

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1418(PB)/2019

IN THE MATTER OF:

Abhishek Jana**Financial Creditor/Petitioner**
v.

Skytech Constructions Private Limited
.....**Corporate Debtor/Respondent**

SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 03.01.2020

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

DR. DEEPTI MUKESH
HON'BLE MEMBER (J)

PRESENT:

For the Petitioner: Mr. Piyush Singh, Mr. Aditya Parolia, Mr. Nithin Chandran & Ms. Harshita Chauhan, Advocates
For the Respondent: Mr. Sameer Singh, Mr. B.P. Singh & Mr. Yash Agrawal, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The Petitioner claiming to be 'Financial Creditor' has filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of M/s. Skytech Constructions Private Limited, who is stated to be the 'Corporate Debtor'.

2. The Petitioner is an allottee of a real estate project. He is ex-facie financial creditor in terms of provisions of Section 5(8)(f) and explanation inserted by the Second Amendment Act, 2018 w.e.f. 06.06.2018. The challenge to the aforesaid amendment has been repelled by Hon'ble the Supreme Court in the judgment rendered in the case of Pioneer Urban Land and Infrastructure Limited and Another v. Union of India &Ors., (2019) 8 SCC 416. Therefore, no doubt is left that the petitioner is Financial Creditor.

3. The Respondent company-the Corporate Debtor, Skytech Constructions Private Limited (CIN U45201DL2004PTC129458) was incorporated on 28.09.2004 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at 385, Kohat Enclave, Pitampura, Delhi, New Delhi-110088.

4. The case of the petitioner in nutshell is that he had booked a unit bearing No. 1106 on 11th Floor having super area 2150 sq. ft. in the project known as 'Skytech-Merion Residency -II' which was being allegedly developed by and promoted by 'the Corporate Debtor'. The total cost of the said unit was Rs. 50,26,175/-. A perusal of Part-IV of Form-1 discloses that the total principal amount of Rs. 44,76,295/- was paid by the petitioner to the

Respondent/Corporate Debtor on various dates vide different cheques and the one namely Housing Loan facility availed from Axis Bank.

5. With respect to the Housing Loan facility a tripartite agreement dated 09.09.2011 (at pgs. 39-53) was executed between the petitioner, the Corporate Debtor and the Axis Bank. We think it appropriate to reproduce the relevant clauses of the said tripartite agreement:-

“3. In case there is any delay in payment of instalment by the Bank or the Borrower/s, in either case it shall be treated as a default on the part of the Borrower/s, and the Borrower/s shall be liable to pay penalty to Builder on the delayed instalment as per the terms of the Agreement with Builder.

4. It is agreed by and between the parties to this Agreement that in case if the BORROWER fails to honour the commitment, the developer/BUILDER shall inform the Bank and the BANK shall have the right to pay the Sale consideration and get its registered either in BANK's name or its nominee. Likewise in the event the Borrower defaults in payment of instalments then, in such an event also, the Bank shall have the right to inform about such default on the part of the Borrower to the



Builder and shall accordingly have the right to write to the Builder for cancellation of the Agreement executed between the Builder and the Borrower, whereafter the Bank shall have the right to pay the Sale Consideration and get the subject property registered either in the Bank's name or in the name of Bank's nominee.

5. The Borrower agrees and confirms that in the event of the Bank enforcing its rights as stated in clause 4 above, the Borrower shall not object/contest the same in any manner whatsoever.”

6. In support of his case, the petitioner then placed reliance on various documents namely allotment letter dated 23.08.2011 (Annexure P-1), Apartment buyers agreement dated 23.08.2011 (Annexure P-2) and payments receipts [(Annexure P-3 (colly))].

7. As per clause 24 of the aforesaid Apartment Buyer Agreement, the Respondent Company undertook to hand over the possession of the said unit to the petitioner as early as possible. It is stated that in accordance with the judgment rendered in the case of *Fortune Infrastructure & Anr. v. Trevor D' Lime & Ors. (Civil Appeal No. 3533-3534 of 2017)*, the Respondent was obligated to give possession of the said unit within a period of three years from the date of the

Agreement i.e. by 23.08.2014. At this stage it would be profitable to read clause 24 of the said agreement which is as under:

“24. The completion of the complex is likely to be completed as early as possible subject, however, due to force majeure circumstances or subject to regular and timely payment by the Allottee(s), or subject to availability of building material etc., change of laws by Government/local authorities etc. No claim by way of damage, compensation shall be against the Developer in case of delay in handing over of the possession on account of the aforesaid reasons or any other reasons beyond the control of the Developer.”

