

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA**

**I.A. (IB) No. 399/KB/2021
and
CP (IB) No. 1149/KB/2020**

In the matter of:

An Application under section 7 of the Insolvency and Bankruptcy Code, 2016

And

In the matter of:

Rosedale Garden Apartment Owners Association, an entity established under the West Bengal Apartment Ownership Act, 1972, having its office at Rosedale Garden Complex, Action Area 3, New Town, Kolkata – 700160.

...Financial Creditor

Versus

Rosedale Developers Private Limited (CIN U45201WB2004PTC100084), a company registered under Companies Act, 1956, having its registered office at Plot No - III, Block - 3, Rajarhat, Newtown – 700156, West Bengal.

... Corporate Debtor

Order reserved on: 15 December, 2021

Order pronounced on: 28 February, 2022

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (through video conferencing):

<i>For the Financial Creditor</i>	:	Mr. Joy Saha, Sr. Advocate Mr. Shaunak Mitra, Advocate Mr. Patita Paban Bishwal, Advocate
<i>For the Corporate Debtor</i>	:	Mr. Reetobroto Kumar Mitra, Advocate Mr. Debangshu Dinda, Advocate

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COMMON ORDER

(CP (IB) No. 1149/KB/2020 and I.A. (IB) No. 399/KB/2021)

Rajasekhar V.K., Member (Judicial)

1. This Court convened through video conferencing.

CP (IB) No. 1149/KB/2020

2. This is a Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) by Rosedale Garden Apartment Owners' Association (*'Financial Creditor'*), incorporated on 28 February, 2019 under the West Bengal Apartment Ownership Act, 1972 and represented by its Vice President, Mr. Manoj Kumar Sharma, authorised by letter of Authorisation dated 06 September, 2020, annexed with the Petition at page 31, seeking to initiate Corporate Insolvency Resolution Process (*'CIRP'*) against Rosedale Developers Private Limited (*'Corporate Debtor'*).
3. The Corporate Debtor is a company engaged in the business of real estate, incorporated on 08 October, 2004, registered under the Companies Act, 1956 with the Registrar of Companies, West Bengal, Kolkata, having its registered office at Plot No. III, Block 3, Rajarhat, Newtown, Kolkata- 700156. Therefore, this Bench has jurisdiction to deal with this Petition.

Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor

4. The Corporate Debtor was appointed by the West Bengal Housing Infrastructure Development Corporation Limited (*'HIDCO'*) to develop 16.32 acres of land owned by HIDCO, situated at Plot No.AA-III, BL, Kolkata – III, New Town, District – North 24 Parganas, West Bengal (*'Plot'*).
5. A development agreement dated **24 February, 2006** was executed between HIDCO and the Corporate Debtor to construct housing complex on the plot and the complex was to be known as 'Rosedale Garden Complex' (*'Complex'*). Accordingly, the construction of the housing complex was done by the

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Corporate Debtor and final occupancy certificate was issued by New Kolkata Development Authority ('*NKDA*') on 14 October, 2015. As per clause 14.3 the allotment letter issued by the Corporate Debtor to the potential buyers¹, the Corporate Debtor was assigned with the responsibility to maintain the common areas and facility in the complex till an Association is formed under the provisions of the West Bengal Apartment Ownership Act, 1972.

6. An interest free maintenance security deposit @ Rs.50/- (Rupees Fifty only) per sq.ft. of super-built area for a flat were to be paid by the owner/allottees to the Corporate Debtor and such payments were to be transferred in entirety by the Corporate Debtor to the Association upon its formation. From 2007 to 2015, six hundred and eleven flat owners had deposited the requisite maintenance security amounting to Rs.7,24,85,600/- (Rupees Seven Crore Twenty Four Lakh Eighty Five Thousand Six Hundred only) with the Corporate Debtor². It is important to note that no particulars of payments with regard to maintenance of three flats owned by the Corporate Debtor are known to the Association.
7. On 28 February 2019, the Association of flat owners comprising of the said Financial Creditors was formed. It is also pertinent to mention that the Corporate Debtor has duly collected monthly maintenance charges up to middle of 2019.
8. In the meantime, separate Deeds of Conveyance were executed by and between HIDCO, the Corporate Debtor and the buyer/allottees. The Financial Creditor has relied on point 13.3 of the Deed of Conveyance, which states that all the terms contained in General Terms and Conditions shall be deemed to be a part of the Deed of Conveyance.
9. Despite the Association being formed, the Corporate Debtor failed to transfer the security maintenance deposit in the favour of the Association. Subsequently, on 29 June, 2019, a meeting was held between the representative of the Corporate Debtor and Association, where it was agreed that the responsibility to maintain

¹Pages 65 of the Petition

² Annexure H, pages 68 – 76 of the Petition.

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common areas will stand transferred to the Association from 01 July, 2019. It was also discussed and agreed that the Corporate Debtor will take steps to transfer the maintenance security deposit to the Association and will also share final bills of respective vendors.

