

IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI
COURT-VI

C.P. NO. IB-1869(ND)/2019

IN THE MATTER OF:

Sh. Charu Chandra Nirmal

.....Financial Creditor/Petitioner

v.

M/S SVS Buildcon Private Limited

.....Corporate Debtor/Respondent

SECTION: Under Section 7 of the Insolvency and Bankruptcy Code, 2016

Judgment delivered on: 17.12.2019

Coram:

Dr.P.S.N PRASAD, HON'BLE MEMBER (J)

DR. V.K. SUBBURAJ, HON'BLE MEMBER (T)

PRESENT: Mr. Mohit Nandwani, Mr.S. Lal and Ms. Kritika, Advocates for Financial Creditor.

Mr. Anurag Tandon and Mr. Saumay Kapoor, Advocates for Corporate-debtore.

ORDER

Dr. P.S.N PRASAD, HON'BLE MEMBER (Judicial)

1. Sh. Charu Chandra Nirmal claiming as the financial creditor, has filed the instant application 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 to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/S SVS Buildcon Private Limited referred to as the corporate debtor



2. The Respondent Company M/S SVS Buildcon Private Limited (CIN No.U45400DL2007PTC171369) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 12.12.2007 having its registered office at 56-58, Community Centre, East of Kailash, New Delhi. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. The applicant has proposed the name of Mr.Rakesh Kumar Jain, for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P01297/2018-19/12068 resident of 1670/120, Shanti Nagar, Tri Nagar, New Delhi., with email – id rakeshjainca@rediffmail.com .Mr. Mr.Rakesh Kumar Jain has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere.

4. The case of the Financial Creditor is as under:



- 4.1 The Financial Creditor ("FC") was allotted a unit with Unit No. 0503 having an area of 1048.50 Sq. Ft. situated on the 5th Floor in Tower E-12 of 'UNIHOMES' at Kolar Road, Village Bairagarh Chichli, Bhopal, Madhya Pradesh ("Said Project") by the Corporate-Debtor ("CD") vide Allotment Letter dated 04.01.2016 and Apartment Buyer's Agreement dated 09.06.2016. Possession was to be delivered on or before 04.01.2018, i.e. within 24 months from the Allotment. The project is nowhere near possession and the Occupation Certificate has also not been obtained.
- 4.2 The Financial-Creditor was employed as 'law officer' in M/s MNT Infratech Pvt. Ltd. since 27.8.2007 to 21.12.2015. The Financial Creditor had resigned from the employment on 21.12.2015, after serving a notice for the agreed period. At the time of his resignation, the Company M/s MNT Infratech Pvt. Ltd. had to pay to the Financial Creditor a total amount of Rs. 20,15,160/- (Rs. Twenty Lacs Fifteen Thousand and One Hundred Sixty Only) towards pending salaries, leave encashment, gratuity and other allowances.
- 4.3 The Company M/s. MNT Infratech Pvt. Ltd. (GROUP COMPANY OF CORPORATE DEBTOR) had instead of paying full & Final settlement amount to the Financial Creditor, offered a two-bedroom



Apartment in the housing project developed by one of its Group Company namely M/s SVS Buildcon Pvt. Ltd. (Corporate-debtor).

4.4 A tripartite settlement agreement was entered amongst the Financial-creditor, the Corporate-debtor & the Company M/s MNT Infratech Pvt. Ltd. wherein the Corporate-debtor has acknowledged/owned the liability for pending dues to Financial Creditor, and agreed to allot an Apartment at a total sales consideration of Rs. 16,03,691/- (Rs. Sixteen Lacs Three Thousand and Six Hundred Ninety-One only). The Corporate Debtor adjusted the liability of pending salary dues to the extent of Rs. 15,53,691/- (Rs. Fifteen Lacs Fifty-Three Thousand and Six Hundred Ninety-One only) against the sales consideration of the allotted Apartment. The balance amount of Rs. 50,000/- (Rs. Fifty Thousand only) was payable by the Financial Creditor at the time of offer of the possession issued by the Corporate Debtor. The settlement agreement dated 04.01.2016 was duly signed by Financial Creditor, Corporate Debtor & its group company M/s MNT Infratech Pvt. Ltd, and the same was also notarized by the Notary Mr. Ajay Seth, Notary License No: 10659 and was entered into Notary Register at Serial No: 389 dated 04.01.2016. The Corporate Debtor had also issued an allotment letter dated 04.01.2016 to the Financial Creditor after the booking of the said Apartment bearing No. 0503 having area of 1048.50 Sq. Ft. situated on the 5th Floor in Tower E-12 of



'UNIHOMES' at Kolar Road, Villalge Bairagarh Chichli, Bhopal, Madhya Pradesh.

