IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

CP (IB) No.119/BB/2021
U/s. 7 of the IBC, 2016
R/w Rule 4 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

Mr. Sethuraman Mahadevan & 183 Ors.,
Authorized Representative vide LOA
R/o. B604, Pavilion Apartments,
Ozone Urbana Complex,
Kannamangala B.O. Devanahalli Taluk,
Bangalore Rural – 562 110. ... Financial Creditors

VERSUS

M/s. Ozone Urbana Infra Developers Private Limited
No. 38, Ulsoor Road,
Bangalore – 560 042. ... Corporate Debtor/Respondent

Order delivered on: 24th June, 2022

Coram: Hon'ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)
Hon'ble Mr. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioners : Sh. S.K. Ravi
For the Respondent : Sh. M.S Shyam Sundar, Senior Counsel a/w Ms. Vandana

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed, under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 4 of the I&B (Application to Adjudicating Authority) Rules 2016, by Mr. Sethuraman Mahadevan and 183 Others (for brevity 'Applicants/ Financial Creditors') *inter-alia* seeking to initiate Corporate Insolvency Resolution Process in respect of M/s. Ozone Urbana Infra Developers Private Limited (hereinafter referred as 'Respondent').

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2. The Corporate Debtor, namely, M/s. Ozone Urbana Infra Developers Private Limited is a Company incorporated on 13.01.2006 having its registered office at No.38, Ulsoor Road, Bangalore - 560042, which falls within the territorial jurisdiction of this Adjudicating Authority. The Authorised Share Capital of the Respondent/Corporate Debtor is Rs.106,000,000/- and the Paid-Up Share Capital is Rs.91,814,000/- as per the Company Master Data attached as Annexure-A1 to this Application.

3. The present application has been filed by the Financial Creditors against the Corporate Debtor in respect of the default amount of Rs.2,11,06,95,965/- (Rupees Two Hundred Eleven Crores Six Lakhs Ninety Five Thousand Nine Hundred Sixty Five only).

4. The Financial Creditors booked and purchased the Unit(s) from the Corporate Debtor in its project "Ozone Urbana", being a plotted residential society and accordingly, entered into separate Agreements i.e. Construction Agreements, Agreement for Sale, Tripartite Agreements, Subvention cum Buy-Back Agreement/Roll Over Agreement (hereinafter jointly referred as 'Agreements') with the Corporate Debtor in the years 2015-2017. Further, the Corporate Debtor had agreed to handover the possession of the units in a time bound manner as described under the Agreements. The Corporate Debtor was under obligation to handover the possession of the Units within 3 years from the date of signing of the Agreement as per Clause 7(c) of the Construction Agreement. The details of the Project as available on the website of Karnataka RERA are as under:

Project Name	Ozone Urbana
RERA Registration	PRM/KA/RERA/1250/303/PR/171019/000287
Land Area	124521 Sq. Mtrs
Location	Ozone Urbana, NH-7, Kannamangala Village, Devanahalli, Bangalore
Total No. of Units	1862 Units
Project Launch Date	01.10.2013
Current Status of Project	Incomplete: Till date only 47% of work has been completed.

5. It is submitted that the Applicants have cumulatively paid a total sum of Rs.1,386,541,004/- to the Corporate Debtor and the same has been duly

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acknowledged by the Corporate Debtor. Despite, paying advance monies to the Corporate Debtor, as and when the demands were raised, which are covered under the definition of financial debt as per Section 5 (8)(f) of the Code, the above stated project could not be completed as per the promised timeline as provided in the Agreement to sell. Moreover, the Applicants are being forced to pay the hefty Pre-Equated Monthly Instalment Interest on the loan amount borrowed by them against the purchase of the units to the banks. The Corporate Debtor even after 4 years of the contractual possession date neither has provided the timely possession nor have refunded the money on account of the delay or as per the buyback option scheme. The matter is well within the limitation period as the possession has not been handed over till date and thus the cause of action is continuous and recurrent. Despite, the buy back there still exists the promise of possession as against the BBA and the Allotment Letter. The Buy Back Agreement has been defaulted as entire payment has not been made. As per Section 5(8)(f) of the Code, the Applicant should be Allottee as per RERA, hence all the Applicants are Allotees.

