

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

*(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)*

C.P. (IB) No.34/BB/2022

U/s 7 of I&B Code, 2016

R/w Rule 4 of I&B (AAA) Rules, 2016

&

IA No.193 of 2022

U/R 11 and 32 of NCLT Rules, 2016

R/w Rule 10 of I&B (AAA) Rules, 2016

In CP (IB) No.34/BB/2022:

1. Mr. Nagappaiya Maiya

S/o Sri P. Ganapaiah Maiya

R/a No.40/26, 2nd Floor,

Lakshmi Complex, KR Fort, Fort,

Bengaluru – 560 002. **& 7 Ors.** ...

Petitioners/Financial Creditors

Versus

M/s. Apple Spire India LLP

Regd. Office at:

No.615, 100 Feet Ring Road,

Banashankari III Stage,

Bengaluru – 560 085. ...

Respondent/Corporate Debtor

In IA No.193 of 2022:

M/s. Apple Spire India LLP

Regd. Office at:

No.615, 100 Feet Ring Road,

Banashankari III Stage,

Bengaluru – 560 085. ...

Applicant

Versus

1. Mr. Nagappaiya Maiya

S/o Sri P. Ganapaiah Maiya

R/a No.40/26, 2nd Floor,

Lakshmi Complex, KR Fort, Fort,

Bengaluru – 560 002. **& 7 Ors.** ...

Respondents/Homebuyers

Order delivered on: 20th July, 2023

Coram: 1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioners : Shri Akshay J. Simha, Adv.
For the Respondent : Shri Kiran B.S., Adv.
For IA 193/2022 : Shri Kiran B.S., Adv. for Applicant
For IA 193/2022 : Shri Akshay J. Simha, Adv. for Respondents

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The instant Petition has been filed on 28.01.2022 u/s 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter as 'IBC / Code') r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Mr. Nagappaiya Maiya and 7 Ors.** (hereinafter as 'Petitioners / Financial Creditors') with a prayer to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of **M/s. Apple Spire India LLP** (hereinafter as 'Respondent/Corporate Debtor') for defaulting an amount of Rs.15,43,59,238/- inclusive of interest.
2. The Corporate Debtor – M/s. Apple Spire India LLP, is a Limited Liability Partnership Firm registered under the LLP Act, 2008 and incorporated on 26.09.2014 with LLPIN: AAC-7595 having its registered address as per MCA at No.615, 100 Feet Ring Road, BSK 3rd Stage, Bangalore-560085. Hence, the jurisdiction lies with this Adjudicating Authority.
3. Brief facts of the case as stated by the Financial Creditors are as under:
 - (a) The Corporate Debtor (CD) is engaged in the business of Real Estate Development and has developed various projects in Bengaluru. One such project being developed by the CD is '**Birla Apple Spire**'

(hereinafter referred to as the '**Project**') situated at Nayanadahalli, Mysore Road, Bangalore.

- (b) The Financial Creditors, total of eight (8) homebuyers, approached the CD to purchase the Apartments / Units in the said Project during 2015-2017. Pursuant to the above, the CD executed individual Agreements to Sell & Construction Agreements with Financial Creditors with respect to their allotted Units for an aggregate sum of Rs.9,78,07,878/- (8 Units). The Agreements for Sale and Construction Agreements contemplate a construction linked scheme of payment wherein instalments are to be paid by the Financial Creditors upon completion/construction of a particular milestone.
- (c) The Construction Agreements contemplate that the delivery of the Units shall be made by the end of March, 2017 / December, 2017. However, the completion date with respect to Unit No.509 allotted to the Financial Creditor No.7 was subsequently extended to 31.03.2018. Upon making various enquiries with respect to the status of the Project, the CD failed to provide a proper response. Despite giving the CD sufficient time to complete the Project, obtain Occupancy Certificate and hand over possession of the Units to the Homebuyers, the CD failed to do so and thereby violated the terms and conditions of the Agreements. Hence, the CD defaulted in handing over the possession of the Units to the Financial Creditors within the stipulated time.
- (d) Since the aforesaid Agreements contemplate a construction linked scheme, the entire consideration with respect to the said Units is yet to be paid by the Financial Creditors. Further, it is stated that majority of the consideration has been collected by the CD, even though the milestones were not completed as on the date of payment. A substantial sum of Rs.8,61,05,943/- has been paid by all the Financial Creditors till date. There is a delay of nearly 45-57 months from the date of

completion as contemplated in the Construction Agreements. Details pertaining to Apartments, consideration, payments, completion date, period of delay, amount in default and documents produced to prove debt and default are at Annexure A-series to Annexure H-series of CP.

