

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

**KOLKATA**

**C.P (IB) No. 390 /KB/2021**

*An application under section 7 of the Insolvency and Bankruptcy Code, 2016  
read with Rule 4 of the Insolvency and Bankruptcy (Application to  
Adjudicating Authority) Rules, 2016.*

**In the matter of**

1. Mr. Mannil Sudhir Nair
2. Mr. Lokender Singh
3. Mr. Pramod Kumar Tyagi
4. Mr. Tarun Kumar Tyagi

*... Financial Creditor*

Versus

Kashish Developers Limited  
CIN: U74300JH2001PLC01231

*... Corporate Debtor*

Date of hearing : 28 July, 2022

Order Pronounced on : 19 September, 2022

**Coram:**

**Mr. Rohit Kapoor, Member (Judicial)**

**Mr. Balraj Joshi, Member (Technical)**

**Appearances (through hybrid mode)**

For the Financial Creditor : Ms. Asmita Chaudhary, Advocate

For the Corporate Debtor : Ms. Vidushi Chokhani, Advocate

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**ORDER**

**Per: Rohit Kapoor, Member (Judicial)**

1. The Court is convened through hybrid mode today.
2. This is a Company Petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (“Code”) by Mr. Mannil Sudhir Nair, Mr. Lokender Singh, Mr. Pramod Kumar Tyagi, Mr Tarun Kumar seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Kashish Developers Ltd. [CIN: U74300JH2001PLC01231] (“Corporate Debtor”).
3. The Corporate Debtor was incorporated on 31 December 2001, having CIN: U74300JH2001PLC01231, under the Companies Act, 1956. It’s registered office is 87, Old A.G. Colony Kadru, Ranchi, Jharkhand-834002. Therefore, this Bench has jurisdiction to deal with this petition.
4. The present petition was filed on 08 November 2019 before this Adjudicating Authority on the ground that the Corporate Debtor owes the Financial Creditors Rs.79,79,512/- (Rupees Seventy Nine Lakh Seventy Nine Thousand Five Hundred and Twelve only).

***Submission of the learned Counsel appearing for the Financial Creditors***

5. The learned Counsel submitted that the Financial Creditors had purchased residential flats in “Manor One” situated at Sector-111, village Chauma and District Gurugram. The Corporate Debtor failed to handover the possession of the flats within the timeline i.e. 13 November 2016.
6. The learned Counsel submitted that the Financial Creditors have jointly approached this Tribunal against the default of the financial debt as committed by the Corporate Debtor on account of the non-payment of the principal amount along with delay penalty as ordered/decreed by the

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Hon'ble Haryana Real Estate Regulatory Authority, Gurugram [“HRERA”] vide orders dated 02.08.2019 in complaint no. 937/2018 for Unit No.11G in favor of Applicant's No.1, 2 & 3 and 932/2018 for Unit no. 11C in favor of Applicant no.4. [Annexure-A7 at Page no.111 and Annexure-A13 at Page No.195 of the Company Petition].

7. That the Financial Creditors had purchased units in the project of the corporate debtor by paying advance considerations as per the payment terms in the agreement, in lieu of which the Corporate Debtor had promised to deliver the possession of the unit by the promised date. However, despite taking advance payments the corporate debtor failed to handover the possession in due time as the construction of the project could not be completed and stalled from last many years.
8. That the Hon'ble HRERA taking cognizance of the same, in one of the unit passed order that in case the Corporate Debtor is unable to handover the possession by September, 2019 then the Corporate Debtor shall refund the entire principal amount with 10.70% interest, with the payment of delay penalty interest @10.70%<sup>1</sup>. Currently, the project is stalled and far from completion. No possession has been offered till date.
9. The Financial Creditors are decree holders and as such are also recognized as creditors of a corporate debtor in Code as per the definition of the creditors in section 3(10) of the Code.
10. That thus by the virtue of the above stated definition, the decree holder has the right to initiate CIRP against a defaulting corporate debtor. The learned Counsel relied on the judgment of the Hon'ble Supreme Court of India in the case of *Dena Bank (Now Bank of Baroda) v. C. Shivakumar Reddt And Anr., 1 (2021) 10 SCC 330* and *Kotak Mahindra Bank Limited v. A Balakrishnan & Anr., 2022 SCC*

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<sup>1</sup>Page 124 of the C.P.

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***OnLine SC 706.***

11. It is most respectfully submitted that it is evident from the facts explained in the present case and from the evidence brought on record that despite an opportunity to handover the possession of the unit by the Hon'ble HRERA, the corporate debtor failed in the same and thereafter even after a lapse of 3 years from the date of the order has failed to refund the principal amount along with the delay penalty interest which reflects upon the poor financial capacity of the corporate debtor and its insolvent condition. The Corporate Debtor in its reply has admitted that there was financial crunch on account of which the project has not been completed.