6. The details of the 184 Applicants, their units, date of possession along with the amounts paid by them, is being provided at Page Nos. 29-35 of the Amended Memo of Parties. The Authorised Representative of the Financial Creditors vide the Letter of Authorization ('LOA') Mr. Sethuraman Mahadevan is residing on rent of another project of the Corporate Debtor in the same complex. As the present project is in default and the AR being Financial Creditor of the same reserves all rights given under the Code for claiming default of the Project Ozone Urbana. Here, the Applicant No.1 plays two roles simultaneously being the applicant in default and Authorised Representative of others. Further as per the Supreme Court Judgement in *Manish Kumar Vs. Union of India and Anr. (2021 SCC Online SC 30)*, has held that the Single Allottee can have multiple units in its name, which shall be considered separate for the purpose of threshold limit. Furthermore, the delay penalty as agreed to be paid by the Corporate Debtor in the event of delay of the possession has not been paid until date. Therefore, the total financial debt of Rs.2,110,695,965/- has been defaulted

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by the Corporate Debtor after accumulation of the delay penalty interest, which is more than the pecuniary jurisdiction of Rs.1 Crore.

7. It is submitted that since the Corporate Debtor expressed its inability to pay the EMI's vide mail dated 21.01.2021, the Writ Petition was filed against the banks restricting the force recovery actions and hence, the said pending Writ as no bar to Section 7 of the IBC, 2016. Further submitted that the LOA authorizing the AR have been filed in consonance to the suo-moto congnizance as taken by the Hon'ble Supreme Court of India in *W.P. No. 3 of 2020*, during the outbreak of COVID-19 pandemic and thus requires no notary. Furthermore, the typographical error in the affidavit whereby instead of Karnataka RERA it has been written UPRERA, the same was done inadvertently.

8. The Petitioner has also relied upon the following Hon'ble Supreme Court judgements:
    (1) Pioneer Urban and Infrastructure Ltd. & Anr. Vs. Union of India & Ors. (2019 SCC Online SC 1005) (Page No. 152 & 85, Para: 28-29 & 60-61).
    (2) Innoventive Industries Limited Vs. ICICI Bank & Anr. (2018)1 SCC 407
    (3) Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. (Civil Appeal Nos. 8512-8527 of 2019) (2020) 8 SCC 401.

9. The Respondent/Corporate Debtor opposed the C.P. filing Preliminary Statement of objections by *inter-alia* contending as under:
    (1) It is submitted that the Application is initially filed by 169 Applicants who are claiming to be Allottees of a project "Ozone Urbana". The Applicant claim on the ground that they fall under the definition of a "Financial Creditor" by the virtue of Section 5(7) of the IBC, 2016 and therefore they can maintain an Application under Sec.7. Whereas the Applicants have misrepresented the facts to bring themselves in the ambit of the definition of an 'Allottees' of the Real Estate Project given that they are all Speculative Investment Customers and are not Allottees, who seek to have a shelter for living.

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(2) It is submitted that out of 184 Applicants, 130 of them are Buy-back customers who have entered into a Buy-Back Agreement with the Respondent resultantly falling under the category of Speculative Investors and certainly not under the category of a bonafide Allottees under the IBC R/w conjunction with the Real Estate (Regulation and Development) Ac, 2016. It is further submitted that out of 169 initial Applicants 23 of them have got more than one apartment unit for the purpose of investment. The details of multiplicate Applicants is produced in tabular form at Page 4 of the Preliminary Objections. Therefore the Applicants have resorted to duplication and multiplication of Applicant to make out a number game is an absolute abuse of the process of law by attempting to defeat the intent of legislation.