- (e) Upon the enactment of the Real Estate (Regulatory and Development) Act, 2016, the CD has registered the said Project with the Karnataka RERA. As per the Registration Certificate issued by the RERA, the Project is only registered till 30.09.2019. It is reiterated that the Project is still not completed till date and the CD has failed to extend its registration with RERA. There is a delay of about 27 months from the date of completion as contemplated in the RERA Registration Certificate.
- (f) It is stated that till date, only 73 Units in the Project have been allotted to various allottees / purchasers. Despite giving sufficient time the CD has not completed the Project and thus defaulted in delivering the Units. The CD has even issued the final demand note to some of the Home buyers, without finishing the Project which is a clear violation of the Agreements. As such, the Financial Creditors have issued legal notices terminating the allotment of their respective Units and called upon the CD to return the amount paid till date along with interest and compensation. Copy of legal notices dt.12.10.2021 has been annexed to the Petition. It is stated that the CD has neither returned the amount nor replied to the said notices. Having defaulted in said payments by the CD, the instant Application has been filed.

4. Pursuant to the issue of notice, Respondent *vide* its statement of objections dated 22.04.2022 has *inter alia* contended as under:

- (a) The CD has accepted One-Time Settlement (OTS) dated 18.01.2022 with Canara Bank, and paid an amount of Rs.21.25 Crores during Jan-March, 2022 to the Bank, which evidences the solvency of the CD.

- (b) It is contended that there are 246 Units/Allottees in the said Project. The Occupancy Certificate dated 14.01.2022 of the local Municipal Authority, BBMP, confirms the said number of Units in the Project.
- (c) The Applicants herein have defaulted in making prompt payments to the Respondent under the said Agreements. Hence, they are Financial Debtors in relation to the CD. It is stated that the CD has obtained the Occupancy Certificate dated 18.01.2022, the Architect Certificate dated 05.07.2020, Pollution Control Board Consent dated 18.09.2020, and all other statutory approvals from various authorities concerned.
- (d) Under provisions of Paragraph 4 of the 'Construction Agreements' – the Applicants are entitled to receive apartments only upon making all payments under the said Agreements. The Homebuyers have failed to do so and hence liable to pay interest to the CD.
- (e) A perusal of the letter dated 01.06.2019 of the CD issued to Syndicate Bank clearly shows that there were 68 Units plus 30 Units allotted to Syndicate Bank for their employees, i.e. 98 Units as on 01.06.2019. The number of units allotted as on date of Petition i.e. 27.01.2022 are given below:

Category of Homebuyers	Units Allotted
1. Homebuyers who have executed Sale Deeds with Respondent (and are in possession of their Units)	64
2. Homebuyers who have executed Agreements with Respondent, but not Sale Deeds	19 (includes 8 Homebuyers herein)
3. Homebuyers to whom Canara Bank (erstwhile Syndicate Bank) has issued Sale Certificates	08
4. Units allotted to and in possession of Canara Bank	52
5. Units allotted to Customers who are yet to execute Agreements with Respondent	04
Total	147

- (f) In view of the non-payment by Applicants of monies that are due and payable under the said Agreements to the CD, the Petitioners have failed to disclose any reason or cause for initiating this Petition.

- (g) A perusal of the Construction Agreements clearly shows that the contractual relationship between the Homebuyers and the Respondent are governed by an Arbitration Clause (Paragraph 19), consequent to which the jurisdiction of this Tribunal is ousted.
- (h) This application is filed consequent to the falsely averred grievance of the Homebuyers that the said Project has not been completed before Mar, 2017/December, 2017, notwithstanding Paragraphs No.8 & 9 in the Construction Agreements, which provide for project delays consequent to force majeure or other reasons. Therefore, the instant proceedings consequent to 'breach of a promise' under the Construction Agreement is barred by limitation under Article 27 of Part II of the Schedule to the Limitation Act, 1963.
- (i) It is contended that the Applicants have deliberately suppressed information on the letter received from the CD calling upon them to pay the balance amounts due. It is stated that the CD has completed the Project without any default and in accordance with the terms and conditions in the Agreements that bind all the Parties herein. The status of the Homebuyers in the books of accounts of the CD is no longer that of Financial Creditors, since they are now Financial Debtors of the CD and have to only schedule a date for registering their respective properties and receive possession of the same.
- (j) Several correspondences have been made by the CD to Homebuyers informing that the concerned Flat is ready for registration, possession and occupancy, are placed on record as Annexure-R8 to Annexure-R15 of the Objections. Further, all the homebuyers herein, except Sri Nagappaiya Maiya, have availed home loans against their respective Units from various financial institutions under Tripartite Agreements, under which the CD has been included as a Party. It is also contended that none of the homebuyers cancelled their bookings; instead, they

