IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II

C.P (IB) No. 1726/MB/C-II/2017

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of

Mr. Amish Jaysukhlal Sanghrajka

…Petitioner No. 1

Mrs. Aparna Amish Sanghrajka

…Petitioner No. 2

Address: Flat No. 610, 6th Floor, 'Richmond' Andheri Co-Operative Housing Society Ltd., Plot No. 20, Vithalbhai Patel Road, Andheri (West), Mumbai – 400058.

versus

Akshar Shanti Realtors Private Limited

[CIN: U70200MH2007PTC169675]

B 102, Mayur Ma Krupa Shimpoli Road, Borivali (West), Mumbai – 400092

… Respondent

Order Pronounced on: 05.10.2021

Coram:

Hon'ble Member (Judicial) : Mr. Ashok Kumar Borah
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances (through video conferencing):

For the Financial Creditor : Mr. Tejas Sanghrajka, Advocate.

For the Corporate Debtor : Mr. Shyam Kapadia, Advocate.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This is a Company Petition filed under section 7 ("**the Petition"**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Mr. Amish Jaysukhlal Sanghrajka & Anr.** ("the Financial Creditors"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Akshar Shanti Realtors Private Limited** ("the Corporate Debtor").
2. The Corporate Debtor is a Private company limited by shares and incorporated on 05.04.2007 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is **U70200MH2007PTC169675**. Its registered office is at B 102, Mayur Ma Krupa Shimpoli Road, Borivali (West), Mumbai – 400092. Therefore, this Bench has jurisdiction to deal with this petition.

Facts of the Case

3. The Applicant has filled this current petition due to default on the part of the Corporate Debtor provided herein as follows:
   A. Failure to abide by the terms of the Letter of Allotment dated 31 July 2015 bearing Flat No. 1601 and Flat No. 1604 respectively;
   B. Failure to register the building "Wing – E" of the project called "Imperial Heights" under the Real Estate (Development & Regulation) Act, 2016;
   C. Failure to construct the building "Wing – E" thereby leading to frustration of the contract (i.e. Letter of Allotment);

D. Violated Section 3 of the Real Estate (Regulations and Development) Act, 2016 by taking an advance monies (i.e. 84% of total purchase consideration for Flat No. 1601 and 50% of total purchase consideration for Flat No. 1604) from the Petitioners for Imperial Height – Wing "E" and simultaneously registering only Wing "A" and Wing "B" of the Imperial Heights and not registering and/or intimating about the present allotments issued by the Respondents evidencing the allotment of aforesaid two flats in Wing "E" of Imperial Heights.

E. Failure to repay the debt amounts of Rs.88,02,792/- (i.e. sum of Rs.66,28,000/- towards principal outstanding and Rs.21,74,792/- towards interest outstanding) under Section 55, 56 and 73 of the Indian Contract Act, 1872 in-spite of receiving the demand notice, dated 23 November 2017, issued u/s. 8 of the Insolvency and Bankruptcy Code (hereinafter referred to as "the IBC").

4. The Petitioners were allotted Flat Nos. 1601 and 1604 on the 16th Floor in Wing 'E' of the project called 'Imperial heights' situated at behind Royal College, Shanti Gardens, Mira Road (East), District Thane vide two separate Allotment Letter dated 31.07.2015. The said project is being developed and constructed by the Corporate Debtor in the name and style as one **'Imperial Heights'**. Pursuant to the aforesaid two Letter of Allotment dated 31.07.2015 which are annexed as **"EXHIBIT – C2"** in the Petition, the Petitioner no.1 had paid an amount of Rs.49,28,000/- vide Cheque Nos. 000030 / 000031 dated 29.04.2015 / 01.05.2015 drawn on HDFC Bank towards Flat no. 1601. The Petitioner no.2 paid an amount of Rs.21,75,000/- vide Cheque No. 000027 dated 16.04.2015 drawn on HDFC Bank towards Flat no. 1604.

