NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 513 of 2024
& I.A. Nos.5085, 6475, 7338 of 2024

(Arising out of Order dated 04.03.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Principal Bench in CP(IB)/288(PB)/2019)

IN THE MATTER OF:

Hari Om Dixit ...Appellant

Versus

Ajit Srivastava & Ors. ...Respondents

Present:

For Appellant	**:**	**Mr. Abhijeet Sinha, Sr. Advocate with Mr. Ashish Choudhury, Mr. Saikat Sarkar, Mr. Abhishek Arora, Mr. Anand Kamal, Advocates**
For Respondents	**:**	**Mr. Ashvary Vikram, Mr. Lucky Sharma, Mr. Vikash C. Shukla, Advocates.**
		Mr. Nipun Gautam, Advocate for IRP.
		Mr. Krishnendu Datta, Sr. Advocate with Mr. Atul Kumar, Mr. Alok Bhardwaj, Advocates for Intervener.
		Ms. Tanvi Jain, Advocate for Applicant in IA No.7338 of 2024.

With
Company Appeal (AT) (Insolvency) No. 1053 of 2024

IN THE MATTER OF:

Ajit Shrivastava ...Appellant

Versus

Anand Sonbhadra
(IRP for Gayatri Hospitality & Realcon Ltd.) & Anr. ...Respondents

Present:

For Appellant	**:**	**Mr. Ashvary Vikram, Mr. Lucky Sharma, Mr. Vikash C. Shukla, Advocates**
For Respondents	**:**	**Mr. Nipun Gautam, Advocate for IRP.**

Mr. Ashish Choudhary, Mr. Abhishek Arora, Advocates for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

Company Appeal (AT) (Insolvency) No. 513 of 2024 has been filed by the suspended Director of the Corporate Debtor ("**CD**") - M/s Gayatri Hospitality and Realcon Ltd., challenging the order dated 04.03.2024 passed by National Company Law Tribunal ("**NCLT**"), New Delhi Principal Bench allowing IA No.4163(PB)/2021, IA No.3422(PB)/2022 and IA No.3534(PB)/2022 for impleadment as Applicants and admitting Section 7 application filed by the creditors in a class, i.e., Respondent Nos.1 to 106 in the Appeal. Aggrieved by the order admitting Section 7 application, this Appeal has been filed.

2. Company Appeal (AT) (Insolvency) No. 1053 of 2024 has been filed challenging only part of the order dated 04.03.2024 insofar it has appointed Mr. Anand Sonbhadra as Resolution Professional ("**RP**") whereas Financial Creditors had filed an application praying for change of RP as prayed in Section 7 Application from Anand Sonbhadra to Mr. Anurag Nirbhaya.

3. Brief facts of the case necessary to be noticed for deciding the Appeal(s) are:

(i) Greater Noida Industrial Development Authority ("Greater Noida") vide Lease Deed dated 11.02.2011 granted lease of land to the CD for Large Group Housing Builders Residential

Plots of an area admeasuring 7,07,771.95 sq. mtrs at Plot No.GH-11, Sector-1, Greater Noida (West), U.P. Possession Certificate dated 14.02.2011 was issued by Greater Noida in favour of the CD.

(ii) The CD launched a Project named – 'Gayatri Aura' in Plot No.GH-11. The Project consisted of 10+1 Towers in phased manner. The CD made allotment in favour of various unit holders from 2011 onwards. On part of land there was some encroachment by farmers, who were agitating for their additional compensation. The encroachment was removed by the Greater Noida with the help of Police on 01.09.2017. Greater Noida granted a zero period from 14.02.2011 to 14.05.2015 of part of the leased land.

(iii) Complaints were filed by the various homebuyers before the UP RERA. Notices were issued by UP RERA to the CD and on 08.01.2019, UP RERA directed the Promoters to complete the work of four Towers, i.e. Tower A, B, E & F of Phase-1 till November 2019. As regards remaining two Towers, the CD was directed to complete it by November 2020.

(iv) On 11.01.2019, eight Homebuyers, including Respondent No.1 – Ajit Srivastava filed Section 7 application as a Financial Creditors in a class against the CD, praying for initiation of Corporate Insolvency Resolution Process ("**CIRP**")

against the CD, on which CP(IB)/288(PB)/2019 was registered.

(v) Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**") was amended by Act No.1 of 2020 with effect from 28.12.2019, amending Section 7 by inserting three Provisos and certain other amendments by the same Amendment Act. By amendments incorporated by the Act No.1 of 2020 with regard to allottees, under the real-estate project, an application for initiating CIRP against the CD, was required to be filed jointly by not less than 100 of such allottees under the same real-estate project or not less than 10% of such real-estate allottees. Third Proviso further directed that in event the application is filed prior to Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("**Amendment Act 2020**"), and the Application has not been admitted, the Applicant within 30 days of the commencement of the Act, shall modify the application to comply with the requirement of 1st and 2nd Provisos.

(vi) The Insolvency and Bankruptcy Code (Amendment) Act, 2020 was challenged before the Hon'ble Supreme Court by Writ Petition No.26 of 2020 under Article 32 of the Constitution of India. Prior to enactment of the Act No.1 of 2020, an Ordinance, by which the Amendment came into effect dated 28.12.2019 was also challenged before the Hon'ble Supreme

Court. The Adjudicating Authority in the CP(IB)/288(PB)/2019 passed an order directing the Applicants to come up after interim order is modified by the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its judgment dated 19.01.2021 decided the Writ Petition, challenging the IBC First Amendment Act, 2020 and upheld the amendments [by judgment reported in (2021) 5 SSC 1 – Manish Kumar vs. Union of India and Anr.)]. The Writ Petition and Transferred Cases were dismissed. Certain directions with regard to filing of application under Section 7 were also issued.