got their respective Units modified/customised as per their individual requirements. Their failure to pay the balance amounts of sale consideration and to comply with their contractual obligations is indicative of their mala fide intentions.

5. Subsequently, the Petitioners *vide* Rejoinder dated 20.05.2022 and various written submissions dated 25.08.2022, 07.11.2022 and 19.01.2023 (for limitation) have *inter alia* further stated as under:
- (a) The Homebuyers are in no way related or privy to the said OTS. Mere part payment to the Canara Bank doesn't evidence the CD's solvency, that too when the Canara Bank has also preferred a Petition u/s 7 of the Code bearing CP (IB) No.28/BB/2021 for default of Rs.51.26 Crores. The OTS dated 18.01.2022 contemplates payment of Rs.55 Crores by 25.12.2022, however, the CD has defaulted its payment due on 25.06.2022, which further establishes the CD's financial incapacity.
 - (b) The CD on one hand states that there are 246 allottees whereas on the other hand states that there are 148 allottees, albeit both these are false, as they failed to provide any proof to justify such number. It is stated that in the CD's calculation of 148 allottees, it has maliciously included 60 Apartments which have been handed/mortgaged to Syndicate Bank/Canara Bank for failure to pay its loan/credit facilities.
 - (c) A perusal of letter dated 01.06.2019 shows that only around 68 Units have been sold as on 01.06.2019. Whereas, the other 30 Units, which are not allotted, have been voluntarily offered to the Bank as collateral towards the recovery of the Bank's dues. It is stated that Banks cannot be considered as 'allottees' with respect to RERA or IBC proceedings.
 - (d) In the absence of a valid RERA Registration, only allottees prior to 30.09.2019 can be considered for calculating 'total number of such allottees' provided in the 2nd proviso of Sec.7 of the Code. On perusal

of the letters dt.01.06.2019, 27.11.2019 and 01.06.2020 issued by the CD to Syndicate Bank, it is specifically admitted that not more than 68-71 Units have been allotted to Purchasers. The CD *vide* sur-rejoinder dt.18.06.2022 has produced a list of alleged sale deeds executed by the CD from 31.12.2018 to 09.06.2022, which are false. All Sale Deeds executed by CD after 30.09.2019 are not in accordance with Law and cannot be considered for the purpose of Sec.7 of Code. In view of the above, as per the said list produced by the CD, there exist only 13 allottees as on date of filing the sur-rejoinder.

- (e) The document Occupancy Certificate dt.14.01.2022 is actually titled as 'Partial Occupancy Certificate' imposing several conditions. This type of partial OC is issued only to Projects which are done in a phase-wise manner etc., which is not the case herein. Therefore, it is stated that only 68-73 units of the Project have been legally allotted. It is stated that the sale of Units after the expiry of RERA registration are void and not maintainable in law. The Hon'ble High Court of Karnataka in *Bangalore Housing Development Authority and Investments v. Bruhat Bangalore Mahanagara Palike ILR 2014 KAR 2863* has clearly laid down that a partial OC imposing certain conditions is not permissible.
- (f) As regards arbitration, it is a well settled position of law that insolvency is not Arbitrable and therefore the subject matter is not Arbitrable. Pursuant to Hon'ble Supreme Court in the case of *In Re: Cognizance for Extension of Limitation (2022) 3 SCC 117*, has held that the period of 15.03.2020 to 28.02.2022 shall be excluded for the purpose of Limitation.
- (g) It is stated that Article 27 of Schedule-I of Limitation Act, 1963 is not applicable. Assuming there is a period of limitation of 3 years from the end of March/December, 2017 as contended, the same would expire in

end of March/December, 2020. However, in view of the aforesaid decision, the present CP being filed on 28.01.2022 is well within time.

