



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court-II)
KOLKATA**

C.P. (IB) No. 324/KB/2022

An application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

Rajkumar Dey & Ors

....Financial Creditor

-Versus-

Usashi Real States Private Limited (formerly known as Dreamparadise Properties Private Limited) [CIN U45400WB2013PTC198195] having its registered office at 86, Golaghata Road, Jamuna Apartment, Kolkata – 700 048, West Bengal;

...Corporate Debtor

Date of hearing: 18 May, 2023

Order Pronounced on: 06 July, 2023

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Financial Creditor : Ms. Urmila Chakraborty, Adv.
: Mr. Avishek Guha, Adv.
: Ms. Arunika Dutta, Adv.



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Rajkumar Dey, representing all the home buyers, duly authorised by virtue of Letter of Authority dated 11 November, 2022 (***‘Financial Creditor’***) for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Usashi Real States Private Limited (formerly known as Dream paradise Properties Private Limited)(***‘Corporate Debtor’***).
3. The present Petition was filed on ***18 November, 2022*** before this Adjudicating Authority. The total amount claimed in default is Rs.3,80,34,952.90/- (Rupees Three Crore Eighty Lakh Thirty Four Thousand Nine Hundred and Fifty Two and Ninety Paise only)[*Principal amount of Rs.3,42,50,611/- together with interest and other charges calculated at the rate of 8% p.a.*]. The ***date of default*** for individual homebuyers is stated to be, as follows;

<i>SI No.</i>	<i>Flat Owner’s Name</i>	<i>Flat delivery date (within 40 months from the date of sale agreement)</i>	<i>Date of default</i>
1.	Asha Dey / Rajkumar Dey	06.10.2019	07.10.2019
2.	Joyjyanta Bhattacharya / Rima Bhattacharya	10.09.2022	11.09.2022
3.	Manju Khan/ Goutam Khan	10.05.2021	11.05.2021
4.	Mahuya Dutta / Himlal Dutta	10.07.2021	11.07.2021
5.	Biswajit Mondal/ Sabita Mondal	08.09.2022	09.09.2022
6.	Raj Kumar Sutradhar	10.01.2020	11.01.2020
7.	Sampati Maitra/ Apurba Maitra	10.07.2021	11.07.2021
8.	Bidhan Chandra Saha / Sukla Saha	10.07.2021	11.07.2021



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

9.	Baisakhi Chakraborty/ Sagar Chakraborty	10.08.2021	11.08.2021
10.	Ranajoy Dutta	30.10.2019	31.10.2019
11.	Prosen Das/ Dipanwita Roy	26.08.2022	27.08.2022
12.	Anish Dasgupta/ Manali Dasgupta	11.03.2022	12.03.2022
13.	Anuradha Saha / Debashis Kumar Saha	24.12.2021	25.12.2021
14.	Dipankar Saha	16.08.2022	17.08.2022
15.	Banasree Chakraborty/ Sudip Chakraborty	24.09.2022	25.09.2022
16.	Panna Das/ Partha Das	11.06.2021	12.06.2021
17.	Jayanti Saha/ Pradip Kumar Saha/ Aninda Saha	06.10.2019	07.10.2019
18.	Sukul Kumar Paul	25.08.2022	26.08.2022
19.	Shantanu Kolay/ Smritikana Kolay	20.04.2021	21.04.2021
20.	Jayashree Majumder/ Prithwisanti Majumder	25.07.2022	26.07.2022
21.	Bijoy Krishna Chakraborty/ Dalia Chakraborty	01.01.2022	02.01.2022
22.	Animesh Dutta (No agreement done by the buyer)	NA	NA

4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs. 25,00,000/- (Rupees Twenty Five Lakh only) with subscribed share capital of Rs. 25,00,000/- (Rupees Twenty Five Lakh only). Part – IV of the Petition deals with the particulars of the Financial Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor.***
 - 5.1 The Financial Creditors are all home buyers of the Corporate Debtor. The Corporate Debtor has represented to the Financial Creditors that it has entered into three development agreements in respect of a property and contiguous land for the purpose of development of the said properties and construction of multi-storied buildings (***‘housing project’***).
 - 5.2 The Corporate Debtor, by virtue of Development Power of Attorneys has further been authorized to hold, occupy, defend possession of the said



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

properties or any part thereof on behalf of the owners in connection with the proposed development work apart from being authorized to receive from the intending purchasers the consideration money or earnest money or advance on or before the completion of the housing project.

