

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI BENCH**

CP IB NO. 755/PB/2020

A/W

IA NO. 6091/ND/2022 IN CP IB NO. 755/PB/2020

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

TARUN AHUJA & ORS.

...Applicants/Financial Creditor(s)

VERSUS

M/S PURI CONSTRUCTION PRIVATE LIMITED

...Respondent/Corporate Debtor

Order Delivered on: 24.01.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES:

1. Anant Ghildiyal
S/o Late Mr. Suresh Chandra Ghildiyal
R/o Flat No. 21, Sweet Home Society, Sector-14,
Rohini, New Delhi.
2. Srishti Malasi
W/o Mr. Anant Ghildiyal
R/o Flat No. 21, Sweet Home Society, Sector-14,
Rohini, New Delhi.
3. Ankit Kukreja
S/o Mr. Rajendra Kukreja

R/o H. No. 193, Sector-14,
Faridabad, Haryana.

4. Jitander Kapil
S/o Mr. S.L. Kapil
R/o 275, Sector 23, NIT,
Faridabad, Haryana-121005.
5. Preethi Pathak
W/o Jitander Kapil S/o Mr. S.L. Kapil
R/o 275, Sector 23, NIT,
Faridabad, Haryana-121005.
6. Manish Kapil
S/o Mr. S.L. Kapil
R/o 275, Sector 23, NIT,
Faridabad, Haryana-121005.
7. Novjot Kumar Gupta
S/o Late Mr. Ramji Lal Gupta
R/o House No. 941, Sector-16, Faridabad, Haryana-121002.
8. Atul Gupta
S/o Late Mr. Ramji Lal Gupta
R/o House No. 941, Sector-16,
Faridabad, Haryana-121002.
9. Om Prakash Yadav
S/o Gariwar Yadav
R/o Raj Mahal, Mujeri Mor, Sector-67,
Vill Chandawali, Ballabgarh,
Faridabad, Haryana-121004.
10. Kalpana Gulati
W/o Mr. Shyam Sunder Gulati
R/o House No. 294, Sector-28, Sector-29,
Faridabad, Haryana-121008.
11. Pragya Gulati
D/o Mr. Shyam Sunder Gulati
R/o House No. 294, Sector-28, Sector 29,
Faridabad, Haryana-121008.
12. Saurabh Kukreja
S/o Rajender Kukreja
R/o H. No. 193, Sector-14,
Faridabad, Haryana.

13. Dhirendra Lamba
S/o Late Mr. D.S. Lamba
R/o House No. 891, Sector-14,
Faridabad, Haryana-121007.
14. Shailesh Gupta
S/o Mr. Prem Chand Gupta
R/o Flat No. 18, HEWO Apartment, Sector 16,
Faridabad, Haryana.
15. Shweta Gupta
W/o Shailesh Gupta
R/o Flat No. 18, HEWO Apartment, Sector 16,
Faridabad, Haryana.
16. Atul Seksaria
S/o Mr. Ganga Prakash Seksaria
R/o House No. 802, Sector 15,
Faridabad, Haryana-121007.
17. Ritu Seksaria
W/o Atul Seksaria
R/o House No. 802, Sector 15,
Faridabad, Haryana-121007.
18. Achal Seksaria
S/o Atul Seksaria
R/o House No. 802, Sector 15,
Faridabad, Haryana-121007.
19. Himanshu Arora
S/o Mr. K.K. Arora
R/o House No. 605, Sector 21C, Neelkhant Apartment,
Faridabad, Haryana-121001.
20. Sanjeev Kumar Kapoor
S/o Mr. Krishan Lal Kapoor
R/o House No. 1691, Sector-16,
Faridabad, Haryana-121002.
21. Nisha Rani Kapoor
W/o Sanjeev Kumar Kapoor
R/o House No. 1691, Sector 16,
Faridabad, Haryana-121002.