***Submissions of the learned counsel appearing on behalf of the Corporate Debtor***

12. Ms. Vidushi Chokani submitted that the present petition was filed by four Homebuyers who have been allotted flats in a project being developed by the Corporate Debtor.
13. Ms. Chokani submitted that *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2020, section 7 of the Code was amended to add that a Homebuyers petition under section 7 of the Code has to be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten % of the total number of allottees under the same real estate project. This amendment was upheld by the Hon'ble Supreme Court in **Manish Kumar v. Union of India, 2021 5 SCC 1**.
14. Petitions filed before the said amendment were to be modified to comply with the requirements of the amendment, but the Financial Creditors in the present Company Petition did not amend the same and instead filed a rejoinder dated 22 March 2022 that the present Company Petition was filed on the basis of the decree passed by the Haryana Real

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Estate Regulatory Authority, Gurugram.

15. The Company Petition was filed on the basis of being allottees but now the Financial Creditors have changed their stand and are contending to file the Company Petition on the basis the order passed by Hon'ble HRERA seeking execution of the said order.
16. The Petitioners herein do not fall under the definition of Financial Creditors under the Code, they are creditors but not Financial Creditors and hence cannot seek initiation of CIRP. The learned Counsel relied on the judgment of the Hon'ble NCLAT in *Sushil Ansal v. Ashok Tripathi and Ors., 2020 SCC OnLine NCLAT 680*, (paragraph 19, 22, 23) wherein the Hon'ble NCLAT had held that a decree holder will not fall into the definition of Financial Creditor. She further relied on a judgment passed by the Hon'ble High Court of Tripura in *Subhankar Bhowmik v. Union of India and Another, 2022 SCC OnLine Tri 208*, (paragraphs 9, 11, 16, 22).
17. The learned Counsel submitted that the Petitioners seek to rely on the judgement of the Hon'ble Supreme Court passed in the case of *Dena Bank (Now Bank of Baroda) v. C. Shivakumar Reddy and Another, 2021 SCC Online SC 543* to contend that a decree holder is entitled to file an application under section 7 of the Code. However, it is pertinent to note that the issue involved before the Hon'ble Supreme Court of India in the said matter was with respect with limitation (paragraphs 23 and 24) and further whether a final judgment or decree or recovery certificate in favor of a financial creditor would give rise to fresh cause of action to initiate proceedings within 3 years from such judgment or decree or recovery certificate. It may be noted that the Supreme Court was dealing with a matter in which the Applicant was a bank and as such a financial creditor as defined under section 5 (7) to whom a financial debt as defined under section 5(8) was owed. It may be noted that it was in the context of extending limitation that the Hon'ble

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Supreme Court had held that a financial creditor who holds a decree in its name is entitled to file an application under Section 7.

18. On the contrary the Hon'ble Supreme Court in paragraph 79 specifically stated that the Code is not another statute for recovery of debts but is essentially for revival of a corporate body. In the present facts the Petitioners do not qualify as a Financial Creditor as they are merely decree holders who do not fall within the definition of financial creditor.
19. Furthermore, by their own submission the Petitioners have not approached this Tribunal as allottees but as decree holders and as such the judgment of the Hon'ble Supreme Court of India passed in Dena Bank(supra.) or as stated in the matter of ***Kotak Mahindra Bank Limitedv. A. Balakrishnan & Ar. (Civil Appeal No. 689 of 2021)*** is not applicable in the facts and circumstances of the Applicant. In both the judgments the sole issue involved was limitation and more importantly the applicants were bank who fell squarely within the definition of financial creditors and were seeking extension of limitation on the basis of a recovery certificate issued by the Debts Recovery Tribunal. In the present case the Petitioners first need to satisfy that they fall in the definition of financial creditor and only then can an application under section 7 may be maintainable.
20. Ms. Vidushi further submitted that the National Company Law Tribunal, Chennai Bench in ***Sunitha Venkatesh v. Oragadam City Developers Pvt. Ltd., 2022 SCC OnLine NCLT 19***, wherein the NCLT held that the mere fact that the petitioner holds a decree against the Corporate Debtor does not entitle the Petitioner to file a petition under section 7 of the Code. Further, the Applicant cannot try and get away from the glitches of an allottee under the pretext of being a decree holder and that no document has been filed to satisfy the minimum threshold.

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21. Ms. Vidushi summarised and submitted that the present Company Petition is vexatious and has been filed only as recovery proceedings admittedly from an order passed by the HRERA and the Petitioners do not come under the definition Financial Creditors.

***Analysis and Findings***

22. Heard the learned counsel for the Financial Creditors and the learned Counsel appearing on behalf of the Corporate Debtor and perused the records.

23. The main defence raised by the Corporate Debtor is:

- a. Whether the Petitioners have filed the Company Petition as allottees or as decree holders?
- b. Whether the Petitioners come under the purview of Financial Creditor?
- c. Whether the Petitioners meet the minimum threshold?

