FIT FOR INDEXING

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1565(PB)/2018

IN THE MATTER OF:

Mr. Mohan Agarwal ....Financial Creditor/Petitioner

v.

M/s. Crown Realtech Private Limited
.............Corporate Debtor/Respondent

SECTION: Under Section 7 of The Insolvency andBankruptcy Code, 2016

Judgment delivered on 06.12.2019

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

SHRI S.K. MOHAPATRA
Hon'ble Member (T)

PRESENT:

For the Petitioner:	Mr. P.K. Mittal, Ms. Tanya Goel & Ms. Shruti Choudhary, Advocates
For the Respondent:	Mr. Jeetender Gupta & Mr. Pradeep Agarwal, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The Petitioner claiming to be 'Financial Creditor' has filed the instant petition 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 M/s. Crown Realtech Private Limited, who is stated to be the 'Corporate Debtor'.

2. The Petitioner is an allottee of a real estate project. He is ex-facie financial creditor in terms of 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., *(2019) 8 SCC 416*. Therefore, no doubt is left that the petitioner is Financial Creditor.

3. The Respondent company-the Corporate Debtor, M/s Crown Realtech Private Limited (CIN U27209DL1983PTC015878) was incorporated on 07.06.1983 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is 2nd Floor, Rajendra House, E1/B1, Mohan Cooperative Industrial Estate, New Delhi-110044.

4. The 'Financial Creditor'-Petitioner has proposed the name of Resolution Professional, Shri Amit Agarwal (Company Secretaries) with the address H-63, Vijay Chowk, Laxmi Nagar, Delhi-110092. His Registration number is IBBI/IPA-002/IP-N00422/2017-18/10456. 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 petitioner in nutshell is that he had booked a commercial space admeasuring 7726 sq. ft. comprised in flat Nos. 409, 410 & 411 on the 4th Floor in Tower B-2 at Village Sarai Khawaja, Faridabad, Haryana for the total consideration of Rs. 2,08,98,830/- under the project namely "Abacus Technopark" of the respondent company.An agreement to sell (Annexure-III) was duly executed between the parties on 10.03.2011 and registered with Sub-Registrar, Faridabad. The petitioner has paid a total amount of Rs. 2,08,60,200/- to the Respondent on various dates through bank (Annexure-II).

6. As per clause 6(d) of the agreement, the Respondent Company undertook to hand over the possession of the said unit to the petitioner on or before December, 2012 with a grace period of three months. It is further postulated by the said clause that in case the Corporate Debtor is not able to handover the possession within the time as stipulated in the aforesaid agreement than the Financial Creditor is entitled to payment of interest @ 20.50% per annum compounded annually on the

amount paid by the Petitioner from 01.04.2013 till the possession of the unit is actually handed over to him. It was stipulated that in case the Respondent fails to hand over the possession of the unit, in that event the Petitioner would be entitled to treat the said agreement as terminated and to claim refund of the entire amount paid to the Respondent with interest @ 20.5% per annum.At this stage it would be profitable to read clause 6(d) of the said agreement which is as under:

> "6(d). The Developer has agreed to hand over Possession of the unit to the buyer on or before December 2012 with a grace period of three months, i.e. latest by 31st March 2013. In case the Developer is unable to meet the said deadline, the Developer shall pay interest @20.5% P.A. compounded annually on the amount paid by the Buyer from 1st April 2013 till the possession of the unit is actually handed over by the Developer to the Buyer, provided further that in case the Developer fails to deliver Possession of the unit even up to 30th September 2013, in that event the Buyer shall be entitled to claim refund of the entire amount with interest @20.5% P.A. compounded annually from the date of payment till the date of refund together with a further

sum equivalent to the amount paid by the Buyer as and by way of liquidated damages and/or market difference."