22. Pritam Lal Dua
S/o Mr. Khanda Ram Dua
R/o House No. 1338, Sector 15,
Faridabad, Haryana-121007.
23. Meena Dua
W/o Mr. Pritam Lal Dua
R/o House No. 1338, Sector 15,
Faridabad, Haryana-121007.
24. Sanjay Dua
S/o Mr. Pritam Lal Dua
R/o House No. 1338, Sector 15,
Faridabad, Haryana-121007.
25. Sahib Singh
S/o Mr. Mehar Singh
R/o House No. 1324 Sector 15,
Faridabad, Haryana-121007.
26. Manjeet Kaur
W/o Mr. Sahib Singh
R/o House No. 1324 Sector 15,
Faridabad, Haryana-121007.
27. Shatamjeev Dewan
S/o Mr. Vasdev Dewan
R/o House No. 154, Sector-14,
Faridabad, Haryana-121007.
28. Shivani Dewan
W/o Mr. Shatamjeev Dewan
R/o House No. 154, Sector-14,
Faridabad, Haryana-121007.
29. Arvind Jain
W/o Mr. Sanjiv Kumar Jain
R/o House No. 338, Sector-21A,
Faridabad, Haryana-121001.
30. Sanjiv Kumar Jain
S/o Late Mr. Nand Lal Jain
R/o House No. 338, Sector-21A,
Faridabad, Haryana-121001.
31. Surender Pal
S/o Mr. Ganpat Rai

R/o House No. 1185, Sector-23A,
Housing Board Colony, HIG,
Faridabad, Haryana-121005.

32. Anju Arora
W/o Mr. Surender Pal
R/o House No. 1185, Sector-23A,
Housing Board Colony, HIG,
Faridabad, Haryana-121005.
33. Rakesh Gulati
S/o Mr. Shyam Dass Gulati
R/o House No. 704, Sector-7C,
Faridabad, Haryana-121006.
34. Sunita Gulati
W/o Mr. Rakesh Gulati
R/o House No. 704, Sector-7C,
Faridabad, Haryana-121006.
35. Saurabh Kharbanda
Through his Authorised Representative
S/o Mr. Vinod Kumar Kharbanda
R/o House No. 943, Sector-9,
Faridabad, Haryana-121006.
36. Raj Kumar Girdhar
S/o Mr. Kanwar Bhar
R/o House No. 868, Sector-15A,
Faridabad, Haryana-121006.
37. Manoj Punjani
S/o Mr. Gulshan Kumar Punjani
R/o 2M-36, Om Niwas, N.I.T,
Faridabad, Haryana-121001.
38. Anuradha Punjani
W/o Mr. Manoj Punjani
R/o 2M-36, Om Niwas, N.I.T,
Faridabad, Haryana-121001.
39. Kiran Girdhar
W/o Raj Kumar Girdhar
R/o House No. 868, Sector-15A,
Faridabad, Haryana-121006

.... and Ors.

.... Financial Creditors

Versus

M/s Puri Construction Private Limited

Through its Authorised Signatory

Registered office at:

4-7B, Ground Floor, Tolstoy House 15 & 17,

Tolstoy Marg, New Delhi-110001.

.... Corporate Debtor

APPEARANCES:

For the Financial Creditor:	Mr. Gaurav Gupta, Ms. Rajshree Jaiswal, Advs
For the Respondent	: Mr. Krishnan Venugopal, Sr Adv., Mr. Pravin Bahadur, Mr. Saurabh Kumar, Ms. Kanika Gomber, Mr. S. Anjani Kumar, Mr. Amit Agarwal, Mr. Vishnu Kant, Advs.

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity “the Code”) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by Tarun Ahuja & Ors. (homebuyers, hereinafter referred to as ‘Financial Creditors’), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against M/s Puri Construction Private Limited [CIN: U45201DL1971PTC005522] (“Corporate Debtor”).
2. The Corporate Debtor was incorporated on 02.02.1971, having CIN: U45201DL1971PTC005522, under the Companies Act, 1956. Its registered office is at 4-7B, Ground Floor, Tolstoy House 15 & 17, Tolstoy Marg, New Delhi-110001. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 24.02.2020 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs. 1,11,93,76,405 (One hundred Eleven crores Ninety-Three lakhs Seventy-Six thousand Four hundred and five) as on 30.01.2020 which includes the principal amount of Rs. 73,22,93,308/- (Rupees Seventy-Three Crores Twenty-two Lakhs Ninety-Three

Thousand Three Hundred and Eight) and Interest of Rs. 38,70,83,097 (Rupees Thirty-Eight crores Seventy lakhs Eighty-Three thousand and ninety-seven).

