

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Petition No. (IB)- 1591/(PB)/2018

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

IN THE MATTER OF:

MANJINDER SINGH SANDHU

...Applicant/Financial Creditor

VERSUS

M/s GOLDEN PEACOCK RESIDENCE PRIVATE LIMITED

...Respondent/Corporate Debtor

Pronounced on: 06.11.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

DR. DEEPTI MUKESH

HON'BLE MEMBER (JUDICIAL)

For the Applicant: Mr. Vipul Srivastav, Mr. Rajendra Vats, Advs.

Mr. Siddharth Masson, Adv.

For the Respondent: Mr. Anand Chibber, Sr. Adv. with Mr.

Vaibhav Sahni, Mr. Shikhar Sarin, Advs.

MEMO OF PARTIES

Sh. MANJINDER SINGH SANDHU

Having his residence address at:

D-1602, Tower D, La Lagune,

Golf Course Road, Sector-54,

Gurugram -122001

...Applicant/Financial Creditor

VERSUS

M/s GOLDEN PEACOCK RESIDENCE PRIVATE LIMITED

Having its registered office at:

502, Building D-mall,

Netaji Subhash Place, Pitampura,

New Delhi- 110034

...Respondent/Corporate Debtor

JUDGMENT

DR. DEEPTI MUKESH, MEMBER (J)

1. Present Application is filed by a home buyer Sh. Manjinder Singh Sandhu R/o D- 1602, Tower D, La Lagune, Golf course Road, Sector- 54, Gurugram- 122001 as a financial creditor (for brevity 'applicant') under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules')

with a prayer for initiation of Corporate Insolvency Resolution Process of M/s Golden Peacock Residence Private Limited (for brevity 'the Corporate Debtor').

2. The Corporate Debtor namely, M/s Golden Peacock Residence Private Limited (CIN U70109DL2012PTC230637) was incorporated on 22.11.2011 under the provisions of the Companies Act, 1956. The registered office of the corporate debtor is situated at Unit No. 502, Building D- Mall, Netaji Subhash Place, Pitampura, New Delhi- 110034. Its authorized share capital is Rs.10,00,00,000/-and the paid-up share capital is Rs. 10,00,00,000/- as per the master data reflected on official website of Registrar of Companies. Since the registered office of the Corporate Debtor is situated in New Delhi, this Tribunal has territorial jurisdiction to entertain and try this application as per the provisions of sub-section (1) of Section 60 of the Code.

3. It is the case of the Applicant that Corporate Debtor launched its residential project by the name of 'Micheal Schumacher World Tower'. The Applicant placed booking for a flat in the

said Project on 16.08.2012 and was allotted a Unit bearing no- 1801, located on 18th floor (admeasuring 4127 sq.ft.) on payment of booking amount of Rs. 30,00,000/- (Rupees Thirty Lakhs only) that was paid by cheques bearing no. 009042 for Rs. 5,00,000/- and another cheque bearing no. 507039 for Rs. 25,00,000/- both drawn on HDFC bank, which is duly acknowledged vide receipt dated 23.08.2012, by the Corporate Debtor.

4. It is further stated by the applicant that the Corporate Debtor sent a Demand Letter dated 03.10.2012 demanding further sum of Rs. 37,50,000/-, which was also paid by applicant vide cheque bearing no. 507048 dated 22.10.2012. The said payment of Rs. 37,50,000/- is also duly acknowledged by the Corporate Debtor by issuing a receipt dated 23.10.2012.
5. Subsequently, the Corporate Debtor issued an Allotment letter dated 26.11.2012 for a unit bearing no- 1801, located on 18th floor in the residential project 'Micheal Schumacher World Tower' in the name of the applicant. The said Allotment letter and payment receipts are annexed with the present

application. On 26.02.2013, Flat buyer's Agreement was duly executed between the Applicant and the Corporate Debtor.

