

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**NEW DELHI**

**BENCH-III**

**C.P. No. IB-1352/ (ND)/2019**

**Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.**

**IN THE MATTER OF:**

**Ms. Pooja Kapoor**

D/o Mr. R.C Kapoor  
R/o E-364, Greater Kailash-1,  
New Delhi-110048.

**Sh.R.C.Kapoor**

S/o. Mr. Late Dina Nath Kapoor  
R.o. E-364, Greater Kailash-1,  
New Delhi-110048.

**M/s Bestco Computer Private Limited**

R/o. E-364, Greater Kailash-1,  
New Delhi -110048.

..Financial Creditors

**Vs.**

**Magic Info Solutions Private Limited**

Through its Authorized Signatory  
Having its Registered Office at  
D-13, Defence Colony, New Delhi-110024.

..Corporate Debtor

**CORAM :**

**R.VARADHARAJAN,**

**Hon'ble Member (Judicial)**

**K.K. VOHRA**

**Hon'ble Member (Technical)**

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**ORDER**

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**Dated: 13.09.2019**

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1. The Petition is filed under the provisions of Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC) read with attendant Rules and Regulations. The petition has been filed jointly by three Petitioners. Third Petitioner is stated to be incorporated under the provisions of the Companies Act, on 10.5.1985. Part-II of the petition discloses the details of the Corporate Debtor (CD) from which it is evident that CD was incorporated on 21.5.2006 and Authorised and Paid up Capital of CD is stated to be Rs.1,00,000/-(One lakh). The Registered Office of the CD is situated at D-13, Defence Colony, New Delhi-110024 which is corroborated with the Master Data as effected in MCA website as filed by the Petitioner as Annexure-II. The Petitioner has proposed the name of one Mr. Gaurav Katiyar as the Interim Resolution Professional (IRP) having Registration No. IBBI/IPA-001/IP-P00209/2017-18/10409 evident from Part III of the petition.

2. As per Petitioners /Financial Creditors the dates of disbursal in relation to each of the Petitioners as evident from Part-IV of the petition, in relation to the flats booked by the Petitioners has come before this Tribunal as Home Buyers/ Financial Creditors (FCs) falling under Sec.5 (8) (f) of IBC 2016. In relation to each of the Financial Creditor (FC), the Principal amount due as well as outstanding compensation claims are as under :-

for delays (Rs)

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Financial Creditor	Total Due	Principal	Outstanding Compensation
FC -1	1,3693,603	80,10,570	56,83,033
FC -2	1,70,76,950	88,76,053	82,00897
FC-3	1,58,98,043	93,95,776	65,02,267

4. It is averred in Part -IV of the petition that all the above stated 3 FCs have booked individual apartments in the project developed by the Corporate Debtor (CD) named as "Godrej Summit" situated at Sector- 104, Gurgaon herein referred to as "the Project".
5. The bookings seem to have been made by each of the FCs in the year 2013 with the CD and allotment of individual letters issued to each of FCs by the CD are annexed as Annexure A, G and Annexure-M. Pursuant to the allotment letters, it is also stated that in relation to each of the individual FCs, with respect to the individual allotted unit, apartment buyers' agreements had also been entered to as between the FC and CD dated 13.5.2013, 1.8.2013 and 8.6.2013 respectively. By virtue of the allotment letters and under the allotment buyer's agreement, it is stated that amounts have been paid by each of the FCs, individually as reflected in the above table. It is also stated in the petition that by virtue of the individual bookings to each of the FCs, the portion of the flat booked was required to be handed over within a period of **47** months from the dates of respective allotment letters.

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6. Further, a grace period of 6 months has also been provided in the specific Agreement in case the possession is not able to be handed over by the CD. Taking into consideration even the extended period of 47 months by another 6 months, the possession of the property was required to be handed over by June, 2017 in relation to FC-1 and in relation to FC-2 and FC-3 in the month of July, 2017. In view of the default in handing over possession, the Petitioner (FC-1), it is stated had issued an e-mail dated 24.4.2019 intimating about the termination of the Agreement in terms of Clause 4.2 of the apartment buyer's agreement as well as in terms of Clause 6.4 and demanded the refund of the entire principal amount along with interest @15%, failing which will initiate legal action. Pursuant to the same, the petition has been filed before this Tribunal on the plea that a 'default' has been committed by the CD in refunding the money and in the circumstances the principal amount along with compensation, the details of which have been given in the tabulation as above being the claim amount and for the initiation of the Corporate Insolvency Resolution Process (CIRP) of the CD.

7. On being afforded an opportunity to file a reply, the same has been filed by the CD wherein it is contended by the CD that the FC for the termination of the agreement has relied upon a wrong clause, as invocation of clause 6.4 of the Agreement is completely misplaced on the part of the FC. It is further contended that there was no question of any default, as the CD vide possession letter dated 05.10.2017 has offered possession of the respective flats subject to fulfilment of contractual obligation by the FCs/ Petitioners. It is also stated in the reply that because of the circumstances beyond the control of the CD, there has been a delay in relation to completion of project and that the said delay is required to be excluded taking into consideration the Agreement as entered into between the parties. In view of the above

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contention, the petition is required to be dismissed with exemplary costs.

