

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

C.P. NO. (IB) 524 OF 2021

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:

Mr. Sachin Dhiman And Ors .

...FINANCIAL CREDITOR/APPLICANT

VERSUS

M/s Ajnara Real Tech Limited

...CORPORATE DEBTOR/RESPONDENT

CORAM:

**SH. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)**

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

Order Delivered on: 15.04.2024

PRESENT:

For the Applicant : Adv. Bharat Bhushan Sethi,
Adv. Chetna Bisht

For the Respondent : Adv. Deepank Yadav

ORDER

PER: MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (J)

1. The instant Company Application is filed by Mr. Sachin Dhiman and 167 other home buyers ('Applicant'/ 'Financial Creditors'/ 'Allottees') under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating the Corporate Insolvency Resolution Process ('CIRP') against M/s. Ajnara Real Tech Limited ('Respondent/Corporate Debtor') having CIN: U45204DL2011PLC216540 on the ground that the Corporate Debtor had committed a default in payment of Rs. 43,89,73,868/- (Rupees Forty Three Crore Eighty Nine Lakh Seventy Three Thousand Eight Hundred and Sixty Eight Only) as the Corporate Debtor has cumulatively defaulted the Financial Debt paid by the Applicants towards the purchase of their respective units, for the defaults committed against the Financial Debts being the non-delivery of the flats/non-payment of the amount paid by the Applicants in lieu of the units purchased.
2. The Corporate Debtor i.e., M/s. Ajnara Realtech Limited having CIN: U45204DL2011PLC216540 is incorporated dated 25.03.2011 under the provisions of the Companies Act, 1956 having its registered office situated at 502, 5th Floor, Sachdeva Corporate Towers 17, Karkardooma Community Centre Delhi DL 110092. Since the

registered office of the Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. Briefly stated the facts of the present case as averred by the Applicant/ Financial Creditor are: -

- a. That the Corporate Debtor is engaged in the business of Real Estate and Infrastructural development including construction and development of residential & commercial complexes. The Corporate Debtor has launched its project **“AJNARA LE GARDEN”** a multi-tower residential project situated at Plot No.- GH-02, Sector -16 Greater Noida, Greater Noida West, 201301, Uttar Pradesh.
- b. The Corporate Debtor had launched its Project with various representations and promises regarding the timely delivery of the Project as described under the allotment letter/Builder Buyer Agreement which was stated to be approx. 3 years. Based on the representations made by the Corporate Debtor, the Applicants/ Financial Creditors booked and agreed to purchase the Unit(s) from the Corporate Debtor in its project by giving in their life time earnings/savings to have their future dream home.
- c. The Corporate Debtor has sold majority of the Units in the said project between 2014 to 2017 and accordingly executed various Allotment letters/Builder Buyer's Agreement with the Financial Creditors/allottees.

- d. The Corporate Debtor in accordance with the allotment letter/Builder Buyer Agreement executed with the Allottees/ Applicants, gave different dates of possession to the different Allottee/ Applicants.
- e. That the Corporate Debtor have raised an advance receipts of total financial debt/sum of Rs.43,89,73,868/- (Rupees Forty Three Crore Eighty Nine Lakh Seventy Three Thousand Eight Hundred and Sixty Eight Only] from the Applicants/allottees.
- f. It is submitted by the Applicant that despite making contractual promises and obligations, the Corporate Debtor has drastically failed to stand over its own commitments and defaulted in the construction of the project thereby delaying the possession of the Units/Flats.
- g. Further it has been stated by the Applicant/ Financial Creditor that the delay in possession of the flats/units is not normal but an extraordinary delay.
- h. It has been submitted by the Applicant that the Corporate Debtor had illegally and without the prior approval of allottees, bifurcated the said project and registered with RERA in different parts. The RERA Registration of the project is as follow

RERA REGISTRATION DETAILS	UPRERAPRJ7486 (Tower A B & C)
	UPRERAPRJ3817 (Phase 1: Tower D E F & G)
	UPRERAPRJ3828 (Phase 2: Tower H I J O & Q)

		UPRERAPRJ3852 (Phase 3: Tower K L M & N)
		UPRERAPRJ4600 (Phase 3: Le Mart Convenient shops)
		UPRERAPRJ14530 (Tower P)

4. This Adjudicating Authority vide its order dated 17.09.2021, had directed the Applicant/ Financial Creditor to issue notice to the Corporate Debtor as to why the application for initiating the CIRP should not be admitted against the Corporate Debtor and ordered to process Dasti service as well notice through all modes. The Applicant/ Financial Creditor vide affidavit of service dated 12.10.2021 submitted that the notice to the Corporate Debtor had been sent through e-mail, Speed post and Dasti Service.

