

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-806(PB)/2019

IN THE MATTER OF:

Ravinder Aggarwal & Ors.Financial Creditors/Petitioners

v.

MSA Developers Pvt. Limited ...Corporate Debtor/Respondent

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

Judgment delivered on 11.10.2019

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA

HON'BLE MEMBER (T)

PRESENT:

For the Petitioner: Mr. Abhay Pratap Singh, Adv.

For the Respondent: Mr. Onkar Nath, Adv.

M.M. KUMAR, PRESIDENT

JUDGMENT

Mr. Ravinder Aggarwal including nine others claiming to be 'Financial Creditors' have filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of MSA Developers Private Limited, who is stated to be the 'Corporate Debtor'.

2. The Petitioners are allottees of a real estate project. The petitioners are ex-facie financial creditors in terms of the provisions of

Section 5(8)(f) and explanation inserted by the Second Amendment Act, 2018 w.e.f. 06.06.2018. The challenge to the aforesaid amendment has been repelled by Hon'ble the Supreme Court in the judgment rendered in the case of Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019, decided on 09.08.2019). Therefore, no doubt is left that the petitioners are Financial Creditors.

3. The Respondent company-the Corporate Debtor, MSA Developers Private Limited (CIN U70200DL2013PTC252698) was incorporated on 24.05.2013 under the provisions of the Companies Act, 1956. The registered office of the Respondent-Corporate Debtor is situated at 11/37, Ground Floor, Old Rajinder Nagar, New Delhi-110060. Its authorized share capital of Rs. 25,00,000/- and paid up share capital of Rs. 1,00,000/- which is based on the details given in master data obtained from the official website of Registrar of Companies (Annexure- A-4). Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal being Adjudicating Authority has territorial jurisdiction in respect of respondent corporate debtor as per the provisions of sub-section (1) of Section 60 of the Code.

4. The 'Financial Creditors'-Petitioners have proposed the name of Resolution Professional, Shri Rabindra Kumar Mintri with the address JD-18-B, Near Ashiana Chowk, Pitampura, New Delhi-110034, email-mintri_ca@rediffmail.com and Mobile No. 9811173846. His Registration number is IBBI/IPA-001/IP-P00707/2017-18/11194. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

5. The case of the petitioners in nutshell is that between 2013-2015 they have entered into different builder buyer agreements [(Annexure A-7 (colly)] with respondent M/s MSA Developers Private Limited for purchase of real estate units being residential flats in the project-MSA Circuit Heights, at Plot No. GH-G4, Jaypee Green Sports City, SDZ, Sector-25, YEIDA, Gautam Buddha Nagar, Uttar Pradesh which was being developed by and promoted by 'the Corporate Debtor'. The petitioners have paid a total amount of Rs. 4,32,75,192/- on various dates to the Respondent/Corporate Debtor and the figures relating to each of the petitioner have been stated in clear terms under Para 1 of Part-IV of the petition.

6. According to clause 19 of the allotment letters/builder buyer agreements, the Respondent Company undertook to complete the construction of flats and hand over the possession of the same to the petitioners within 36 months with grace period of six (6) months from the date of starting of excavation/signing of agreement. At this stage it would be profitable to read clause 19 of the said allotment letters/builder buyer agreements which is as under:

“19(a) That the developer shall complete the development/construction of the Flat within 36 months from the date of starting of excavation/signing of agreement which may vary for +_ 6 months. No claim by the way of damages/compensations shall lie against the developer in case of delay in handing over the possession and developer shall be entitled to a reasonable extension of time for the delivery of possession of the flat to the Allottee.

(b)

(c) In case of delay in construction of the flat for reasons other than force majeure condition, the Developer shall pay a sum at the rate of Rs. 5/- (Rs. Five Only) per sq. ft of super area per month for the delayed period, which shall of any/all damages, compensation, claim for delayed possession”.

