NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 697 of 2022

(Arising out of Order dated 16.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP(IB) No.1337/MB/2020)

IN THE MATTER OF:

Dharmesh S Jain,
[Suspended Director]
Opposite Nirmal Nagar,
L.B.S. Marg, Mulund (West),
Mumbai – 400 080 .... Appellant

Vs

1. SREI Equipment Finance Limited
'Vishwakarma', 86 C, Topsia Road,
Kolkata 700 046.

2. Dilipkumar Natvarlal Jagad
Interim Resolution Professional
of the Corporate Debtor
803/804 Ashoka Heights, Old Nagardas X Road,
Opp. Saraswati Apartments, Gundavali,
Andheri (East), Mumbai 400069. .... Respondents

Present:

For Appellant:	**Mr. Ramji Srinivasan, Sr. Advocate, Mr. Kunal Vajani, Mr. Kunal Mimani, Mr. Kartikey Bhatt, Mr. Shubhang Tandon and Ms. Megha Dugar, Advocates.**
For Respondents:	**Mr. Krishnendu Dutta, Sr. Advocate with Mr. Anirban Bhattacharya, Mr. Harshad Vyas, Mr. Ativ Patel, Mr. Darshit Dave and Mr. Dhruv Sachdeva and Mr. Rajeev Chowdhary, Advocates for R-1.**
	Mr. P.Vohra, Advocate
	Mr. Dhaval Deshpande, Mr. Yash Jariwala, Advocates for R-2&3.

Company Appeal (AT) (Insolvency) No.698 of 2022

(Arising out of Order dated 16.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in CP(IB) No.1337/MB/2020)

IN THE MATTER OF:

1. Deepak Sudhir Keluskar
3/3, Sateri CHS, Shivkrupa Nagar,
Kanjurgaon, Bhandup East,
Mumbai – 400 042

2. Ankush Namdev Kamble
Kamble Chawl, Kailash Nagar,
Near Shiv Mandir, Road No. 28,
Thane – 421 306

3. Ravi Singhal
B-502, Shree Chintamani Tower,
Manorama Nagar,
Thane (W) – 400 607

4. Hemant Goyal
1902, Bliss, City of Joy, JSD Road,
Mulund (West), Mumbai – 400 080

5. Kachru Kalu Jagtap
Esquire Skytower 1202,
12th Floor,
ACC Cement Road Mulund Check Naka
Mulund West, Mumbai – 400 080 …. Appellant

Vs

1. SREI Equipment Finance Limited
'Vishwakarma', 86 C, Topsia Road,
Kolkata – 700 046

2. Dilipkumar Natvarlal Jagad
Interim Resolution Professional
of the Corporate Debtor
803/804 Ashoka Heights, Old Nagardas X Road,
Opp. Saraswati Apartments, Gundavali,
Andheri (East), Mumbai – 400 069

3. Nirmal Lifestyle (Kalyan) Private Limited
Nirmal Lifestyle, Opp. Nirmal Nagar,
L.B.S Marg, Mulund (West),
Mumbai – 400 080 …. Respondents

Present:

For Appellant:	**Mr. Abhijeet Sinha, Mr. Shikhar Khare, Mr. Pranav Malhotra, Advocates.**
	Mr. M.J. Michael, Advocate for intervenors
	Mr. Mayank Kshirsagar, AOR & Ms. Abha Goel
For Respondents:	**Mr. Krishnendu Dutta, Sr. Advocate with Mr. Anirban Bhattacharya, Mr. Harshad Vyas, Mr. Ativ Patel, Mr. Darshit Dave and Mr. Dhruv Sachdeva and Mr. Rajeev Chowdhary, Advocates for R-1.**
	Mr. P.Vohra, Advocate
	Mr. Dhaval Deshpande, Mr. Yash Jariwala, Advocates for R-2&3.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeals have been filed against the same order dated 16.06.2022 passed by National Company Law Tribunal, Mumbai Bench-IV in CP (IB) No.1337/MB/2020, by which Application under Section 7 filed by Respondent No.1 - SREI Equipment Finance Limited has been admitted. The Company Appeal (AT) (Insolvency) No. 697 of 2022 has been filed by a Suspended Director of the Corporate Debtor – Nirmal Lifestyle (Kalyan) Private Limited and Company Appeal (AT) (Insolvency) No. 698 of 2022 has been filed by five Appellants, who are Homebuyers in the real estate Project of the Corporate Debtor known as "Lifestyle City, Kalyan".