(3) It is further submitted that the Application does not include the necessary parties to the proceedings. Maximum number of the Applicants out of 169 are joint Allottee(s) and despite there being multiple purchasers of each unit, the joint purchaser has not been included as an Application. A tabular list of corresponding joint Purchasers of maximum number of Applicants starting from first Applicant to last Applicant is produced at Page Nos. 6 & 7 of the objections. It is well settled law that locus to sue is either single or joint and if it is joint one out of them in the absence of another cannot prosecute. If the joint persons are excluded, the present application would undoubtedly suffer paucity of numbers as required under law.

(4) It is further submitted that out of 169 initial Applicants, only Applicant No.1 & 2 are prosecuting personally and the remaining 167 Applicants are being represented by Applicants Nos.1 &2 on the basis of Letter of Authorization allegedly executed by the Applicant Nos.3 to 169. Even the Letter of authorization which the Applicant Nos.3 to 169 said to have executed are flagrantly invalid as they are not Power of Attorneys and if the said Authorization Letter are to be construed as one fulfilling the requirement of Power of Attorney they are still not valid because most of the Applicants are residing at a foreign territory and they appear to have simply signed the same on dotted lines and sent it

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without following the due procedure. The residential status of the Applicants i.e. Bangalore Residents, outside Bangalore Residents and Foreign Residents is produced at Page Nos. 8-14 of the Preliminary objections.

(5) It is further submitted that none of the Letters of Authorization coming from abroad have been duly adjudicated in the manner known to law and they are not duly stamped and adjudicated by an appropriate authority within the local limits where such a Power of Attorney is intended to be used. The Order III Rule 2 unambiguously demands for a valid Power of Attorney and not a vaguely styled letter of authorization.

(6) It is further submitted that the Applicants claim that the cumulative total of the amount claimed to have been paid by them to the Respondent is Rs.127,05,10,277/- and their claim including interest is Rs.191,65,13,949/- However, the Applicants have not paid the sums as depicted under the tabular representation at Part IV Pg. No. 101 of the application. It is further submitted that the Applicant have suppressed the fact the Pre-EMI was being paid by the Respondent alone and that most of the applicants have now approached the Hon'ble High Court of Karnataka through various Writ Petitions, wherein they are seeking a direction against the Banks/Financial Institutions to not demand or claim for payment of EMI from them and the Hon'ble High Court of Karnataka was pleased to pass an interim order to the benefit of the present Applicants whereby stalling demand and recovery from them and that the matter is sub-judice before the Hon'ble High Court of Karnataka. The list of the Applicants who are before the Hon'ble High Court of Karnataka in various Writ Petitioners seeking orders against the financial institutions from recovering from them and such other directions is produced at Page Nos. 15-18 of the Preliminary Objections.

(7) It is also submitted that the Applicants have also suppressed vital information that several of them have already approached the RERA Forum seeking relief of payment of compensation, refund and other

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reliefs. The list of the Applicants who have approached the RERA forum is shown at Para 10 of the Preliminary Objections.

(8) It is stated that the security offered to the financial aid granted by various Financial institutions towards the purchase of units is nothing other than the Apartment unit sought to be purchased by the Applicant/s and the said apartment units are still jurally owned by the Respondent. Should there be a recovery action from the Banks or financial institutions they will proceed against the apartment unit and not against any other assets of the Applicants. Therefore, the Applicants be considered as a Financial Creditors and particularly to the extent of alleged financial debt. The list depicting the partial or complete return of investment payments made to several Applicants which by record falsifies the claim of the Applicants is produced at Page Nos. 19-21 of the Preliminary Objections.

(9) It is submitted that the Applicant Nos. 1 & 2 states that only 47% of the project is complete but the Applicant No.1 is residing in the very same project Ozone Urbana which he claims as incomplete and not handed over. The Occupancy Certificate has already been received for several Apartment units/parts of the project in the comprehensive Ozone Urbana project while the completion of the project in its entirety can be completed on or before 30.09.2023 in terms of RERA allowances extended by the appropriate Real Estate Regulatory Authority by considering the Covid-19 concessions and other enlargements. Further, none of the Applicants are distressed and not even their financial credentials since the Banks and Financial Institutions have come forward and extended loan facility is on the strength and credentials of the project and of the Respondent developers after being satisfied with the marketability and the worth of the project. The statement of bank loans depicts the fact that all the Applicants have contracted purchase by not incurring their own funds, but by the succour of Banks and the same is produced at Page Nos. 22-29 of the Preliminary Objections.