10. Further, the Corporate Debtor in its email dated 11 July, 2019 has allegedly agreed that the Corporate Debtor will have no authority in connection to maintaining common areas, raising bills and collecting money on and from 01 July, 2019³ and all collection made under the head of electricity charge will be deposited with Association from 16 July, 2019.
11. Subsequently, on 16 July, 2019, a reminder letter was sent from the Financial Creditor to the Corporate Debtor stating to hand over the management and maintenance of the common area to the Financial Creditors along with important original documents as mentioned in 'Annexure-A' of the letter⁴.
12. The Financial Creditor also relied on the draft agreement sent by the Corporate Debtor on 06 January, 2020. In clause 3⁵ of the Agreement the Corporate Debtor records that after making necessary adjustment, the Corporate Debtor '*has transferred the balance deposit to the Association*'. However, there were no agreement between the parties for the Corporate Debtor to make adjustments or deduction on any account before transferring the maintenance deposit amount. Such clause was unilaterally incorporated by the Corporate Debtor.
13. It is also pertinent to mention that *vide* electronic mail dated 01 November, 2019 the Corporate Debtor had forwarded to the Financial Creditor a calculation chart, where it was stated that the Financial Creditor was entitled to deduct an aggregate a sum of Rs.2,54,23,513.41/- from the total maintenance deposit of Rs.7,24,85,600/- because some of the individual allottees have not made the payment of maintenance charges. Further, such allegation and claims for deduction are totally misconceived by the Corporate Debtor. The Corporate

³Annexure J, page 106 of the Petition.

⁴Annexure K, pages 107 - 109 of the Petition

⁵Page 128 of the Petition.

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Debtor is not entitled to claim deduction of any amount made in excess of the concerned individuals respective contribution towards maintenance security deposit. As per clause 14.3 of the Terms and Conditions the excess amount paid by the individual allottee can be utilized to cover any subsequent deficit payment by that concerned allottees only. Hence, the Corporate Debtor has wrongfully and in contravention of the terms and conditions claimed deduction.

14. Further, there is no proof or evidence by the Corporate Debtor to substantiate the default committed by the concerned flat owners except the chart of calculation annexed as 'Annexure O' in the Petition.
15. The Financial Creditor *vide* letter dated 25 February, 2020 issued instructions on the Corporate Debtor to transfer the entire maintenance deposit to the Financial Creditor with interest[Is it provided in the the agreement ?] and without any deductions. The Financial Creditor also raised issues pertaining to the delivery of possession of the common areas, list of certificates, NOCs, approvals, drawings and data sheets pending from the Corporate Debtor.
16. No part of the outstanding financial debt due is barred by limitation. The Corporate Debtor has refused, failed and neglected to pay the maintenance deposit amount along with interest payable @15% per annum to the Financial Creditor.
17. The said Financial Creditor also submits that the Corporate Debtor has collected a part maintenance amount for the month of June 2020 and no collections were made from July 2020. Further, the same has been accounted separately and deducted from the outstanding maintenance due. ***Such adjusted amount aggregates to a sum of Rs.47,70,413/- (Rupees Forty Seven Lakh Seventy Thousand Four Hundred Thirteen only).***
18. As on 01 March, 2020, an aggregate sum of Rs.8,24,52,370/- (Rupees Eight Crore Twenty Four Lakh Fifty Two Thousand Three Hundred Seventy only) is due and payable by the Corporate Debtor. The breakage of the aggregate sum is as follows:

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- a) Principal outstanding – Rs.7,24,85,600/- (Rupees Seven Crore Twenty Four Lakh Eighty Five Thousand Six Hundred only).
- b) Interest accrued from 01 March, 2019 to 01 March, 2020 – Rs.99,66,770/- (Rupees Ninety Nine Lakh Sixty Six Thousand Seven Hundred Seventy only)

Ld. Counsel appearing on behalf of the Respondent submits that:

18. There is no claim outstanding as of 01 March, 2020. Further, the Corporate Debtor denies that any maintenance amounts were to be paid by the individual owners/allottees to the Corporate Debtor and neither the same was to be transferred to the Financial Creditor in its entirety.
19. No negligence has been done by the Corporate Debtor. Further the entire allegation made by the Financial Creditor is false, save and except the facts of the case. The Corporate Debtor also submits that the draft agreement 06 January, 2020 was not made with ulterior motive.
20. The application by the Financial Creditor has failed to make any case the grounds for initiation of CIRP against the Corporate Debtor

Supplementary Affidavit filed by the Financial Creditor

The said Financial Creditor has also filed the Supplementary Affidavit on 5th August, 2021 to bring into record the mail dated 28 July, 2021 sent by the Corporate Debtor recording the amount payable to the Financial Creditor along with reconciled deposit details⁶. During the arguments on 11.2.2022, the Ld. Sr. counsel placed reliance on two case laws viz. *Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others*⁷ & *Bhaskar Biswas v. Aavaani Oxford Owners' Association and Ors*⁸

⁶Page 4 of the Supplementary Affidavit by the Financial Creditor.