5. The Petitioner submits that the said amounts have been admittedly

received by the Corporate Debtor and the payment has been acknowledged by the Corporate Debtor in the both aforesaid Letters of Allotment. The Bank Certificate evidencing the payment has been annexed as **"EXHIBIT – B1"** in the Petition.

6. The Petitioners submitted that they thereafter requested the Corporate Debtors to commence the construction of the building. The Corporate Debtor kept giving the assurances to commence the construction shortly. The Corporate Debtor on 29.07.2017 registered only Wing 'A' and Wing 'B' under the Real Estate (Regulation and Development) Act, 2016 and a Registration Certificate No. P51700006296 has also been issued to the Corporate Debtor. The Application and Registration Certificate has been annexed as "**EXHIBIT – H"** in the Petition.

7. The Petitioner submits that the Corporate Debtor filed a separate application for registration of Wing 'C' with the RERA Authorities (as mentioned in the Additional Affidavit, dated 02.08.2021 referred and relied by the Corporate Debtor). On 05.03.2020, the Corporate Debtor registered a separate project namely Imperial Heights – Phase II under 'C' Wing under Real Estate (Regulation and Development) Act, 2016.

8. Due to the failure of the Corporate Debtor to register the project and to commence construction of the project, the Petitioners have acquired a residential flat at Andheri and thereafter requested the Corporate Debtor to repay the amounts received under the aforesaid Letters of Allotments so as to enable the Petitioners to make the payment of purchase consideration for the flat purchased at Andheri.

9. The Petitioner Submits that it is well settled that, once a contract is frustrated then under Section 65 of the Contract Act, principal of restitution applies and consideration received must be repaid. The Corporate Debtor, based on aforesaid understanding, initially agreed to repay the entire amount along with interest and accordingly paid an

amount of Rs.4,75,000/- on 15.07.2017 vide Cheque no. 275470 drawn on Bank of India in favour of Petitioner No.2. The Bank Certificate, issued by Bank of India, evidencing the payment is received by the Petitioner from Corporate Debtor is annexed as **"EXHIBIT – B1"** in the Petition.

10. The Petitioner submits that the contract (i.e. Letter of Allotment) between the Petitioners and Corporate Debtor was frustrated due to default made by the Corporate Debtor and admittedly the Corporate Debtor has acknowledged and/or accepted contract by making the part repayment of Rs.4,75,000/- to the Petitioner No.2. The Petitioner submits that the obligations to pay by the Corporate Debtor is hence admitted. Moreover, In-spite of agreeing to pay the entire amount with interest, the Corporate Debtor subsequently refused to repay the amounts received under the Allotment Letters. The refusal to repay the amounts is a default and breach of the terms of the aforesaid two Allotment Letters under Section 55, 56 and 73 of Indian Contract Act, 1872.

11. The Petitioner submits that due to non-compliance of the Demand Notice dated 25.11.2017 by the Corporate Debtor the Petitioners were compelled to file the present Petition before this Hon'ble Court.

12. Subsequent to the filing of the present Petition, the legislation was pleased to clarify that the present Petitioners should be treated as 'Financial Creditors' and hence a Petition under Section 7 of the IBC would be an appropriate remedy as per the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018. The Petitioners accordingly filed a Misc. Application no. 999 of 2018, to amend the present original Petition, which was filed under Section 9 of the IBC, to a Petition under Section 7 of the IBC. This Tribunal vide Order dated 25 February 2019 was pleased to allow the application & granted permission to the

Petitioners to file the Form I a/w. filing fees. The Petitioners in compliance with the Order filed the Form I a/w. filing fees on 28th February 2019.

13. Thereafter, Order dated 25th February 2019 of this Tribunal was challenged by the Corporate Debtor, vide Company Appeal (AT) (Insolvency) No. 357 of 2019, before the Hon'ble National Company Law Appellate Tribunal seeking:

i. To set aside the Impugned Order, dated 25th February, 2019 as passed by the Hon'ble National company Law Tribunal, Mumbai Bench, in Miscellaneous Application No. 999/2018 filed in Company Petition (IB) -1726/ (MB)/2017;

ii. To stay further proceeding in Company Petition (IB) - 1726/(MB)/2017 before Hon'ble NCLT Mumbai Bench; and

iii. To stay the effect, implementation and operation of the Impugned Order, dated 25th February 2019. The Hon'ble Courts were pleased to dismiss the aforesaid Appeals/Petitions thereby retaining the Order dated 25 February 2019.