- (h) The CD has vaguely stated that the reason for delay is due to force majeure and reasons beyond the control of the CD, however, it failed to justify the delay of nearly 5 years and it is neither substantiated nor the CD provided any proof for the same.
 - (i) After issuing the Legal Notices dated 12.10.2021, the Applicants sought several clarifications with respect to completion of the Project, which were never properly responded to by the CD. The Financial Creditors have stopped making payments only due to the undue delay in delivery and expiration of the RERA registration, which has not been extended till date. Further, the BWSSB water and GAIL gas connections have not been obtained, all lifts in the Apartment are not operational, car parking slots have not been provided, sufficient capacity DG sets are not provided.
 - (j) In the event this Tribunal comes to a conclusion that there exists more number of allottees than 68-71, they seek an opportunity to cure/rectify such defect in view of the Proviso in Section 7(5)(b) of Code.
- 6.** Further, the Respondent has filed sur-rejoinder dt.28.06.2022, Memo dt.09.11.2022 and written submissions dt.07.02.2023 by *inter alia* further contending as under:
- (a) It is reiterated that the instant CP is not maintainable as there are 246 Units/Allottees in the said Project. Hence, the threshold u/s 7 of the Code are not met. The CD has been issued various statutory approvals and has been following up with the Homebuyers to get their respective units registered. However, they have intentionally not executed the conveyance deed, owe a total sum in excess of Rs.2.3 Crores to the CD. Hence, they are Financial Debtors of the CD.

- (b) On the date of filing the instant CP, the relevant details of the Project of the CD are given below:

Sl. No.	Particulars	Number
1.	Number of units in the Real-Estate Project of Respondent-Developer in its entirety (as per BBMP Sanction Plan): - Main Tower Block - Small Building Block - Total Number of Units	246 26 272
2.	Number of Units for which Occupancy Certificate dated 14.01.2022 is issued by BBMP	246
3.	Number of Homebuyer-Allottees (in Tower Block):	
	- Allottees who have executed registered Sale Deeds and taken possession of flats	65
	- Homebuyers who have purchased flats from Canara Bank and have taken possession of the same	08
	- Flats allotted to Applicants in CP (IB) 34/BB/2022	08
	- Homebuyer-Allottees who have executed Agreements of Sale with Respondent (excluding the 8 Applicants herein)	11
	- Flats allotted to and in physical possession of Canara Bank	52
	- Flats allotted to customers who were in the process of executing Agreements of Sale	04
	- Total No. of Allottees:	148

- (c) The relevant dates related to the Agreements of the Applicant-Homebuyers are summarised hereunder:

Applicant No.	Flat No.	Agreement Date	Completion Date	Payment Demand Date	RERA Registration Validity Date
Applicant No.1	604	30.10.2015	25.12.2018	15.06.2019	30.09.2019
Applicant No.2	1103	28.08.2015	17.01.2018	15.06.2019	
Applicants No.3 & 3A	503	20.08.2015	14.06.2019	01.02.2020	
Applicants No.4 & 4A	2008	19.05.2017	11.01.2019	15.04.2019	
Applicants No.5 & 5A	703	18.12.2015	25.12.2018	06.03.2019	
Applicants No.6 & 6A	1903	16.09.2016	17.01.2019	05.04.2019	
Applicants No.7 & 7A	509	07.01.2016	25.12.2018	27.03.2019	
Applicants No.8 & 8A	1202	23.07.2015	08.01.2019	20.04.2019	

- (d) As per the above Table, the CD has completed the Project well before 30.09.2019, the expiry date of RERA Registration. Possession of the Units has not been handed over to the Applicants because of their refusal to pay the balance monies payable to the CD and execute the Sale Deeds. The Applicants have contravened *inter alia* provisions u/s

11, 17, 18 and sub-sections (6), (7), (8), (9), (10) and (11) of Section 19 of the RERA, 2016. Hence, as speculative investors in the said Flats, the Applicants cannot claim reliefs under the Code.

