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

CP (IB) No. 1720/KB/2018

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

Deves Damani & Ors

... Applicant/Financial Creditor

-Versus-

IN THE MATTER OF:

Mounthill Realty Pvt.

...Respondent/ Corporate Debtor

Coram: Shri Madan B Gosavi, Member (Judicial)
Shri Virendra Kumar Gupta, Member (Technical)

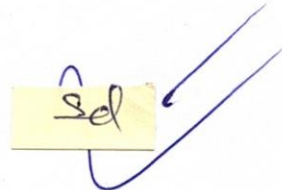
For the Financial Creditor:

1. Mr. Sumit Binani, PCA

For the Corporate Debtor :

1. Mr. Sankarsan Sarkar, Advocate





Date of pronouncement of the Order :

O R D E R

Per Shri Madan B Gosavi, Member(Judicial)

1. Total 16 Home Buyers, through their representative, Mr. Deves Damani (One of the Home Buyers) - Financial Creditors, filed this Application under Section 7 of the Insolvency & Bankruptcy Code, 2016, read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating Corporate Insolvency Resolution Process (in short CIRP), as against M/s. Mounthill Realty Pvt. Ltd./Corporate Debtor, on the ground that the Corporate Debtor committed default in financial debt of Rs. 7,56,11887=10.

2. The following facts are not in dispute :

By Agreement dated 15-09-2013, all the 16 Home buyers agreed to purchase residential flats in the housing project being developed and built by the Corporate Debtor. The Financial Creditors paid the purchase price of their respective flats as per the schedule, more particularly, disclosed in tabular form as Annexure-I, Exhibit 'B', Page 85 of the Paper book. As per clause 9.5 of the terms and conditions of the said Agreement, it has clearly been mentioned that completion date of the construction and making the flats in habitable condition by the Developer/Corporate Debtor was within June, 2016. However, the completion date may be extended for a period of six months provided there is some obstruction due to any other reasonable cause.

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It is also not in dispute that all the Applicants have paid the sale price of their respective flats. It is true that some of them might have paid the due amount beyond some time than agreed to be but it is not in dispute that each of them paid the amounts prior to 24-08-2015 (Annexure A Exhibit B Page 85).

It is also not in dispute that none of all the 16 Applicants did get possession of their residential unit till filing of the Application. Pending this proceeding, the Financial Creditor and the Corporate Debtor entered into MOU dated 05-04-2019 wherein the Developer /Corporate Debtor undertook to give possession of the flats within six months. But this MOU is not signed by any of the Applicants herein.

Section 5(8) (f) and explanation attached thereto of Insolvency & Bankruptcy Code, 2016 now recognizes the flat buyers as the Financial Creditors. Hon'ble Supreme Court, in its ruling, in the case of Writ Petition(Civil) No. 43 of 2019 – Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors., in upheld the constitutional validity of this provision.

It is now well settled that in enquiry under Section 7 of the Insolvency & Bankruptcy Code, 2016, the Adjudicating Authority should only consider whether two facts are proved – i) whether financial debt is due and payable by the Corporate Debtor ii) whether the Corporate Debtor made default in paying the same. It is also be considered as to whether the claim is not time barred.

The Applicants herein filed this Application to initiate CIRP process against the Corporate Debtor on above grounds only. They suggested the name of Mr. Aditya Kumar Tibrewal, having registration number IBBI/IPA-001/IP-P00743/2017-2018/11249 for appointment as the IRP against whom no disciplinary proceeding appears to be pending. In this case, notice of the Application has been duly served on the Corporate Debtor (appeared

in the matter through one of its Directors, Mr. Srikant Sikaria). He filed an affidavit in reply separately dealing with the claim of each Applicants.