Submissions on Maintainability by the Petitioner:

14. The Petitioners state that the Corporate Debtor have, in express terms, admitted that the present Petitioners are the only two buyers who remain outstanding in respect of 'Wing E'. In view of the said statement, and thus the Petitioners comply with the threshold limit of 10%. In-fact, the Petitioners are 100% allottees in the project 'Wing E' pursuant to the Judgement, dated 19.01.2021, passed in the case of ***Manish Kumar V/s Union of India*** by the Hon'ble Supreme Court of India.

15. The Petitioner submits that U/s 3 of the Real Estate (Regulations and Development) Act, 2016, "no promoter shall advertise, market, book,

sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under the Act". In view of the above, the Corporate Debtor has violated the aforesaid Section 3 by accepting the advance monies from the Petitioner for Imperial Height – Wing "E" and simultaneously registering only Wing "A" and Wing "B" of the Imperial Heights and not registering and/or intimating about the investments received by the Corporate Debtor against the allotment of flats in Wing "E" of Imperial Heights to the Hon'ble MahaRERA Authority.

16. The Petitioner relies on definition of "allotee" under Section 2(d) of the RERA, 2016 to make it clear that since they were been allotted flats no. 1601 and 1604, they are to be considered as "allottee" under the Act of 2017. And that in the present petition, they are to be considered as 'Allotees/Home buyers' as against 'Speculative Investors'. The Petitioner further submits that the Respondent failed to respond to the Demand Notice U/s 8 of the IBC and therefore are estop from raising any issue.

Submissions on Merits by the Petitioner:

17. The Petitioner submitted the Due, Default and Breach by the Respondent as under:

i. Failure to abide by the Terms of the Letter of Allotment (dated 31.07.2015)

ii. failure to register the building Wing E of the Project Imperial heights under the Real Estate (Development & Regulation) Act, 2016;

iii. failure to construct the building Wing E thereby leading to

frustration of the contract;

iv. failure to repay the debt amounts of Rs.88,02,792/- under Section 55, 56 and 73 of the Indian Contract Act, 1872;

v. failure to comply and/or pay the amount of Rs.88,02,792/- after receiving the demand notice u/s. 8, dated 23rd November 2017, issued as per the provisions of IBC.

18. The Petitioner submits that the payment of Rs. 66,28,000/- w.r.t allotment of Flat No. 1601 and 1604 against the total consideration of Rs. 1,02,30,000/- under the Allotment Letter form binding and enforceable agreements/contacts.

19. The Petitioner submits that the Corporate Debtor was supposed to finish the conduction of Flat No. 1601 and 1604 but the same has not yet been completed even after 6 years. Moreover, the Respondents have only registered 'Wing A and B' as separate project and subsequently registered 'Wing C' as a separate project. And 'Wing E' is clearly illegal and attracts penal actions mentioned under Section 59 of RERA, 2016 as it has not been registered as a project, failing the criteria of Section 3 of RERA, 2016.

20. The Petitioners state that there is no dispute w.r.t to two facts:

i. Non-registration of the project under Section 3 of the Real Estate (Regulation and Development) Act, 2016 and

ii. the construction of the Wing E has till date not commenced. Due to the said breaches and/or failure of registration and construction of 'Wing E', the Corporate Debtors are liable to repay the amounts under Section 55, 56 and 72 of the Indian Contract Act, 1872.

21. The Petitioner further submits that under the purview of Section 46 of the Indian Contract Act, 1872, if the time for performance of the contract is not specified, the same has to be performed within a

reasonable time. In the present case, a period of 6 years was given to the Corporate Debtor to perform their part of the contract. Till date the Corporate Debtor have failed to commence construction and/or register the project with the RERA Authorities. Therefore, the non-performance of the contract amounts to breach of the contract and the Petitioner have incurred loss of the amount as paid by the, and the same shall be repaid to them under Section 55 of the Indian Contract Act, 1872.