- (e) The Financial Creditors have failed to furnish any evidence of default along with their CP. In the instant case, there are 246 Units and 148 Allottees as on the date of filing of the Applicant herein, consequent to which a minimum number of 15 Applicants should file this Application jointly for initiating CIRP, but they are only 8 Applicants. Further, vide order dated 07.10.2022 in CP (IB) No.28/BB/2021, this Tribunal has dismissed as withdrawn, the CIRP against the Respondent here initiated by the Canara Bank. Hence, the allotment made to the Banks were not merely for the purpose of mortgage but for the purpose of sale and hence, should be counted for the purpose of threshold u/s 7 of Code.
- (f) As regards Limitation, it is stated that the RERA registration ended on 30.09.2019 which means that the Apartments were ready for occupation from that date and Sale Deeds were ready to be executed. The order passed by the Hon'ble Supreme Court in Suo-Motu WP(C) No.3/2020 does not apply to 'sending of notice' to initiate proceedings under the Code, which can be done through electronic mode and need not be done physically. On one hand they are claiming to have met with the threshold by taking the number of allottees as on 30.09.2019 and on the other hand they are stating by sending notice on 12.10.2021 they are well within limitation.
- (g) In the instant case, the total Applicants has admitted in the main CP that they owe the CD, monies of Rs.1,15,70,123/-. Upon completion of obligations under the Construction Agreements, the CD was in the position of a 'Creditor', since each of the Applicant owed an operational debt. In the instant case, the CD has issued letters to each of the

Applicants herein calling upon them to pay the balance amounts and get the properties registered in their names.

- (h) The CD has settled their liability under OTS of Rs.55 Crores with delayed period interest and the loan has been liquidated on 30.12.2022. Canara Bank has issued a Deed of Discharge on 19.01.2023, discharging the mortgage of the said Apartment, which shows that CD is solvent.
- (i) The Applicants herein have deliberately suppressed information on the letters received from the CD calling upon them to pay the balance amounts due. Pursuant to completion of the Project and the issuance of Completion Certificate, the Respondents has been executing sale deeds with and handing over possession of units to Allottees since the year 2019. Hence, the CD neither applied to RERA for the renewal nor extension for registration. Further, the RERA approval has neither lapsed nor been revoked u/s 8 of the RERA Act, 2016.
- (j) It is stated that if there are certain conditions issued while granting a Partial Occupation Certificate, they are of formal nature. Therefore, the ratio relied upon, by the Counsel of Allottees, is contrary to the submissions made therein. Further, the CD is ready to handover possession and execute Sale Deeds for the properties of the Applicants but the Applicants are proceeding with this CP without having any cause of action.
- (k) Further, in the instant case no provision in the Construction Agreement is inconsistent with any law and hence, the Parties should refer the case to arbitration, which make this CP not maintainable.
- (l) In support of the above, the Respondent had relied upon the following decisions:

i. Sushil Ansal v. Ashok Tripathi & Ors. (Comp. Appeal (AT) (Insolvency) No.452 of 2020;

- ii. *In Re: Cognizance For Extension of Limitation: Suo-Motu WP (C) No.3/2020;*
 - iii. *Dr. BVS Lakshmi v. Geometrix Laser Solutions (P) Ltd.; Company Appeal (AT) (Insolvency) No.38 of 2017;*
 - iv. *Pawan Dubey v. JBK Developers; CP (IB) No.385(ND)/2017;*
 - v. *Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416;*
 - vi. *Nidhi Rekhan v. Samyak Projects Private Limited, Company Appeal (AT) (Insolvency) No.1035 of 2020;*
 - vii. *Akash Jain & Shilpa Jain v. Raheja Developers, Company Appeal (AT) (Insolvency) No.864 of 2019*
 - viii. *Bangalore Housing Development and Investment v. BBMP ILR 2014 KAR 2863;*
 - ix. *Invent Asset Securitisation & Reconstruction Pvt. Ltd. v. Girnar Fibres Ltd., Civil Appeal No.3033 of 2022;*
 - x. *Ankit Goyat v. Sunita Agarwal & Anr., Company Appeal (AT) (Ins.) No.1020 of 2019;*
 - xi. *Binani Industries Ltd. v. Bank of Baroda & Anr., Company Appeal (AT) (Ins.) No.82 of 2018;*
 - xii. *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.*
7. Heard Shri Akshay J. Simha, Ld. Counsel for the Petitioner and Shri Kiran B.S., Ld. Counsel for the Respondent and perused the pleadings on record.
8. In the present case, as per the documents produced by all the 8 Petitioners, the Homebuyers are allottees in the Corporate Debtor's Project i.e., **Birla Apple Spire** on account of having entered into individual Agreement for Sale and Construction Agreement with respect to their allotted Units. The said Project accommodates a total number of 73 Units whereas the Petitioners in the instant C.P. are holding 8 Units and thus satisfied the threshold limit required u/s 7 of the Code. On the other hand, Respondent in its pleadings contended that there are a total of 148 Flats in the Project, as per the aforementioned table and *vide* Annexure-R18 has given a list of homebuyers along with Sale Deed Nos. and Date of Registration, Flat No. etc., which contains a total of 65 homebuyers as on filing date of CP i.e.