(vii) Subsequent to the above judgment of the Hon'ble Supreme Court, the Applicants in CP(IB)/288(PB)/2019 filed an IA No.4163 of 2021 on 15.07.2021 seeking impleadment of 52 allottees in Section 7 Application. In the application, the Applicants have pleaded that they come across news article published in Times of India on 14.09.2019 that there are four Towers in the Project, totalling 544 units out of which 450 have been sold. The Appellants filed the application to implead 52 Applicants, so as to modify the application to comply the 2nd Proviso as inserted by Amendment Act No.1 of 2020. Notices were issued. The CD filed reply to the application pleading that total units as on 11.01.2019 were 888. IA No.1821 of 2022 was filed by one – Gaurav Rana,

allottee, to delete his name, which was allowed on 27.04.2022. IA No.3422 of 2021 was filed on 07.07.2022 by the Applicants for impleadment of 22 allottees in the application. The CD has filed reply affidavit stating that till 18.11.2022 there are 1124 allottees. Another IA No.499 of 2023 was filed by the Applicants on 03.01.2023 to add 25 allottees.

(viii) The CD had filed a revision before the State Government seeking a relief for declaration of zero dated till 01.09.2017, on which date the possession of encroached area was given. The State Government allowed the revision vide order dated 02.08.2023 and declared the zero period for the CD from 14.02.2011 to 01.09.2017. The UP RERA has also issued Notification dated 06.06.2020 and 18.08.2021, extending the period for completion of the Project on account of spread of Covid-19.

(ix) In Section 7 application, the reply was filed by the CD, objecting to the maintainability of the application. It was pleaded that application does not fulfill the requirement inserted by Amendment Act No.1 of 2020, since neither 100 allottees, nor 10% of the total unit holders are the Applicants. It was pleaded that allotment of more than 50 Applicants, including the original Application and those who sought impleadment have been cancelled, due to non-payment of

balance consideration. It was pleaded that certain allottees have already settled and hence, the application was not maintainable. An affidavit dated 01.12.2023 was filed by the CD before the Adjudicating Authority, claiming therein the details of zero period allowed by the State Government, Notifications issued by UP RERA and further pleading that application does not fulfill the threshold criteria. Before the Adjudicating Authority, the CD came with the proposal that the CD is ready to refund the amount to allottees with SBI FD rates with interest within 60 days and is also ready to offer possession of two Towers, i.e. Towers A and B, which are complete.

(x) The Adjudicating Authority passed an order on 26.07.2023 directing the CD to convene a meeting of all 1124 allottees and an Advocate Commissioner was appointed to conduct the meeting. The CD circulated the settlement proposal to the Homebuyers and decided to put the settlement proposal for e-voting from 14.09.2023. The Advocate Commissioner submitted its Report stating that 746 allottees participated in the e-voting, out of which 81% voted in favour of proposal. The Applicants, i.e. creditors in class (Respondents herein) objected to the e-voting process and submitted that, those, who have e-voted were not genuine allottees. The Adjudicating Authority directed the Advocate Commissioner

to file a Report. The Advocate Commissioner submitted a Report that all 746 allottees, who have participated, their relevant files have not been placed by the CD before the Advocate Commissioner, hence verification of allottees, who participated in the voting cannot be made.

(xi) The Adjudicating Authority heard the Applicants as well as the CD and Advocate Commissioner appointed by the Adjudicating Authority and by the impugned order dated 04.03.2024, IA Nos.4163 of 2021, 3422/2022 and 499 of 2023, impleaded the Applicants in Section 7 application and held that after impleadment of the Applicants, total number of Homebuyers comes to 107, which met the threshold limit of 100 in number. The Adjudicating Authority further held that particulars of debt have been given in Part-IV and non-completion of the Project is reflected in Architect Certificate itself and both the requirement of debt and default are established. Section 7 application was admitted by appointing IRP.

4. Challenging the order dated 04.03.2024, Company Appeal (AT) (Insolvency) No. 513 of 2024 was filed by the suspended Director of the CD on 07.03.2024, which came for consideration before this Tribunal. Learned Counsel for the Appellant as well as Financial Creditors in a class and Intervenors were heard and notices in the Appeal was issued

on 11.03.2024 and following interim order was passed in paragraph 8, 9 and 10:

> "**8.** In the facts of the present case, in the meantime, no further steps be taken by the IRP in pursuance of impugned order dated 04.03.2024.
>
> **9.** We, however, make it clear that it shall be open for those applicants who want to exit by taking entire amount along with SBI FD rate by communicating their acceptance to the Appellant for making payment within 60 days, as has been submitted.
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> **10.** Learned counsel for the Respondent submits that in view of the initiation of CIRP, the Corporate Debtor shall not alienate any of the assets of the Corporate Debtor or operate any accounts, without leave of the Court. That is the legal position which is well settled."

5. The detailed reply has been filed by Respondents - Financial Creditors in a class, to which rejoinders have also been filed. Various IAs have been filed, which need to be noticed.

6. IA No.5085 of 2024 has been filed by Nidhi Tiwari and 164 other Homebuyers, seeking leave to intervene in the Appeal. The Applicants also prayed to set aside the impugned order dated 04.03.2024. It is submitted that the Intervenors are opposing the initiation of CIRP. Another IA No.6467 of 2024 has been filed by Gyatri Apex Auro Welfare Association, who claimed to be an Association of Project Gyatri Apex Aura registered on 05.08.2024. The Association also seek leave to intervene in the Appeal and has prayed to set aside the order dated 04.03.2024. IA No.7338 of 2024 has been filed by one Abhishek Bansal, seeking leave to intervene in the Appeal and prayed for direction to refund the entire

amount paid by the Applicant i.e. Rs.21,37,571/- along with SBI FD interest rates in terms of paragraph 9 of the order dated 11.03.2024. The Respondents have also filed reply to the IAs.