2. Brief facts of the case necessary to be noticed for deciding these Appeals are:

(i) The Corporate Debtor is a real estate company, who has launched several real estate Projects under the Project name Lifestyle City, Kalyan. On 05.08.2019 a loan Agreement was entered between Corporate Debtor and the Financial Creditor - SREI Equipment Finance Limited. The Personal Guarantee was executed on 05.08.2019 with the Directors. A Mortgage Deed dated 18.09.2019 was also executed by the Corporate Debtor. Financial Creditor disbursed an amount of Rs.84,23,75,000/-. After six months moratorium, the loan was required to be paid as per the terms and conditions of Loan Agreement. The first default in repayment of the loan occurred on 05.02.2020 and the second on 05.03.2020 and thereafter on every month.

(ii) The Financial Creditor filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") claiming an amount of Rs.7,87,50,000/- as on 07.09.2020. The Adjudicating Authority issued notice on Section 7 Application. The Corporate Debtor filed a reply opposing the admission of Section 7 Application. The Adjudicating Authority after hearing the parties, by order dated 16.06.2022 admitted the Application. The Adjudicating Authority took a view that for defaults, which have occurred subsequent to 05.03.2020 are hit by Section 10A, hence, the only amount of default for which the Application is maintainable is default of Rs.1,12,73,387/-. The Adjudicating Authority after finding default which was more than threshold of Rs.1 crore, admitted the Application.

3. We have heard Shri Ramji Srinivasan, learned Senior Counsel for Appellant in Company Appeal (AT) (Insolvency) No. 697 of 2022; Shri Abhijeet Sinha, learned Counsel for the Appellant in Company Appeal (AT) (Insolvency) No. 698 of 2022; Shri Krishnendu Dutta, learned Senior Counsel, who has appeared for Financial Creditor. We have also heard learned Counsel for different Homebuyers, who have filed Intervention Applications in both the Appeals.

4. Shri Ramji Srinivasan, learned Senior Counsel appearing for the Appellant submits that the default for which Application was filed was an imaginary default. The Corporate Debtor is a real estate company. The Adjudicating Authority was not justified in holding that Company Petition is complete in all respect. The objections raised by the Corporate Debtor has not been dealt with by the Adjudicating Authority. The entire claim of the Financial Creditor was based on insufficiently stamped documents. The Loan Agreement was executed and stamped as per the law applicable in the State of West Bengal, bearing stamp of Rs.100/-, which Agreement is sought to be enforced in the State of Maharashtra, in which State, stamp duty was required to be paid within three months. There was adequate security interest given by the Corporate Debtor and thus, Application under Section 7 was not required to be admitted. Shri Ramji Srinivasan, learned

Senior Counsel submits that the Appellant was also ready to make payment of default amount of Rs.1.12 crores. It is further submitted that Appellant had received communication from Swamih Investment Fund on 03.06.2021 in response to the request made by the Appellant to invest an amount of Rs.250,00,00,000/- and an additional amount of Rs.132,20,00,000/-, on receiving the above amount, Appellant shall be able to complete the Projects.