- 5.3 Five residential towers were to be constructed by the Corporate Debtor to be used for residential of the Financial Creditors. Believing such representations to be true and correct and in good faith, the Financial Creditors have entered into various agreements for sale on diverse dates with the Corporate Debtor.
- 5.4 It was also represented that the respective flats under the agreements to be sold to the Financial Creditors will be made ready and fit for habitation within 24 months from the date of execution of the agreement for sale and physical possession thereof will be handed over to the applicants/purchasers upon making payment of the amounts/ sale consideration by the applicants/purchasers to the Corporate Debtor/Developer.
- 5.5 Further, under the agreements for sale, the Corporate Debtor is liable to pay interest @ 8% per annum to the Financial Creditors, if any default is made towards delivery of possession of the flats by the Corporate Debtor within 40 months from the date of execution of the respective agreements for sale.
- 5.6 The applicants have made payments towards sale consideration for an aggregate sum of Rs. 3,42,50,611/- (Rupees Three Crores Forty Two Lakhs Fifty Thousand Six Hundred and Eleven Only), the payment of which have been duly received by the Corporate Debtor.
- 5.7 The Corporate Debtor has failed to deliver the respective flats of the Financial Creditors within the time as committed. Several Financial Creditors had even issued notices to the Corporate Debtor requesting the Corporate Debtor to hand over physical possession of the respective flats or refund of the consideration amount already paid by the Financial Creditors.



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

- 5.8 The Financial Creditors states that despite repeated assurances the Corporate Debtor has failed to deliver vacant physical possession of the flats. Having failed to do so the Corporate Debtor has committed default and, as such, the present proceeding can be initiated against the corporate debtor for a sum of Rs. 3,80,34,952.90/- (Rupees Three Crores Eighty Lakhs
- 5.9 The dates of default being the dates 40 months from the dates of execution of the agreements for sale when the vacant possession of the flats were to be delivered to the Financial Creditors.

Analysis and Findings

6. We have heard the Learned Counsel appearing on behalf of the Financial Creditor.
7. The matter was heard from time to time (*i.e.*, 28 December, 2022, 15 February, 2023, 11 April, 2023 and 18 May, 2023). The registry served the notice on the Corporate Debtor twice *i.e.*, on 02 January, 2023 and 09 March, 2023. An email dated 22 March, 2023 was also sent to the registered email address of the Corporate Debtor. Despite, several opportunities, none appeared on behalf of the Corporate. Accordingly, the Debtor was set *ex-parte* as on 11 April, 2023.
8. Pursuant to the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, allottees of real estate projects (***'Homebuyers'***) have been included within the ambit of “financial creditors” under the Code and they could initiate insolvency proceedings against real estate developers.
9. Further, as per the submission by the Financial Creditor there are total 138 allottees in the said housing project, out of which only Twenty-Two (22) allottees have filed this Application. Such allottees form 15.9% of the total number of the allottees. As envisaged under section 7 (1) of the Code, allottees can initiate Corporate Insolvency Resolution Plan, on the following grounds;



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

“7. (1) A financial creditor either by itself or jointly with I[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

[Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.]

(Emphasis implied)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

10. The Hon'ble Apex Court in ***Pioneer Urban Land and Infrastructure Limited & Anr. V. Union of India & Ors.***¹, has held as under;

“67. A perusal of these definitions would show that even though the Petitioners may be right in stating that a “borrowing” is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression “borrow” is wide enough to include an advance given by the home buyers to a real estate developer for “temporary use” i.e. for use in the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the home buyers. The “something equivalent” in these matters is obviously the flat/apartment. Also of importance is the expression “commercial effect”. “Commercial” would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have “commercial” interests in the same – the real estate 161 developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act.

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.

¹WRIT PETITION (CIVIL) NO. 43 OF 2019



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

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 implied)

11. In light of the facts and circumstances and legal position enumerated above, the present petition filed by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.

12. Accordingly, it is, hereby ordered as follows:-

- (a) The application bearing **C.P (IB) No. 324/KB/2022** filed by Rajkumar Dey & Ors, the Financial Creditors, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Usashi Real States Private Limited (formerly known as Dreamparadise Properties Private Limited), the Corporate Debtor, is ***admitted.***
- (b) There shall be a moratorium under section 14 of the IBC.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) **Mr. Arun Kumar Gupta**, registration number **IBBI/IPA-001/IP-P00013/2016-2017/10037**, email: **guptaarunkumar2001@yahoo.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)**

Rajkumar Dey & Ors. v. Usashi Realstates Private Limited (formerly known as Dreamparadise Properties Private Limited)

C.P. (IB) No. 324/KB/2022

- (h) The Financial Creditor shall deposit a sum of **Rs.4,00,000/- (Rupees Four Lakh 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 (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 13. C.P (IB) No. 324/KB/2022** to come up on 04 August, 2023 for filing the periodical report
- 14.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 06th day of July, 2023

SA [LRA]