8. It is further the case of the petitioner that both the parties i.e. the petitioner and the Respondent entered into an arrangement. As per said arrangement the Respondent agreed to make payments for Pre-EMI due to inordinate delay in delivering the possession of the Unit. The Respondent has till date made payment of Rs. 4,08,252/- towards the principal for payment of Pre-EMI. However, the Respondent defaulted and stopped paying Pre-EMI since March, 2019 onwards.

9. In view of the considerable delay in handing over the possession of the Unit, the petitioner terminated the agreement vide

an e-mail dated 17.05.2019 (Annexure P-5) and shown his willingness in terminating the agreement and seeking refund of the entire amount paid along with appropriate interest but all in vain. The petitioner has availed the remedy under Section 7 by filing the instant petition.

10. The precise case of the Petitioner thus is that the total amount in default due and payable to the Petitioner by the Respondent-Corporate Debtor as on 29.05.2019 is Rs. 52,86,038/- inclusive of interest. A tabular chart depicting working out the amount in default is annexed (Annexure P-6).

11. Learned counsel for the Corporate Debtor has advanced numerous arguments to resist the admission of the petition by arguing as under: -

- (i) The present petition is not maintainable because of absence of the required privity of contract between the parties. There is no established relation between both the parties i.e. the Respondent and the Petitioner after the cancellation of the booking of the flat/unit (Annexure R-1 dated 27.09.2011) by the petitioner itself. It would be



apposite to read the said cancellation letter written by the petitioner:

“To,
The Director,
M/s. Skytech Construction Pvt. Ltd.
New Delhi

Date 27.09.2011

Subject: Cancellation of Flat No. 1106 (4BHK) 11th Floor,
Area 2150 Sqft Skytech “Merion Residency “II

Respected Sir,

This is to say that I, Mr. Abhishek Jana S/o Shri Amarendra Nath Jana, Have booked a Flat No. 1106 (4BHK) 11th Floor, Area 2150 Sqft in Skytech “Merion Residency “Phase-II situated at GH Plot No. 6, Crossing Republic Ghaziabad U.P.

Due to Some personal problems I will not be able to continue my booking of the above said flat, so please cancel my booking and repay my home loan to Axis Bank Ltd.

Please do the needful, I shall be highly obliged.

Thank You,

Regards,

Abhishek Jana”

Thus, in the light of abovesaid position the relation of the petitioner and the respondent remained between the banker and the builder in view of the tripartite agreement.



- (ii) The present petition is even otherwise not maintainable because the liability of the bank is being paid by the Respondent in terms of tripartite agreement.
- (iii) The project in which Unit is situated, was completed since long. Even the maintenance has been transferred to the RWA/AOA. The possession of respective flats had been delivered to its allottees to their satisfaction and they are living there since long. It is the petitioner who due to its own wish did not prefer to make the payment and to take the possession. The Respondent then placed reliance on a MOU dated 22.01.2018 (Annexure R-2) executed between one Maintenance Company namely M/s. Skytech Maintenance Company and M/s. Skytech Merion Residency Phase-2 Apartments owners Association Society (AOA). The Maintenance Company, through said MOU took over the maintenance work of the said complex/society.

12. To further establish the fact that the flat/unit booked by the petitioner has already been cancelled and in this regard appropriate steps had also been taken by the Axis Bank, a letter dated 09.07.2019 written by the Axis Bank addressed to the Respondent

has subsequently been placed on record. A copy of said letter was also sent to the petitioner at his two addresses mentioned in the bottom of the said letter. At this stage it would be extremely relevant to read the contents of said letter:

“To,
SKYTECH CONSTRUCTION PVT LTD
C-60, SECTOR-63, NEAR FORTIS HOSPITAL
NOIDA-201301

Also at
385, KOHAT ENCLAVE PITAMPURA
NEW DELHI – 110088

SUBJECT: Cancellation of Allotment of Flat No. 1106, 11th Floor, Skytech Merion Residency, PH-2, Crossing Republic, NH-24 Ghaziabad

Dear Sir,

With reference to the captioned subject we would like to inform you that the subjected unit was allotted to **Mr./Mrs. Abhishek Jana** where the customer has availed a Loan **Rs. 3800000/- (Rupees Thirty Eight Lakh Only)** from Axis Bank Ltd. and the unit is mortgaged to the Bank with your permission.