4. Submissions of learned Counsel appearing for the Financial Creditor

- a) The Section 7 petition was originally filed by 83 allottees having 51 units under a real estate project named “Aanand Vilas” (“Project”) located at Sector 81, Faridabad to initiate CIRP against the Corporate Debtor. However, subsequently certain allottees/Petitioners withdrew their names from the present petition who got settled by the Corporate Debtor.
- b) Vide Provisional Allotment Letters, the Financial Creditors were allotted units in April 2013 in the Project after depositing the booking amount in lieu of the Units.
- c) The Apartment Buyer’s Agreement was executed by and between the Financial Creditors and the Corporate Debtor (“Agreement”) in December 2013- January 2014 pursuant to issuance of provisional allotment letters.
- d) In terms of the Clause 11(a) of the Agreement, the Corporate Debtor was liable to give possession of the Units to the Financial Creditors within a period of 48 (Forty-Eight) months i.e. Dec 2017- Jan 2018 from the date of execution of the Agreement. Further, a grace period of 180 days was granted, however, the Corporate Debtor failed to give possession of the said Units to the Financial Creditors.
- e) The Financial Creditors had made payments aggregating to about 80-95% of the sale consideration by August 2016.
- f) This Adjudicating Authority initiated the CIRP against the Corporate Debtor vide order dated 10.01.2019 in the matter of *Kunal Prasad & Anr. Vs Puri Construction Private Limited* bearing CP IB No. 131/PB/2018. However, the Hon’ble NCLAT vide its order dated 31.01.2019 in the matter of Company Appeal (AT) (Ins) No. 52 of 2019 titled *Arjun Puri Vs Kunal Prasad & Anr.* set aside the order dated 10.01.2019 initiating CIRP against the Corporate Debtor on the account of settlement between the parties.
- g) The Financial Creditors in terms of Clause 14 of the Agreement were entitled to the refund of the amount paid along with interest had the possession not been

given to the Financial Creditors in the stipulated time. However, the Corporate Debtor had failed to refund the amount paid.

- h) The construction as on 10.01.2019 was nowhere near completion and the Letter dated 01.05.2019 addressed to the Chief Engineer Housing Board Haryana, states that EWS units in project 'Aanand Vilas' are in semi-finished position and hence, incomplete. Further, the Financial Creditors units were in a similar state of incompleteness till May, 2019.
- i) The Corporate Debtor admitted before RERA that a total of 512 units were constructed in the project and by 2019, only 303 flats were booked.
- j) The Corporate Debtor claims that the Occupation Certificate was received on 24.01.2019 and the possession was to be offered in writing to each allottee on or before 23.04.2019, however, the Corporate Debtor failed to do so. Further, the Corporate Debtor offered the possession of the apartment to the allottees vide letter dated 20.05.2019 i.e. after 4 months of obtaining the occupation certificate.
- k) The Corporate Debtor applied for the CTO and electricity connection only in the year 2020. Thereafter, the electricity connection was given to the Corporate Debtor in the year 2021. Therefore, the project was incomplete at the time of filing of the present petition.

5. Submissions of learned Sr. Counsel appearing for the Corporate Debtor

- a) The Project was completed in December 2018 and Occupation Certificate for the whole project was received on 24.01.2019. Thereafter, the possession was offered to all the existing allottees, including all the Petitioners herein, after adjusting the compensation @ 10.75 % p.a. on the paid amount for the period of alleged delay due to Force Majeure circumstances in handing over the possession.
- b) As on date, out of 512 flats, allottees of 445 apartments have made payment of the final demand and taken possession of their respective units and conveyance deed had been executed in relation to 419 flats.
- c) As per clause 11(b), 11(c) and 15 of Apartment Buyer's agreement (ABA), a reasonable delay in offer of possession, along with crediting of delayed compensation, cannot be considered as 'default' under the ABA.

