resolution Process against Corporate Debtor cannot be sustained. **The Adjudicating Authority has landed in grave error in admitting the application of Respondent Nos. 1 and 2 under Section 7 who claimed to be the 'Financial Creditors' in their capacity as 'decree-holders' against the Corporate Debtor on account of non-payment of the amount due under the Recovery Certificate dated 10th August, 2019 issued by the 'UP RERA' while execution of decree/recovery of amount due under Recovery Certificate would not justify triggering of Corporate Insolvency Resolution Process.***

12. However, the Financial Creditor has relied upon the judgement of Hon'ble Supreme Court in the matter of *Vishal Chelani v. Debashis Nanda*, 2023 SCC OnLine SC 1324



wherein the Hon'ble Supreme Court while adjudicating the distinction between class of financial creditor in real estate project for the purpose of drawing up a resolution plan has held that an allottee who has approached RERA and obtained a court order or decree by RERA would be considered as a homebuyer within a class. Relevant paras of the judgement are reproduced below: -

*"...[7]. It is thus evident that with the introduction of the explanation home buyers and allottees of real estate projects were included in the class of "financial creditors" - because financial debt is owed to them. On a plain reading of Section 5 (8)(f) no distinction is per se made out between different classes of financial creditors **for the purposes of drawing a resolution plan.** Consequently, the reasoning of the Mumbai Bench of NCLT "Mr. Natwar Agrawal (HUF)" is correct in the opinion of this Court.*

*"...[9]. **The Resolution Professional's view appears to be that once an allottee seeks remedies under RERA and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA - no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the***



**ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable.** As held in *Natwar Agarwal (HUF)* (Supra) by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to “hyper classification” and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced...” “...

[10] the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors **for the purposes of the resolution plan** which is awaiting final decision before the adjudicating authority...”

13. It is pertinent to note that the aforementioned observations made by the Hon’ble Supreme Court were made while considering the Resolution Plan and it has categorically been stated that the observation is for the purpose of Resolution Plan. The stage differs significantly in both of the



above judgments. In the Sushil Ansal judgment (supra), it was at the pre-admission stage when there was no moratorium in operation under section 14 of the Code, whereas in the Vishal Chelani judgment, the stage was post-admission of CIRP when the moratorium was in operation including that on the RCs. Furthermore, it is also important to point out that no judgment of the Hon'ble Supreme Court has been brought to our notice by which the judgement of Hon'ble NCLAT in Sushil Ansal has been expressly overruled.

14. In the present case, three out of four allottees namely (1) Rakesh Kumar Singh (2) Anuj Verma (3) Jai Ram Saran Singh approached UPRERA seeking refund of their principal amount along with interest. One of the four allottees namely Krishna Kumar had approached UPRERA seeking possession of the unit alongwith payment of penal interest and waiver of EMI. The relevant dates in are respect of these allottees mentioned in the table below: -

<b>Applicant No</b>	<b>Name of Applicant</b>	<b>Complainant Number before UPRERA</b>	<b>Date of filing of Complaint before RERA</b>	<b>Date of order of RERA u/s 31</b>	<b>Date of issue of RC u/s 40(1) of RERA</b>
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90	Krishna Kumar	NCR144030550/2019	14.03.2019	04.10.2019	25.06.2021
5	Rakesh Kumar Singh	NCR144/08/57795/2020	08.08.2020	19.02.2021	06.09.2021
85	Anuj Verma	NCR144/04/74180/2021	26.04.2021	24.01.2022	11.08.2022
100	Jai Ram Saran Singh	NCR144/03/72885/2021	28.03.2021	24.01.2022	13.09.2022

15. The Hon'ble UP RERA has passed orders under section 31 of RERA in respect of the above three allottees (Applicant Nos 5, 85, 100) and directed the promoters to refund the principal amount with interest. In respect of one allottee (Applicant No 90) the UPRERA had passed orders directing the promoters /developer to give possession of the unit till March, 2020 failing which to refund entire amount with interest. To seek a refund as in the case of three allottees (No 5, 85 &100) in the first instance itself from the promoter it is provided for in section 18(1) of RERA that the allottee would wish to withdraw from the project and only then will the allottee be able to secure an order for refund in his favor.



