

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH, KOCHI

**C.P.(IB)/01/KOB/2021**

*(Under Section 7 of Insolvency and Bankruptcy Code,2016)*

**Order delivered on 18<sup>th</sup> November,2021**

**Coram:**

*Hon'ble Mr. Rajesh Sharma,  
Member (Technical)*

*Hon'ble Mr. Ashok Kumar Borah,  
Member (Judicial)*

**In the matter of**

1. Mr. Anoop John and  
Mrs. Blessy Sara Prasad  
Classic 6, Jairaj summit,  
Padamughal, Thrikkakara  
Ernakulam-682021
2. Mr. Mmanjesh Mohana Panicker and  
Mrs. Janeesha Chandran  
Anizham House,  
Thiruvalla, Kuttor P.O,  
Thiruvalla-689106
3. Mrs. Geena Thomas  
(as POA holder of Mr. Roffy Alexander)  
Attumalil Kuruvelil House,  
Manjadi P.O, Thiruvalla,  
Pushpagiri, Pathanamthitta,  
Kerala-689105
4. Mr. Anoop John  
(as POA holder of Mr. Vineet Thomas)  
Classic 6, Jairaj summit,  
Padamughal, Thrikkakara  
Ernakulam-682021

..... Financial Creditors

**Vs.**

Nucleus Premium Properties Private Limited  
34/239 C, Near Mariya Park,  
Pipe Line Road,  
Padivattom,  
Edappally,  
Ernakulam -682024  
Kerala

..... Corporate Debtor

**Parties present:**

For Financial Creditors : Shri. Prashanth Kumar, Advocate

For Corporate Debtor : Shri. Vinod P.V, Advocate

**ORDER**

**Per: Ashok Kumar Borah, Member(J)**

This application has been filed by the Financial Creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'I & B Code') for initiating Corporate Insolvency Resolution Process against the Corporate Debtor Nucleus Premium Properties Private Limited on account of default in repayment of an amount of ₹ 2,13,32,729.20/-.

Brief facts as construed from the perusal of the records are as under: -

1. The Financial Creditors approached the Corporate Debtor for purchase of villas, for which transaction comprised of two separate limbs (i) purchase of plot and (ii) construction of villas. The purchase of plots has been carried out. However, the corporate debtor is yet to complete the construction of villas as promised. For the construction of villas, the financial creditors executed the construction agreements with the corporate debtor. As per clause 6.1 of the construction agreement the corporate debtor is required to complete and handover possession of the villas on or before 18 months from the date of the construction agreement or from the date when the authority approves the building plan. It is also stated that Recital H of the construction agreement shows that the corporate debtor had

not obtained the building permit from Thrikkakara Municipality on the dates of the construction agreements. Thus, the project was not completed on the scheduled date of completion.

2. The corporate debtor filed a counter stating that the corporate debtor is an MSME and was incorporated in the year 2011 and have 10 on-going small sized projects with more than 2000 flats/villas under construction. The project “Nucleus Heyday Villa” consists of 20 villas and 16 apartments. The applicants have purchased the plots from the land owners and have registered the deed of conveyance in their name including the building permit. Based on the construction agreement entered between the applicants the corporate debtor has completed 90% of the work and the final phase of the work is pending.
3. It is further stated that the present application is filed with malicious intent as the applicants are aware that if the corporate debtor goes into CIRP/liquidation, applicants would be in a beneficial position as they are the defaulters, they have only construction arrangement with the Corporate Debtor, they are absolute owner of the Villas and building permit is also obtained in their name. In the event of liquidation, the villas of applicants shall not form the asset of the corporate debtor in the liquidation estate, so they can easily walk away from the project with their Villa pushing the corporate debtor into death. Therefore, the present application squarely falls under the law laid down by the Hon’ble Supreme Court in **Pioneer Urban Land and Infrastructure Ltd. V. Union of India, reported in (2019) 8 SCC 416**.
4. With respect to the date of delivery of villas in August 2018, the major flood affected the project which is located at Ernakulum District and for a period of 6 months no work could be undertaken due to heavy rain and after effects. Thereafter, in 2019 another flood also affected the project. In 2020 due to covid-2019 lockdown the completion of the project was affected. Thus, as per the clause 6.1 of the agreement, any delay affected in the project other than non-completion

on account of default in payment of the instalment was on account of force majeure event.