(10) It is further submitted that documents produced by the Applicants are voided to be considered as acceptable testimonies since they lack

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support of proper probating certificate as required under 65 (B) of the Evidence Act. The Applicant Nos.1 & 2 have made perjuries false statement to the effect that they have downloaded certain relied document from the website of Uttar Pradesh Real Estate Regulatory Authority which has nothing to do with the Respondent's Real Estate project which is registered with the Karnataka Real Estate Regulatory Authority.

(11) It is also submitted that the Applicants have avoided to place all the documents such as Sale Agreements, Construction contracts, Buy-back Agreements etc and all other relevant contractual papers of each of the Applicants and have placed only selective documents of Applicant Nos.1 & 2 which is nothing but as serious suppression of information.

(12) It is submitted that the Respondent is a Profit making company and great prejudice would be caused if the application is allowed. Further the Applicants have no locus-standi to present the instant application. The purpose of law is not to convert this Hon'ble Forum into a Debt Recovery Court. The entire gamut of IBC law is to ensure that an incapable corporate entity does not survive or exist as would cascade on the economy of the country at large besides distressing several interested persons and entities.

(13) The Respondent has relied upon the following Hon'ble Supreme Court judgements:

(1) Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited Etc. (Civil Appeal Nos. 8512-8527 of 2019) (2020) 8 SCC 401.

(2) Murlidhar Aggarwal v. State of UP (1974) 2 SCC 472.

(3) All India Power Engineer Federation and Others v. Sasan Power Limited and Others (2017) 1 SCC 487.

(4) Shalimar Tar Products Ltd v. H.C. Sharma (1988) 1 SCC 70.

(5) Lachoo Mal v. Radhey Shyam (1971) 1 SCC 619.

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10. The Petitioner has filed Rejoinder by *inter-alia* contending as follows:

(1) It is submitted that the Applicants are whether Speculative Investors or not, the Corporate Debtor has received the finances from the Applicants and has provided allotment letter with respect to the allotted units and has entered into sale and construction agreement with the Applicants. Further, the Applicants have made their investments under the 'Schemes' floated by the Respondent and however, the said schemes are not fully availed by the Applicants or never offered other schemes of purchase of the apartments to these Applicants at the time of sale but the Respondent has sold the apartment only under 'Schemes' to mobilize the funds for the project.

(2) It is further submitted that the Applicants have purchased more than one units and for the same separate payment and separate allotment letters have been issued by the Corporate Debtor. And most of the units have been booked by the Applicants along with Spouse name. As decided in various cases, any of the spouse may filed the Petitioner under IBC Laws. Hence, it is not necessary that co-allotees also be made a necessary party to the Petition.

(3) The intent Petition has been filed jointly by all 169 Petitioners as per the right given U/s.7 of the Code and there is not specific procedure laid for the filing of a Petition by more than 100 Applicants U/s. 7 of the Code, further the letter of authorization clearly speaks for they are authorizing representative for acting on their behalf with regards to the present Petition. In this regard, the Petitioner has relied upon the Section 424(1) of the Companies Act, 2013. Further, it is submitted that the Petition has jointly been filed by 169 Applicants having the identical cause of action. However, owing to the large size of the Agreement, only sample agreement has been filed along with related details with the Petition.

(4) It is further submitted that the Corporate Debtor admitted the fact of paying a certain amount of the debt owed. The Hon'ble RERA had decided the matter in favour of some Applicants wherein the amount was directed to be refunded along with the delayed penalty interest. Since, the Corporate Debtor did not comply the same, he has wilfully

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accepted the amounts due as per the decree. That once the liability has been admitted and part payment has been made, no dispute can be raised with regards to the same by the Corporate Debtor.