3. We have gone through those replies. The Corporate Debtor mainly raised following defences :

- i) Claim of some of the Applicants being time barred, cannot be entertained ;
- ii) Since some of the Applicants settled dispute with him, this Application, jointly filed by the Applicants, is not maintainable;
- iii) The Application is also not maintainable because the original land owners are not the main party to it because it is a joint venture agreement in between the land owners, flat buyers and the Developer;
- iv) Unless the Applicants terminate the agreement as per clause 3, the financial debt is not said to be due and payable in law and on facts.

4. We have gone through the evidence and material on record. We heard submission of Ld. Counsel and Ld. PCA, appearing for the Flat buyers and the Ld. Counsel for the Developer at length.

5. As noted above, it is not in dispute that the Corporate Debtor received sale price of the flats from each of the Applicants by end of August, 2015. He did not hand over possession of the flats as agreed to, by June, 2016 or within six months thereafter, as per clause 9.5 of the Agreement. He did not offer them money back upon failure to give possession of the flats as agreed. Hence, both facts that financial debt due and payable by the Corporate Debtor and it has committed default in making payment, are said to be proved. However, defence raised is that the debt is time barred. The Ld. Counsel for the Corporate Debtor brought to our notice the payment schedule at Page 85, Annexure A. He submitted that claims of Applicant Nos. 1,3,7, 8 and 12 are completely time barred because they paid money

by end of August, 2015 and this Application is filed in December, 2018 i.e. beyond the period of three years from the date of which the right to sue accrue in their favour. We have considered this submission. We hold that above submissions made by the Ld. Counsel for the Corporate Debtor are not only incorrect but also fallacious. As per Clause 9.5 of the Agreement, it was bounden duty of the Corporate Debtor to give possession of the flats to each of the Applicants on or before June, 2016 or within six months thereafter i.e. by December, 2016. On the basis of this admitted fact, it can safely be concluded that the cause of action arose to file this proceeding against the Corporate Debtor to each of the Applicant in June, 2016/December, 2016. This proceeding is filed in December, 2018. It is filed within the period of limitation.

6. The Ld. Defence Counsel submitted that some of the Applicants have settled dispute and some of them cannot have any claim against his client because those Applicants were to get possession of the flat from the quota allotted to the original land owners. To support his argument, he pointed out the Agreement entered and executed in between the Applicants No. 4 and the Corporate Debtor. The Ld. Defence Counsel further submitted that the Applicant No. 14, Gita Rani Gupta settled the dispute with the Corporate Debtor and signed MOU dated 07-11-2019. We have considered his above submissions. We make it clear that without entering into the legalities or otherwise about the transaction in between those Applicants and the Corporate Debtor, we keep out of our consideration their claim amount of Rs. 42,16,167/- and Rs. 42,04,626/-. Apart from the same, it is seen from evidence on record that the default amount due and payable is still more than Rs. 1 Lakh(permissible under Section 4 of the Insolvency & Bankruptcy Code, 2016). Hence the above submissions of the Ld. Counsel for the Corporate Debtor do not further its defence any more. The Ld. Counsel for the Corporate Debtor also submitted that if 2 out of 16 Applicants decided to withdraw the application under Section 7 of the Insolvency & Bankruptcy

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Code, 2016, how other can proceed as it is joint application filed by them. In this behalf, we make it clear that we are not permitting applicant No. 14 to withdraw the Application. Even the Applicant No. 14 has not filed any such Application under Rule 8 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for withdrawal of the Application. As far as the Applicant No. 4 is concerned, whether he has claimed against the Corporate Debtor or the original land owner, we are not entering into that controversy at this stage. Section 7 of the Insolvency & Bankruptcy Code, 2016 permits the Financial Creditor to file such Application jointly. Once the Application is filed jointly, it has to be withdrawn by all of them jointly and one of them cannot be permitted to do so. At the most, the IRP/RP may consider such Applicants' claim during CIRP process. We hold that this Application cannot be rejected on this ground.

7. The Corporate Debtor raised two contentious defences.:

- i) Unless the Financial Creditor cancels the Agreement of sale, they cannot claim refund of the amount
- ii) Since it was joint venture project in between the Corporate Debtor and the original land owners, the original land owners ought to have been party to this proceeding.