5. It is also stated that the Real Estate Regulatory Authority permitted to extend the completion date upto 30.04.2022. Therefore, the date of delivery has been extended by the statutory authority RERA and in view of the judgment of Hon'ble Supreme Court, the Applicants cannot claim default in delivery as long as the project is within the timeline fixed under the RERA regulations. All the applicants are bound by the orders of RERA cannot take a different stand for the purpose of invoking Section 7 of I&B Code. The applicants have not challenged the decision of RERA extending the timeline and that the extension was granted exclusively to the Project and all other contentions against extension are not supported by evidence and are misleading.
6. It is also stated that the claim of applicants is based on a construction agreement and applicants are registered owners of the Villa. As per construction agreement, corporate debtor has completed the construction for the amount paid. Therefore, there were no liability on the part of corporate debtor. The applicant is only entitled to claim the entire due only if the Villa is owned by corporate debtor and if there was no transfer of the property and no work was done for the entire amount received by corporate debtor. However, the corporate debtor does not have any title or interest in the property except the right of construction. Hence the applicants cannot claim entire payment made for construction. On the other hand, there are dues and amount payable by the applicants to the corporate debtor. Therefore, applicant does not meet the minimum threshold of Rupees One Crore to initiate the CIR Proceedings under Section 4 of the IBC and this application in benefit of merit is liable to be dismissed.
7. Their further contention is that the applicants are operational creditors and not financial creditors and the dues claimed by the applicants are not financial debt because the dues are arising out of a construction agreement. The applicants claim

to be financial creditors for the reason that applicants have registered with RERA claiming that they are allottees' and non-delivery as cause of default. Since the RERA has extended the timeline upto 30.04.2022, the project completion is within the timeline fixed by a statutory authority. As such there is no default in delivery. Therefore, applicants cannot claim default and as such there is no financial debt due and payable by the corporate debtor.

8. We have heard the learned counsel in either side through video conferencing and have thoroughly perused the whole case records filed by the financial creditors and Corporate Debtor. On a perusal of records submitted by the financial creditors/home buyers and also as per Sub Section 5(a) of Section 7 of the code, the application filed by the applicants/financial Creditors has to be admitted on satisfaction of the following:

- (i) Default has occurred;
- (ii) Application is complete, and
- (iii) No disciplinary proceedings against the proposed IRP is pending.

9. On perusal of the records, it is seen that applicants have entered into a construction agreement on different dates, such as on 10.09.2015, 21.03.2016, 30.09.2015 and 08.10.2015. The applicants stated that as per clause 6.1 of the construction agreement the corporate debtor is required to complete and handover possession of the villas on or before 18 months from the date of the construction agreement or from the date when the authority approves the building plan. Clause 6.1 of the construction agreement reads as follows: -

***“Expected Possession Time***

*Based on the present estimations, the builder endeavours to complete **the construction of the said villa and handover possession thereof to the client within 18 months with a grace period of 3 months from the date of this agreement or from the date on building***

*plan/permit are sanctioned by the authorities concerned, whichever is later provided that the builder shall be entitled to reasonable extension of time for giving delivery of the said villa on the afore said date, if the completion of the said villa is delayed on account of,*

- *Force majeure events;*
- *Any delay in payments stipulated in this agreement by the Client;*
- *Any delay in obtaining any approval, sanction of the authorities concerned;*
- *Any delay due to any order, notification of authorities concerned;*
- *Any delay in obtaining electricity and/or. water connections and;*
- *Any default by the Client of the terms and conditions of this agreement;”*

10. In order to counter the claim of the applicants, the corporate debtor stated that 90% of the work has been completed and the final phase of the project is pending. Furthermore, the applicants did not deny the stage of work completion done by the Corporate Debtor. The Real Estate Regulatory Authority extended the completion date of the villas in question upto to 30.04.2022, and that the order of RERA is binding on the applicants as they have not challenged the decision of RERA before any forum.
11. On the other hand, applicants stated that the corporate debtor acknowledged the debt on multiple occasions prior to the expiry of limitation period, which initially ended on 06.10.2015, 21.12.2017, 03.08,2017 and 23.12.2017 for applicants respectively. All the acknowledgements were made to the applicants together. Hence the limitation period was extended. On 05.01.2018 the corporate debtor sent an e-mail to the applicants, stating that the work will be completed within 6

months. Thus, the limitation period ended at 05.01.2021. Subsequently, corporate debtor sent another e-mail to the applicants stating that the work will be completed within 8 months. Therefore, the limitation period ended on 14.02.2021. Further, on 30.04.2018 the Managing Director of the Corporate Debtor admitted they could not complete the villas on the date stipulated. Thereafter, on 29.06.2018 the Corporate Debtor sent an e-mail to the applicants stating that the work will be completed by December 2018 and the project will be completed by April 2019. Hence the Corporate Debtor acknowledged the debt on 29.06.2018. Therefore, the limitation period ended on 29.06.2021. Again on 22.01.2020 the Corporate Debtor stated that it is investing its best efforts to start the work. Therefore, the limitation period will be ended on 22.01.2023.