8. The parties were heard in detail. Counsels for the parties reiterated the pleadings and referred to documents filed respectively by the parties. Counsel for the Petitioner<sup>s</sup> during the course of submissions in relation to Possession letter as given by the CD dated 5.10.2017 pointed out that even though in the Possession letter it is stated that the occupation certificate in relation to tower in which the unit of the FC were situated ~~even though~~ when actual possession was sought and despite repeated requests made by the FC was not given which prompted the FC to issue notice of termination in the year 2019. u

9. On the part of CD, the Counsel for the CD submits and brings to the notice of this Tribunal and referred to in Clause 2.6, 6.2 and 6.4 of the Buyer's Agreement and contended that the termination letter which has been issued by the FC cannot be sustained legally. In the circumstances, the possession of the flats having already been offered in the year 2017 itself, there is no question of any default on the part of the CD as contemplated under the provisions of IBC, 2016. e

10. Going into the merits of this petition, it is required to be kept in mind by this Tribunal the recent ~~provisions~~ pronouncement made by the Hon'ble Supreme Court of India in the matter of Pioneer Land & Infrastructure Ltd. & another Vs. Union of India and others in Writ Petition No.(C) 43, 2019 rendered on 9.8.2019, wherein the Hon'ble Supreme Court after considering several objections raised by the Real Estate Developers as to whether a Home Buyer can be considered as an FC, has categorically come to the conclusion that Home Buyers can be considered as FCs, both prior to as well as subsequent to the amendment of Sec.5 (8) (f) of IBC 2016 by Amendment Act of 2018 incorporating the explanation to the said u

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provisions as the Home Buyers finance the project significantly as developed by the Real Estate Developers.

11. It is also held by the Hon'ble Supreme Court of India that finances which are made available by the Home Buyers to the Project is in return that the real estate developers are required to handover the possession of the respective flats or units booked to the Home Buyers within time which in effect is the consideration against the time value for money, even though not in money terms but in terms of the physical possession of the property booked which is required to be handed over within the agreed period as between the parties. Failure of the Real Estate Developers (CD) in not handing over the possession of the property as agreed to between the respective parties is to be considered as a 'default' as envisaged under Section 3 (12) of IBC 2016. Thus the FC in case of violation of the Agreement not handing over possession of the respective units has right to seek for the termination of the Agreement and also the refund of the principal amount and compensation as provided under the agreement in case of its breach.

12. Thus we are not in a position to appreciate the technical objection taken by the CD in stating that a different clause has been invoked which should not have been invoked in the first place by the FC. The issue is not in relation to invocation of a clause, whether it is right or wrong, what is material is that either a default has occurred on the part of the CD which has made the FC to issue Notice of Termination and seek for refund of the principal amount as well as agreed compensation from the CD.

13. From the facts, it is clearly evident that even after the offer of possession made in the year 2017 by the CD effective possession of the property contracted to each of the parties have not been given by the CD which is also admitted by CD, however, wants to



consider exclusion of time of delay as beyond its control, which plea cannot be entertained.

14. Taking all the above into consideration as well as judgement of the Hon'ble Supreme Court passed on 09.8.2019 in Writ Petition (Civil) No.43 of 2019 in the case of Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors and Sunil Handa and Others Vs. Today Homes Noida India Limited's case ~~Judgement~~ and guided by it as well as the order passed by the Hon'ble Principal Bench on 20.08.2019 in Rachna Singh & Anr Vs. Umang Realtech Pvt Ltd., we do not have any hesitation in admitting this petition and thereby initiating the CIRP in relation to the CD. Mr. Gaurav Katiyar having its office at D-32, East of Kailash, New Delhi, 110065 and registered with IBBI with Registration. No. IBBI/IPA-001/IP-P00209/2017-18/10409 and as proposed by the FCs in Part-III of the petition is appointed as the Insolvency Resolution Professional in terms of IBC, 2016 in relation to Corporate Insolvency Resolution <sup>Process</sup> ~~Professional~~ of the CD. Counsel for the Petitioner also points out to the necessary consent as given by the IRP proposed by the Petitioner as enclosed on page No.387 and 388 from which it is seen that necessary disclosures of his independence viz-a-viz CD has also been enclosed. The Registration Certificate of the IRP proposed has also been enclosed.

15. The moratorium as envisaged under Section 14 of IBC 2016 will follow on admission of the petition from the date of this order. IRP to strictly adhere to the provisions as well as the attendant Rules & Regulations governing his conduct while acting as IRP in relation to CIRP of the CD. A copy of this order shall be duly despatched to the FC and CD as well as a copy be also communicated to the IRP named as above by the Registry. It is further directed that on receipt of certified copy by the Petitioner, the Petitioner in addition shall also communicate this

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order to the IRP named as above at the earliest. The petition with above directions is disposed of.

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**(K.K. VOHRA)**  
**MEMBER (TECHNICAL)**

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**(K. VARADHARAJAN)**  
**MEMBER (JUDICIAL)**