5. Shri Abhijeet Sinha, learned Counsel appearing for the Appellants in Company Appeal (AT) (Insolvency) No. 698 of 2022 submits that the order passed by the Adjudicating Authority is an unreasoned order. The Appellant – Homebuyers have filed an Application for intervention in the Company Petition and they were also required to be heard. The order prejudicially affects the right of the Appellants, who want the Project to be completed and possession of the homes to be given to Homebuyers. The learned Counsel for the Appellants relying on judgment of this Tribunal in ***Flat Buyers Association vs. Umang Realtech Pvt. Ltd. – Company Appeal (AT) (Insolvency) No.926 of 2019*** submit that the Corporate Insolvency Resolution Process ("**CIRP**") be confined to only to the Project where Financial Creditor is concerned. The present is a case where reverse insolvency resolution process as recognised by this Tribunal, should be resorted and reverse CIRP be adopted, so that all Project be not included. The Appellants are ready and willing to disburse the balance consideration, which will then inevitably be used to repay the claims of the various stakeholders including the Financial Creditor. Shri Sinha submits that in

event the CIRP is proceeded, the Homebuyers will be the great sufferer because they will not be able to get their houses for which they have handed over their life savings.

6. The learned Counsel appearing for Homebuyers, who have filed Intervention Applications in these two Appeals submit that Homebuyers anxiety is only to get the possession after due completion of the unfinished Projects. It is submitted that in event the Corporate Debtor completes the Projects, they have no objection in CIRP not proceeding, but suspended Director has not come up with any concreate proposal inspite of time allowed by this Tribunal to them to come up with a concrete proposal. The Swamih Investment Fund, on which reliance has been placed is subject to fulfilment of various conditions precedent and there is no surety that Corporate Debtor will be able to obtain investment from Swamih Investment Fund and suspended Director has not come up with any mechanism to complete the Project. It is submitted that Company Appeal (AT) (Insolvency) No. 698 of 2022 filed by five Homebuyers are those Homebuyers, who are connected with the Corporate Debtor.

7. We have considered the submissions of the learned Counsel for the parties and have perused the record.

8. In Company Appeal (AT) (Insolvency) No. 697 of 2022 notices were issued by this Appellate Tribunal on 22.06.2022. In Company Appeal (AT) (Insolvency) No. 698 of 2022, this Tribunal on 12.07.2022 passed an interim order directing that till next date of hearing, the Interim Resolution Professional ("**IRP**") shall not constitute the Committee of Creditors ("**CoC**"),

however, the Resolution Professional shall continue to function and ensure that the Corporate Debtor continues as a going concern. In pursuance of the interim order, the IRP has taken control over the Corporate Debtor on 18.06.2022 and had already issued publication notice for inviting claims. The IRP has filed three Status Reports in these Appeals. The third Report was filed on 26.09.2022, gives the details of the Corporate Debtor as on 15.09.2022. Paragraphs 5, 6 and 7 of the Status Report are as follows:

> *"5. The Interim Resolution Professional states and submits that pursuant to the Public Announcement made by the Interim Resolution Professional, claims from 3 Financial Creditors have been received for an amount aggregating Rs.1,930.40 Crores and the said claims are under verification as per direction of Hon'ble NCLAT as the constitution of COC was stayed.*
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> *6. The Interim Resolution Professional states and submits that pursuant to the Public Announcement made by the Interim Resolution Professional, and subsequent to the 2nd progress report, 68 claims are received from home buyers for an amount aggregating to Rs.29,43,69,469 and the said claims are under verification. Majority home buyers have suggested the name of Mr. Vithal M. Dahake IBBI/IPA-003/IP-N001117/2017-2018/11296 as their Authorized Representative. The IRP has filed an Interlocutory Application for the appointment of Authorised Representative with Hon'ble NCLT, Mumbai bench .*
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> *7. The Interim Resolution Professional states and submits that pursuant to the Public Announcement*

made by the Interim Resolution Professional, and subsequent to the 1st progress report, one claim is received from operational creditor (towards Government dues) for an amount aggregating to Rs.3,38,69,531 and the said claim is under verification. Sales Tax Department has attached bank accounts and immovable properties of CD, for which detailed reply was sent by IRP."