12. It is manifest from the above dated communications that the Corporate Debtor failed to fulfil the commitments based on the construction agreement. On multiple occasions the corporate debtor has stated that it will complete the project. Every such promise of completion underscores the fact that the project was incomplete on the date when the promise was made. Hence, this Tribunal considers every promises as acknowledgement of debt by the Corporate Debtor.
13. The dates of default are as under: -
  - i. Construction Agreement dated 10.09.2015
  - ii. Construction Agreement dated 21.03.2016
  - iii. Construction agreement dated 30.09.2015
  - iv. Construction agreement dated 08.10.2015
  - v. The payment of receipts of advances paid by first financial creditors.
  - vi. The payment of receipts of advances paid by second financial creditors.
  - vii. The payment of receipts of advances paid by third financial creditors.
  - viii. The payment of receipts of advances paid by fourth financial creditors
14. For further clarification, we refer to the judgement of Hon'ble Supreme Court of India dated January 19, 2021 in the matter of **Manish Kumar v. Union of**

*India ((2021)16 SC)* which upheld the constitutional validity of Section 7 and Section 32A of the Insolvency and Bankruptcy Code(Amendment) Act, 2020. The Financial Creditors can initiate a Corporate Insolvency Resolution Process (“**CIRP**”) against Corporate Debtors under Section 7 of the amended Act. Hence,the present application is complete in that respect.

15. In this case the applicants proposed the name of an Insolvency Professional Shri. K.P. Dileep, and produced his written consent in Form 2 as per Sub Rule (1) of Rule 9 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The learned Insolvency Professional certified that there are no disciplinary proceedings pending against him with the Board or ICAI Insolvency professional Agency.
16. A reading of the above facts, makes it clear that the applicants are financial creditors and there is due from the side of the Corporate Debtor to the applicants. It is true that the RERA has extended the timeline upto 30.04.2022, which makes it clear that the Corporate Debtor is required to honour the commitments made to the applicants in completing the villas. The failure on their part shows that the debt due to the applicants is to be made good by the Corporate Debtor. Hence, this is a fit case to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under Section 7 (5) (a) of the I&B Code,2016.
17. In view of what is stated above, the following order is passed.
  - I. The Application **CP. IB/1/KOB/2021** filed by the Financial Creditors under Section 7 of the I& B Code 2016 read with Rule 4 (1) of the Insolvency and Bankruptcy Code,2016 for initiating Corporate Insolvency Resolution Process against Nucleus Premium Properties Private Limited, the Corporate Debtor is **admitted**.

II. There shall be a moratorium under Section 14 of the I&B Code,2016, in regard to the following:

- a. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement, decree or order in any Court of Law, Tribunal, Arbitration Panel or other authority;
- b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- c. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002(54 of 2002);
- d. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

III. Notwithstanding the above, during the period of moratorium, the following are also to be strictly followed: -

- a. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- b. That the provisions of Sub-Section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. That the order of moratorium against the Corporate Debtor shall have effect from the date of pronouncement of this order till the completion of the CIRP or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or

passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

- V. That the public announcement of the CIRP shall be made immediately as specified under Section 13 of the I&B Code, 2016 read with regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- VI. That this Bench appoints **Mr. K.P Dileep**, having Registration No. **IBBI/IPA-001/IP-P01310/2018-2019/12220**, email id- **kpdileep57@gmail.com**, residing at veluthedath House, Ponnurunni, Vytiila P.O, Cochin as the Interim Resolution Professional to carry out the functions as mentioned under the Code. The fee payable to IRP, or, as the case may be the RP, shall comply with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP/ RP shall carry out his functions as contemplated by Sections 15, 17, 18, 19, 20 and 21 of the I&B Code, 2016.
- VII. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 of the I&B Code, 2016. The officers and managers of the corporate debtor shall provide all documents in their possession and furnish every information in them to the IRP within a period of one week from the date of receipt of order, in default of which coercive step will follow.

- VIII. The Applicants shall deposit an amount of **₹2,00,000/- [Rupees Two Lakhs]** with the Interim Resolution Professional for initiation of the proceedings as directed by this Tribunal forthwith. This amount is subject to ratification by the CoC.
- IX. The Registry is directed to communicate this order to the Financial Creditor, Corporate Debtor and IRP through email and speed post immediately.

Dated this the 18th day of November,2021

Sd/-  
**(Rajesh Sharma)**  
**Member (Technical)**

Sd/-  
**(Ashok Kumar Borah)**  
**Member (Judicial)**

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