⁷(2019) 8 SCC 416

⁸Company Appeal (AT) (Insolvency) No.864 of 2020 dated 13 July, 2021

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I.A (IB) No. 399/KB/2021

21. This is an Interlocutory Application filed by the said Financial Creditor against the Corporate Debtor praying for as follows:
 - a) Injunction on the Corporate Debtor from dealing with, disposing off or creating any third party rights over the unsold/unregistered apartments/flats along with the car parking areas;
22. The Applicant states the Corporate Debtor owes a sum of Rs.8,24,52,370/- (Rupees Eight Crore Twenty Four Lakh Fifty Two Thousand Three Hundred Seventy only) as on 01 March, 2020, along with 15% interest calculated from 01 March, 2020.
23. The Applicant has also filed a Section 7 application against the Corporate Debtor. The Corporate Debtor has defaulted in making payment of maintenance security deposit to the Financial Creditor, as collected by the Corporate Debtor till middle of 2019.
24. Despite several assurances the Corporate Debtor failed to hand over the maintenance security deposits collected to the Applicant. The Applicant states that unless the maintenance security deposit is handed over to the Applicant, it will be extremely difficult for them to carry out maintenance in the Complex.
25. Recently, in 3rd week of March, 2021, the Applicant came to know that the Board of Directors of the Corporate Debtor has been reconstituted. At the time of filing Section 7 Application the Directors were, namely, Mr. Ravi Todi, Mr. Rahul Todi, Mr. Santosh Kumar Mukherjee and Mr. Shyamal Kanti Sarkar. However, at present the names of the Directors reflected on the master data are Mr. Rupinder Singh and Smt. Lakshmi Maheshwari.
26. The reconstitution of the Board of Directors of the Corporate Debtor is evidently done with mala-fide intention. The current Directors of the Corporate Debtor are unknown to the Applicant and are apparently stooges of the ex-directors, who are trying to distance themselves from the affairs of the Corporate Debtor.
27. The Applicant also submits that the Corporate Debtor has recently sold the unregistered flats along with the car parking area held and owned by it in the

Complex⁹. Further, the Corporate Debtor still owns some flats and car parking space in the Complex.

28. It is pertinent to mention that if the Corporate Debtor sells or disposes all of its remaining shares in the Complex then the Applicant will have no real prospects of recovering the dues from the Corporate Debtor.
29. The Corporate Debtor has no defence to the Application filed by the Applicant under Section 7 of the Code. Further, the Corporate Debtor is acting with ulterior motive.

Analysis and Findings

30. We have heard the Ld. Counsel appearing on behalf of the said Financial Creditor and Corporate Debtor and perused the records. No reply has been filed by the Corporate Debtor in I.A. (IB) No. 399/KB/2021.
31. At the outset, the question that arises is whether the Financial Creditor has provided reasonable grounds to prove that the maintenance deposit amount due from the Corporate Debtor falls within the ambit of 'Financial Debt' as defined under Section 5 (8) of the Code?
32. As envisaged under 5(8)(f) explanation (i) - a financial debt includes any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of borrowing. Further, as opined by the Hon'ble Supreme Court in *Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others*¹⁰ that an amount raised under a transaction does not necessarily has to be a loan transaction, as long as they have commercial effect of borrowing. The term 'borrow' is wide enough to include an advanced given by the home buyers to real estate developers.
33. In *Bhaskar Biswas v. Avaani Oxford Owners' Association and Ors*¹¹ Hon'ble NCLAT held that the explanation in 5(8)(f) makes it apparent that the amounts collected by the Developers and kept for the purpose of maintenance till the

⁹Annexure – C, page – 200 of the I.A (IB) No. 399/KB/2021

¹⁰(2019) 8 SCC 416

¹¹Company Appeal (AT) (Insolvency) No.864 of 2020 dated 13 July, 2021

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Association/Society or Holding Organization has commercial effect of borrowing. Hence, it is a Financial Debt.

34. Further, no point with regard to interest component is mentioned in the general Terms and Conditions¹² as agreed between the parties.

35. In light of the above facts and circumstances, it is, accordingly, hereby ordered as follows:-

- (a) The application bearing CP (IB) No. 1149/KB/2020 filed by Rosedale Garden Apartment Owners Association, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Rosedale Developers Private Limited, the Corporate Debtor, is *admitted*.
- (b) There shall be a moratorium under section 14 of the IBC.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) **Mr. Ananda Rao Korada** registration number **IBBI/IPA-002/IP-N00286/2017-18/10844**, email: **raoka55@gmail.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional)

¹² Pages 60 – 67 of the Petition

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Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (g) The IRP/RP shall submit to this Adjudicating Authority progress reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs.3,00,000/-** (Rupees Three Lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- (j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

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36. *CP (IB) No. 1149/KB/2020* to come up on *20 April 2022* for filing the progress report. Since, the *CP (IB) No. 1149/KB/2020* is admitted, the *I.A. 399/KB/2021* stands dismissed as infructuous.
37. On the date of pronouncement i.e. 01 February, 2022, the Ld. Sr. Counsel appearing on behalf of the Applicant made further submissions.
38. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
39. File be consigned to record.

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

The order is pronounced on February 28, 2022

SA (LRA)