- 4.5 Apartment Buyer's Agreement dated 09.06.2016 was executed amongst the Corporate Debtor, the Financial Creditor and Khaneja Properties Pvt. Ltd. (owner of the land on which the project UNIHOMES was being developed by the Corporate Debtor and which eventually signed as Confirming Party) allotting/booking a two-bedroom apartment bearing No. 0503 having area of 1048.50 Sq. Ft. (Approx. 97.44 Sq. Mt.) situated on the 5th Floor in Tower E-12 of 'UNIHOMES' at Kolar Road, Village Bairagarh Chichli, Bhopal Madhya Pradesh to the Financial Creditor.
- 4.6 As per the payment schedule mentioned in the Annexure-A of the Apartment Buyer's Agreement, an amount of Rs. 15,53,691/- (Rs. Fifteen Lacs Fifty-Three Thousand and Six Hundred Ninety-One Only) was payable at the time of Booking and remaining Rs. 50,000/- (Rs. Fifty Thousand Only) was payable on the notice of possession. The booking amount of Rs. 15,53,691 (Rs. Fifteen Lacs Fifty-Three Thousand and Six Hundred Ninety-One only) was adjusted by the Corporate Debtor as per terms of tripartite settlement agreement signed on 04.01.2016 amongst the Financial Creditor, the Corporate Debtor and its group Company M/s MNT Infratech Pvt. Ltd.



- 4.7 As per Clause 4.5 of the Apartment Buyer's agreement, the Corporate Debtor was to handover the possession of the Apartment within 24 months from the date of allotment of Apartment.
- 4.8 Accordingly, the possession of the Apartment to the Financial Creditor was to be offered/given on or before 03.01.2018, but no offer of possession of the apartment has been given to the Financial Creditor till date.
- 4.9 Personal visits and follow-ups were made by the Financial Creditor with the Corporate Debtor on the progress and possession of the apartment and every time only verbal assurances were given by the Corporate Debtor to hand over the flat on time.
- 4.10 The possession of Apartment was due as per Apartment Buyer's agreement, but neither offer for possession was issued by the Corporate Debtor nor was the actual possession given.
- 4.11 Financial Creditor followed-up for possession of the apartment with Corporate- Debtor, and every time only vague excuses for delay were given.
- 4.12 The Financial Creditor also approached the Company MNT Infratech Pvt. Ltd. to honour the terms of the settlement agreement dated 04.01.2016, and in response received a vague and ambiguous reply dated 17.04.2019 mentioning that possession of the apartment will be given within next 06 to 07 months by the Corporate Debtor.

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4.13 On 31.05.2019, Financial Creditor sent an email to Corporate Debtor to hand over the possession within 7 days, but no response was received from the Corporate Debtor.

4.14 Financial Creditor sent an email to Corporate Debtor in pursuance of the Clause 4.7 of the Apartment Buyer's agreement and demanded the refund of entire consideration paid/adjusted along with interest @ 10% per annum. However, no action has been taken by the Corporate Debtor.

5. The applicant has filed the present application under Section 7 of the Code in the requisite FORM-1 to initiate Corporate Insolvency Resolution Process against the respondent Corporate Debtor under the Code. As per part IV of the application it is claimed that a sum of is Rs. 20,98,973/- with Interest is due from the respondent company. The date of default is 08.07.2019.

6. Upon receipt of the notices issued by this tribunal as well as service of notice by the petitioner, the Respondent / Corporate debtor has appeared through its counsel and has filed a detailed reply in the matter. The CD has raised the following defence to the claim of the FC:

6.1 That the Hon'ble Supreme Court has stayed proceedings against the CD vide orders dated 30.10.2017 & 09.04.2018 in the matter titled as 'Sanjay Chandra & Anr. Vs. State Govt. of NCT of Delhi'.

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6.2 There is no disbursement of debt by the FC, hence the present application is not maintainable: In the instant case, there has been no disbursement by the Financial Creditor. The alleged Financial Creditor has placed on record copies of documents pertaining to his engagement with M/s MNT Infratech Pvt. Ltd. Thereafter, by way of a settlement, the Applicant herein accepted an apartment in the project titled unihomes, being constructed by the Respondent in Bhopal. Thus, as may be seen from the facts set out above, as well as the documents annexed with the Application, there has been no disbursement by the Applicant herein, and in the absence of the same, it cannot be said that the applicant has acquired the status of a financial creditor.

