



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 1138/MB-IV/2020

Under **Section 7** of the I&B Code, 2016

In the matter of:

Mr. Avinash Totade & Ors.

...Financial Creditor/Petitioner

V/s

Sinew Developers Private Limited

[CIN: U45202PN1994PTC128486]

...Corporate Debtor/Respondent

Order Dated: 19.05.2023

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Prateek Sakseria a/w Mr. Amir Arsiwala , Mr. Amey Hadwale and Ms. Geeta Lundwani, Advocates.

For the Respondent(s) : Mr. Rohit Gupta, Advocate.

Per: Prabhat Kumar, Member Technical

1. The present Company Petition is filed by **Mr. Avinash Totade & Ors**, (hereinafter referred to as the "Financial Creditor") under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred to



as “CIRP”) in the case of **Sinew Developers Private Limited** (hereinafter referred to as the “Corporate Debtor”).

2. The details relating to the amount due by the Corporate Debtor to the Financial Creditor are as under:

i. The Applicant Company No 1.

Interest @ 10.4% p.a.+ other amount as per RERA order	Total Amount in default
Rs.78,89,157+ Rs.1,61,988 (excess amount paid to respondent + Rs. 25,000) (Legal Expenses)	Rs. 80,76,145/-

ii. The Applicant Company No 2.

Interest @ 10.4% p.a.+ other amount as per RERA order	Total Amount in default
Rs.38,46,265+ Rs.25,000 (Legal Expenses)	Rs. 38,71,265/-

iii. The Applicant Company No 3.

Interest @ 10.4% p.a.+ other amount as per RERA order	Total Amount in default
Rs. 21,67,623+ Rs.25,000 (Legal Expenses)	Rs. 21,92,623/-

iv. The Applicant Company No 4.

Interest @ 10.2% p.a.+ other amount as per RERA order	Total Amount in default
Rs. 23,88,286+ Rs.25,000 (Legal Expenses)	Rs. 24,13,286/-



v. The Applicant Company No 5.

Interest @ 10.4% p.a.+ other amount as per RERA order	Total Amount in default
Rs. 84,79,711+Rs.1,02,27,473.66 Rs.25,000 (Legal Expenses)	Rs. 1,87,32,184/-

vi. The Applicant Company No 6.

Interest @ 10.4% p.a.+ other amount as per RERA order	Total Amount in default
Rs. 11,76,040+ Rs.25,000 (Legal Expenses)	Rs. 12,01,040/-

vii. The Applicant Company No 7.

Interest @ 9% p.a.
Rs.53,16,168/-

viii. The Applicant Company No 8.

Interest @ 9% p.a.
Rs.77,62,264/-

Total Outstanding due amount: - 4,95,64,975/-

Case of the Financial Creditor:

3. The Financial Creditor and Corporate Debtor entered into an agreement for sale, as the “Purchaser” and the “Developer” respectively. The details of the same are as follows:

Sr. No	Name of the Applicant/Purchaser	Date of Agreement
1.	Mr. Avinash Totade	26.04.2013
2.	Mrs. Madhuri Ramesh Purandare	16.08.2010



3.	Mr. Suresh Fatate	15.04.2011
4.	Mrs. Savita Vidhate	23.03.2013
5.	Mrs. Shwethalana	08.03.2010
6.	Mr. Sunil K Tiwari	20.12.2012
7.	Mr. Satish Joshi	02.03.2013
8.	Mrs. Jyoti Satish Joshi	02.03.2013

- 3.1 Later on, in the year 2015, the Corporate Debtor sent a letter to the Financial Creditor stating that project “45 Nirvana Hills” is getting transferred from “Ms. Kumar Sinew Developers Private Limited” to “Sinew Developers Private Limited”
- 3.2 The Corporate Debtor as per the terms and conditions in agreement to sale failed to comply the promises in terms of handling possession. As aggrieved by the Corporate Debtor malafide practices and fraudulent conduct, the Applicants/Financial Creditors No 1 to 6 filed a complaint u/s 18 of the MAHA RERA (Regulations and Development Act) 2016.
- 3.3 After filing of compliant, the MAHA RERA pleased to pass the order in favor of the Applicants/Financial Creditors No 1 to 6, thereby directing the Corporate Debtor to pay the interest at prescribed rate of 10.2% and 10.4% respectively.
- 3.4 On the other hand, the Applicants/Financial Creditors No.7 and 8 submits that as per the agreement to sale dated 02.03.2013;

“Firstly, the Corporate Debtor was liable to hand over the possession on or before 5 years but failed to do so;

Secondly, as per the agreement the Applicants/Financial Creditors No.7 and 8 shall be entitled to receive the interest @9 %p.a. from the date it



received the same amount and till the date the amounts and interest thereon is refunded to the Applicants/Financial Creditors No.7 and 8.”