22. The petitioner submits that Under Section 3 of RERA, 2016, the Respondents were required to register the ongoing project within a period of three months from the date of commencement of the Act and now time period of registration has been lapsed and therefore the project i.e. 'Wing E' cannot be registered and/or commenced.

23. Further, the Corporate Debtor themselves have admitted in their Affidavit that there are no home buyers/allottees save and except the Petitioners herein. Therefore, the project/building 'Wing E' will never be constructed. Therefore, the Petitioners are entitled to repayment of the said amounts under Section 56 and under Section 73 of the Indian Contract Act, 1872 for aforesaid inactions, breaches and illegalities which has been denied by the Corporate Debtor.

24. The petitioner submits that the Respondent has acknowledged the Debt of the petitioner and for the same the Petitioner relies on

A. Affidavit in Reply dated 10 March 2018

B. Further Affidavit in Reply dated 17 October 2019

25. Lastly, the Petitioner submits that the Respondent in their Original reply have considered the Petitioner as home buyers but in their subsequent Affidavits, they have considered Petitioner as Speculative Investor.

Judgements relied upon by the Petitioner

26. The Petioner relies upon following Judgements:

A. In case of ***Manish Kumar V/s Union of India and Another*** in Writ Petition (Civil) No. 26 of 2020, wherein the Hon'ble Supreme Court of India dealt with the question as to "Allottees to be from same Real Estate Project, Is it constitutional?

> *"139. We have referred to the definition of the word 'allotee' in Section 2(d) of the RERA. In regard to a real estate project, all persons, who are treated as allottees, as per the definition of allottee would be entitled to be treated as allottees, for the purpose of Section 5(8)(f) (Explanation) and also, for the purpose of the impugned provisos. All that is required is that the allottees must relate to same real estate project. In other words, if a Promoter has a different real estate project, be it in relation to apartments, in the case an application under Section7, those would not be reckoned in computing one-tenth as well as the total allotments.*
>
> *140. The rationale behind, confining allottees to the same real estate project, is to promote the object of the Code. Once the threshold requirement can pass muster when tested in the anvil of a challenge based on Articles 14, 19 and 21, then, there is both logic and reason behind the legislative value judgment that the allottees, who must join the application under the impugned provisos, must be related to the same real estate project. The connection with the same real estate project is crucial to the determination of the critical mass, which Legislature has in mind, as a part of its scheme, to streamline the working of the Code. If it is to embrace the total number of allottees of all projects, which a Promoter of a real estate project, may be having, in one sense, it will make the task of the applicant himself, more cumbersome. It becomes a sword, which will cut both ways. This is for the reason that*

the complaints, relating to different projects, may be different. With regard to one project of a Promoter of real estate project, maybe, in the advanced stage, the allottees in a particular project, may not have much of a complaint. The complaint, in relation to yet another project, may be more serious. If the complaint in respect of the latter, attracts the attention of a critical mass of allottees, and the proposed applicant is part of that project in the said project, then, it may be easier for the allottees to fulfil the statutory mantra in the impugned provisos, with the junction of likeminded souls. If, on the other hand, the requirement was to make a search for allottees of different projects, as would be the case, if the entirety of the allottees, under different projects, were to be reckoned, the task would have been much more cumbersome. The requirement of the allottees, being drawn from the same project, stands to reason and also does not suffer from any constitutional blemish, as pointed out."