8. We considered second defence first. From the evidence on record, it is clearly seen that all monies, advances, instalments were received by the Corporate Debtor from the Applicants. The original owners were not party to receipt of such money at all. Secondly, as per the Agreement, it is the sole duty of the Developer/Corporate Debtor to hand over possession of the flats to the Applicants in June, 2016 or before December, 2016(5.6 of the Agreement). So, the Corporate Debtor now cannot turn around and say that it was not his responsibility to give possession of the flats in time bound manner. From the evidence on record, it clearly established that it is the

Corporate Debtor has only committed default in paying the financial debt by not giving possession of the flat as agreed.

9. We have also considered the Corporate Debtor's defence whether the buyer/Applicant should have cancelled the Agreement first and then claimed the refund. We hold that it was not necessary at all. This is not a proceeding for recovery of the consideration price paid to the Corporate Debtor. This proceeding is filed on the ground that the Financial Creditor invested the amount to purchase the flats in proposed building to be constructed by the Corporate Debtor. The Corporate Debtor was to give possession of the flat by 2016. The amount invested by the Applicants is the financial debt as per Clause 5(8) of the Insolvency & Bankruptcy Code, 2016. The Corporate Debtor committed default. It did not offer to refund the amount to any of the Applicant along with interest and damages as per the agreement after December, 2016. In such situation, it was not necessary for the Applicants to claim their amount after cancelling the Agreement as contended by the Corporate Debtor. Considering the evidence on record, it is clear that the Corporate Debtor has already committed breach of the Agreement. Hence we hold that the Corporate Debtor committed default in paying the financial debt.

10. The Ld. Counsel for the Corporate Debtor also brought to our notice, the photographs of the project, to contend that the construction of the building is complete barring some finishing work. He also submitted that out of 1600 flat buyers, only 15 remained to give possession. Such defence is not available to the Corporate Debtor. There cannot be equity against the law. It was the duty of the Corporate Debtor to give possession of the Flat to each of the Flat buyers before December, 2016, as agreed to by him. It is proved from evidence on record that the Corporate Debtor is liable to pay the financial debt and he committed default in paying the same.

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11. The Financial Creditors suggested the name of the IRP against whom no disciplinary proceeding is pending. This Application is defect free. Hence we pass the following Orders :

ORDERS

- i) The application filed by the Financial Creditors under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s. Mounthill Realty Pvt. Ltd., is hereby admitted.
- ii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15.
- iii) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:-
 - a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) 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

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Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

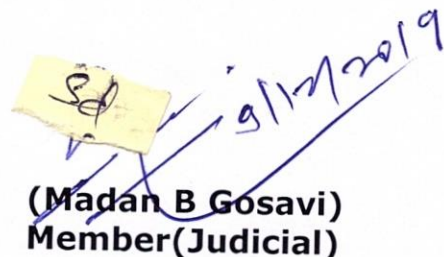
- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- iv) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vi) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- vii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- viii) **Mr. Mr. Aditya Kumar Tibrewal**, having registration number IBBI/IPA-001/IP-P00743/2017-2018/11249, **E-mail ID : adityatibre@gmail.com** is hereby appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

- ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date and follow Regulation 40A strictly.
- x) The Financial Creditors are directed to deposit Rs.2,00,000/- (Rupees Two Lacs Only) in the ESCROW Account in SBI to be operated through the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP within one week of the date of this order.
- xi) Registry is hereby directed under section 7 (4) of the I & B Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.
- xii) List the matter on 13-01-2020 for filing of the progress report.

9. The free copy/certified copy of the Order may be issued to all the concerned Parties, if applied for, upon compliance with all requisite formalities.



(Virendra Kumar Gupta)
Member(Technical)



(Madan B Gosavi)
Member(Judicial)

Signed on this, the 9th day December, 2019

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