7. We have heard Shri Abhijeet Sinha, learned Senior Counsel appearing for the Appellant in Company Appeal (AT) (Ins.) No.513 of 2024; Shri Ashvary Vikram, learned Counsel for Respondents Financial Creditors in a class and also for Appellant in Company Appeal (AT) (Ins.) No.1053 of 2024; Shri Krishnendu Datta, learned Senior Counsel for Intervenor in IA No.5085 of 2024. We have also heard learned Counsel for other Intervenors.

8. Shri Abhijeet Sinha, learned Senior Counsel appearing for the Appellant in support of the Appeal submits that Section 7 Application, which was initially filed by 08 Homebuyers on 11.01.2019, did not fulfill the threshold as directed by Amendment Act 2020. The Applicants failed to modify the application to conform to the amended requirements inserted by Amendment Act 2020. Hence, the application deserved to be rejected on this ground alone. It is submitted that on the date of filing of the application there are 888 Homebuyers, list of which was already filed before the Adjudicating Authority. Application to implead 52 Applicants by IA No.4163 of 2021 was filed only on 15.07.2021, which did not fulfill the threshold, hence, further IA No3422 of 2022 was filed to implead 22 Applicants on 07.07.2022 and IA No.499 of 2023 was filed to implead 25 Applicants on 03.01.2023. Various objections were raised to the impleadment applications, pointing out that several Applicants were

illegible to be treated as allottees, as allotments of some of them having been cancelled due to non-payment of balance consideration. The Adjudicating Authority without adverting to any issues raised regarding eligibility of the Applicants, has allowed the application, holding threshold to be met. It is submitted that it is only handful of allottees, who want to put the CD in the CIRP, whereas Towers A and B were already completed and those, Financial Creditors in a class, who were Respondent, were offered to take possession in the Towers A and B. It is submitted that the CD has also offered to refund the amount to those allottees, who wanted their refund with SBI FD interest rate. It is submitted that settlement proposal submitted by the CD was placed for voting before the Homebuyers, where 746 Homebuyers participated in the voting and the proposal was approved with 81% vote share. Objections raised by the creditors in a class that allottees have not been verified, who participated, was not properly dealt with by Advocate Commissioner with regard to verification of allottees and non-receipt of various files, leading to contradictory findings. Shri Sinha submits that when the State Government has declared zero period from 14.02.2011 to 01.09.2017, there cannot be any default on the part of the CD in carrying out the construction. Clause 16 of the Builder Buyer Agreement provided for 40 months for Project completion with a grace period of six months. When the period is calculated from 01.09.2017, the period provided for completion of the construction was not even completed on 11.01.2019. When the application under Section 7 was filed, period for construction

being not complete, no default can be held to have been committed by the CD. The application under Section 7 being pre-mature, was liable to be rejected. It is submitted that UP RERA has also issued Notification extending the Project period. It is submitted that orders passed by UP RERA were brought on the record, where UP RERA had granted time for construction till November 2019 and November 2020, which period was further extended by various Notifications. There was no default committed by the CD and Adjudicating Authority without adverting to all relevant pleas raised before it and being relevant materials on record, committed error in admitting Section 7 Application. It is submitted that majority of the Homebuyers are opposing initiation of CIRP, since that creates hurdle in completion of the Project. At present more than four Towers are completed and possessions have also been offered by the CD and about 250 Homebuyers are residing in the Towers. The Appellant is ready to abide by its settlement proposal, which was circulated in pursuance of the order dated 26.07.2023 of the Adjudicating Authority, i.e. to grant exit to those Homebuyers, who wanted SBI FD interest rate, within 60 days and to offer possession to those, who want possession of their units. It is submitted that the Appellant is ready to carry out the construction. The submission of the Respondents that the Appellant has given out different numbers of Homebuyers and the total units allotted at different point of time in not correct as the number of units kept increasing by further allotments.

9. Learned Counsel for the Respondents Shri Ashvary Vikram appearing for the Financial Creditors in a class refuting the submissions of learned Counsel for the Appellant submits that the CD has not provided the details of total number of units allotted inspite of communications sent by the Respondent. Applications were filed for impleadment of allottees by the Homebuyers on the basis of number of units as came to be known to the allottees. The Adjudicating Authority has rightly allowed all the three IAs for impleadment of 52, 22 and 25 allottees. The submission of the Appellant that Applicants, who sought to be impleaded as well as original Applicants were not eligible to be treated as allottees, since allotment of about 50 such Applicants have been cancelled due to non-payment of consideration is without any basis. The cancellation of allotments have been undertaken by the CD after filing of the application under Section 7 and after filing the impleadment application to defeat the rights of the Homebuyers. The action of the CD to cancel the allotment when allottees sought impleadment, is only to defeat the application under Section 7, which cannot be permitted. The CD in his affidavit has submitted that total number of units on the date of filing of the application was 820. The CD further filed an affidavit and changed his stand from 820 units to 1124 units. Learned Counsel for the Respondent has referred to RERA website, where total upto previous quarter was shows as five 2BHK and seven 3BHK Flats before 08.07.2022. The CD provided details of only 12 Flats to the RERA. The CD was in habit of changing the number of allotments and misguiding the