- d) It is in fact the Petitioners, who are defaulters under the Buyer's Agreement as they are part of the minority of allottees, who refused to make payment of their remaining dues and take possession of their apartments.
- e) The Petitioners herein, have either approached RERA or the Consumer Foras or both to seek refund of the amounts paid by them and all of these Petitions before RERA or Consumer Foras have either already been adjudicated or are still pending for adjudication.
- f) The Respondent is financially sound company and there is no outstanding loan. The cash and bank balance of the Respondent as on 31.03.2021 is Rs. 50,44,03,450. Further, the Respondent has positive net worth/ shareholders fund of Rs. 491,93,04,634 as on 31.03.2022.
- g) The present petition was originally filed by 83 petitioners consisting of 51 units. however, 24-unit holders had already approached HRERA for seeking refund of the amount. The HRERA vide order dated 09.04.2019 dismissed these petitions and observed that these allottees were not entitled to refund as the Respondent had already received the Occupation Certificate and offered possession to the allottees including the Petitioners herein.
- h) Some of the unit holders had approached RERA in 2019. These RERA complaints were pending at the time of filing the present petition. Subsequently, the complaints were disposed of as withdrawn vide order dated 06.10.2020. Further, majority of the unit holders had also approached the National Consumer Disputes Redressal Commission (NCDRC) for relief of refund or possession prior to filing of the present petition and the same is still pending adjudication. Further, as on date, 36 out of 51-unit holders had withdrawn their petition by accepting the possession of their respective apartments.
- i) Therefore, it is stated that the Petitioners fail to meet the threshold of 10 % as it is stated that 41 out of 51-unit holders had elected their remedies before the RERA or the NCDRC or both and hence, extinguished their status of allottees. Further, while calculating the threshold of 10%, the Petitioners have not taken into consideration the 91 EWS units and 10 commercial units in the project which are covered by the same occupancy certificate. The details of the individual/joint allotment of units are mentioned hereunder as: -

Sr. No.	Particulars	Number of Units	Units Already Allotted	Position as on 25.02.2020	Position as on 22.02.2022
1	Ready to Move Normal Units for General Public	512	461	310	434
2	Units for Economically Weaker Section	91	91	91	91
3	Commercial Units/Shops in the Complex	10	10	10	10
	Total	613	562	411	535

Analysis and Findings

6. We have heard the Learned Counsel for the Financial Creditor and Shri Krishnan Venugopal, Learned Senior Counsel for the Corporate Debtor and perused the averments made in the petition, reply and rejoinder. Since the registered office of the Corporate Debtor is in Delhi, this Tribunal which has territorial jurisdiction over the Union Territory of Delhi, therefore, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of the respondent Corporate Debtor under Section 7 of the Code.
7. On the basis of pleadings and submissions made by both the sides, following issues need to be considered:
 - i. Whether homebuyers who have approached RERA or NCDRC for refund would still be treated as 'Financial Creditors' in terms of Section 5(8)(f) of the Code?
 - ii. Issue of threshold on the date of filing of the present Section 7 petition.
 - iii. Whether there is a default by the Corporate Debtor in giving possession to the homebuyers?

8. In order to affirm that this petition falls within the ambit of Section 7, we need to see whether there is a debt owed to the Financial Creditor and whether there is a default with respect to such debt. Additionally, we also need to see whether the Financial Creditors being the allottees under a real estate project in the present case, fulfill the threshold limit provided under Section 7 of the IB Code, for maintaining this application.
9. Proviso to Section 7 which lays down the minimum threshold limit for the Financial Creditors who are allottees under a real estate project state that:

“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.”.

10. In the present case, the Applicants are the group of allottees who have booked their flats in a project namely “Aanand Vilas” of the Corporate Debtor, M/s Puri Construction Private Limited (Corporate Debtor) and the Corporate Debtor is engaged in the business of real estate activities which includes developing, buying, selling, renting, managing and appraising real estate amongst others. Further, it is envisaged under Section 5(8)(f)(ii) of the Code that the definition of ‘allottees’ for the purpose of IBC, shall have same meaning as defined under Section 2(d) of the Real Estate (Regulation and Development) Act, 2016.