9. In the Status Report, the IRP has also submitted Project Status as registered with MAHA RERA. According to the Status Report, there are Projects, which are divided in three Zones, i.e., Kalyan Zone-1, Kalyan Zone-2 and Kalyan Zone-3. In paragraph 9 of the Report, following has been stated:

> *"9. The Interim Resolution Professional states and submits that at Vadavli, village, Taluka-Kalyan, Dist – Thane, Pin Code- 421301, the Corporate Debtor has registered 30 buildings having different names with MAHA RERA under the project name "Lifestyle City- Kalyan". The Corporate Debtor also has land parcles around project site namely at- Village ambivali, Taluka- Kalyan, Dist- Thane. The Interim Resolution Professional visited the project site and these buildings are at different stages of completion. In some of the buildings 100% Civil/ structural work is completed but further fit out work is pending. In some of the projects, only foundation work is completed."*

10. Out of 30 buildings, the Corporate Debtor has received Occupation Certificate for three buildings namely – Victory A, Victory B and Spirit A and Corporate Debtor has applied for Occupation Certificate for six other buildings. The Status Report also refers to various litigation, which have been initiated against the Corporate Debtor by different Homebuyers and other entities. All buildings are duly registered with MAHA RERA. This Tribunal after hearing the parties on 09.11.2022 directed the Appellant to file a response by an affidavit with regard to grievance, which was raised at the time of hearing. On 09.11.2022, following order was passed:

> *"**09.11.2022:** We have heard Learned Counsel for the parties and Learned Counsel for the Intervener who have filed the application for intervention on behalf of the Home Buyers.*
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> *Learned Counsel for the Home Buyers have expressed apprehension that there are no facts brought on behalf of the promoters regarding the steps which are proposed to be taken by the promoter and the timelines for completion of the flats.*
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> *Mr. Krishnendu Dutta, Learned Senior Counsel appearing for the Financial Creditor who has initiated CIRP submits that the Appellant has also not dealt with the dues which is due today to the Financial Creditor.*
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> *Before the next date of hearing, Learned Counsel for the Appellant is permitted to file response by an Affidavit after serving copy of the Affidavit on the Counsel for the Respondent, dealing with the grievances which have been expressed during submissions before the Court.*

List these appeals for further 'hearing' on 7th December, 2022 for consideration of the Affidavit and Response of the parties thereon.

Interim order to continue."

11. An affidavit in response to order dated 09.11.2022 was filed by the Appellant in Company Appeal (AT) (Insolvency) No. 697 of 2022 bringing on record letter dated 03.06.2021 issued by Swamih Investment Fund. The letter dated 03.06.2021, which has been brought on the record is a letter, which contains 37 preconditions, which are required to be fulfilled before any investment is made by Swamih Investment Fund. The Appellant in his written submission has also referred to a letter dated 08.12.2022 addressed by Swamih Investment Fund informing that letter dated 03.06.2021 is valid and subsisting.

12. Now we come to the question of debt and default. The Adjudicating Authority in the impugned order in paragraph 8 of the judgment has held that default on or after 05.04.2020 was for an amount of Rs.1,12,73,387. The learned Counsel for the Financial Creditor submitted that even after the period covered by Section 10A came to an end, no payments are yet been made to the Financial Creditor by the Corporate Debtor. It is submitted by Financial Creditor that huge dues have been accumulated against the Corporate Debtor as on date. In the 3rd Status Report, the IRP has stated that in pursuance of the Public Announcement claims of Financial Creditors have been received of Rs.1930 crores in addition to claims of Homebuyers of Rs.29,43,69,469/-. There is no material brought on record except to the letter of the Swamih Investment Fund dated

03.06.2021, which provided for approval of fund subject to several conditions. The Financial Creditor submits that one of the condition was that NOC of Financial Creditor was required to be obtained, whereas no NOC have been obtained from Financial Creditor for the said fund.