Further, the customer has been defaulting in Payment EMIs to the Bank and inspite of several notices/communication, the customer has not paid the dues to the Bank.

The Bank has decided to exercise the rights as per Tripartite Agreement executed between the Builder, Borrower and the Bank specified in clause number 4, 6, 8 & 12 thereby we request to cancel the property allotted to the customer and close the account (A/c No. PHR012600360010) of the customer as per foreclosure letter enclosed herein within 7 days of receipt of this letter. We have issued Demand-cum-Loan, Recall Notice Dated 20.06.2019. You are requested to refund the customer any dues after selling the property and taking appropriate transfer charges as per Tripartite Agreement.

We hope for an early action and settlement of the loan account as per Foreclosure letter attached in annexure-1 within the stipulated time. You may intimate the customer on the same as per your cancellation process. This notice is being issued without prejudice to bank's rights and contentions in the recovery suit/Original Application filed by the bank if any against the Borrowers and You the above mentioned addressee before respective Distt. Courts/Debts Recovery Tribunal.

We also refer to the Indemnity Bond, under which the Home Buyer/Customer have expressly authorized the Bank to seek cancellation of the allotment upon a default and adjust all monies refunded by the Builder Company to itself. The Home Buyer/Customer has also subrogated all their rights to claim refund in favour of the Bank. The Home Loan Agreement contemplates several "Events of Default", including payment related defaults, and other defaults related to the relevant flat, including if the Property is destroyed, sold, disposed of, charged, encumbered, alienated, attached or restrained in any manner. Failure to develop and allot the property within the time period promised and further diluting the security interest of the Bank in the said property by the Builder is such that the property is restrained, is an 'Event of Default'. By stepping in to the shoes of the Home Buyers/Customer also, Bank is a financial creditor of the Builder Company and hence, claiming as on date Total Outstanding dues for a sum of **Rs. 3529702/- (Rupees Thirty Five Lakh Twenty Nine Thousand Seven Hundred Two Only)** from you by way of the said Unit/property allotment cancellation.

Kindly revert for further queries/clarifications & Contact to Mr. Vineet Sharma, Axis Bank Ltd. at his Contact No. 9999251518

Looking forward for your co-operation in this regard.

Regards,
For Axis Bank Ltd.
(Authorized Signatory)


Encl:
1) Copy of Loan payoff
2) Copy of Loan Statement

CC
1)
Abhishek Jana

J-1105, Prateek Wisteria, Sector-77, Maharishi Nagar, Noida,
Gautam Buddha Nagar, Uttar Pradesh – 201304

Also at
F3, Sector-3, Noida, Uttar Pradesh-201301”

13. We have heard learned counsel for the parties at a considerable length and are of the view that the nature of the dispute in the present case does not show that the issue concerning insolvency of the Corporate Debtor are involved. It is admitted case of the petitioner that he was not interested in the allotted flat and made a request for the cancellation of the same vide letter dated 27.09.2011. It appears from the MOU (Annexure R-2) filed by the Respondent with the reply that the project has been completed since long and the Maintenance Company took over the maintenance work of the said complex/society. The possession of the respective flats had been delivered to its allottees and they are living at the project. It is patent that aforesaid unit/flat was purchased by the petitioner after availing a loan facility from Axis Bank and the Petitioner had paid the installment in time. When the petitioner had been defaulting in Payment EMIs to the Axis Bank, the Bank decided to exercise the rights as per Tripartite Agreement executed between all three of them. The Bank wrote a letter to the Respondent requesting it to cancel the property allotted to the petitioner and

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close its account. It further requested to refund the petitioner's any dues after selling the property and taking appropriate transfer charges as per tripartite agreement. The Bank showed its outstanding dues for a sum of Rs. 3529702/- against the said unit/flat. The petitioner out of his own volition did not prefer to make the payment and to take possession of the unit/flat. The nature of the dispute in the present case does not prove that there is any default committed by the Corporate Debtor. Accordingly, we are unable to persuade ourselves to admit the petition and initiate Corporate Insolvency Resolution Process in respect of the Respondent- Skytech Constructions Pvt. Ltd.

14. We wish to make it to clear that in the present case the proceedings are summary in nature and dismissal of the present petition may not be construed as a bar to avail any other remedy in accordance with law.

15. The Petition stands disposed of.

—sd—

(M.M. KUMAR)
PRESIDENT

—sd—

(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)

03.01.2020
Vineet

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