3.5 In the view of the aforesaid it is clearly evident that the Corporate Debtor is in clear default as it has failed to deliver the promises in terms of giving possession to the Financial Creditors and also had failed to repay the interest as directed By Maharashtra Real Estate Regulatory Authority.

Case of Corporate Debtor

4. The Corporate Debtor submits that petition has been filed on the basis of the alleged claim of the Petitioners at Rs. 3,64,86,543/- (Rupees Three Crore Sixty-Four Lakhs Eighty-Six Thousand Five Hundred Forty-Three only) sought by Petitioner Nos. 1 to 6 on the basis of orders passed by the Maharashtra Real Estate Regulatory Authority dated (i) 4th October 2019 in favor of Petitioner NO.6; (ii) 30th December 2019 in favor of Petitioner NO.1, 2 and 5; (iii) 3rd January 2020 in favor of Petitioner NO.3; and (iv) 15th January 2020 in favor of Petitioner NO.4 ("RERA Orders").

4.1 The Corporate Debtor submits that the present petition is liable to be dismissed on the following grounds:

4.1.1 The Petition is barred by the law of limitation. The reliefs claimed by the Petitioner Nos. 2 to 6 are severely barred by the law of limitation. The Respondent states that the Petitioners claims are not maintainable since more than 3 (three) years have gone by as to when the right to sue first accrued in favor of the Petitioners on account of the Agreements were executed by the Petitioner with KSDPL.



- 4.1.2 The Respondent submits that the revised date for completion of the project has been extended to 3rd December 2023 and the same has been duly recognized and accepted by the MAHA RERA in the said RERA Orders, therefore, since the Respondent has been permitted to hand over possession of the flats to the Petitioners by 3rd December 2023, the question of any default on the part of the Respondent cannot and does not arise.
- 4.1.3 The Petitioners have failed to meet the minimum threshold limit to file the captioned Petition, It is also stated that no order has been passed by RERA in case of Petitioner No. 7 & 8; the petitioner No. 4 is not Allottee in the subject matter project; and the Petitioner No. 5 sought the cancellation of his booking and consequential refund of the money and is no longer an Allottee, however, RERA decree dated 30.12.2019 in his favour states that till the compliance of the order, the charge of the aforesaid amount shall be on the booked flat. The Petitioners are not one hundred allottees nor they are ten percent of the total number of such allottees.
- 4.1.4 There is no financial debt or default, as on the date of the filing of the captioned Application. The Petitioners and particularly Petitioner Nos. 1-6 are not 'Financial Creditors' as their entire case is based on the defaults arising out of failure to pay amounts directed to be paid by the Maharashtra Real Estate Regulatory Authority. As regards Petitioner Nos 1-4 and 6-7 a perusal of the RERA Orders reveal that there is no financial debt to be repaid to the Petitioners, since in fact certain payments were due and were to be made by the Petitioners towards that consideration, maintenance, service tax. In certain cases, such as Petitioner No



6, the RERA has directed the Petitioner No. 6 to pay Rs. 4,19,464/- towards consideration and Rs. 65,239/- towards service tax to KSDPL with prescribed interest from the day it became due until its payment.