Adjudicating Authority. Since number of allottees, who filed application for impleadment were more than 100, thus, the threshold was fully met. It is submitted that several criminal proceedings are pending against the Promoters. It is submitted that submission of the Appellant that on declaration of zero period from 14.02.2011 to 01.09.2017, has no relevant with regard to period of completion of construction as directed in the Builder Buyers Agreement. The zero period was at best relevant for determination of the dues of the CD, which were to be paid to Greater Noida and in no manner shall effect the time of 40 months, during which the construction was required to be completed. The defence of *force majeure* taken by the Appellant is unfounded. The Appellant was well aware of the physical possession of the plot and period of 40 months in which the construction was to be completed. The CD cannot now take the plea that complete possession of entire plot was not handed over till 01.09.2017. The present is not a case for applicability of clause *force majeure*. The Project is substantially incomplete and out of ten Towers, only two Towers are structurally complete. The offer submitted by the CD, which was placed for e-voting before the Homebuyers was not approved by majority, as pleaded. Those, who participated in the voting, were not genuine allottees and Advocate Commissioner, has submitted Report that he was unable to verify the genuineness of those Homebuyers, who participated in the voting. The Adjudicating Authority has rightly not accepted the voting result, which took place in September 2023. The Homebuyers are interested to receive their possession of the units and

they are not interested in refund, as was offered. The cancellation of the Flats by the CD during the pendency of the application is wholly erroneous with the intent to defeat Section 7 application, which cannot be permitted. All cancellations, as alleged, are subsequent to filing of Section 7 application and even after filing of the impleadment application by the allottees. In the Joint Development Agreement dated 25.10.2021, entered with M/s Floral Homes Pvt. Ltd. only 664 units are mentioned. The CD has given different number of units at different times. The Advocate Commissioner has also submitted in its Report that only two Towers are complete and other Towers are not complete.

10. Shri Krishnendu Datta, learned Senior Counsel appearing for 165 Homebuyers, who have filed application for impleadment, submits that the Applicant – Homebuyers oppose the initiation of CIRP, since the Homebuyers want to get their units. Two Towers are complete and flats to some of the allottees in the said Towers have already been handed over and construction of two Towers are nearly complete. It is only handful of Homebuyers who have initiated Section 7 application with their personal vendetta are clamouring for initiation of Section 7 proceedings. Initiation of Section 7 is not in the interest of Homebuyers. Several Homebuyers have received their possession from the CD and living in the Project. The CIRP shall cause further hardship to the Homebuyers, who are awaiting for their houses.

11. We have considered the submissions of learned Counsel for the parties and have perused the records.

12. The first and foremost question, which needs consideration is regarding fulfilling of threshold with respect to Section 7 application filed by the creditors in a class, i.e. CP(IB)/288(PB)/2019. Admittedly, the application under Section 7 was filed initially by eight Homebuyers on 11.01.2019. Part-IV of section 7 application gives the details of eight Applicants and the date of allotment letter. It is useful to notice Part-IV claiming – "Amount claimed to be in default and the date on which the default occurred", which is as follows:

<table>
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<td>Amount claimed to be In default and the date on which the default occurred.</td>
<td>The Applicants have paid an aggregate amount of Rs. 1,03,55,225/- (Rupees one crore three lakhs fifty five thousand two hundred and twenty five only) to the corporate AS debtor as per the agreed schedule between the Applicants and the Corporate Debtor, as have been elucidated hereinabove.

The Corporate Debtor has been charging interest at 24% per annum from financial creditors as per clause no. 11 of BBA in case of delay in disbursement. So the financial creditors are also entitled for refund with interest at the same in terms of section 2(za)(i) of RERA 2016. In any default to provide the flats/units to the buyers the company is liable to refund the amount/ consideration given to it by the homebuyers with interest.

It is submitted that such disbursement was in terms of a Builder Buyer Agreement (hereinafter, 'the Agreement') executed by the Corporate Debtor with each of the Applicants. As per the terms of the Agreement, the possession to each of the Applicants was due to be handed over as on the following dates:
<table>
<tr><td>S. No.</td><td>Name of the Allotee</td><td>Date of Signing</td><td>Date of handing</td></tr>
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			of the Allotment Letter	over the possession
1.	Ajit Srivastava	29-10-2012	29-08-2016	
2.	Kanishko Enterprise	03-08-2012	08-08-2016	
3.	Abhishek Shrivastava	22-05-2011	22-03-2015	
4.	Sanjay Kumar	23-03-2012	23-01-2016	
5.	Sultan Masood Salim	03-08-2012	03-06-2016	
6.	Surendra Kumar	03-3-2012	03-01-2018	
	Samaresh Nandi	29-12-2011	29-10-2018	
	Satish Kumar Chandra	20-06-2011	20-04-2015	

It is submitted that despite such disbursement, the Corporate Debtor has failed to deliver possession of the said units to the Applicants till date, which is in contravention of the respective Agreements.

It is submitted that complaint No. 220186671 has also been filed by shri Surendra Kumar (Applicant No. 6) against M/s Gayatri Hospitality & Realcon Ltd in Real Estate Regulatory Authority Uttar Pradesh for refund of amount paid due to delay in possession and adoption of unfair practices.

It is further submitted that Complaint No. 9201819507 has also been filed by the association of homebuyers M/s Gayatri Aura Social Welfare Association against M/s Gayatri Hospitality & Realcon Ltd & Greater Noida Industrial Development Authority in Real Estate Regulatory Authority Uttar Pradesh for: i) Cancellation of registration of promoter M/s GHAR Lid in view of continued violation of UP Apartment Act 2010 and RERA 2016 and adoption

		of unfair practices; ii) Appointment of another Developer in consultation with the State government and the association of homebuyers.”

13. The allotment claimed by the original Applicants are from 22.05.2011 to 29.10.2012. The above application was filed prior to amendment of Section 7 as was inserted by Act No.01 of 2020 – IBC (Amendment) Act, 2020. Amendments were initially introduced by IBC Ordnance Act, 2019 with effect from 28.12.2019, which subsequently was enacted by Act No.01 of 2020. Section 7, sub-section (1) as amended by Act No.01 of 2020 is as follows:

> “**7. Initiation of corporate insolvency resolution process by financial creditor.** (1) A financial creditor either by itself or jointly with 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 subsection (6A) of section 21, an application for initiation 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 or 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 provisos as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation. - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