B. In case of Smt. ***Sharda Mahajan Versus Maple Leaf Trading International P. Ltd*** (2007 SCC OnLine Del 496: (2007) 139 Comp Case 718), wherein the Hon'ble Delhi High Court held that:

"30. The facts of the present case show that section 56 of the Contract Act is applicable. The petitioner had entered into a contract in 1999 with the respondent. Immediately, thereafter in 1999, itself after raids by the Enforcement Directorate and criminal prosecution initiated against the directors, the respondent-company's accounts were frozen and the money lying in the bank accounts was seized. The contract envisaged recruiting and duplication of new members by existing members like the petitioner, which was impossible because of search, seizure and commercial activities of the respondent-company coming to a standstill. Neither was it possible for the respondent-company to

comply with the terms of the contract and enroll new members. It was practically impossible for the respondent-company to comply with their obligations in view of the action taken by the Enforcement Directorate and freezing of accounts. The respondent-company has not been able to carry on business for the last nearly eight years. In fact the respondent-company admitted frustration of contract in the advertisements informing the investors like the petitioner that they shall be repaid the entire amount deposited/paid by them though with a rider that repayment will be made after accounts are de-sealed. It is clear from the judgments referred to above that for section 56 of the Contract Act to apply, it is irrelevant whether the intervening circumstances making the contract impossible of performance had not occurred due to default of any of the parties. Therefore, even if it is presumed that the respondent-company was not responsible for the seizure of bank accounts and the injunction orders passed, doctrine of frustration of contract is still applicable. The delay and laches also results in frustration of contracts and therefore the above contract has ceased to be binding. The contract stands frustrated.

31. It is equally well-settled that once a contract is frustrated then under section 65 of the Contract Act, principle of restitution applies and the consideration received must be repaid. (refer to Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay, [1958] SCR 1122 : AIR 1958 SC 328, wherein it has been held that when a contract becomes void or frustrates, any person who has received any advantage under such agreement or contract is bound to restore it to the person from whom he had received it.)

48. In the light of the findings given above, it is, inter alia, held as under:

(I) The respondent-company is liable to be wound up on the ground of its inability to pay its debt under section 433(e) of the Act for the following reasons:

(a) *The contract between the petitioner and the respondent-company stands frustrated under section 56 of the Contract Act and the respondent-company is liable to refund/restitute the amount received*

(b) *Even otherwise, conditions of section 433(e) read with section 434 (1) (a) of the Act are satisfied. Admittedly, Rs.60,000 was received from the petitioner by the respondent-company. The respondent-company had agreed to refund/repay this amount received from the petitioner. Refund has not yet been made. The obligation to pay is admitted. For the reasons mentioned above, it is held that the respondent-company is liable to pay the debt due to the petitioner.*

(II) It is just and equitable to wind up the respondent-company for the reasons set out above."

C. In case of ***Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay & Ors.***, reported in AIR 1958 SC 328**,** wherein the Supreme Court has held that:

"24. Counsel for the respondents relies on these observations and contends that when the contract of service was entered into between the employer and the employees, they could not have contemplated that the legislature would have, intervened and required the employer to pay the arrears of wages to the Board, and that that is a supervening impossibility which brings Section 56 into play and renders the contract void. We are not satisfied that the performance of the contract of service has been rendered impossible by reason of Section 3(1) of the impugned

Act. But assuming that that is the position, what follows? The matter would then be governed by Section 65 of the Contract Act, which provides that when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. Under this section, the employer is liable to make compensation to the employee for the work done by him, and that liability can be enforced against him in spite of the fact that he has paid the unclaimed wages to the Board under Section 3(1) of the Act. We are therefore of opinion that even if the matter is governed by Section 56 of the Contract Act, the employer is no more discharged than by the operation of the bar of limitation under Section 15 of the Wages Act, or the provisions of the Limitation Act. In this view, it must be held that the provisions of the impugned Act are unconstitutional, in that they take away the property of the appellant in violation of either Article 19(1)(f) or Article 31(2) of the Constitution."

Submission on behalf of the Respondent

27. The Respondent submits that the entire petition proceeds on an oral agreement between the parties and that even if the Debt has arisen, it cannot be considered as one 'Financial Debt' under the IBC only on the basis of an alleged oral undertaking, which has still nit been proved in evidence. Moreover, the Letter of Allotment dated 31st July 2015 do not mention about the refund or interest. Perusal of allotment letters dated 31st July 2015 clearly shows that no date for handover of possession of the flats has been mentioned and therefore, no Default has arisen.