7. There was apparently inordinate delay in delivering the possession of the said unit as well as in making payment towards interest by the Respondent. As a result, the Petitioner wrote a letter dated 10.06.2016 (Annexure-IV) to the Respondent requesting it to comply with the terms of the agreement in delivering the possession and in making the payment of interest. Thereafter another letter dated 13.08.2018 (Annexure-VI) was writtenshowing his willingness in terminating the agreement and seeking refund of the entire amount paid by them but all in vain. The petitioner has availed the remedy under Section 7 by filing the instant petition.

8. The precise case of the Petitioner thus is that the total amount in default due and payable to the Petitioner by the Respondent-Corporate Debtor as on 31.08.2018 is Rs. 8,43,57,228/- inclusive of interest and liquidated damages.

9. Learned counsel for the Corporate Debtor has advanced numerous arguments to resist the admission of the petition by arguing as under: -

(i) The Respondent had earlier applied for occupation certificate in respect of the said project. However, the office of Director Town & Country Planning Department vide letter dated 06.03.2019 had refused the permission on account of incomplete rain water harvesting system and internal public health services. It has again reapplied for grant of occupation certificate on 12.09.2019 after fulfilling the said compliances.

(ii) The project under question is being regularly monitored by Haryana Real Estate Regulatory Authority Panchkula and in terms of the undertaking made by the Respondent before it, the date of completion of Tower B-1 & B-2 are declared as December, 2019 & May, 2020 respectively.

(iii) The above Authority namely Haryana Real Estate Regulatory Authority Panchkula vide its order dated 21.02.2019 (Annexure CD-1) has observed that the grant of refund to any allottee would seriously jeopardise the interest of rest of the allottees and would affect the completion of the project. The said judgment/order is a judgment/order in rem and binds all the allottees including the present one. The Respondent submits that similar approach in the larger interest of the other allotteesand in the interest of the completion of the project may be accepted.

(iv) Another argument raised is based on the judgment rendered in Pioneer Urban Land and Infrastructure Limited (supra). According to the learned counsel once the project of the Corporate Debtor is registered with RERA under Section 4 then the principle of harmonious construction, as laid down in the Pioneer Urban Land and Infrastructure Limited (supra), has to be applied and the timeline i.e. May, 2020 given by Authorities under RERA has to be respected.

(v) The Civil Structure of the said project is more or less complete and the project is complete to the tune of 80-85% with an investment of over Rs. 200 crores. To complete the project amount around Rs. 30 crores are required as of date. The Respondent has receivables of around Rs. 35 crores from the existing allottees and there is hardly any unsold inventory.

(vi) The delay caused in the completion of the project was primarily on account of non-payment of the instalments by the majority of the allottees ranging between Rs. 30-35 crores, which is due and payable by them and which would be approx. Rs. 50 crores including interest to be paid by these allottees.

(vii) The Respondent has already paid a sum of Rs. 4.32 crores as on 30.03.2019 to clear the entire loan advanced by Punjab National Bank and there are no other financial creditors of the Respondent. It has also cleared the statutory liability of Rs. 4.25 crores as on 02.08.2019 towards External Development Charges and has also paid a sum of Rs. 40.75 lakhs towards payment of statutory taxes as on 19.07.2019.

(viii) The Petitioners who have filed the various petitions before this Tribunal have pleaded that they have booked the units for their own use and the purpose of their allotment. In absence of the specific pleadings in this regard, these petitioners can be classified as speculative investors, who are not genuinely interested in purchasing the unit.

10. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor has succeeded in establishing a case for triggering the Corporate Insolvency Resolution Process.

11. Before discussing the legal issues raised, we deem it appropriate to first refer to the material clause of the agreement. According to clause 6(d) of the agreement the Corporate Debtor had proposed to handover the possession of the said unit on or before December, 2012 with grace period of three months.It is further postulated by the said clause that in case the Corporate Debtor is not able to handover the possession within the time as stipulated in the aforesaid agreement then the Financial Creditor is entitled to payment of interest @ 20.50% per annum compounded annually on the amount paid by the Petitioner from 01.04.2013 till the possession of the unit is actually handed over to him. It is also provided that in case the Respondent fails to hand over the possession of the unit, in that event the Petitioner would be entitled to treat the said agreement as terminated and

to claim refund of the entire amount paid to the Respondent with interest 20.5% per annum.

