

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**JAIPUR BENCH (RAJASTHAN)**

**CP No. (IB)-86/7/JPR/2018**

**Coram: SHRI P.S.N. PRASAD,  
HON'BLE JUDICIAL MEMBER**

**SHRI RAGHU NAYYAR,  
HON'BLE TECHNICAL MEMBER**

**Under Section 7 of the Insolvency and Bankruptcy Code, 2016**

**IN THE MATTER OF:**

**Gagan Deep Singh Duggal**  
6, Sultanpur, Mandi Road,  
Mehrauli, New Delhi-110030

**...FINANCIAL CREDITOR/ APPLICANT**

**VERSUS**

**Ninaniya Estates Limited**  
160, Karni Vihar, Ajmer Road,  
near Rawat Mahila College,  
Jaipur, Rajasthan-302019

**...CORPORATE DEBTOR/ RESPONDENT**

**FOR APPLICANT (S) : Mansi Bidani, Adv.**

**FOR RESPONDENT (S) : Sachin Mehta, Adv.**

**ORDER PRONOUNCED ON: - 24.12.2020**

**ORDER**

Per: P.S.N. Prasad, Member Judicial

1. Mr. Gagan Deep Singh Duggal, claiming to be the Financial Creditor, has filed this Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer for initiation of Corporate Insolvency Resolution Process ('CIRP') in respect of the Respondent Company M/s Ninaniya Estates Limited.
2. The Respondent Company bearing CIN No. U45201 RJ 2004 PLC 019382, was incorporated on 09.06.2004 under the provisions of the Companies Act, 1956 with its registered office at 160, Karni Vihar, Ajmer Road, near Rawat Mahila College, Jaipur, Rajasthan-302021. Since the registered office of the Respondent Company is in Jaipur, this Tribunal has territorial jurisdiction and is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of the Respondent/ Corporate Debtor under sub-section (1) of Section 60 of the Code.

3. It is the case of the Applicant that he executed a Space Buyer Agreement dated 25.04.2011 with the Respondent/ Corporate Debtor for purchase of commercial space for a cumulative consideration of Rs. 11,21,50,000/-, which was to form part of a five star hotel project, which would be constructed by the Respondent in the revenue estate of Gwalpahiri, Dist. Gurgaon. It is stated that the Agreement between parties was for sale of 3<sup>rd</sup> and 4<sup>th</sup> floors in the real estate project called 'Space' of the Prism Commercial Tower in the complex of a five-star hotel. Subsequently, on 28.11.2013 a Supplemental and Amendatory Agreement was entered into between the parties.
4. It is submitted that as per the Agreement it was agreed between the parties that if the construction was not complete within 36 months from the date of the Agreement, the Applicant would be entitled to receive rent of Rs. 45 per sq. ft. for every month of such delay. The Applicant made complete payment of Rs. 10,53,76,287/- on 03.07.2014 after deducting service tax; however, the Respondent failed to hand over the possession of the premises to the Applicant within 36 months of the execution of the Agreement. Consequently, the Respondent became liable to make rental payments to the Applicant, however, the same was not done. Thereafter, the Respondent issued a Memorandum of Understanding ('MoU') on 01.06.2017, recording that the Respondent

- would buy back the premises from the Applicant for a consideration of Rs. 16,25,00,000/-, but the Respondent failed to make timely payments.
5. On 30.01.2018 the Respondent paid Rs. 4,60,00,000/- to the Applicant and the remaining amount is still unpaid. The Applicant issued legal notice to Respondent for payment of remaining amount. It is submitted that Respondent vide letter dated 28.02.2018 and 12.03.2018 admitted that Rs. 6,92,88,466/- is due and payable towards Applicant. The Corporate Debtor also paid Rs. 4,50,00,000/-.
  6. It is claimed in part-IV of the Application that the Respondent is liable to pay an amount of Rs. 7,15,00,000/- and interest @ 18% amounting to Rs. 1,50,00,000/- to the Applicant. The date of disbursement alongwith receipts of payment, MOU and other letters have been placed on record. In addition, the computation of amount claimed alongwith interest calculation has also been placed on record.
  7. The Respondent has filed its reply. Rejoinder to the reply by Applicant has also been filed.
  8. We have heard the Learned Counsels for the parties and have perused the case records including the written submissions filed by the parties.
  9. The procedure in relation to the Initiation of CIRP by the “Financial Creditor” is delineated under Section 7 of the Code, wherein only “Financial Creditor” / “Financial Creditors” can file an Application. As per Section 7(1) of the Code an Application could be maintained by a