5. Submissions of the Ld. Counsel appearing for the Respondent/Corporate Debtor are:

a. The Respondent/Corporate Debtor appeared through its counsel and filed Reply denying various averments made in the Application. The Respondent/Corporate Debtor has alleged that the present application under Section 7 of Insolvency and Bankruptcy Code, 2016 has been filed in violation of the law as neither the application is filed by one hundred of such creditors in the same class nor ten per cent of the total number of such creditors in the same class.

- b. Further, the Respondent has submitted that the present application is not maintainable and is liable to be dismissed as the all the applicants are not the creditors in the same class and they belong to different classes of creditors. The applicants have booked their units /flats in different Towers namely A, B, C, D, E, F, G, H, J, I, K, L, M, N, O, P, Q of the Respondent's project and applicants in each Tower constitutes different class of creditors.
- c. The Respondent/Corporate Debtor in its reply has raised objections pertaining to non-mentioning of date of default and details of alleged default etc. Furthermore, it has argued that the applicant is not properly authorized on behalf of other applicants to file the present application.
- d. The Respondent/ Corporate Debtor has further stated that the instead of invoking the provisions of the Arbitration and Conciliation Act in terms of the clause contained in respective Builder-Buyer Agreements, the applicants have filed the present application under Section 7 of IBC, which is liable to be dismissed.
- e. The Respondent has submitted that the present application is not maintainable as the claims of the applicants are barred by limitation.

6. Rejoinder on behalf of the Applicant/ Financial Creditor

- a. The Applicant has filed its rejoinder and denied all the contentions raised by the Respondent in its reply. The applicants have submitted that the petition has been filed in prescribed Form-1. As per section 7 of IBC, petition can either be filed severally or jointly with other financial creditors. The present petition has been jointly filed by 168 Homebuyers.
- b. It has stated that "Ajnara Le Garden" is one Real Estate Project with multiple Towers and units in it. Also, the whole allotment letter and Builder Buyer, Agreement has been executed portray the whole project as the one Real Estate Project. It has been further submitted that the project was launched in the year 2012, whereas RERA Regulations came in effect from 01.05.2017 and the Respondent/ Corporate Debtor had registered the project in various phases as per their own convenience and comfort without any information/approvals from the Home Buyers.
- c. It has been submitted by the Applicant/ Financial Creditor that the default of non-possession of the said units is still continuing in nature and being renewed every day, hence, not barred by the limitation act.
- d. It is the settled law that the Arbitration is not required before filing a petition under IBC. The Hon'ble Supreme Court, in the matter of "M/s. Innovative Industries Ltd. Versus ICICI Bank &

Anr." held that the IBC has overriding effect and the Arbitration is not a pre-requisite to file any petition under IBC.

- e. It has been Submitted that the Applicants in the present application are the Financial Creditors as Allottees in a class, the Applicants are covered under the definition of Financial Creditors under Section 5(7) and respective debt is covered under the definition of Financial Debt under Section 5(8) of IBC. More, particularly explanation to clause 'f' of Section 5(8) clearly states that allottees shall be deemed to have commercial effect of borrowing hence, Financial Debt.

ANALYSIS AND FINDINGS

7. Heard. We have also perused the documents on record. The issue at hand is that whether the Applicants are fulfilling the threshold limit of the second proviso to Section 7(1) of the IBC, 2016.
8. We have heard the Ld. Counsel on behalf of the Applicant/Financial creditor and further perused the averments made in the application, reply filed by the Corporate Debtor, rejoinder and written submission presented by Financial Creditor and Corporate Debtor. Since, the registered office of the Respondent/ Corporate Debtor is in Delhi, this Adjudicating Authority is having territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 7 of The Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor.

9. Adverting to the facts of the present case, the primary objection raised by the Respondent is that the Applicant No.1 is not properly authorized by the other applicants to proceed in the present matter. In this regard, when we peruse the letters of authorization (annexed from page no. 111-413 of the application, it is found that authority by the other applicants has been properly given in favour of Applicant No. 1.
10. The Respondent have contended that the matter is required to be referred to the arbitration as per clause mentioned in the Builder-Buyer Agreement. Further, the present application has not been not filed by the applicants to resolve any dispute but for initiating the Corporate Insolvency Resolution process of the Respondent, who has defaulted in giving possession to the applicants/financial Creditors/homebuyers within the time stipulated in the respective Builder-Buyer Agreements. It is pertinent to mention that remedy under Arbitration and Reconciliation Act does not create any bar for the applicants to prefer an application under Section 7 of the Code as the Code by virtue of Section 238 has the overriding effect over all other laws inconsistent with the IBC.
11. At this stage, it is pertinent to refer to the definition of the expression **“Financial Debt”** defined in sub-section 8 of Section 5 of the Code.

Section 5(8)(f) along with its explanation reads as follows:

Section 5: Definitions

.....

“(8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]”

12. Examining whether the applicants, being the Financial Creditors/ allottees fulfil the threshold limit as prescribed under section 7 of IBC, 2016. At this stage, we consider it appropriate to refer to the Proviso of Section 7(1) of the IBC, 2016, which lays down as under:

Section 7: Initiation of corporate insolvency resolution process by financial creditor.