- 4.1.5 The Hon'ble Tribunal has no jurisdiction to execute RERA orders. The Petitioner Nos. 1 to 6 by approaching this Hon'ble Tribunal for recovery of the alleged claim, MAHARAS (awarded under the RERA Orders), has sought to convert this Hon'ble Tribunal into an executing court of RERA Orders. The Petitioner Nos. 1 to 6 have withheld from this Hon'ble Tribunal that they have already initiated execution proceedings of the RERA Orders before the Maharashtra Real Estate Regulatory Authority itself. It is submitted that IBC is not meant to be utilized as a tool for recovery, that too of amounts which are not due or payable.
- 4.1.6 No privity of contract between the Financial Creditors and the Corporate Debtor.
- 4.1.7 The Application is barred under the principles of section 10 of Civil Procedure Code, 1908 ("CPC"), as the Petitioner Nos. 1 to 6 have already initiated the execution proceedings of RERA Orders before Maharashtra Real Estate Regulatory Authority, and the Respondents therein have also filed the Review Application before the Appellate Tribunal. An effective remedy has thus already been availed by been Petitioner Nos 1 to 6.
- 4.1.8 The Respondent has been paying its debts. The Respondent is a solvent company which is undertaking the development of the said real estate projects of Tower C-1 and Tower C-2. The Respondent has been duly and regularly paying salaries, taxes, bills and all other liabilities accrued in the normal course of



business. Barring the Petitioners, no other allottee has filed any proceedings before this Hon'ble Tribunal.

4.1.9 The Petitioners are speculative investors. The Petitioners did not even come forward to pay the consideration towards their Flats, the stamp duty and registration charges, GST charges and maintenance charges etc thereon, despite having been ordered by the Maharashtra Real Estate Regulatory Authority under the RERA Orders and having been called upon and reminded by the Respondent for the same. Therefore, there is no delay in the construction and developing the said Projects and the Respondent is bound by the completion date.

4.1.10 The Petitioners have played fraud upon this Hon'ble Tribunal as well as on the Hon 'ble RERA Tribunal. The Petitioner Nos. 1 to 6 have relied upon the RERA Orders to recover the alleged claims, without disclosing the material fact that the Petitioner Nos. 1 to 6 have already applied for execution of RERA Orders and the same have been pending before the Maharashtra Real Estate Regulatory Authority.

Rejoinder dated 21.12.2021 by Applicant

5. The petitioner states that the present petition is well within the limitation While assailing upon the present petition on the ground of limitation, the Respondent failed to appreciate that present Petition is filed in the month of June 2020 on the basis on the Final orders passed by Maharashtra Real Estate Regulatory Authority ("RERA") which are dated 04.10.2019, 30.12.2019, 03.01.2020 and 15.01.2020 (hereinafter referred to as "Final orders"). Hence it is beyond any pale of doubt that the present petition is within the period of limitation as prescribed under limitation act.



- 5.1 Revised date of completion of project on RERA portal is immaterial for ascertaining the date of default. This very argument is categorically rejected by the Hon'ble RERA in Para (5) of its Final order. The ERNMEN Applicant crave leave to relay on the same at the time of arguments. Moreover, the Hon'ble Supreme Court in the matter of *M/S Imperia Structures Limited vs Anil Patni wherein it is categorically observed that, "it is the date as mentioned in the Builder- Buyer Agreement which is relevant for purposes of computing default under section 18 of the RERA Act"*. Hence there is no force in Respondents contention and deserves to be rejected.
- 5.2 The Petitioners has compiled the minimum threshold limit as prescribed under amended section 7(1) of IBC. The present Petition has been jointly filed by 8 (Eight) allottees of the project in the capacity of being Financial creditors. A bare perusal of the information furnished by the respondent on the webpage of MAHARERA portal, it can be clearly seen that 48 number of flats are booked in "45 Nirvana Hills C2 Wing". Hence the respondents are sufficiently more the ten per cent of the total number of such allottees under the same real estate project as required under the law.
- 5.3 The Petitioners have lawfully complied with the monetary threshold limit of 1 crore as provided under section 4 of IBC. The Code itself entitles the Financial Creditors to jointly file Petition under section 7 of the Code.
- 5.4 The Petitioners fall within the definition of 'Financial Creditor' by virtue of being allottees and along on basis of RERA orders. The Petitioners being the allottees have jointly preferred the present petition the capacity of a Financial Creditors as defined under section 5 of the Code which states that "*Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder.*" Even other wise of being an allottee, the Petitioners reiterates that owing to the Order passed by the RERA Authority, the



Petitioners have stepped into the shoes of Financial Creditors for the claims as fructified in the Final order RERA.

5.5 The Petitioners have not initiated execution proceedings before MAHARERA. The Respondent is clearly misrepresenting facts before this Hon'ble Tribunal and the same shall be dealt strongly.