(5) It is also submitted that the Applicants have not approached this Hon'ble Tribunal for the purposes of recovery, but for the default of possession of units, to initiate the CIRP process on account of Corporate Debtor inability to complete the construction of the Project. Hence, the instant Petition has been filed for 'maximisation of assets' not for recovery of money.

11. Heard Mr. S.K. Ravi, learned Counsel for the Petitioner and Mr. M.S. Shyam Sundar, learned Senior Counsel along with Ms. Vandana, learned Counsel for the Respondent/Corporate Debtor and have also perused the records carefully.

12. In the back drop of the above referred facts and the rival contentions, the following issues fell for our consideration:

(1) Whether the Petitioner Nos. 1 & 2 who filed the instant C.P. on their behalf and also on behalf of the remaining 182 Petitioners, were validly authorised to file the same on behalf of the remaining 182 Petitioners?

(2) Whether the Petitioners satisfies the minimum threshold limit of 10% of the total Homebuyers in the subject Real Estate Project or 100 in number, whichever is less, to enable them to maintain the C.P?

(3) Whether the C.P. is premature as the Respondent has already completed 60% of the Project and obtained Occupancy Certificates and delivered possession of part of the Project to various other flat buyers and that there is still time to complete the Project till September, 2024?

(4) Whether the C.P. is barred by the period of limitation?

(5) Whether the Petitioners proved the debt and default thereof?

13. The instant C.P. was filed originally by 169 Flat Buyers. Thereafter, vide order dated 24.05.2022 in I.A No. 128 of 2022, 15 other Homebuyers of the same real estate project got impleaded in the C.P. as Petitioners and thereby the total number of Petitioners in the C.P. are now 184. The 1st

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Petitioner i.e. Shri Sethuraman Mahadevan and the 2nd Petitioner i.e. Shri Bipul Bhattacharya filed the C.P. directly along with their supporting individual affidavits and signed the vakalatnama. The Petitioner Nos. 3 to 184 have only given authorisation letters in favour of the Petitioner Nos. 1 and 2 authorising them to sign on their behalf and to file the C.P.

14. As pointed out by the learned Senior Counsel appearing for the Respondent/Corporate Debtor that except in case of the 3rd Petitioner i.e. Shri Rohit Menon, the signature of the respective Petitioners were not attested by either any Advocate or notary public. Further, as pointed out by the learned Senior Counsel appearing for the Respondent/Corporate Debtor there were a number of joint purchasers of various units, but only one of them issued the said unattested and un-notarised authorisation letters in favour of the Petitioner Nos. 1 and 2. Admittedly, there were number of Applicants who are the Residents in various Countries other than India and the alleged authorisation letters issued by them were not in accordance with law, as applicable, in the respective Countries where they reside. There was no explanation from the Petitioner Nos. 1 and 2 about the invalid, unattested and un-notarised authorisation letters of the Petitioners. It is also not the case of the Petitioners that the authorisation letters without even identifying the signature of the deponent by a notary public or as per the rules in force applicable in a particular Country where the respective Petitioner is residing, are valid as per law,

15. Similarly, with regard to non-joining of the joint owners of number of flats, no explanation forthcoming from the Petitioners. Though the Respondent raised various objections as observed above, with regard to the authenticity and validity of the authorisation given to the Petitioner Nos. 1 and 2, no steps were taken and no explanation was given till date. Therefore, the C.P. is to be considered as if filed by the Petitioner Nos. 1 and 2 only and there by does not satisfy the minimum requirement of 10% or 100 in number, whichever is less, and accordingly, liable to be dismissed on this ground alone. Accordingly, issue Nos. 1 and 2 are held against the Petitioners.

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16. In view of holding issue Nos. 1 and 2 against the Petitioners, there is no need to delve upon the remaining issues.

17. In the circumstances and for the aforesaid reasons, the instant C.P. is dismissed. However, this order shall not preclude the Petitioners from filing a fresh C.P., in accordance with law, if they are so advised.

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(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

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(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)