ISSUE NO. 1

11. In the present case, the petition has been filed by 83 allottees holding 51 units. However, subsequently, settlement arose between certain allottees and the Corporate Debtor and therefore, such allottees withdrew their names from the present petition. Further, it is the contention of the Corporate Debtor that as on the date of filing 310 out of 512 units were ready to move for the general public. Further, it is contended by the Corporate Debtor that 41 out of 51-unit holders had approached either RERA or NCDRC for seeking refund of the amount already paid to the Corporate Debtor, however, such

applications before RERA or NCDRC were either dismissed or disposed of as withdrawn, therefore, such allottees cease to be considered as 'financial creditors' in the light of Section 5(8)(f) of the Code. However, it is pertinent to refer to the decision of the Hon'ble Supreme Court in the case of **Vishal Chelani & Ors. Vs Debashis Nanda, 2023 SCC OnLine SC 1324**, wherein, the Hon'ble Supreme Court has clarified that once an allottee seeks remedies under the RERA Act and opts for a refund of money, they are still considered homebuyers. The relevant extract of the judgment is reproduced hereunder as: -

*"6. It is thus evident that with the introduction of the explanation home buyers and allottees of real estate projects were included in the class of "financial creditors" - because financial debt is owed to them. **On a plain reading of Section 5(8)(f) no distinction is per se made out between different classes of financial creditors for the purposes of drawing a resolution plan.** Consequently, the reasoning of the Mumbai Bench of NCLT "Mr. Natwar Agrawal (HUF)" is correct in the opinion of this Court.*

8. The Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in *Natwar Agarwal (HUF) (Supra)* by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. **In any case, the distinction made by the R.P. is artificial; it amounts to "hyper classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced.**

9. In view of the foregoing reasons, the impugned order is hereby set aside; the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority."

In view of the above-mentioned judgment of the Hon'ble Supreme Court, it is concluded that irrespective of the fact that the home buyer allottees approached RERA or NCDRC before approaching this Adjudicating Authority, the status of the home buyers being 'financial creditors' under Section 5(8)(f) of the Code remains intact. Hence, the averment of the corporate Debtor that the allottees who approached RERA or NCDRC ceases to be considered as 'financial creditors' under Section 5(8)(f) of the Code does not hold any ground. Therefore, the contention of the Corporate Debtor in this regard is not sustainable.

ISSUE NO. 2

12. As to the fact that certain allottees withdrew their application after filing of the main petition under Section 7 of the Code, reference is taken from the judgment of the Hon'ble Supreme Court in the case of **Manish Kumar Vs Union of India (2021) 5 SCC 1**, wherein, it was held that the quorum of 100 is to be seen as "on the date of presentation of the petition" and not at the time of hearing or admission. The relevant extract of the judgment is reproduced hereunder:

"The point of time to comply with the threshold requirements

141. The question, then arises, as to the alleged lack of clarity about the point of time, at which the requirements of the impugned provisos, are to be met. Is it sufficient, if the required number of allottees join together and file an application under Section 7 and fulfil the requirements, at the time of presentation? Or, is it necessary that the application must conform the numerical strength, under the new proviso, even after filing of the application, and till the date, the application is admitted under Section 7(5)? There can be no doubt that the requirement of a threshold under the impugned proviso, in Section 7(1), must be fulfilled as on the date of the filing of the application. In this regard, we find support from an early judgment of this Court, which was rendered under Section 153-C of the Companies Act, 1913. Section 153-C is the predecessor to Sections 397 and 398 read with Section 399 of the Companies Act, 1956. Its most recent avatar is contained in Sections 241 and 242 of the Companies Act, 2013 read with Section 244. In fact, Section 399 (3) of the Companies Act, 1956, read as follows: "399(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

142. In the decision of this Court in Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao and others⁵¹, the provision in question, viz., Section

153-C of Companies Act, 1913 dealt with the power of the Court to Act, when the Company acts in a prejudicial manner or oppresses any part of its members. It, inter alia, provided that no application could be made by any member, in the case of a company having a share capital unless the member has obtained consent, in writing, of not less than one hundred in number of the members of the company or not less than one-tenth in number of the members, whichever is less. There was also an alternate requirement, to which, resort could be made in regard to company, not having share capital. There was another mode of fulfilling the threshold requirement. In the facts of the said case, the number of the members of the company were 603. Sixty-five members consented to the application. The problem, however, arose as it was contended that 13 of the members who had consented, had, subsequent to the presentation of the application, withdrawn their consent. This Court went on to hold as follows:

“5 xxx xxx xxx We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed with the application or the jurisdiction of the court to dispose of it on its own merits.”