“(1) A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.”

The 2nd proviso to Section 7(1) reads as follows:-

“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:”

13. For better understanding of the preceding paragraph, we may refer to the definitions of “Allottee” defined under Section 2(d) and “Real Estate Project” defined under Section 2(zn) of the RERA Act, 2016.

Section 2(d) and Section 2(zn) reads as follows:

2. Definitions —

(d) “allottee” in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;”

“(zn) “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;”

14. It is submitted that the project in question namely “Ajnara Le Garden” located at Plot No.GH-02, Sector 16, Greater Noida, Uttar Pradesh consists of 17 towers and the total number of flats/units in the said project is 3220, out of which 3022 flats have been sold/allotted to the buyers. The present application is being preferred on behalf of more than 100 allottees, total 168 allottee and therefore the present application is maintainable as per the threshold limit as set out in Section 7 of the Code. As per the settled law, the Financial Creditors/homebuyers are entitled to file petition under Section 7 of the Code against the Corporate Debtor for its failure to hand over the possession in terms of the Builder Buyer Agreement by claiming the Principal Amount along with Interest payable (delay penalty as well as Interest payable for the delay). In the present case, as a matter of fact, the Corporate Debtor is liable to make payment to all the allottees for the delay in handing over the possession along with the Interest. Apparently, the threshold limit as prescribed under the provisions of the code is satisfied.
15. It is submitted that the Corporate Debtor has committed default of financial debt owed to Applicant/Financial Creditors. In terms of the Allotment Agreement(s) executed with the respective allottees, including the Applicants, the Corporate Debtor was required to hand over the possession of the allotted units to the Applicants on or before 31.10.2017 with an additional grace period of 6 months. However, the

Corporate Debtor has failed to hand over the possession of the said units/flats.

16. The project was to be completed in near about 3 years from the date of booking with an extension of 6 months as per the Builder Buyer Agreement executed between respective Applicants and Corporate Debtor. Corporate Debtor has defaulted in completing the construction and delivering the possession on time. The stand taken by Corporate Debtor in his reply that the claims of most of the homebuyers are time barred as per Limitation Act cannot be accepted as it is very clear that in case of home buyers/ allottees who have a booked a unit/flat, the cause of action for filing a petition continues to run till the actual delivery is given.
17. Thus, from the facts which are borne on record, as narrated above, we are of the considered view that the 'financial debt' is not barred by limitation and the submissions of the Corporate Debtor as to the present application being barred by limitation is not sustainable. Hence, in all respects the 'debt' as claimed by the Financial Creditor is well within the period of limitation and the Corporate Debtor has committed 'default' in repayment of the said 'financial debt'.
18. Further, we are supported by the judgment of the Hon'ble Supreme Court in the **Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (2018) 1 SC 407**, which clearly held that:

“29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand

notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the

adjudicating authority may reject an application and not otherwise.”

19. Thus, it is clear that when a default takes place i.e., the debt becomes due and is not paid, the Insolvency Resolution Process shall begin against the corporate debtor. Therefore, on the basis of discussion in the aforesaid paragraphs, we are satisfied that the present application is complete in all respects. The Applicant/financial creditor is entitled to move the application against the corporate debtor in view of outstanding financial debt in default above the pecuniary threshold limit as provided under Section 4 of the Code, 2016. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the instant petition ***I.B./524/2021 stands admitted*** and CIRP of ***M/s Ajnara Real Tech Limited*** shall be initiated.
20. The applicant in Part-III of the application has proposed the name of Mr. Amarpal as Interim Resolution Professional, having Registration Number - IBBI/IPA-01/IP/P01584/2018-2019/12411 having email id amarpal@icai.org. Accordingly, Mr. Amarpal is appointed as an Interim Resolution Professional (IRP) for corporate debtor. The consent of the proposed interim resolution profession in Form-2 is taken on record. The IRP so appointed shall file a valid AFA and disclosure about non-initiation of any disciplinary proceedings against him, within three (3) days of pronouncement of this order.
21. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the

provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

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

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.”

(e) The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota,

concessions, clearances or a similar grant or right during the moratorium period.”

22. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.
23. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (within 3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.
24. We direct the Applicant/Financial Creditor to deposit a sum of Rs. 2,00,000/- (Two Lakh Rupees Only) with the Interim Resolution Professional namely Mr. Amarpal to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the

Financial Creditor. The said amount, however, is subject to adjustment towards Resolution Process cost as per applicable rules.

25. The Interim Resolution Professional shall perform all his functions as contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.
26. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders.
27. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of his obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

28. In terms of section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.
29. Accordingly, the instant application filed under Section 7 of the Code, 2016 bearing **I.B./524/2021 stands admitted.**

Sd/-

(DR. SANJEEV RANJAN)
MEMBER (T)

Sd/-

(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)