14. The above provision indicates that by Amendment Act No.01 of 2020, three Provisos were inserted as above. The CP(IB)/288(PB)/2019 was filed on 11.01.2019, i.e. prior to above Amendment. When we look into third Proviso as inserted in Section 7, sub-section (1) the requirement was to modify the application to make it compliant with first and second Proviso within 30 days. IA No.4163 of 2021 was filed by the Appellant on 15.07.2021 to implead 52 Applicants. Copy of the application has been brought on record, both by the Appellant as well as Respondents. In reply filed by the Respondents, Annexure R-1 is IA No.4163 of 2021. The copy of the order dated 13.01.2020 passed by Adjudicating Authority has been annexed with the application. On 13.01.2020, the Adjudicating Authority has passed the following order:

> "For this application namely IB No. 288(PB)/2019 being covered under ordinance, since it is being said by somebody that Hon'ble the Supreme Court has already granted stay over the ordinance 2019 (No. 16 of 2019) published in the Gazette of India on 28.12.2019, if that is not the case these applicants can proceed in accordance with law on the next date of hearing, these parties shall comply with the ordinance within 30 days as mentioned under the aforesaid ordinance and mention this matter before 28.01.2020.
>
> List the matter on 30.01.2020."

15. The Adjudicating Authority has noticed that there was already stay granted by the Hon'ble Supreme Court with regard to Ordinance. Subsequently on 30.01.2020, the Adjudicating Authority passed the following order:

> "Hon'ble Supreme Court having already granted stay against the proceedings, the parties are hereby directed to mention the matter as and when Hon'ble Supreme Court of India modifies the order earlier passed. Until such time, the Registry is hereby directed not to list this matter."

16. Thus, the Adjudicating Authority granted liberty to the parties to mention the matter, as and when the Hon'ble Supreme Court modifies the order earlier passed, till that time, the matter was directed not to be listed. The challenge to the IBC Amendment Act 2020 came to be decided by the Hon'ble Supreme Court vide its judgment dated 19.01.2021, which judgment is reported in ***(2021) 5 SCC 1 – Manish Kumar vs. Union of India and Anr.*** The amendments made in Section 7, sub-section (1), came for consideration before the Hon'ble Supreme Court in **Manish Kumar**'s case. The third Proviso added in Section 7, sub-section (1), which is relevant for the present case, was specifically noticed and

considered by the Hon'ble Supreme Court in **Manish Kumar**'s case. In paragraph 331, the Hon'ble Supreme Court noticed the third Proviso. Paragraph 331 of the judgment is as follows:

> "**331.** We will recapitulate the third proviso, at this juncture.
>
> > "7. Initiation of corporate insolvency resolution process by financial creditor.— * * *
> >
> > * * *
> >
> > 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."

17. Legislative intent of third Proviso has been noticed by Hon'ble Supreme Court in paragraph 331.1, 331.2 and 331.3, which are as follows:

> "**331.1.** A perusal of the same, makes it clear that the third proviso is a one-time affair. It is intended only to deal with those applications, under Section 7, which were filed prior to 28-12-2019, when, by way of the impugned Ordinance, initially, the threshold requirements came to be introduced by the first and the second impugned provisos.
>
> **331.2.** In other words, the legislative intention was to ensure that no application under Section 7 could be filed after 28-12-2019, except upon complying with the requirements in the first and

second provisos. The legislature did not stop there. It has clearly intended that the threshold requirement it imposed, will apply to all those applications, which were filed, prior to 28-12-2019 as well, subject to the exception that the applications, so filed, had not been admitted, under Section 7(5).

331.3. In other words, the legislature intended that in every application, filed under Section 7, by the creditors covered by the first proviso and by the allottees governed by the second proviso, should also be embraced by the newly imposed threshold requirement for which, it was intended, should be complied within 30 days from the date of the Ordinance. However, this restriction was not to apply to those applications which stood admitted as on the date of the Ordinance. It is also clear that the consequence of failure to comply with the threshold requirement, in regard to applications, which have been filed earlier, was that they would stand withdrawn."

18. The rationale for third Proviso was examined and noticed by the Hon'ble Supreme Court. It is useful to extract paragraphs 437, 438 and 440, which are as follows:

"**437.** The nature of the right involved in this case, is the right of the financial creditors to move an application under Section 7. Though, Section 7 confers a right upon the financial creditor to file the application, the proceedings are one in rem. We have already dealt with the scope of the Code and the consequences it can produce on the stakeholders and also the real estate project. The legislature was faced with the situation, where it felt that the requirement, as to maintainability of the application under Section 7, must, in regard to pending applications, be modified in the manner done. There is a determining principle, namely, the perception from experience about how the entire object of the Code would stand jeopardised if applications already filed could go on even when a fair and reasonable number of kindred souls are not available to support it. Once there is a principle, it cannot be

capricious, excessive or disproportionate unless we find that the time given under the proviso is manifestly arbitrary. A vested right under a statute can be taken away by a retrospective law. A right given under a statute can be taken away by another statute. We cannot ignore the fact that there was considerable public interest behind such a law. The sheer numbers, in which applications proliferated, combined with the results it could produce, cannot be brushed aside as an irrational or capricious aspect to have been guided by in making the law. Being an economic measure, the wider latitude available to the law giver, cannot be lost sight of.

438. The issue, which, however remains, is the period of 30 days made available. Is it reasonable to expect that a single applicant could, under the aegis of the laws, collect information, and furthermore, gather the support of fellow travellers, also inclined to support the applicant, as required? The third proviso does not provide for the applicant applying before the Tribunal and seeking extension of the period. It could be also argued that by granting such extensions, no harm is caused to the stakeholders, insofar as, all this is done before the admission of the application, with which alone, the consequences, including the appointment of the interim resolution professional and the passing of an order of moratorium, would arise. But here again we would be foraying into areas of legislative value judgment and be proceeding on the basis of what would be a fairer law.