13. Therefore, in view of the Judgment of the Hon’ble Supreme Court in the **Manish Kumar (Supra)**, the number of allottees has to be seen on the date of the filing of the petition and subsequent withdrawal of certain allottees in view of the settlement arose between settled allottees and the Corporate Debtor would not affect the maintainability of the present petition. Thus, this Adjudicating Authority is of the view that the total number of allottees being 83, at the date of the filing of the instant application, fulfills the threshold limit of minimum 10 percent as envisaged under Section 7 of the IB Code, 2016.

ISSUE NO. 3

14. In the present case, the Applicants being the homebuyer allottees booked 51 units out of 512 units in the March-April 2013 in the project named “Aanand Vilas” developed by the Corporate Debtor. The Financial Creditors were allotted units in April 2013 vide provisional allotments letters after depositing the booking amount in lieu of the Units. The Applicants paid principal amount to the tune of Rs. 73,22,93,308 as payment in

lieu of allotment of flats. The total amount claimed to be due as on 30.01.2020 is Rs. 1,11,93,76,405 which is inclusive of interest of Rs. 38,70,83,097.

15. It is observed that as per clause 11(a) of the Apartment Buyer's Agreement (ABA) dated 07.11.2013, the construction of the apartment had to be completed within a period of 48 months from the date of the execution of the agreement. Further, if due to *Force Majeure* circumstances, the project fails to be completed within the prescribed period of 48 months, an additional grace of 180 days shall be provided to the company to complete the project and apply for the occupation certificate. Therefore, the possession was to be handed over to the Applicants by June 2018. However, the Corporate Debtor failed to handover the possession to the Applicants within the mentioned period citing the reasons for delay in the completion of the project as delay in making remaining payment by some of the allottees, stay on construction activities in NCR in the year 2015 due to increased levels of pollution which could not be foreseen in the year 2013 at the time of the execution of the Agreement. The Corporate Debtor further stated that the unexpected demonetization in the year 2016 lead to labor shortage which lead to the hindrance in the completion of the project. It is observed that the Occupancy Certificate was received by the Corporate Debtor on 24.01.2019 and further, the offer of possession was sent to the allottees on 20.05.2019.
16. It is observed that the delay in offering possession was less than one year, however, the Applicants herein, refused to make payment and take the possession of the apartments rather sought refund of the money on the basis of delay in offering possession of the apartments. On the perusal of the clause 11(b), 11(c) and 15 of the ABA, it is observed that where there is a delay in offering possession to the allottees, however, the Corporate Debtor pays compensation to the allottees from the date of delay till the date of offering of possession, then such, shall not be treated as a default on the part of the Company. In the present case, the Corporate Debtor adjusted compensation @ 10.75 % p.a. on the amounts paid by each allottee for the alleged period of delay in the 2019 itself before filing of the present petition. Further, as per the decision of the Hon'ble Supreme Court in the case of **Vineet Kumar & Anr. Vs DLF Universal Ltd. 2019 SCC Online NCDRC 9**, the delay of less than one year is considered as 'reasonable'. The relevant extract of the judgment is reproduced hereunder as: -

*“25. It is true that except in one case, there was delay on the part of the developer in offering possession of the allotted flats to the concerned allottees. The delay was one year or less in 16 matters whereas it was more than one year in a few matters. Out of 20 cases subject matter of these appeals, the possession in 17 matters had been offered before the consumer complaints were instituted by the concerned allottees. As noted earlier in one case, i.e., the complaint filed by Vineet Kumar, there was no delay. **The question which arises for consideration is whether the allottees were justified in refusing possession solely on account of such a delay, despite the fact that the basis facilities and amenities essentially required for the use and enjoyment of the allottees flats were available at the time the possession was offered.** The project in which flats were booked by the complainant is a large project. Some delays in a large project of this nature are understandable and sometimes inevitable. In fact, there is also a change in the judicial approach, in the cases where the possession is offered either before or during the pendency of the complaint. **It is only where the delay is unreasonable or the circumstances of the allottee have materially changed in the meanwhile that the allottee may be justified in refusing to accept the possession and seek refund of the amount paid by him to the developer along with compensation etc.** As noted earlier, the delay in 16 matters was not more than one year and there was no delay in one matter. Even in the remaining three matters, the delay, though more than one year, was not so unreasonable that it would justify the offer of possession given by the developer, even if a fair and just compensation is paid to the allottee for the delay in making the said offer. **It has to be kept in mind that a bona fide purchaser books a flat for the purpose of having a shelter over his head. In the case of booking of a flat, the house is constructed for him by the developer. The refund to an allottee whether with or without compensation is also directed with a view to enable him to purchase an alternative flat, in lieu of the flat booked by him. Therefore, ordinarily there will be no justification for not accepting the possession except in a case where the delay is very substantial and cannot at all be justified by the developer, or there is material change in the circumstances of the allottee, which would justify refund to him.**”*