28.01.2022 and other 52 Flats allotted to and in physical possession of Canara Bank given *vide* Annexure-R17 to the sur-rejoinder. Therefore, the Respondent submits that there should be a minimum of 15 Allottees to file the instant Petition and as the same is not complied with, the Petition is not maintainable. However, we have noticed that the Respondent *vide* Annexure-R7 has addressed a letter dated 01.06.2019 to Syndicate Bank (now Canara Bank) wherein it is *inter alia* stated as under:

"1. We have vide our letter dated 14.03.2019 has sought time till the end of November, 2019 for clearing all the outstanding, as we were in the process of arranging funds.

2. Further, we made a payment of Rs.5,00,00,000/- (Rupees Five Crore) immediately as per our commitment vide our above letter.

*3. Now, the project is at the verge of completion. **We have so far sold around 68 Flats** and all the amount towards the booking of these flats have been remitted in to our ESCROW A/c and Current A/c maintained with you. The details of which can be verified in the statement of account available with you.*

4. Out of the 68 units, a good number of prospective purchasers who have already paid around 80% of their unit's sale consideration amount, have shown enthusiasm to get their respective units duly Registered by executing the Absolute Sale Deed. In the process, we will get the balance 20% amounting to Rs. 11,69,48,039/- (details enclosed) which will be deposited into our Escrow A/c. However, we require DISCHARGE LETTER from you in favour of the respective unit & purchaser to complete the Registration formalities.

....."

The details of the 30 Flats proposed to be handed over to Syndicate Bank (now Canara Bank) **as Security against outstanding dues** was enclosed to the said letter dated 01.06.2019.

9. Therefore, it has been correctly contended by the Petitioner that in this letter it has been categorically admitted by the Corporate Debtor that they had sold only 68 Flats till 01.06.2019. Moreover, there is a subsequent letter issued on 27.11.2019 related to improvement of offer in the OTS in which it was stated as under:

"...for your kind information, we could able to do only 4 bookings for the whole year 2018 and 3 bookings for 2019 as on today."

In a subsequent letter dated 01.06.2020 issued by the Corporate Debtor to the Canara Bank related to OTS offer, the following was mentioned:

"Now with the COVID Lockdown, the situation has worsened and we were not able to sell a single flat since the last 10 months."

- 10.** Further, it is already mentioned above that the 30 Flats which the CD is stated to have been completed and allotted to Syndicate Bank (now Canara Bank) have been merely offered as a Security to Syndicate Bank against the outstanding dues as per the enclosure to the letter dated 01.06.2019. Subsequently, in the letter dated 01.06.2020, it is also mentioned that out of the Flats given to Canara Bank as a Security, the Bank was able to sell 8 Flats for an amount of Rs.5 Crores approximately.
- 11.** Therefore, the contention of the Applicant is that a perusal of these correspondences establishes that there existed only 68-71 original homebuyers / allottees upto 01.06.2020. In view of the expiry of RERA Registration and non-extension of the same, the Corporate Debtor could not have legally marketed or sold more Flats and therefore any sale after 30.09.2019 was void and illegal. It has been rightly contended that the allotment of 30 Flats as a Security to the Loan from Syndicate Bank cannot be treated as allotment per se and the Bank is in the process of selling the Flats to independent Parties out of this Security. Therefore, the inclusion of the 60 apartments which have been mortgaged and handed over to Syndicate Bank out of 148 Flats against the Loan cannot be treated as allottees for the purpose of RERA / Section 7 of the IBC, 2016. Moreover, the contention that the Project was completed before 30.09.2019 is also not acceptable in view of the above referred letters dated 01.06.2019, 27.11.2019 and 01.06.2020; and the facts discussed above.