Financial Creditor either by itself or jointly with other Financial Creditors. Section 7 of the Code thus mandates that the Applicant “Financial Creditor” has to only prove the default. In other words, even if there is a clear default, the Application under Section 7 of the Code is not maintainable in case the Applicant is not a Financial Creditor. Therefore, in order to maintain the present Application filed under Section 7 of the Code for initiation of CIRP in respect of Respondent, the present Applicant has to satisfy that it comes within the definition of “Financial Creditor”.

10. Besides in the reply and written submission, one of the main objections raised by the Respondent is that the Applicant does not come under the definition of ‘*Financial Creditor*’ and the debt claimed is not a ‘*financial debt*’.

11. The expressions “Financial Creditor” and “Financial debt” have been defined in Section 5 (7) and 5 (8) of the Code. Clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with effect from 6<sup>th</sup> June, 2018. In view of the explanation inserted in the revised definition, it has been abundantly made clear that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of borrowing and thus will come within the definition of ‘Financial Debt’ under the Code. Definition of ‘Financial Debt’ has been amended

to remove any cloud and to specifically include dues of the real-estate buyers. The Amendment Act leaves no doubt that real-estate buyers are “Financial Creditors”. Accordingly, allottees/ real-estate buyers being “Financial Creditors” in terms of Explanation to Section 5 (8) (c) of the Code, can initiate CIRP against the defaulting builder or developer.

12. Further, Hon’ble Supreme Court in case of *Pioneer Urban Land and Infrastructure Limited and Anr. Vs. Union of India and Ors.* reported in 2019 SCC OnLine SC 1005; while upholding constitutional validity of the Insolvency and Bankruptcy (Second Amendment) Act, 2018 held that the *allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.*

13. In view of the proposition of law settled by the Hon’ble Supreme Court allottees/ real-estate buyers are to be regarded as Financial Creditors in terms of Section 5(8)(f) of the Code. Hon’ble Supreme Court further made it clear that the allottees/ real-estate buyers can avail the remedies available under the provisions of the Code.

14. In the present case it is an admitted fact that the Corporate Debtor agreed to sell 3<sup>rd</sup> and 4<sup>th</sup> floor of the commercial tower to the Applicant for a consideration. The consideration amount was paid to the Corporate Debtor. The only contention of Corporate Debtor is that since the Applicant itself vide email dated 15.02.2017 asked Respondent to cancel

the allotment and refund the principal amount, therefore the Applicant ceased to exist as an allottee of the Corporate Debtor. This argument of the Corporate Debtor cannot be accepted because the nature of amount due does not change by e-mail dated 15.02.2017; in fact it becomes due and payable from 15.02.2017 and the Corporate Debtor clearly defaulted to repay the amount.

15. Since the amount has been raised from the Applicant/ allottee under a real estate project, not only the debt has a commercial effect of borrowing and comes within the scope of 'financial debt' but also the Applicant comes within the definition of 'Financial Creditor'.
16. Accordingly, the Applicant being a Financial Creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the Code against the Respondent Corporate Debtor in case of default in repayment of financial debt.
17. The present Application under Section 7 of the Code for initiation of CIRP has been filed by Applicant/ Financial Creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 accompanied with required information, documents and records as prescribed under the Rules.
18. The Applicant/ Financial Creditor has proposed the name of Mr. Deepak Arora, for appointment as Interim Resolution Professional ('IRP') with registration number IBBI /IPA-002 /IP-N00122 /2017-18/ 10291, with

email-id arcracs2@gmail.com. Mr. Deepak Arora has agreed to accept the appointment as the IRP and has signed Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

19. The next question raised for consideration is whether Respondent/ Corporate Debtor has committed default in payment of the financial debt?