5.6 The Respondent has filed an Additional Affidavit on 20.04.2022 in compliance with the directions of this Hon'ble Tribunal in the order dated 24.12.2021 to provide the details of the investors/ allottee in Tower C-1 and C-2 as on date of filing the present petition i.e. 24.06.2020. Further, both the parties have also filed a clarification sought by order dated 24.03.2023 by this Bench on the issues i.e. i) nature of interest under Section 18 of Real Estate (Regulation and Development) Act, 2016 is compensatory or penal; ii) when does the amount under RERA orders fall due for the payment by Respondent; iii) the effect of RERA order dated 30.12.2019 on the booking made by Petitioner No. 5.

Findings:

6. We have heard the Counsels and perused submissions available on the records.

6.1 This Bench finds that RERA has extended time for completion of the real estate project to 03.12.2023. On occurrence of default in the initial completion date, stipulated in the agreement for sale executed with the flat allottees, the Petitioner No. 1-6 approached RERA with a complaint u/s 18 of RERA Act for claiming interest on their investments for delayed possession of their booked flats. The RERA, in the case of Petitioner 1, Petitioner 2 vide its order dated 30.12.2019, in the case of Petitioner No. 3 vide order dated 03.01.2020, in the case of Petitioner No. 4 vide order dated 15.01.2020, in the case of Petitioner No. 5 vide order dated 30.12.2020, and in the case of Petitioner No. 6



vide order dated 04.10.2019 directed the Corporate Debtor to pay interest @10.4% from the date of agreed date of possession till getting possession. The RERA further granted a liberty to the parties to adjust their respective claims and pay the balance to whom it is due.

6.2 It is an undisputed fact that no order has been passed by RERA in case of Petitioner No. 7 & 8; the petitioner No. 4 is not Allottee in the subject matter project; and the Petitioner No. 5 sought the cancellation of his booking and consequential refund of the money and is no longer an Allottee, however, RERA decree dated 30.12.2019 in his favour states that till the compliance of the order, the charge of the aforesaid amount shall be on the booked flat. Accordingly, there are 4 Allottees and 1 ex-allottee related to the subject matter project, in whose case RERA has passed the order directing the Respondent to pay the interest. The Financial Creditor has claimed that there are 48 allottees, accordingly, there must be a minimum of 5 homebuyers to satisfy the minimum threshold of 10%. In view of this, a question arises whether an ex allottee can be said to be an allottee after having cancelled. In this regard, this Bench finds that the RERA decree dated 30.12.2019 holds that “ *Till the compliance of the order, the charge of the aforesaid amount shall be on the booked flat.*” The said direction has the effect of holding Petitioner No. 5 as Allottee because the flat allotted to her cannot be sold to another customer unless her debt is paid. Accordingly, this Bench feels that this Application is maintainable on the ground of threshold.

6.3 This Bench finds that the Ld. RERA Authority granted a liberty to the parties to adjust their respective claims and pay the balance to whom it is due in case of order passed in Petitioner No. 1, 2, 3 and 6. Further, the claim of Petitioner No. 7 & 8 is not adjudicated and merely based on the provisions of Sec. 18 of the RERA Act. It is undisputed fact that



the Corporate Debtor is constructing flats, and it is not the case of the Petitioners that such flats are not likely to be handed over by the extended date of completion i.e. 03.12.2023, and the Allottees, including the Petitioner 1, 2, 3, 6,7 and 8 have to pay the remaining cost of the flats in accordance with the agreed payment plan. This Bench feels that no prejudice is caused to these Petitioners if their decreed claim or claim of interest u/s. 18 of the RERA Act, if due, is settled against such amount receivable from them by the Corporate Debtor. For this reason, the default claimed in the petition occurs to be a recovery tool than an attempt to resolve the Corporate Debtor. The Hon'ble Supreme Court in the case of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors (2019) ibclaw.in 03 SC* held that *It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.*

- 6.4 In view of this, this Bench is of the considered view that the present Application is not maintainable as being against the intent and purport of the Code. Hence, this Application filed u/s Section 7 of the Code is Dismissed.

ORDER

The petition bearing CP No 1138/2020 filed by **Mr. Avinash Totade & Ors**, (hereinafter referred to as the "Financial Creditor") under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process (hereinafter



referred to as “CIRP”) against **Sinew Developers Private Limited** (hereinafter referred to as the “Corporate Debtor”) is **DISMISSED**.

We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA-Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)