- 12.** As per Part-IV of Form-1 of the CP, the total amount claimed to be in default is Rs.15,43,59,238/-. It is seen that the Corporate Debtor was supposed to complete the Project in question in 2019. However, the same is not yet delivered to the Petitioners herein. Therefore, the debt and default is established as required under the Code.
- 13.** The details of homebuyers and their respective promised date of delivery of Flats as per respective Construction Agreement(s) is hereunder:

Sr. No.	Name of Petitioners	Flat No.	Date of Construction Agreement	Date of Delivery as per Construction Agreement (including grace period)
1.	Mr. Nagappaiya Maiya	604	30.10.2015	31.03.2017
2.	Mr. Kamalanand Subramani	1103	28.08.2015	31.03.2017
3.	Dr. Uma Harish Bilgi & Mr. Harish R. Bilgi	503	20.08.2015	31.03.2017
4.	Mrs. H.P. Shyla & Mr. Rohit N.	2008	19.05.2017	31.03.2018
5.	Dr. K.N. Ganesha & Mrs. K. Sumangala	703	18.12.2015	31.03.2017
6.	Mr. Vijayakumar CA & Mrs. Shantalakshmi	1903	16.09.2016	30.06.2017
7.	Mrs. Amitha Shashidhar Kudwa & Mr. Shashidhar Sitaram Kudwa	509	<i>As per Construction Agreement: 07.01.2016 As per Addendum to Sale & Construction Agreements: 24.02.2018</i>	31.03.2018
8.	Mr. S.T. Rajagopal & Mrs. Anupama Rajagopal	1202	23.07.2015	31.03.2017

- 14.** As regards the Limitation, the completion date of Flat including grace period in respect of Petitioner No.7 & 7A herein is 31.03.2018. The instant Petition has been filed on 28.01.2022. In this regard, the Petitioner has relied upon the decision of Hon'ble Supreme Court in *Re: Cognizance for Extension of Limitation (2022) 3 SCC 117*, wherein the Hon'ble Apex Court has extended the period of limitation from 15.03.2020 to 28.02.2022. Considering the above, the Petition is filed within the limitation period.

- 15.** It is seen that Certificate of Registration issued by the RERA Karnataka in respect of 'Apple Spire India' is valid from 31.07.2017 till 30.09.2019. The Respondent in its reply has filed Partial Occupancy Certificate dated 14.01.2022 issued by Bruhat Bangalore Mahanagara Palike (BBMP) to the CD, wherein, it is *inter alia* stated that this Partial Occupancy Certificate is issued subject to various conditions mentioned therein and on default of the above conditions the said Certificate will be withdrawn without any prior notice. The Petitioners relied upon the Judgment of Hon'ble High Court of Karnataka in *Bangalore Housing Development Authority and Investments vs. Bruhat Bangalore Mahanagara Palike (ILR 2014 KAR 2863)* wherein it is clearly laid down that a partial Occupancy Certificate imposing conditions is not permissible. Therefore, reliance on this point does not lead to the conclusion of completion of the Project in the time frame mentioned above.
- 16.** The Respondent in its reply has enclosed Partial Occupancy Certificate dated 14.01.2022, Architect Certificate dated 05.07.2020, Pollution Control Board Consent dated 18.09.2020, Karnataka Fire & Emergency Services Clearance Certificate dated 07.07.2021, which leads to the conclusion that the Project was not complete as on 30.09.2019. The Certificate issued by RERA Karnataka for the Project in question has already expired on 30.09.2019, and as stated by the Petitioner it is observed that the Corporate Debtor has failed to extend the same as the Corporate Debtor has not delivered the Flats, and the aforesaid Certificates are obtained by the Corporate Debtor post expiry of RERA Registration. As the registration of said Project expired on 30.09.2019, only allottees prior to 30.09.2019 can be considered for calculating 'total number of such allottees' provided in the 2nd proviso to Sec.7 of the Code.
- 17.** As regards the Respondent's contention that the Petitioners have not paid the balance amounts in order to handover the Flats, it is submitted by the Petitioners that they have stopped making payments only due to the undue

delay in delivery and expiration of the RERA registration, which has not been extended till date. The contention of the Respondent that since there was an Arbitration Clause in the Construction Agreement that the jurisdiction of this Tribunal is ousted is not a legally tenable argument.