20. In this regard it is seen that Applicant has furnished details/ receipts given by the Respondent and copy of agreements executed between the parties, in support of disbursement of amount to the Respondent/ Corporate Debtor.

21. It is also appropriate to mention here that under Section 18 of the Real Estate (Regulation and Development) Act, 2016 (RERA) if the promoter fails to complete or is unable to give possession of the apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment etc. with such interest as may be prescribed and must, in addition, compensate the allottee in case of any loss caused to him.

22. Similarly, under Section 19 of RERA, the allottee shall be entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale.

23. However, in the present case neither the possession of the flats has been given to the Applicant nor the Corporate Debtor has returned even the amount collected from the Applicant since the year 2014. It is pertinent to mention here that the Corporate Debtor in its reply has itself admitted that Rs. 2,48,88,466/- is still due and payable to the Applicant out of the amount paid by Applicant for the said allotment. There is thus sufficient material on record to conclude that Respondent/ Corporate Debtor has committed default in repayment of the financial debt.

24. It is also pertinent to mention here that the Corporate Debtor has raised objection regarding MOU signed between the parties. It is alleged that the MOU is false and fabricated and a criminal complaint has also been lodged against the Applicant. In respect of these allegations, since Respondent itself has admitted Rs. 2,48,88,466/- as due and payable to Applicant, the objection regarding fabrication of document can be ascertained by the IRP or RP after initiation of CIRP during verification of claim of Applicant.

25. There is no denial of default and the amount of default exceeds much more than Rs. 1,00,000/-. Once there is a debt and default and the Application is complete, the Adjudicating Authority is bound to admit the Application preferred under Section 7 of the Code.

26. As a sequel to the aforesaid discussion it is seen that the Applicant being an allottee comes within the definition of Financial Creditor. The

material placed on record further confirms that Applicant/ Financial Creditor had disbursed the money to the Respondent/ Corporate Debtor as consideration for purchase of commercial space. Though considerable period has since lapsed, the possession of the space has not been given to the Applicant. Even the principal amount disbursed has not been repaid by the Respondent/ Corporate Debtor. It is accordingly reiterated that Respondent/ Corporate Debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of Rs. 1,00,000/-. Besides it is also seen that the Application filed in Form – 1 under Section 7 of the Code read with Rule 4 of the Rules is complete and there is no infirmity in the same.

27. As a consequence of the above discussion and in terms of Section 7 (5) (a) of the Code, the present Application is admitted. It is seen that IA No. 270/JPR/2019 had been filed vide Diary No. 1688/2019 dated 28.08.2019, seeking early hearing in the main matter. Upon disposal of the main case, this IA has become infructuous. Accordingly, IA No. 270 is disposed of.

28. Mr. Deepak Arora, with registration number IBBI /IPA-002 /IP-N00122 /2017-18/ 10291, and email-id [arcrcacs2@gmail.com](mailto:arcrcacs2@gmail.com) is appointed as the Interim Resolution Professional.

29. We direct the Applicant/ Financial Creditor to deposit a sum of Rs. 2,00,000/- with the IRP to meet out the expenses to perform the

functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount, however, shall be subject to adjustment towards Resolution Process cost as per rules and shall be paid back to the Financial Creditor.

30. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the IRP immediately (in 3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this Application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

31. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

*“(a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

*(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.”*

32. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the Corporate Debtor in terms of Section 14 (3) (b) of the Code.

33. The IRP shall perform all his functions contemplated, inter-alia, under Sections 15, 17, 18, 19, 20 & 21 of the Code, and transact proceedings

with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate Application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

34. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status

of 'Corporate Debtor' and specific mention regarding admission of this  
Application must be notified to the public at large.

Sd-

**SHRI RAGHU NAYYAR,  
MEMBER (T)**

Sd-

**SHRI P.S.N. PRASAD  
MEMBER (J)**