13. Although, the Appellant has submitted that they are ready to deposit an amount of Rs.1,12,50,000/-, which was the amount of default admitted by the Adjudicating Authority, but we are of the view that by mere depositing the said amount, the CIRP cannot be set aside. We are quite conscious that in the real estate Projects, it is the Homebuyers, who are the major sufferer. Most of the Homebuyers belong to middle income group, who for funding their homes also takes loan from financial institutions and suffer due to non-handover of possession by the builders. The Project, which has been commenced by the Corporate Debtor, consisted of large numbers of buildings, where only few have been completed and most of them are incomplete. The Corporate Debtor has not brought on record any convincing material to indicate that it is able to complete the Project and also able to meet the liabilities of the Financial Creditors and other creditors. We, thus, are satisfied that present is a case where order initiating CIRP need no interference. Consequently, the CoC has to be constituted to find out the ways and means to complete the Project, so that interest of the Homebuyers be firstly fulfilled.

14. The learned Counsel for the Homebuyers has placed reliance on judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No.926 of 2019 - Flat Buyers Association vs. Umang Realtech Pvt. Ltd.***, where

this Tribunal after considering the difficulties of the Homebuyers in a real estate Project has observed that in real estate Project, the CIRP can be confined to one Project as per approved Plan by the different authorities. In paragraph 21 and 25, following have been observed:

> *"**21.** In Corporate Insolvency Resolution Process against a real estate, if allottees (Financial Creditors) or Financial Institutions/Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where separate plan(s) are approved by different authorities, land and its owner may be different and mainly the allottees (financial creditors), financial institutions (financial creditors, operational creditors are different for such separate project. Therefore, all the asset of the company (Corporate Debtor) are not to be maximized. The asset of the company (Corporate Debtor – real estate) of that particular project is to be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority. Any other allottees (financial creditors) or financial institutions/ banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained.*

So, we hold that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not other projects which are separate at other places for which separate plans approved. For example – in this case the Winter Hill – 77 Gurgaon Project of the 'Corporate Debtor' has been place of Corporate Insolvency Resolution Process. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised.

25. *In the light of aforesaid discussion, as we find it is very difficult to follow the process as in normal course is followed in a Corporate Insolvency Resolution Process, we are of the view, that a 'Reverse Corporate Insolvency Resolution Process' can be followed in the cases of real estate infrastructure companies in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganized workmen."*

15. We have taken the view that CIRP of the Corporate Debtor needs to be proceeded with. The CoC may be constituted immediately and CoC may take a call regarding finding out ways and means to complete the Projects. With the approval of CoC, the IRP may take steps to obtain interim finances to complete the Project, if any. It is also open for the CoC to take a decision to invite Resolution Plan in staggered manner, confined to Project wise/ building wise, as may be feasible and convenient, so that unfinished Project

may be completed and Homebuyers be handed over the possession without paying any additional cost.

16. In view of the aforesaid discussions, we decide both these Appeals in following manner:

(A) The order impugned dated 16.06.2022 passed by the Adjudicating Authority, admitting Section 7 Application is upheld.

(B) The IRP may constitute the CoC within one week from today and submit a Report of the constitution of CoC to the Adjudicating Authority.

(C) The CoC may deliberate on ways and means to complete the unfinished Projects, either by obtaining interim finances or by inviting Resolution Plan.

(D) It shall be open for the CoC to invite Resolution Plan on Project wise/ building wise, individually or separately or jointly, as may be found feasible and practical after looking into overall facts and situation.

(E) The suspended management and employees of the Corporate Debtor may extend their cooperation to the IRP/ Resolution Professional in completion of the Projects.

(F) The period during which the constitution of CoC was stayed, i.e., 12.07.2022 to till this date, is excluded from the period of CIRP.

17. The Appeals are disposed of accordingly. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

4th January, 2023

Ashwani