12. It is not disputed that the agreement dated 10.03.2011 (Annexure-III) was signed and executed between the parties. True copy of statement of bank accounts (Annexure-II) in respect of the petitioner depicts that on six occasions a sum of Rs. 2,08,60,200/- was paid to the Corporate Debtor. The Financial Creditor-allottee has not been paid any amount of interest @ 20.5% per annum as agreed by the Respondent in aforesaid clause w.e.f. March, 2013 nor the possession has been offered.

13. As per the agreement dated 10.03.2011 the Financial Creditor was required to be given possession by December, 2012 plus grace period of three months. The aforesaid fact is clear from clause 6 (d) of the agreement executed on 10.03.2011. A long period of more than eight years have gone by. There is no occupation certificate in sight and the present management is unable to perform its obligation in accordance with the builder-buyer agreement. It not unwarranted to infer that the Petitioner has lost faith in the Corporate Debtor. Therefore, the Financial Creditor would be well within his right to trigger the Corporate Insolvency Resolution Process because it was such a process

alone that a new management may come in and perform it obligations as per law. In that regard pertinent observations in para 39 in Pioneer Urban Land and Infrastructure Limited (supra) in so far as applicable to the facts and circumstances of this case would read as under:-

> "39. It is also important to remember that the Code is not meant to be a debt recovery mechanism [see paragraph 28 of Swiss Ribbons (supra)]. It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code, i.e. that it must be approved by at least 66% of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such home buyer/allottee may have to wait for a very long

period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. ***Thus, given the bona fides of the allottee who moves an application under Section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the NCLT under the Code hoping that some other developer takes over and completes the project, while always taking the risk that if no one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up.*** Given the reasons of the Insolvency Committee Report, which show that experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse, i.e. failure of the project itself,............."

(emphasis added)

14. Even otherwise 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 cases. There is extraordinary delay of about 6 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 stipulated time carved out in the agreement i.e. December, 2012 plus grace period of three months. The default has occurred because the payment made for the allotment of the said unit has the commercial effect of borrowing within the meaning of Section 5(8)(f) of the Code. The amount in fact becomes due and payable on the completion of period by December, 2012 plus grace period of three months and; a maximum period of further one year could be granted. The possession should have been offered by March, 2014 and therefore, the principal amount along with compensation and interest becomes payable.

15. 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.

16. As a matter of fact, the petitioner waited to the maximum time postulated in the agreement and the possession was not delivered till November, 2018 i.e. date of filing of the petition.

17. Even assuming that the aforesaid unit is complete to the tune of 80-85% with an investment of over Rs. 200 crores (as asserted by the respondent), the delay of almost 6 ½ years is a crucial factor.

18. 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.

19. 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 (supra) on 11.03.2019, hearing in this matter was deferred on various occasions.

20. We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our order dated 27.11.2018 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt. Ltd. (IB-1039(PB)/2018).

21. After a reading of Section 7 of the Code along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.

22. As a sequel to the above discussion, this petition is admitted and Mr. Amit Agarwal is appointed as an Interim Resolution Professional.

23. 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.

24. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. 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 supplies of goods or services as provided by

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

25. 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 her 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.

26. 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.

27. 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.

28. 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.

29. A copy of this order shall also be sent to the Secretary, Ministry of Corporate Affairs, New Delhi for compliance of directions issued in para 28 above.

-Sd-

(M.M. KUMAR)
PRESIDENT

-Sd-

(S.K. MOHAPATRA)
MEMBER (T)

06.12.2019
Vineet