440. As regards the compelled withdrawal under the third proviso of the pending applications is concerned, we hold as follows. Once the legislature intended that the pending applications must be made compliant with the threshold requirement, consequences for not doing so had to be provided. Otherwise, it would have created complete uncertainty and the applicant would have been dealt with in a manifestly arbitrary manner. Providing for the consequence of withdrawal before admission, which we have explained, does not have the consequence of preventing the fresh filing, even in regard to the same default, after complying, no doubt, with the requirement of the first or the second proviso, cannot be dubbed as

arbitrary. No doubt, there is lack of clarity in this regard in the provision but on an understanding of the law, as we have expounded, the provision was capable of being understood in the manner done."

19. The Hon'ble Supreme Court after elaborate consideration upheld the impugned amendment. The sufficiency and insufficiency of 30 days period was also noticed and following was observed in paragraph 444:

"**444.** We have noted the consequences of the deemed withdrawal, the nature of the right, the Explanation to Section 7, the objects of the Code, the factual matrix reflecting a tenfold increase in the applications, the pressure on the dockets of the bodies, which are charged with the imperative duty to deal with matters with the highest speed, the impact on similar stakeholders in the category and the sheer largeness of the class of creditors. The period could have been more fair to the petitioners by being longer but that is where we must bear in mind, the limits of our jurisdiction. Where would the Court draw the line? We find it difficult to hold that within the time-limit of 30 days it is impossible to comply with the requirements."

20. Ultimately the Hon'ble Supreme Court upheld the amendment and in paragraphs 447 and 448 held following:

"**447.** We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India:

447.1. If any of the petitioners move applications in respect of the same default, as alleged in their applications, within a period of two months from today, also compliant with either the first or the second proviso under Section 7(1), as the case may be, then, they will be exempted from the requirement of payment of court fees, in the manner, which we have detailed in the paragraph just hereinbefore.

> **447.2.** Secondly, we direct that if applications are moved under Section 7 by the petitioners, within a period of two months from today, in compliance with either of the provisos, as the case may be, and the application would be barred under Article 137 of the Limitation Act, on the default alleged in the applications, which were already filed, if the petitioners file applications under Section 5 of the Limitation Act, 1963, the period of time spent before the adjudicating authority, the adjudicating authority shall allow the applications and the period of delay shall be condoned in regard to the period, during which, the earlier applications filed by them, which is the subject-matter of the third proviso, was pending before the adjudicating authority.
>
> **447.3.** We make it clear that the time-limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay caused by the applications pending before the adjudicating authority. In other words, it is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under Section 5 of the Limitation Act, in regard to the period, during which, the applications were pending before the adjudicating authority, which were filed under the unamended Section 7, as also thereafter.
>
> **448.** The writ petitions and the transferred case will stand dismissed subject to the aforesaid directions and the observations contained in the judgment, and we only make it clear that the benefits of the directions, under Article 142, will be available also to the petitioners in the transferred case."

21. Certain directions were given in 447.1 and 447.2 with regard to exemption from court fee and filing of fresh application under Section 7, with which we are not concerned in these Appeals.

22. Now, we revert back to the aforesaid section and third Proviso as inserted in Section 7, sub-section (1). The application under Section 7 was filed by only eight Applicants on 11.01.2019, i.e., prior to

amendment. Thus by virtue of third Proviso, the application, which was filed under Section 7, was required to be modified to comply with the requirements of second Proviso, i.e. Section 7 application to be modified to fulfill 100 allottees or 10% of the total number of unit holders. For the first time the application for amendment, being IA No.4163 of 2021 was filed on 15.07.2021. We have noticed above that the NCLT after noticing the interim order passed by the Hon'ble Supreme Court, given the liberty to the parties to mention after the order of the Hon'ble Supreme Court is modified, which order was passed on 30.01.2020. The Hon'ble Supreme Court on 19.01.2021 having upheld the Amendment Act No.01 of 2020, the provisions of Section sub-section (1) became clearly applicable with respect to Section 7 application and after the judgment of the Hon'ble Supreme Court delivered on 19.01.2021, there was no escape from complying with the provisions by modifying Section 7 application, which was filed prior to amendment. For the first time, the application for modification was filed on 15.07.2021 being IA No.4163 of 2021. The copy of the application has been brought on record by Respondents themselves. The pleadings in IA No.4163 of 2021 clearly indicate that Applicants were well aware of the Ordinance dated 28.12.2019 and amendments brought by the Ordinance. The Applicants have also referred to the judgment of the Hon'ble Supreme Court in **Manish Kumar** delivered on 19.01.2021. It is useful to notice paragraphs 2(C), (D) and (E), which are as follows:

> "2C. The Pleadings in the present matter were completed and arguments were going on. However, on 28.12.2019 the Ministry of

Law and Justice published the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 ("Ordinance") and the same came into effect from 28.12.2019. As per the ordinance, in sub-section 1 of section 7 of the Insolvency and Bankruptcy Code ("the code"), the following proviso has been inserted before explanation:

> "Provided that for financial creditors, referred to in clause (a) and (b) for 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 percent of 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 creditors in the same class or not less than ten percent of total number of such creditors in the same class, whichever is less:
>
> Provided also that where an application for initiating corporate insolvency Resolution process against the Corporate Debtor has been filed by the financial creditors referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy (Amendment) Ordinance, 2019, such application shall be modify to comply with the requirements of the first or second proviso as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.

D. On 13.01.2020 the present matter was taken up for hearing by this Hon'ble Tribunal whereby the Hon'ble Tribunal directed the petitioner to comply with the ordinance if the said ordinance is not stayed by the Hon'ble Supreme Court. On 30.01.2020, the said matter was again taken up for hearing on 30.01.2020, wherein the Hon'ble Tribunal directed the petitioner to mention the matter before this Hon'ble Tribunal as and when the stay granted by the Hon'ble Supreme Court is vacated. Copy of orders dated 13.01.2020 and order dated 30.01.2020 are annexed and marked as Annexure A-1(colly.).