7. As per clause 3 of the Annexure-'D' namely Special Scheme attached with the allotment letters/builder buyer agreements, the petitioners were offered a special 'buy back' scheme whereby they had an option to sell the flats back to the Corporate Debtor after a period of 42 months from the date of execution of the allotment letters/builder buyer agreements. The relevant clause 3 incorporated in the said allotment letters/builder buyer agreements reads thus:

"3. The allottee can either retain the flat or opt for the buyback scheme from the developer with Rs. 46,46,250/- (BSP Rs. 2950*1575 sq.ft) after 42 months or possession whichever is earlier."

8. However even after expiry of sufficient long-time possession of the said flats have not been handed over to the petitioners. The petitioner No. 3 has also filed a complaint against the Respondent Company with Economic Offences Wing, Delhi Police (Annexure A-10). The petitioners have landed before Adjudicating Authority-NCLT. Copies of statement of bank accounts of some of the petitioners where deposits are made or credits received normally by them have been placed on record (Annexure A-8).

9. The Petitioners have also attached other documents to the petition to prove the financial debt, the total amount due and payable along with the date of default.

10. It is claimed that the Respondent is liable to pay an amount of Rs. 4,32,75,192/- (Rupees Four Crores Thirty Two Lakhs Seventy Five Thousand One Hundred and Ninety Two only) to the petitioners.

11. Learned counsel for the Corporate Debtor has made valiant attempt to resist the admission of the petition by arguing as under:-

1. The construction at project site is in full swing and the same is under strict monitoring of Hon'ble High Court of Delhi vide order dated 23.05.2019 (Annexure-3) (Garima Gupta v. State, Bail Application No. 721/2019). Out of 93 buyers/complainants who had lodged the FIR and subsequently approached the Hon'ble Delhi High Court in Mediation & Conciliation Centre, 55 (fifty five) agreed to extend the time for construction, 15 (fifteen) were settled/shifted to other projects and 10 (ten) have in-principle agreed to settle the dispute by extending time for construction and taking the possession of flats.

2. The petitioners are speculative buyers who already own multiple properties and have invested in the project to tap the momentum of real estate market. The petitioner No. 1 is himself in real estate business and President of Association of Certified Realtors of India and knowing the market condition is not interested in the possession of the flat.
3. The petitioners have not filed any documents to establish that they have paid the sum of Rs. 4,32,75,192/- to the Corporate Debtor as the same is incorrect, false and misleading. The petitioners have not placed any document pertaining to the entries in a Bankers Books in accordance with the Bankers Books Evidence Act, 1891.
4. The whole purpose of insolvency code is to first attempt revival of the beleaguered corporate debtor failing which the process of liquidation is the inevitable consequence. Insolvency proceedings is sought to be initiated with the sole purpose and intent to coerce such corporate debtor to repay which may lead to its unnatural death in place of its revival or resolution. Such proceedings may be avoided

where the alternative offer are more viable alternate options for resolution of dispute.

12. Before embarking upon the legal issues, we deem it appropriate to first refer to the material clauses of the agreement. According to clause 19(a) of the allotment letters/builder buyer agreements the Corporate Debtor had proposed to handover the possession of the flats within thirty six months from the date of starting of excavation/signing of agreement with grace period of six months. It is further postulated by clause 19(c) of the allotment letters/builder buyer agreements that in case the Corporate Debtor is not able to handover the possession within the time as stipulated in the aforesaid allotment letters/builder buyer agreements than the Financial Creditors-allottees are entitled to payment of compensation for delay @ Rs. 5/- per square feet per month of the super area. As per clause 3 of the Annexure-'D' namely Special Scheme attached with the allotment letters/builder buyer agreements, the petitioners were offered a special 'buy back' scheme whereby they had an option to sell the flats back to the Corporate Debtor after a period of 42 months from the date of execution of the allotment letters/builder buyer agreements whichever is earlier.