Support can be taken from Section 18 of RERA, which is reproduced as below: -

**18. (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, —**

a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

**he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:**

*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.*

16. On a perusal of the orders passed by UPRERA u/s 31 of RERA in respect of these allottees it is clear that three of the allottees (Nos. 5, 85, 100) have demanded for a refund of the principal amount along with interest and compensation. They



are squarely covered under section 18(1) of RERA as has been indicated in the order u/s 31 of RERA and UPRERA has adjudicated after hearing the matter whether in accordance with their wish to withdraw from the project they are entitled to withdraw from the project and therefore claim the entire principal amount with interest. UPRERA only after having adjudicated that the allottees were entitled to withdraw from the project passed orders to the developer/promoter to refund the entire amount with interest to the allottees, resulting in the fructification of their wish to withdraw from the project. It is therefore, clear that in accordance with their wish and confirmation by UPRERA these 3 allottees have withdrawn from the project much before they have filed the Section 7 Petition. On a perusal of the orders of UPRERA in respect of the fourth allottee (Nos. 90) it is clear that he is covered under the proviso to section 18(1) of RERA. He has not sought withdrawal from the project, rather he has sought possession of the unit and penal interest and waiver of EMI. However, on non-compliance of the order of UPRERA u/s 31 of RERA in respect of this allottee, on the request of the allottee, the RC was also issued in his case.



17. The relevant portion of translated copy of orders u/s 31 passed by UPRERA in respect of one of the allottees i.e., Rakesh Kumar Singh is as below: -

*The reply mentions the completion date of the project as June 2021. However, it is evident from the local inspection report that construction work in the said project cannot be completed soon. Therefore, the plaintiffs are not interested in continuing with the project.*

....

*If the project is delayed and there is no likelihood of its expeditious completion, then the allottee is entitled to receive the entire amount along with interest, after separating themselves from the project*

....

*Based on the principles of natural justice and a thorough examination and analysis of the evidence and arguments presented, the bench concludes that the plaintiffs are entitled to receive the deposited amount with interest.*

18. After the orders referred to above had been passed by UPRERA the 4 allottees approached UPRERA for execution of these orders. UPRERA issued Recovery Certificates (RCs) under Section 40 of RERA in respect of the 4 allottees. The RCs were addressed to Collector, Gautam Budh Nagar District with the directions to recover the due amounts as arrears of land revenue.



19. It is understood that the process of recovery of such arrears is provided for under section 279(1) of the UP-Zamindari Abolition and Land Reforms Act (Section 170 of the U.P. Revenue Code, 2006). The process of recovery to be adopted is a coercive process. Section 279(1) of the UP-Zamindari Abolition and Land Reforms Act, 1950 is reproduced below:

**279. Procedure for recovery of an arrear of land revenue.**

(1) An arrear of land revenue may be recovered by anyone or more of the following processes:

- (a) by serving a writ of demand or a citation to appear on any defaulter;
- (b) by arrest and detention of his person;
- (c) by attachment and sale of his movable property including produce;
- (d) by attachment of the holding in respect of which the arrear is due;
- (e) [by lease or sale] of the holding in respect of which the arrear is due;
- (f) by attachment and sale of other immovable property of the defaulter, [and]
- [(g) by appointing a receiver of any property, movable or immovable of the defaulter.]

From the bare reading of the above provision, it is clear that the recovery can be effected by the Collector through one or more of the above processes and not necessarily in the order given. The process is clearly a coercive one with recovery



charges also being charged by the collector (as stated in para 9 of Recovery Certificate). Therefore, any amount recovered after issue of RC cannot in any way be treated as being voluntarily paid by the defaulter.

20. It is noteworthy that the RCs which are addressed to the Collector are not even endorsed to the concerned allottee. It is therefore, clear that the allottee is not the 'holder of the RC.' The Financial Creditors in this petition have time and again referred to the said allottees as 'RC holders' giving the impression that it is on the will of the allottee to take steps to get the RC executed and money recovered. In other words, if such were the situation the allottees could hold on to RC till they had filed the petition under Section 7 as a Home Buyers. However, the fact of the matter is that once the RC is issued the coercive recovery process by the Collector/Tahsildar commences immediately and the allottees has no role to play. The action taken is only by Collector/ Tahsildar. A copy of the translated RC issued to Collector/District Magistrate, Gautam Budh Nagar in respect of one of the above 4 allottees. Mr. Jai Ram Saran Singh is reproduced hereunder: -



U.P. Real Estate Regulatory Authority

Regional Office, H-169 Sector-2  
Greater Noida City, Gautam Budh Nagar

Letter No. 2618/UPRERA/Regional Office/Recovery 2022-23

Dated 13/09/2022

Recovery Certificate (Under Section 40 Real Estate (Regulation and  
Development) Act, 2016)

To,  
District Magistrate, U.P. Land Regulatory Authority,  
Regional Office, Greater Noida, Gautam Buddha Nagar

Sir

In the present complaint No. NCR144/03/72885/2021 Jai Ram Sharan Singh vs. Rudra Buildwell Projects Pvt. Ltd. under Section 31 of the U.P. Real Estate (Regulation and Development) Act 2016, the UP Real Estate Regulatory Authority, after hearing as per the rules, has passed the following Orders on 17-01-2022:-

“Within 45 days from the date of uploading this Order, the Respondent will pay the amount deposited by the complainants with annual interest at the rate of MCLR + 1% from the date of deposit to the date of payment.”