6. The Applicant further states that payments were made as and when demands were raised by the Corporate Debtor, the details of which are as follows: -

Date of Payment	Amount Paid	Mode of Payment	Receipt issued by CD
16.08.2012	Rs.25,00,000/-	Cheque no. 507039	Bearing no. 000052 dated 23.08.2012
16.08.2012	Rs. 5,00,000/-	Cheque no. 009042	Bearing no.000053 dated 23.08.2012
23.10.2012	Rs. 37,50,000/-	Cheque no. 507048	Bearing no. 000101 dated 23.10.2012
30.09.2013	Rs. 7,895/-	Cash	Not issued
30.09.2013	Rs. 61,93,129/-	Cash	Bearing no. 1800000010 dated 11.10.2013
30.09.2013	Rs. 5,00,000/- (Towards insurance)	Cash	Not issued as the amount was paid to M/s Bharti Axa Insurance of the property.
31.05.2014	Rs. 55,14,529/-	Cash	Bearing no. 1800000005 dated 02.06.2014

27.06.2014	Rs. 8,00,000/-	Cheque no. 000081	Bearing no. 1800000015 dated 27.06.2014
27.06.2014	Rs. 3,00,000/-	Cheque no. 009052	Bearing no. 1800000016 dated 27.06.2014
01.07.2014	Rs. 39,383/-	Cheque no.009054	Bearing no. 1800000017 dated 01.07.2014
17.10.2014	Rs. 46,75,953/-	Cheque no.085434	Bearing no. 1800000030 dated 21.10.2014
11.03.2015	Rs.32,43,933/-	Cheque no. 285224	Reflected in the statement of Corporate debtor
11.03.2015	Rs. 13,42,021/-	Cheque no. 000089	Reflected in the statement of Corporate debtor
GRAND TOTAL	Rs. 2,93,66,813/-		

7. It is further stated that the Corporate Debtor issued NOC in favour of PNB Housing Finance Limited, to enable the Applicant to avail Housing loan and in pursuance of the same a Tripartite Agreement dated 03.10.2013 was executed between the Applicant, PNB Housing Finance Limited and the Corporate Debtor.

8. It is further submitted by the Applicant that even after receiving all payments as demanded, the Corporate Debtor has miserably failed to honour the terms and conditions as stipulated under the Flat Buyer's Agreement dated 26.02.2013 and has failed to deliver the possession of the flat to the Applicant till date despite receiving the consideration amount of Rs. 2,93,66,813/- (Rupees Two Crores Ninety- Three Lakhs Sixty- Six Thousand Eight Hundred and Thirteen only).

9. As per the said Flat Buyer's Agreement, the Corporate Debtor was to hand over the possession of the said unit to the applicants within 36 months of booking date i.e. on or before 25.02.2016 with further grace period of six months i.e. latest by 26.07.2016 which has also expired. The relevant clauses of the above-mentioned agreement are reproduced as follows:

"12. Time of handing over the possession:

The company shall offer possession of the Unit within 36 months from the date of execution of this agreement. In case of any delay in such approvals from the Competent Authority

beyond the above expected period, the Allottee (s) hereby agrees for proportionate extension in the said period. The Allottee (s) agrees and understands that the Company shall be entitled to a grace period of 6 (six) months.”

10. The Applicant further states that the date of handing over the possession has already lapsed in July 2016 and there is an inordinate delay in delivering the possession of the said unit for about more than 3 years. Further as per Clause 14, if the handing over of possession of the allotted unit is after the expiry of the grace period, the Corporate Debtor was also liable to compensate the Applicant as per the terms described therein. Thus, the Applicant in present scenario is entitled to refund of an amount of Rs. 2,93,66,813/- along with an amount of Rs. 27,23,820/-. The applicant is further entitled to an amount of Rs. 1,23,810 for delay of each month on and from November 2018 till payment. Clause 14 of the Flat Buyer's Agreement is reproduced below:

“ (a) In case within a time period along with grace period of six months as stated in Clause 12(a), the company is not able to offer possession to the Allottee (s), the Allottee(s) shall be

entitled to payment of compensation at the following rates per square feet of the Unit per month for the period of delay, provided the allottee(s) has complied with all the terms and conditions of this agreement.