24. On perusal of the Company Petition, it is clear that the petition has been filed on the basis of the orders passed by the HRERA on 02.05.2019 (Annexure A7 at paged 111 to 126 and Annexure A13 at pages 195 to 207), and the default date has been calculated from the time granted to the Corporate Debtor in the said order i.e. till September 2019.

25. Let us now consider the second issue, since the Company Petition has been filed pursuant to orders passed by HRERA, and the said orders were in favour of the Petitioners, the Petitioners are decree holders. The learned Counsel relied on ***Subhankar Bhowmik (supra.)*** wherein the Hon'ble High Court at Tripura held that decree holders are creditors under the Code but fall under the category of "other creditors" and will not come under the purview of "Financial Creditors" under the Code. But the point that has to be seen is the point when is this classification is

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made, the main issue that is dealt in the judgement is “*the treatment of "decree holders" who hold decrees against a Corporate Debtor under the insolvency resolution process.*”

26. Hence, the judgment deals with creditors at the time when the Corporate Debtor is already in Corporate Insolvency Resolution Process as is evident from paragraph 17 of the said judgment which refers to the membership of the Committee of Creditors.

27. The learned Counsel has relied on the judgment of the Hon’ble Supreme Court in ***Dena Bank v. C Shivakumar Reddy and Ors.*** wherein it has been held that the decree holder can initiate CIRP under section 7 of the Code.

28. The same stand has been taken by the Hon’ble Supreme Court in ***Kotak Mahindra Bank Limited v. A. Balakrishnan and Ors.*** ***MANU/SC/0736/2022 decided on 30.05.2022***, wherein the Court held that

“*A liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning of Clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of Clause (7) of Section 5 of the IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.*”

29. Hence, a decree holder can file a petition under section 7 of the Code hence the present petition is maintainable.

30. Taking the third defence into consideration as to whether the petition is under the minimum threshold or not. The petition was filed in 08 November 2019 and the amendment that increased the minimum threshold to Rs.1 Crore came in on 25 March 2020, thus at the time the petition was filed, the minimum threshold limit was Rs.1 Lakh and this

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the debt in this present Company Petition is above Rs.1 Lakh.

31. We are satisfied that there is a debt and the Corporate Debtor is in default as the Corporate Debtor has failed to deliver possession of the apartments to the Financial Creditors herein. Another point to be noted is that this Company Petition has been filed by two sets of decree holders. At this stage both set of decree holders are eligible to file petitions under section 7 of the Code. The claim of one set of decree holder is Rs.79,79,512/- and the claim of the other decree holder is Rs.49,02,647/-, so both claims individually are above the threshold limit.
32. In this present petition, we are satisfied that the Corporate Debtor is in default and even after several opportunities, the Corporate Debtor is still not able to deliver possession of the said apartments.
33. The present petition made by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.
34. The Financial Creditors have proposed the name of **Mr. Amarpal**, registration number **IBBI/IPA-001/IP/P-01584/2018-2019/12411**, email: [amarpal@icai.org](mailto:amarpal@icai.org), to be appointed as the Interim Resolution Professional. On perusal of his profile in the IBBI website, it is seen that he has ten assignments assigned to him.<sup>2</sup> In view of this, we shall appoint an Insolvency Professional from the panel given by the Board.
35. In the light of the above facts and circumstances, it is, hereby ordered as follows:-
- a. The application bearing **CP (IB) No. 390/KB/2020** filed by **Mr. Mannil Sudhir Nair and Others**, the Financial Creditors, under section 7 of the Code read with rule 4(1) of the

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<sup>2</sup>[https://ibbi.gov.in/en/insolvency-professional/details?fieldid=MzU3NQ%3D%3D&type=Assignment\\_Details](https://ibbi.gov.in/en/insolvency-professional/details?fieldid=MzU3NQ%3D%3D&type=Assignment_Details)

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Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against ***Kashish Developers Limited***, the Corporate Debtor, is ***admitted***.

- b. There shall be a moratorium under section 14 of the IBC.
- c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e. ***Mr. Kamal Tayal***, registration ***IBBI/IPA-003/IP-N00413-C01/2021-2022/13966***, email: [\*\*\*cakamaltayal@gmail.com\*\*\*](mailto:cakamaltayal@gmail.com), is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their

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possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.

- g. The Interim Resolution Professional is expected to take full charge of the Corporate Debtor, its assets and its documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the Interim Resolution Professional in this regard.
- h. The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- i. The Financial Creditor shall deposit a sum of **Rs 3,00,000/- (Rupees Three Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- j. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- k. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this

Court within seven days from the date of receipt of a copy of this order.

36. **CP (IB) No. 390/KB/2020** to come up on **02 November, 2022** for filing the periodical report.
37. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**(Balraj Joshi)**  
**Member (Technical)**

**( Rohit Kapoor)**  
**Member (Judicial)**

Order signed on, this 19<sup>th</sup> day of September, 2022

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