- 18.** Vide order dated 02.06.2023, the Petitioners were given an opportunity to rectify the application since the proposed IRP was suspended by IBBI's order dated 19.05.2023. Further, on 21.06.2023, the Petitioners were directed to file revised Form No.1 within 7 days', since date of default was not mentioned in Part-IV in the original Form No.1. In compliance to order dated 21.06.2023, Ld. Counsel for the Petitioner has filed a Memo enclosing revised Form-1 vide Diary No.3448 dated 28.06.2023 wherein it is *inter alia* stated in Part-IV of Form-1 that the date of default for delivery of Apartments for Financial Creditors No.1, 2, 3, 3A, 5, 5A, 6, 6A, 8 and 8A is on 31.03.2017, for Financial Creditors No.4 and 4A is on 31.12.2017, for Financial Creditors No.7 and 7A is on 31.03.2018. Accordingly, as already discussed above in Para 14, the Petition is filed within the limitation period.
- 19.** In view of the foregoing, we are of the considered view that the instant Petition is liable to be admitted. We have carefully considered the arguments of the respective Counsels and their pleadings. In view of the facts and circumstances discussed above, the present Petition being complete and having established the default in payment of the financial debt and for the default amount being above Rs.1,00,00,000/- (Rupees One Crore Only), the **Petition** is **admitted** in respect of **Respondent-Apple Spire India LLP** under Section 7 of the IBC, 2016. Accordingly, moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

- i. 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;*
- ii. Transferring, encumbering, alienating or disposing off by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;*
- iii. 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;*
- iv. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.*

It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period.

The provisions of sub-section (1) shall however, not apply to such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority, and to a surety in a contract of guarantee to a Corporate Debtor.

The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority 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.

20. Pursuant to order dated 02.06.2023, Ld. Counsel for the Petitioners *vide* Dy.No.3001 dt.08.06.2023 has proposed Mr. Madhugiri Venkatarayappa

Sudarshan, a qualified insolvency professional having Regn. No. IBBI/IPA-002/IP-N00561/2017-2018/11707 as the Interim Resolution Professional (IRP) in respect of the Corporate Debtor; and Part-III of the Form No.1 is also rectified accordingly. Affidavit and Written Consent of the said IRP in Form-2 dated 06.06.2023 has been filed by the Petitioner, wherein, the IRP *inter alia* affirmed that he is eligible to be appointed as a RP in the case of the Corporate Debtor and that no disciplinary proceedings are pending against him with the Board or ICSI Institute of Insolvency Professionals.

- 21.** The Law Research Associate of this Adjudicating Authority has checked the credentials of Mr. M.V. Sudarshan, and found that there is nothing adverse against him. In view of the above, the Bench hereby appoints **Mr. M.V. Sudarshan**, bearing Reg.No.IBBI/IPA-002/IP-N00561/2017-2018/11707 residing at No.984/3, 8th Main, Geiringer II Phase, Bangalore – 560 085, having Mobile: 9620300691, Email: sudarshan.mv@outlook.com as the Interim Resolution Professional of the Corporate Debtor. The IRP is directed to take the steps as mandated under Sections 15, 17, 18, 20 and 21 of IBC, 2016. The IRP is also directed to file a copy of valid AFA within seven days from the date of receipt of this order.
- 22.** The Financial Creditors shall deposit a sum of **Rs.2,00,000/- (Rupees Two Lakhs 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.
- 23.** The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Adjudicating Authority on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee.

The Interim Resolution Professional is further directed to send regular progress reports to this Adjudicating Authority every fortnight.

24. A copy of the order shall be communicated to both the Parties. The Ld. Counsel for the Petitioners shall deliver a copy of this Order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this Order to the Interim Resolution Professional at his e-mail address forthwith.

25. IA No.193 of 2022 is filed by the Corporate Debtor under Rules 11 and 32 of NCLT Rules, 2016 r/w Rule 10 of I&B (Application to Adjudicating Authority) Rules, 2016 against the Petitioners / Homebuyers in the main CP seeking to dismiss the Company Petition. In view of the main Petition admitted, the instant IA becomes infructuous and accordingly, the same is hereby **dismissed**.

Sd/-
MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-
T. KRISHNAVALLI
MEMBER (JUDICIAL)

jsr