28. The Petitioners made vexatious statements alleging that they raised the

demand notice dated 23rd November 2017 due to non-performance of the alleged "*works contract*". The Petitioners have referred to the allotment letters dated 31st July 2015 to be the alleged works contract The Respondent submits that a letter of allotment of a flat is not a works contract.

29. The Respondent submits that the Section 7 Petition preferred by the Petitioners is not maintainable as it does not meet the threshold prescribed under the IBC. The *proviso* to Section 7 of the IBC provides that, for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution against the corporate debtor shall be filed by not less than 100 of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project whichever is less. It further provides that where an application for insolvency has not been admitted by the adjudicating authority before commencement of Insolvency and Bankruptcy Code (Amendment Act), 2020 ("**said Amendment**"), then such application shall be modified to meet the threshold within a period of 30 days of the commencement of the Amendment Act, failing which the application shall be deemed to be withdrawn before its admission. The said amendment was challenged before the Hon'ble Supreme Court in the case of ***Manish Kumar v. Union of India & Anr.,*** wherein the Supreme Court unequivocally held the said amendment to be constitutional and retrospective. Therefore, the threshold prescribed via the said Amendment would be applicable to the Petitioners. The failure of the Petitioners to meet the said threshold bars the captioned Petition at the very outset.

30. It is submitted that the Petitioners have no locus before this Hon'ble Tribunal as the Real Estate (Regulation and Development) Act, 2016

("**RERA Act**") does not apply to them. The *Explanation* to Section 5(8)(f) of the IBC stipulates that the expressions, '*allottee'* and '*real estate project*' shall have meanings assigned to them in Section 2 (d) and (zn) of the RERA Act. In order for a homebuyer to attract the provisions of the IBC, it is imperative that the said homebuyer qualifies as an allottee to which the RERA Act applies. It is pertinent to note that, vide allotment letters dated 31st July 2016, the Petitioners were allotted Flat Nos. 1601 and 1604 in Wing - E of the project titled, 'Imperial Heights'.

31. It is the Petitioners own admission that Wing - E of the Respondent's Real Estate Project was never registered with MahaRERA ***(@Para 7, Pg.4, further Affidavit in Rejoinder dated 29th October 2019)***. Since, the said project is unregistered, the RERA Act does not apply to the Petitioners. The said submission is buttressed by the Bombay High Court's decision in *Macrotech Developers Ltd. v. State of Maharashtra &Ors., 2019 SCC OnLineBom283*, wherein it was held that:

> *"**62**. It is apparent from the said decision that this Court has held that the Act will only apply after the project has been registered. Further, it has been held that the Act is prospective in operation. Accordingly, it is apparent that the Act cannot have any retrospective operation and will only apply to those projects which have been completed and registered either prior to commencement of the Act or in the case of ongoing projects, the project or a phase thereof have been completed and received the occupancy certificate/part occupancy certificate within the window of three months from the date of commencement of Section (3) of the Act i.e. 1st May, 2017…"*

32. Similarly, the MahaRERA in *Laxmikant Kothari v. Propel Developers Pvt. Ltd., CC006000000196355,* observed that the allottee's flat belonged to an *unregistered wing* of the developer's real estate project and, therefore,

the allottee had no locus standi in respect of the said real estate project on account of the said wing being unregistered. Therefore, even under the RERA Act (and, consequently, under the IBC), the Petitioners cannot claim that they are '*allottees'* and therefore falling within the definition of financial debt.

33. Respondent submits that the Petitioners in its submissions sought to contend that they are more than 10% of the allottees in the 'E' wing since a number of other purchasers have been moved to the other wings. Without prejudice to the fact that this is completely flawed on account of the Petitioners not being allottees at all, the submissions are premised on them being 10% of the "building" (i.e. E wing) whereas the proviso to Section 7 of the IBC required "real estate project".