E. That the Hon'ble Supreme Court on 10.01.2021 passed an order in the matter of "Manish Kumar v. Union of India" wherein the Hon'ble Supreme Court upheld the validity of the Ordinance and directed the applicants to amend the petition as per the mandate of the Ordinance. In the said judgment, the Hon'ble Supreme Court also passed direction to the real estate developers to make the details of allottees available in the public domain."

23. The Applicants in the application has pleaded about the steps taken by them to find out the total number of units. In paragraph 2(G) and (H), following have been pleaded:

> "2G. That consequently the lead financial creditor made its own efforts to find out total no of the units in the real estate project in question of the Corporate Debtor i.e. Gayatri Aura. During collating allottees for completing the mandate under the Ordinance, the Lead financial Creditor came across a news article published in Times of India on 14.09.2019, wherein the spokesperson of the Corporate Debtor has stated that project Gayatri Aura comprises of four towers having total no. 544 units out of which 450 have been sold. Copy of news article published in Times of India dated 14.09.2019 is annexed and marked as Annexure A-3.
>
> H. As per the Ordinance, the application under section 7 of the Code has to be filed jointly by not less than 100 of such creditors who are allottees under the same real estate project or by not less than 10 percent of the total number of such allottees under the same real estate project. Accordingly, assuming for the time being without admitting that the Corporate Debtor has allotted all 544 units in this real estate project to various allottees, the lead financial creditor is required to modify the petition by adding 47 (as 8 allottees has originally filed the petition, therefore including 47 more allottees it becomes 55, being 10 percent) allottees of this real estate project as applicants in the present petition so as to fulfil the criteria of 10 percent of the total no of allottees in the real estate project in question. However, if we rely upon the news article published in Times of India annexed as A-3, the lead financial creditor is required to modify the petition by adding 37 more (as 45 being the 10 percent of the allotted units) allottees allottees of this real estate project as applicants in the present petition so as to fulfil the criteria of 10 percent of the total no of allottees in the real estate project in question. It is pertinent to mention that the Corporate Debtor is registered with UP RERA. Copy of the said registration certificate issued by UP RERA is annexed and marked as Annexure A-4."

24. By the application – IA No.4163 of 2021, the Applicants sought to add 52 Applicants to make the application in compliant with the amended provision. The prayers made in the application are at page 62, which are as follows:

> "1. Modify Company Petition (IB 288 (PB)/2019) as per the provisions of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (No. 16 of 2019) and consider this

application of the applicants as part and parcel of the present petition,

2. Admit the petition filed by the lead financial creditor and initiate the Corporate Insolvency resolution process against the Corporate Debtor namely, M/s Gayatri Hospitality and Realcon Limited,

3: Pass any other order (s) as this Hon'ble tribunal deems fit and proper in the interest of justice."

25. As noted above, the above application was filed only on 15.07.2021. The third Proviso to Section 7, sub-section (1) provided for a timeline for amending the application. The third Proviso uses the expression "***shall be modified to comply with the requirements of the first and second provisos as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before admission***". There are two parts of the above Proviso. Firstly, the application, which was filed prior to amendment has to be mandatorily modified to comply with the first and second Proviso and secondly, it is further provided that failing which the application **shall be deemed to be withdrawn before its admission**. Thus, in event the application is not modified within the time prescribed, underlying deeming fiction shall come into play and application shall be treated to be withdrawn. The above statutory provision makes it clear that in event the Applicant, fails to comply with the second Proviso to modify the application within thirty days from the date of amendment, deeming provision of law shall come into play and the application shall be deemed to have been withdrawn. The consequences provided by above legislative intent, cannot be defeated by any act of the parties. The

legislature did not require any order of the Court for withdrawal of the application and application shall be deemed to be withdrawn.

26. We wonder as to why the above statutory provision was not adverted to by the Adjudicating Authority while passing order of admission of Section 7 application. The filing of IA No.4163 of 2021 by the Applicants to comply with the provisions of second Proviso by adding 52 Applicants to make it compliant, clearly indicate that the original application was filed by eight Homebuyers was not in compliance with the amended provisions. Learned Counsel for the Homebuyers has also made submission with regard to different number of unit holders as provided by the CD from time to time. At one point of time the CD came with a case that there are 820 units in all and subsequently, it said there are 1124 units. Learned Counsel for the Homebuyers has also referred to website of UP RERA data as on 08.07.2022, where according to the Appellant, till previous quarter, only 12 units were booked and in the current quarter 832 units have been booked. We have to find out the number of units, which were allotted by the CD on the date of filing of application on 11.01.2019. Without entering into any other details suffice it to say that original application was filed by eight Homebuyers, who claimed their allotments between 2011 to 2012. Fifty two Applicants who sought to be added on 15.07.2021, claimed their allotments from 09.01.2011 to 30.06.2016 and other Applicant, who were sought to be added by IA No.3422 of 2022 and IA No.499 of 2023, are claiming allotment prior to filing of the application , i.e. 11.01.2019. Thus, according to own case of

the Respondents, all 107 Applicants, who were permitted to be added, claimed allotment prior to filing of Section 7 application. Thus, according to the own case of the Respondents, units were more than 100, hence, original application, which was filed by eight Homebuyers did not comply with the requirement. Filing of IA on 15.07.2021, i.e. IA No.4163 of 2021 to modify the application itself indicate that Applicants were conscious that their application is not in conformity with the statute. Hence, they have filed the application, but the application having been filed on 15.07.2021, i.e. beyond 30 days period provided in the third Proviso, the application shall be deemed to have been withdrawn and it was not open to the Adjudicating Authority to proceed further with the application. We, thus, are of the view that in view of the deeming clause as contemplated in third Proviso of Section 7 sub-section (1), the application stood withdrawn. Steps to modify the application having been not taken from 30 days from the date of enactment, i.e. 18.12.2019 and at least from 30 days from 19.01.2021, when the Hon'ble Supreme Court upholds the Amendment and also upheld the third Proviso, the detailed discussion with regard to third Proviso, we have already extracted above in this judgment.