13. It is not disputed that the allotment letters/builder buyer agreements were signed and executed between the parties. True copy of statement of bank account of one of the petitioners namely Ms. Radha Negi depicts that on 09.02.2015 & thereafter on 20.02.2015 a sum of Rs. 6,00,000/- & Rs. 1,09,910/- respectively were paid to the Corporate Debtor. A confirmation of accounts from 01.04.2013 to 05.10.2014 issued by the Corporate Debtor with regard to petitioner namely Ms. Arti Prasad further proves that a total sum of Rs. 33,71,901/- were credited in the account of the Corporate Debtor in various tranches. According to the clause 19(a) of the allotment letters/builder buyer agreements the construction of the flats was to start from the date of the excavation/signing of agreement and admittedly in the case in hand first agreement with regard to petitioner namely Mr. Ravinder Aggarwal was signed on 20.08.2014. Therefore, from 20.08.2014 the period of thirty six months has to be counted which expire on 20.08.2017. The maximum period i.e. 36 (thirty six) months plus further grace period of 6 (six) months would be completed on 20.02.2018. It also appears that the Financial Creditors-allottees have not been paid any amount of compensation @ Rs. 5/- per square feet per month nor the possession has been offered. A reasonable period of delay of six months to one year might

be acceptable. However, the facts in the present case shows that the project is not complete. The principles of reasonableness are implied in such like contract. There is extraordinary delay of about 1 ½ years in delivering the possession. In fact, there is a fundamental breach of the terms of the contract by not delivering the possession within the reasonable period even after expiry of thirty six months plus grace period of six months. The amount in fact become payable on the completion of period of thirty six months plus grace period of six months and; a maximum period of further one year could be granted. The possession should have been offered by February, 2018 and therefore, the principal amount along with compensation and interest becomes payable.

14. For Corporate Insolvency Resolution Process Part-II (chapter-I) has been carved out and in Section 5 (8) (f) of the Code the expression 'financial debt' has been defined to mean a debt along with interest, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction including the sale or purchase agreement, which has commercial effect of a borrowing. The explanation has clarified that any amount raised from an allottee under a 'real estate project' was to be considered as an amount having the commercial effect of a borrowing

and the expression 'allottee' and the 'real estate project' are to have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016. It is the aforesaid provision which was subject matter of challenge before Hon'ble the Supreme Court in a bunch of petitions. In the lead case titled as Pioneer Urban Land and Infrastructure Limited (supra) the conclusion of detailed discussion has been recorded in para 86 by Hon'ble the Supreme Court which reads as under:-

“Conclusion

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

fiction added by the Amendment Act is only clarificatory of this position in law.”

A perusal of conclusion (i) shows that the explanation added to Section 5 (8) (f) by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 w.e.f. 06.06.2018 has been upheld by holding that it does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India. Conclusion (iii) further shows that Section 5 (8) (f) as originally incorporated in the Code was a residuary provision and always subsumed within it allottees of flats/apartments and the Amendment Act is only clarificatory of the position of law.

15. It is pertinent to mention that the resolution process is an attempt to rescue a fund starving body corporate from the financial challenging conditions and to restore it back to a sustainable financial ease. It may involve financial restructuring, any other arrangement by involving another fund infusing company or even by compromise with its creditors. The object of the ‘Code’ is to resolve the insolvency which could not be achieved unless the petition is admitted. The resolution as against liquidation would only be possible if the Corporate Insolvency Resolution Process is triggered and efforts in that direction are made. Even this petition could be withdrawn after admission if requirement of Section 12A of the Code are fulfilled.

Even before constitution of CoC the CIR Process could be withdrawn by filing an application under Rule 11 of NCLT Rules, 2016. In that regard the parties have to fulfil the requirements of law as laid down by Hon'ble the Supreme Court in Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. (Writ Petition (Civil) No. 99 of 2018 decided on 25.01.2019.

16. If some homebuyers are satisfied with the breach of obligation then it cannot be a lawful ground to resist those who have vested right to invoke the provisions of Section 7 of the Code. Such a course is wholly unwarranted and would not be sustainable in the eyes of law.