- (i) Rs. 10/- (Rupees Ten Only) per square feet of the Unit per month for the first six (6) months of delay.
- (ii) Rs. 20/- (Rupees Twenty Only) per square feet of the Unit per month for the next six (6) months of delay.
- (iii) Rs. 30/- (Rupees Thirty Only) per square feet of the Unit per month for any delay thereafter.

11. In Part-IV of the present application, the Applicant has given the details of the total amount of the debt and the transactions on account of which the debt fell due.

PARTICULARS OF OPERATIONAL DEBT	
1. TOTAL AMOUNT OF DEBT GRANTED	An amount of Rs. 3,20,90,633/- (Rupees Three Crores Twenty Lakhs Ninety Thousand Six Hundred and Thirty-Three only).
2. AMOUNT CLAIMED	Rs. 3,20,90,633/- (Rupees Three Crores Twenty Lakhs Ninety Thousand

TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURED	Six Hundred and Thirty- Three only) and a further amount of Rs. 1,23,810/- per month. Date of default is 26.07.2016 i.e. the date by which the possession of the Unit allotted as per the Allotment Letter was to be handed over in terms of the Flat Buyer's Agreement.
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12. The Corporate Debtor has opposed the admission of the application and has advanced the following arguments: -

- (i) As per the Flat Buyer Agreement dated 26.02.2013, the Corporate Debtor was entitled to reasonable extension of time if the delay caused was due to force majeure factors. Clause 28 of the said agreement which talks about 'Force Majeure factors' is reproduced below:

"The Company shall not be liable or responsible for damages or in any manner whatsoever to the Allottee(s) for failure or delay to perform or fulfil any provisions of this Agreement when such failure or delay is due to

reasons beyond the power and control of the Company which, inter alia, includes unforeseen circumstances by reason of fire, war, civil commotions, acts of God, acts of Government, terrorism, natural calamities, acts of public authorities, strike, lockout, non-availability of cement, steel or other construction material due to strikes of manufacturers, suppliers, transporters or obligation in any of the approvals from any Authority, including delay in issuance of any certificate/authorizations/ approvals, occupation certificate, completion certificate and/or any other certificate as may be required or for any other actions or causes whatsoever, similar or dissimilar, which can not reasonably be forecast or provided against, and which cannot be overcome by due diligence which shall be informed to the Allottee (s) within thirty days of its occurrence. In such event the time for performance shall be extended for the period of the continuance of such inability. In the event any of such cause or causes shall continue for a period of 180 days, the parties hereto




shall mutually discuss the matter and decide one or the other course of action to be taken.”

- (ii) That the Corporate Debtor appointed a contractor namely M/s Shapoorji Pallonji & Company Private Limited on 26.06.2013 for development works and due to disputes and differences with said contractor, the construction of the project was stalled. The Arbitration between the said contractor and the Corporate Debtor is pending which is the major cause of delay in completion of the said project.
- (iii) Further an application before RERA Haryana for regularisation filed by the Corporate Debtor is also pending consideration.
- (iv) It is further submitted that Applicant has only deposited an amount of Rs.95,31,404/- out of a total consideration of the sale amount of Rs. 4,75,06,844/-, where the Applicant has taken approx. 63% loan of the total sale consideration from the PNB Housing Finance Limited. Further as per Clause 5 of the Tripartite Agreement dated 03.10.2013, if the Applicant/ borrower fails to pay or cancel the booking

or seeks refund, then in that event, PNB Housing Finance Limited will step into the shoes of borrower and PNB Housing shall be entitled to the refund. The applicant has never cancelled the agreement nor has ever demanded compensation as envisaged in Clause 14 of the agreement dated 26.02.2013. Hence applicant cannot demand refund in such circumstances.

13. The applicant in rejoinder, reiterated the submissions made in the application and controverted the assertions of the Corporate Debtor. It is submitted that the present proceedings are not per se for any refund. The Corporate Debtor has miserably failed to complete the project on time. There is an inordinate delay, leading to a default on the part of Corporate Debtor and thus debt is due from the Corporate Debtor.