6.3 It is also alleged that the registration of said project has been extended by RERA and therefore the CD is not under any default: The RERA Registration of UNIHOMES Bhopal has been extended and in light of the judgment of the Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Ltd. and Anr. Vs. UOI & Ors., The application under reply is liable to be dismissed. It is submitted that in the instant case, the Insolvency Resolution Process has been invoked fraudulently and with malicious



intent, and is in no way in the interest of resolution of insolvency, but is as a means to coerce the respondent/corporate debtor and to extract amounts of money as settlement amounts. Not only has the RERA Registration of the respondent/corporate debtor been extended, thereby ensuring compliance with the prevalent RERA provisions, but the corporate debtor, being a joint venture with Unitech, the Hon'ble Supreme Court is seized of the matter and a portal has been created wherein homebuyers are being offered refunds for the monies paid by them. It is open to the Applicant herein to file his particulars at the portal created, and to seek either a refund or possession of the Unit allotted to them. Approaching this Hon'ble Tribunal as has been done in the instant case is only going to lead to numerous homebuyers being left in the lurch as the respondent/corporate debtor is a fully functional entity and is in no manner in requirement of resolution of insolvency.

7. We have gone through the application filed in the matter and perused the documents and also heard the counsel for the applicant.

8. The scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,



- a) Financial creditor
- b) Operational creditor, and
- c) Corporate debtor itself.

9. The expressions “Financial Creditor” and “Financial debt” have been defined in Section 5 (7) and 5 (8) of the Code respectively. It is pertinent to mention here that Clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with effect from 6th June, 2018. In view of the explanation inserted in the revised definition, it has been abundantly made clear that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and thus will come within the definition of ‘Financial Debt’ under the Code. Definition of ‘Financial Debt’ has been amended to remove any cloud and to specifically include dues of the home buyers. Amendment Act leaves no doubt that home buyers are “Financial Creditors”. Accordingly, allottees/home buyers being “Financial Creditors” in terms of Explanation to Section 5 (8) (c) of the Code, can initiate Corporate Insolvency Resolution Process against the defaulting builder or developer.

10. Hon’ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited & anr. Vs. Union of India & Ors. reported in 2019 SCC Online SC 1005 decided on 09.08.2019 has held as follows:



“We, therefore, hold that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

Conclusion

- i. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.*
- ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.*
- iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.” (Emphasis given).*



16. In view of the proposition of law settled by the Hon'ble Supreme Court allottees/home buyers are to be regarded as financial creditors in terms of Section 5(8)(f) of the Code. Hon'ble Supreme Court further made it clear that the allottees/home buyers can avail the remedies available under the provisions of the Code.
17. In the present case the main ground raised by the respondent that the Hon'ble Supreme Court has stayed proceedings against the CD vide orders dated 30.10.2017 & 09.04.2018 in the matter titled as 'Sanjay Chandra & Anr. Vs. State Govt. of NCT of Delhi'. As per the order dated 30.10.2017, "if any proceeding is pending against the petitioners and the company, that may continue and final order be passed, but no coercive steps will be taken for executing the said order". Firstly, the said order is only qua proceedings against the petitioners namely Mr. Sanjay Chandra, Mr. Ajay Chandra and M/s Unitech Ltd. Secondly, the stay is with regard to execution proceedings and clearly states that final orders be passed. Further, as per the order dated 09.04.2018, "As an interim protection, it is directed that no other court or authority shall take any coercive steps against petitioner No. 3 and its subsidiary companies except for the production of Petitioner Nos. 1 and 2 in the concerned criminal Courts". This order applies only Petitioner No. 3, i.e. M/s Unitech Ltd. and its subsidiary companies only. It is seen that in accordance with Section 2 (87) of the Companies Act, 2013, the CD shall be termed as a subsidiary company of Unitech Ltd.



(Petitioner No. 3), only and only if Unitech Ltd. or its subsidiary company, holds more than 50% of the total voting power of the CD or controls the Board of Directors of CD. In the present case, separate company, i.e. Unitech Holdings Ltd. holds only 50% share in the CD through an Assignment Deed and hence, CD cannot be treated to be a subsidiary company of Unitech Ltd., i.e. the Petitioner No. 3 in the matter before the Hon'ble Supreme Court. Accordingly, the Hon'ble Supreme Court orders would not apply to the CD.

18. Moreover, in the present case the petitioner had booked flat on payment of instalments as the per the agreement to sale to the respondent corporate debtor. The various dates of disbursement of the said principal amount including the details of flats have been furnished in the application. Letter of Allotment and Agreement to Sell executed have been placed on record. Petitioners have also placed on record respective copy of the Bank Statements and Loan Agreements along with relevant Statement of Accounts of all the three petitioners in support of the disbursement of the amounts to the respondent corporate debtor.
19. Since the amount has been raised from the petitioner/allottee under a real estate project, petitioner being allottee/home buyer are regarded as financial creditors in terms of Section 5(8)(f) of the Code. Petitioner gave advances to the real estate developer and thereby financed the real estate project at hand. Money that is disbursed is no longer with the allottee, but



is with the real estate developer who is legally obliged to give money's equivalent back to the allottee. Not only the debt has a commercial effect of borrowings and come within the scope of 'financial debt' but also the petitioner clearly comes within the definition of 'financial creditor'.