17. The objections raised on behalf of the Corporate Debtor also do not warrant any serious consideration. It is already observed that the object of the Corporate Insolvency Resolution Process is to rescue a fund starving body corporate from the financial stress as is discussed in para 15 of the order and it is not understood as to how the Corporate Insolvency Resolution Process could be deferred merely because it was agreed between the parties that in case of default on the part of the Respondent, the Petitioner would take over the possession of the property, which has been allotted as collateral security to the Petitioner and are of a very high value. It is not the

property which is at the base of the Code, 2016. It is cash liquidity which is the basis for triggering the Corporate Insolvency Resolution Process. Such like factors cannot obstruct the admission of the petition.

18. Another objection raised by the Corporate Debtor is that the petitioners are speculative buyers. The basis of the objection is that they have multiple properties and have invested in the project to tap the momentum of real estate market and one of them is in real estate business being President of the Association. There is nothing on record to show that any one of the petitioners own multiple properties. Even the places where the properties are situated have not been highlighted. The objection is wholly vague. In any case this fact alone may not be a clinching fact or to conclude that the petitioners are to be regarded as speculative buyers. As a matter of fact, each one of them waited to the maximum time postulated in the builder buyer agreements and the possession was not delivered till February, 2018. It is by efflux of time that the buy back clause came into operation which was invoked by them. Even in respect of petitioner No. 1 there is only bald averments made and no document has been placed on record showing that he is in real estate business and is President of Association of Certified Realtors of India. On the basis of these bald

averments no finding could be recorded in these summary proceedings to conclude that the petitioners are speculative buyers within the meaning of para 50 of the Pioneer Urban Land and Infrastructure Limited case (supra).

19. Another objection raised by the Corporate Debtor is that the petitioners have not filed any document to establish the disbursement of amount claimed being Rs. 4,32,75,192/- to the Corporate Debtor. The objection is otherwise also wholly ill-advised as there is a series of documents in the shape of builder buyer agreements along with allotment letters [(Annexure A-7 (colly))] and the statement of individual petitioner account with respect to flat/unit (Annexure A-8). Even the receipts confirming the payment of amount issued by the Corporate Debtor to individual petitioner have been placed on record [Annexure A-6 (colly)]. Therefore, the objection is frivolous and is wholly unsustainable and is hereby rejected.

20. It is pertinent to mention that on account of stay order passed by Hon'ble the Supreme Court in Pioneer Urban Land and Infrastructure Limited's case on 11.03.2019, hearing in this matter was deferred on various occasions.

21. Learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditors stand fulfilled and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It is further submitted that the details of default along with its dates have been clearly stated in part IV along with all the minute details. There is overwhelming evidence to prove default. The name of the resolution professional has also been specified.

22. We may now examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-

“Initiation of corporate insolvency resolution process by financial creditor.

7 (1)

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3)

7 (4)

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b)

23. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. We are satisfied that a default amounting to lacs of rupees has occurred. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

24. As a sequel to the above discussion, this petition is admitted and Shri Rabindra Kumar Mintri is appointed as an Interim Resolution Professional.

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

26. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

- (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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.”

27. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other services or supplies as provided by

Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

28. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else the Interim Resolution Professional/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional/Resolution Professional shall be under a duty to protect and preserve the value of

the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

29. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

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

31. Before parting we must notice the complaint made against Financial Creditors in the form of discrepancies in the statement of

account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditors as it is only fair to do so.

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



**(M.M. KUMAR)
PRESIDENT**



**(S.K. MOHAPATRA)
MEMBER (T)**

11.10.2019
Vineet

Pronounced today under Rule 151 of the NCLT Rules 2016 as Hon'ble Member (T), Shri S.K. Mohapatra is not holding Court today.



**(NIRMALA VINCENT)
COURT OFFICER**