 14. Before embarking upon the legal issues, we deem it appropriate to first refer to the material clauses of the allotment agreement. According to clause 12 of the

agreement, the Corporate Debtor undertook to hand over the possession of the said unit to the applicants within 36 months of booking date with a grace period of six months, subject to Force Majeure factors. Hence, as per the terms of agreement, the period for delivery of possession of the said unit came to an end in the July, 2016. A reasonable period of delay of six months to one year even if it is to be considered, Corporate Debtor has not established a single reason of Force Majeure to explain delay. However, the facts in the present case shows that the project is not complete till date. There is an inordinate delay of more than 3 years in delivering the possession and the Financial Creditor- allottee cannot be put to receiving end for the failure of Corporate Debtor by strict construction that the contract is not determined. In fact, there is a fundamental breach of the terms of the contract by not delivering the possession within the reasonable period. Therefore, we are of the view that by no terms or clauses of the Builder buyer's agreement the obligation to deliver possession of the unit within reasonable period could be excluded and the argument advanced on behalf of the Corporate Debtor is hereby rejected. The

possession should have been offered by February, 2016 or maximum by July 2016, failing which, the principal amount along with compensation agreed and penalty for delay per month, has to be refunded by Corporate Debtor to the applicant. The obligation assumed under the Allotment Agreement required that the construction was to be completed by 25.02.2016. There was grace period of six months which would bring it to August, 2016. By adopting reasonable interpretation of the Allotment Agreement, we find that the non-completion of the project even today is wholly unreasonable. The argument is absolutely illogical and the application cannot be thrown out on the ground that time was not essence of the contract.

15. Even if the defence of Corporate Debtor is considered that in case of default, as per terms of Tripartite Agreement, the PNB Housing Finance Limited will step into the shoes of borrower but as admitted by Corporate Debtor that Applicant has paid only Rs.95,31,904/- which is much beyond the requirement Rs. 1 Lakh to trigger the CIRP of a defaulting company, thus that argument also fails.

16. Applicant being financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the Corporate debtor in case of default in repayment of financial debt.

17. In the lead case titled as **Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil)No. 43 of 2019)** the judgment has now been pronounced on 09.08.2019. We have gone through the judgment and find that the directions issued by the Hon'ble Supreme Court do not in any manner advance the case of the Corporate Debtor and the application deserves to be admitted. The possession in this case is not even offered much beyond the agreed timeline i.e. three years have elapsed from the timeline as per the agreement.

18. It is true that the proceedings under the Code are not in the nature of recovery. In the present application the Financial Creditor is seeking initiation of Corporate Insolvency Resolution Process by making prayer that all the Financial Creditors, Operational Creditors and other Stakeholders

may raise their claims and if Corporate Financial Restructuring is possible then within the stipulated period it may be explored failing which the due process of law is to take its course. Therefore, by initiation of Corporate Insolvency Resolution Process the Financial Creditor is only highlighting the default committed by the Corporate Debtor with respect to its inability to pay. The same is required to be remedied. Therefore, it cannot be concluded that the filing of the present application would amount to recovery of the debts by the Financial Creditor.

19. As a sequel to the aforesaid discussion and the material placed on record it is confirmed that applicant-financial creditor had disbursed the money to the Corporate Debtor as consideration for purchase of a residential unit. Though a considerable long period has lapsed and the said possession of unit is not handed over, it is accordingly held that Corporate Debtor has committed default. The outstanding financial debt exceeds the statutory limit of rupees one Lakh, thus, the application warrant admission as it is

complete in all respects. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

20. The Financial Creditor has proposed the name of Resolution Professional, Mr. Jitesh Gupta, email id- Jitesh@jkgupta.com and registration No. IBBI/IPA-002/IP-N00144/2017-18/10380, is appointed as an Interim Resolution Professional.

A written communication of Insolvency Resolution Professional in Form 2 is annexed.

21. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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22. As a consequence of the application being admitted in terms of Section 7 of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the Respondent prohibiting proviso (a) to (d) of the Code. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come in vogue. Thereby, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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23. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *inter alia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code.

24. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Manish Kumar Gupta to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

25. Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in their knowledge within a period of one week

from the admission of the petition to the IRP, otherwise coercive steps to follow.

26. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than seven days from today. The applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-

(M.M.KUMAR)
PRESIDENT

6.11.2019

Sd/-

(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)