27. In view of the foregoing discussions, we are of the view that application filed under Section 7 CP(IB)/288(PB)/2019, shall be deemed to be withdrawn and order of the Adjudicating Authority proceeding with the application and admitting the said application is contrary to the statutory scheme and cannot be sustained.

28. Although, learned Counsel for the Appellant has advanced his submission on the basis of order of the State Government dated 02.08.2023, by which the State Government allowed the revision filed by the CD and declared the zero period from 14.02.2011 to 01.09.2017 and as per the Appellant, in view of the aforesaid zero period having been declared, the 40 months period for construction had not even elapsed on 11.01.2019, when the application under Section 7 was filed. We having already taken the view that application under Section 7 deemed to be withdrawn by virtue of third Proviso to Section 7, sub-section (1) as amended by IBC (Amendment) Act 2020, it is not necessary to consider further submissions raised by the parties in this Appeal.

29. However, it is relevant to notice one aspect of the matter, which needs consideration. As noted above, the Appellant himself before the Adjudicating Authority and before this Tribunal has referred to its settlement offer, which was circulated in pursuance of the order of the Adjudicating Authority dated 26.07.2023, application permitting exit route to those Homebuyers, who want to exit by taking refund of the entire amount deposited with SBI FD deposit interest rates and further it shall also revive the allotments, which were cancelled, permitting CIRP as closed. The Appellant in the Appeal, itself at page 71 has extracted the proposal at pages 74 to 76, which is as follows:

> "Claim Settlement of Home Buyers: The corporate debtor through the co-promoter is willing to settle claim of home buyers. It is pertinent to mention here that the corporate debtors along with co-promoter has over the last 4 years, settled claims in excess of Rs

10 Crs of homebuyers due to withdrawal of allotment and or cancellation of the unit due to non-payment. Co-promoter and its group being a high net worth group willing to settle home buyers within 60 days. Over and above co-promoter has secured financial assistance of 367 crores which gives additional space to the co-promoter. Since refunds of already cancelled units were considered as liability and part of SWAMIH underwriting hence refunds can also be made through investment proceed. (The Home Buyers Association are not aware of the terms and condition of the final sanction hence they are casting unnecessary aspersion)

107 homebuyers have filed petitions in Hon'ble NCLT

3 Homebuyers have settled. Two have taken possession and one has already taken a refund.

The allotment of 50 allotees has been cancelled. For allottees who have not secured a refund order from any other judicial/quasi-judicial body, the corporate debtor is willing to restore their allotment if they wish to continue in the project provided the project comes out of NCLT proceedings. Those who wish to get an exit from the project corporate debtor is ready to refund their entire money along with interest at the rate of SBI Bank FD Rate within 60 days of the order.

Balance 55 home buyers: We are offering alternate possession in completed towers or towers that are nearing possession i.e. Tower A, B, E & F. In case, they wish to take the refund, then we are ready to refund their money as well along with interest at SBI Bank FD Rate, 100% of the amount with interest within 60 days.

For Home Buyers Who are not the Part OF NCLT Proceedings:

Corporate Debtor is proposing a 3 months moratorium from the zero date on all demand.

Next Demand shall be raised only after three months based on the payment plan under which units have been booked.

There shall be no cost escalation and shall not be charged any extra money other than the charges mentioned in the builder-buyer agreement.

If they wish to exit from the project corporate debtor is willing to refund their money along with interest rate at SBI Bank FD Rate.

Future Course of Action:

The corporate debtor/co-promoter agreed to infuse 25 crores and committed to infuse more if required. Infusion of 25 crores is also one of the key terms and conditions of the SWAMIH Investment Fund.

Corporate debtor and co-promoter are willing to pay GNIDA demand within 60 days of issuance of demand or the terms of issuance of demand whichever is earlier.

Corporate debtor and co-promoter willing to deploy project monitoring committee and financial monitoring committee under the supervision of SWAMIH Investment Fund which will bring transparency and good governance.

Progress reports of monitoring committees shall be shared with home buyers on a monthly basis."

A true copy of the email dated proposing the resolution is annexed and marked as “Annexure A-49””

30. We have already noticed that after filing of the application, the CD has cancelled the allotment of about 50 allottees. The Appellant himself offered to restore the allotment, if the unit holders wish to continue in the Project. In view of the above, we are of the view that Appellant is held to be bound with its proposal, i.e. (1) to grant withdrawal to those units holders, who want to withdraw their amounts deposited with SBI CD interest rate within 60 days from the receipt of communication; (2) the allotments, which were cancelled by the CD, after filing of the application

under Section 7, till passing of the impugned order, shall stand revived. However, the unit holders shall be liable to pay the balance due consideration as per Builder Buyers Agreement.

31. We having taken the view that Section 7 application filed by the Homebuyers has to be treated to be deemed to be withdrawn by virtue of third Proviso of Section 7, sub-section (1), no orders are required in Company Appeal (AT) (Insolvency) No. 1053 of 2024.

32. In view of foregoing discussions, both the Appeal(s) are decided in following manner:

(1) The impugned order dated 04.03.2024 admitting Section 7 application is set aside and it is held that CP(IB)/288(PB)/2019 stood withdrawn under third Proviso to Section 7, sub-section (1) as inserted by IBC (Amendment) Act, 2020.

(2) The Appellant is held bound to honour its settlement proposal as noted above, i.e.:

(I) to grant withdrawal to those units holders, who want to withdraw their amounts deposited with SBI FD interest rate within 60 days from the receipt of communication;

(II) the allotments, which were cancelled by the CD, after filing of the application under Section 7, till passing of the impugned order, shall stand revived. However, the

unit holders shall be liable to pay the balance due consideration as per Builder Buyers Agreement.

Both the Appeal(s) are disposed of accordingly. Pending IAs, if any, are also disposed of. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

8th July, 2025

Ashwani