The order has not been complied with by the promoter/developer. The complainant/allottee Jai Ram Sharan Singh has filed an application on 24-03-2022 requesting for the implementation of the order.

*Akhil*  
2/09/2022

TRUE COPY





ii. interest (calculated from 30.06.2011 to 15.09.2022) Rs. 18,21,034.18

7. Grand total to be recovered Rs. 43,40,460.18
8. The above calculation is till the date 15.09.2022, therefore, from the date 16.09.2022, 8.30 percent annual simple interest will be payable on the principal amount deposited on 25.19.426.00.
9. The collection expenses can be recovered as per the rules against the recovered amount.

While sending the collection certificate in triplicate, it is requested that the above mentioned amount of Rs. 43,40,460.18 (Rupees- Forty Three Lakh Forty Thousand Four Hundred Sixty and Eighteen paisa) be recovered from land arrears of Respondent M/s Rudra Buildwell Projects Pvt Ltd and deposited by bank draft in the name of UP Real Estate Regulatory Authority which will be payable at Lucknow.

Sd/-

21. The recovery under the RC can be made for the allottee till any time before the Developer (Corporate Debtor) is admitted into CIRP and moratorium under Section 14 sets in. Therefore, as and when the Collector/Tehsildar recovers the amount due to the allottee from the Developer the allottee will no longer remain a creditor or for that matter a home buyer and therefore, not eligible to file a Section 7 petition along with other home buyers in respect of whom no RCs have been issued. It can be therefore safely be said that it is the promptness of action on that part of a third party i.e. the Collector/Tehsildar which will determine the status of the



allottees as Creditors/Financial Creditors/Home Buyers and not by either of the two parties concerned i.e. the Allottees and the Developer. Therefore, if allottees in respect of whom RCs have been issued are accepted as Financial Creditors/Home Buyers at the pre admission stage (when no moratorium is in force) highly anomalous and unsustainable situations can arise. One such scenario could be that if all the homebuyers (Financial Creditors in a class) above the threshold level are those in respect of whom RCs have been issued and they file a Section 7 petition against the Developer (Corporate Debtor) and all their dues are recovered through coercive process by the Collector/Tehsildar before admission of the petition, for such allottees to pursue and sustain that petition would be an abuse of the process of law, since they would have become rank outsiders to the project with no stake at all in the project. It is important to note that this situation is quite distinct from the one in which after filing of section 7 Petition, the Developer voluntarily refunds the amount of some of the allottees in order to defeat their threshold requirement to file a section 7 petition, since the former is action by a third party (Collector/Tehsildar) and the



latter by the party who would be prejudicially affected by the Section 7 Petition. It is perhaps for this reason that Hon'ble NCLAT in judgment is Sushil Ansal Vs. Ashok Tripathi has emphatically denied status of allottees in respect of whom RCs have been issued to be eligible for triggering CIRP against the Developer at the admission stage.

22. In the light of the above it is clear that in terms of adjudicated orders of UPRERA referred above and under Section 18 (1) of RERA that 4 of the allottees on their own volition and after confirmation by RERA have withdrawn from the project much before they filed the section 7 Petition and that RCs issued in favor of 4 allottees makes their status as Home Buyers indeterminate on their own action or the action of the Developer, rather determined by action of a third party i.e. the Collector/Tehsil. Therefore, their contention of being home buyers along with other home buyers in respect of whom RCs have not been issued at the pre admission stage is neither tenable nor sustainable. In the present case, the total number of allottees in the Project is 1002. Therefore, in order to fall within the mandate of the second Proviso of Section 7(1) of the Code, the captioned Application ought to have been



filed by not less than 100 allottee. With the exclusion of these 4 allottees, the number of homebuyers in this petition falls below the threshold of 100, hence the main Petition is liable to fail at the threshold itself.

23. Based on the facts & circumstances of the present case we are of the considered view that the present application is not maintainable because the Financial Creditors failed to fulfill threshold requirement under second proviso of Section 7(1) of the Code. Accordingly, IA 5045/2023 stands allowed and the main CP (IB) 888/2022 stands dismissed and consequentially all other connected IA(s) & CA(s) stand dismissed as being infructuous.

Let copy of the order be served to the parties concerned.

<b>SD/-</b>	<b>SD/-</b>
<b>(RAHUL BHATNAGAR)</b>	<b>(MAHENDRA KHANDELWAL)</b>
<b>MEMBER (TECHNICAL)</b>	<b>MEMBER (JUDICIAL)</b>