20. The present application under Section 7 of the Code for initiation of Corporate Resolution Insolvency Process has been filed by petitioner financial creditors in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with required information, documents and records as prescribed under the Rules.
21. The next question comes for consideration is whether respondent corporate debtor has committed default in payment of the financial debt.
22. In this regard it has been alleged that the Corporate Debtor has failed to provide the possession of the flats to the financial creditor, although the stipulated period from the date of execution of the Agreement to Sell has since been expired.
23. Accordingly, as per Clause 5.8 of the Agreement to Sell, the corporate debtor was liable to pay back to the financial creditor with agreed interest, in case of failure of providing possession of the flat to the financial creditor.
24. It is also appropriate to mention here that under Section 18 of the Real Estate (Regulation and Development) Act, 2016 (RERA) if the promoter



fails to complete or is unable to give possession of the apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment etc. with such interest as may be prescribed and must, in addition, compensate the allottee in case of any loss caused to him.

25. Similarly, under Section 19 of RERA, the allottee shall be entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale.
26. However, in the present case neither the possession of the flat has been given to the petitioner nor the Corporate Debtor has returned even the amounts collected from the petitioner. There is sufficient material to show on record to conclude that respondent corporate debtor has committed default in repayment of the financial debt.
27. In the present proceeding the Tribunal is not supposed to ascertain the quantum of amount of default or to pass a decree as to how much is actually due to the applicant financial creditor. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. Adjudicating Authority is only to ascertain the existence of a default and not the exact amount due. The application under Section 7 is



maintainable once the default is more than one lakh, in view of Section 4 of the Code.

28. Hon'ble Supreme Court in the case of Shalini Ranbah Vs. Unitech Limited reported in 2017 SCC online NCDRC 525 decided on 05.10.2017 has observed that when a Builder is not in a position to deliver possession of property for long time, has to refund the amount with interest as the allottee cannot be expected to wait for possession of the apartment for indefinite period.
29. In the present case Financial debt is outstanding. There is no denial of default and the amount of default exceeds much more than Rupees 1 lakh. The threshold limit to trigger the Code is purposely kept low at only one lakh rupees, making it clear that even small individuals may also trigger the Code as financial creditors. In view of Section 4 of the Code, the moment default is Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable. Once there is a debt and default and the application is complete the Adjudicating Authority is bound to admit the application preferred under Section 7 of the Code.
30. Under sub-section 5 (a) of Section 7 of the code, the application filed by the applicant financial creditor has to be admitted on satisfaction that:
1. Default has occurred.
 2. Application is complete, and



3. No disciplinary proceeding against the proposed IRP is pending.

31. As a sequel to the aforesaid discussion it is seen that the petitioner being home buyer come within the definition of Financial Creditor. The material placed on record further confirms that applicant financial creditor had disbursed the money to the respondent corporate debtor as consideration for purchase of flats. Though considerable period has since lapsed the possession of the flat has not been given to the petitioner. Even the principal amount disbursed has not been repaid by the respondent corporate debtor. It is accordingly reiterated that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds much above the statutory limit of rupees one Lakh. Besides it is also seen that the application filed in Form – I under Section 7 of the Code read with Rule 4 of the Rules is complete and there is no infirmity in the same. Moreover, the material on record reveals that there is no disciplinary proceeding pending against the proposed IRP. In the facts we are satisfied that the present application is complete and there has been a default in payment of the financial debt and that no disciplinary proceeding is pending against the proposed IRP and therefore, the applicant financial creditors are entitled to initiate Corporate Insolvency Resolution Process against the respondent corporate debtor under Section 7 of the Code



32. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.
33. Therefore, in terms of Section 7 (5) (a) of the Code, the present application is admitted.
34. A moratorium in terms of section 14 of the Code is being issued prohibiting the following:
- 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;
 - transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - Recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
35. 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 moratorium period.
- The provisions of sub-section (1) of section 14 of the Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

36. Mr. Rakesh Kumar Jain, for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P01297/2018-19/12068 resident of 1670/120, Shanti Nagar, Tri Nagar, New Delhi., with email – id_rakeshjainca@rediffmail.com is appointed as an Interim Resolution Professional. He has affirmed that he is a registered insolvency professional and that no disciplinary proceeding is pending against him. He has also given his consent in Form-2 for appointment as IRP in the present matter. In the facts Mr. Rakesh Kumar Jain, is appointed as Interim Resolution Professional, who shall take statutory steps as envisaged under section 15, 17 and 18 of the Code. Since, the tenure of the IRP under section 16(5) shall not exceed 30 days from the date of his appointment, the IRP is directed to submit his report at the earliest but not later than 30 days.

37. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process as per Sub-Section (4) of section 14 of the Code.



38. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

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(DR. V.K. SUBBURAJ)
MEMBER (T)

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(Dr. P.S.N PRASAD)
MEMBER (J)