Therefore, in view of the judgment of the Hon'ble Supreme Court in **Vineet Kumar (Supra)**, it is observed that the delay of less than one year in the real estate project was not unreasonable and hence, the Applicants in the present case are not justified in seeking refund of the amount paid and refusing to take possession of the apartments. Further, the Applicants had approached RERA or NCDRC for the purpose of seeking refund, however, their applications were either dismissed or withdrawn and the RERA vide its order dated 09.04.2019 was of the view that Applicants are not entitled to receive refund merely on the ground of lapse in deemed date of possession and such an order of the RERA attained finality. Further, the fact that the Applicants are seeking refund of

the money reflects the intent of the Applicants that the Applicants are concerned only with refund of money paid and they are no longer interested in the completion of the project. Therefore, we are of the view that 'no debt' is owed to the home buyer allottees in the present case.

17. It is further observed that the occupancy certificate was received on 24.01.2019 and the offer of possession was sent on 20.05.2019. Further, the project is complete with all the basic amenities and as on date allottees of 445 apartments had made the payment of the final demand and taken possession of their units. It is further observed that the project is complete and the section of unit holders who approached this Adjudicating Authority are in default of refusing to make payment of their remaining dues and taking possession of their apartments rather emphasizing on seeking refund of the amount paid. The Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs Union of India & Ors. (2019) 8 SCC 416** has upheld the status of allottees of a real estate project as financial creditors provided "the allottees are interested in completion of the project", however, such is not the position in the present case. In the present case, the homebuyers are concerned only with seeking refund of the money and have no longer interest in taking over the possession of the Flats. Further, the Corporate Debtor relies upon the post completion Brochure of the project which clearly demonstrates by way of actual images that the project in question is complete and nothing remains to be done in the project. Hence, we are of the view that there is 'no default' on the part of the Corporate Debtor.
18. It is further observed that the Corporate Debtor is a fully solvent company having net worth of Rs. 491 Crores as on 31.03.2022. Further, as per the decision of the Hon'ble Supreme Court in the case of **Vidarbha Industries Power Limited Vs Axis Bank Limited (2022) 8 SCC 352**, CIRP shall not be initiated against companies which are fully solvent and capable of paying its debts. The relevant extract of the judgment is reproduced hereunder as: -

*"81. The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is **certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by***

initiation of CIRP. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.”

19. This Adjudicating Authority is further of the view that had the CIRP been initiated against the Corporate Debtor, it would result in irreparable damage to the allottees of 445 apartments who had made the final payment and taken possession of their respective units. Hence, this Adjudicating Authority is not inclined towards initiating CIRP against the Corporate Debtor.
20. In view of the conspectus of facts and applicable law as discussed above, the present application filed under Section 7 of the IB Code, 2016 filed by the Applicant against the Corporate Debtor lacks merit, is not maintainable, and is liable to be dismissed.
21. In the light of the above, the instant petition **COMPANY PETITION IB (IBC)/755/(PB)/2020** being devoid of merit, is hereby **dismissed**.
22. The Respondent has also filed an Interlocutory Application bearing I.A. No. 6091/ND/2022 seeking dismissal of the Section 7 petition bearing CP IB No. 755/PB/2020 on the ground of the petition being filed fraudulently. However, in light of the observations made hereinabove, in the CP IB No. 755/PB/2020, the **I.A./6091/ND/2022 stands dismissed as infructuous**.
23. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
DR. SANJEEV RANJAN
MEMBER (TECHNICAL)

Sd/-
MAHENDRA KHANDELWAL
MEMBER (JUDICIAL)