34. Section 2 (j) of the RERA Act defines "*building*" whereas Section 2(zn) of the same Act defines "*real estate project*". These are separate definitions and the Petitioners are attempting to conflate the two. Since E Wing is admittedly not registered, it is not possible to treat it as a separate 'real estate project' like the Petitioners would like to.

35. Case laws relied upon by the Respondent:

A. It is submitted that the Petitioners are nothing but speculative investors who are either unable to pay the balance consideration or who realized that the real estate market is failing and therefore, do not want to continue with their obligations and The Supreme Court in ***Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India &Ors.****, Writ Petition (Civil) No.43 of 2019,* observed as follows:

> *"50…under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do*

by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death." (emphasis supplied by us)

B. The NCLAT in its decision in ***Navin Raheja v. Shilpa Jain & Ors.***, *Company Appeal (AT) (Insolvency) No.864 of 2019,* has observed that the Adjudicating Authority ought to discover whether a petition is being filed by trigger-happy allottees who would ignite the process of removal of the management of the real estate project and potentially lead the corporate debtor to its death. The NCLAT further observed that:

"37…in a large number of cases in the language of the Hon'ble Supreme Court the allottees are speculative investor and not a person who is genuinely interested in purchasing a flat/ apartment. They do not want to go ahead with its obligation to take possession of the flat/ apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it."

In such cases, the allottees would be liable for malicious prosecution.

36. Lastly, the Respondent submits that the Petitioners are not genuine

allottees rather they simply seek a refund of the amount "*invested*" since they now want to invest in some other project. From a perusal of the aforementioned allotment letters, it is evident that the Petitioners were supposed to pay monies to the Respondent upon completion of certain slabs. Additionally, the allotment letters don't even whisper about refund, let alone payment of any interest whatsoever.

Rebuttal filed by petitioner against Judgements used by the Respondent

37. In the matter ***of Laxmikant Kothari v. Propel Developers Pvt. Ltd.*** the said judgement has been issued by the Ld. Member of the RERA and therefore not binding upon this Hon'ble Court. Assuming that the same is applicable it will be supporting the case of the Petitioners that each and every Wing of a project has to be registered as a separate project under the RERA Act.

38. In the matter of ***Shridhar Krishna Mani & Ors. v. Lucina Land Developers Ltd.***, the judgment has been issued by the Ld. Real Estate Appellate Authority hence not binding upon this Hon'ble Court. Further in Para 42 (h) the Ld. Real Estate Appellate Authority has been pleased to declare that the said judgment is not a binding precedent. Therefore, the Respondents cannot seek support of the said judgment.

39. In the matter of ***Macrotech Developers v. the State of Maharashtra & Ors.*** the Hon'ble High Court has held that if a project is not registered under Section 3 of the Real Estate (Regulation and Development) Act, 2016 then the concerned allottees do not have the right to claim any reliefs under the said act. In the present case, as the project has not been registered under the Real Estate (Regulation and Development) Act, 2016 therefore the Petitioners are claiming relief under the IBC. The Petitioner cannot be without any remedy for seeking reliefs.

40. In the matter of ***Navin Raheja v. Shilpa Jain & Ors.,*** the facts of the said case are not applicable to the present case. The present Petitioners are not investors and are genuine home buyers.

41. In the matter of ***Pioneer Urban Land and Infrastructure Limited & Anr. Versus Union of India & Ors.***, supports the claim of the Petitioners, as the Hon'ble Supreme Court of India held that under Para 86 as under:

"86. We, therefore, hold that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

Conclusion

i. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.

ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law."

42. We have heard the arguments of Financial creditor and Corporate Debtor and perused the records.

43. In order to attract the provisions of IBC, a homebuyer must qualify as an 'Allotee' under the Section 2 (d) of the RERA Act. As the "Wing

E" itself was not complete and registered, thus, the provision of RERA Act shall not apply to the Petitioner in this case as was held by Hon'ble Bombay High Court's in ***Macrotech Developers Ltd. v. State of Maharashtra &Ors.***:

> *"**62**. It is apparent from the said decision that this Court has held that the Act will only apply after the project has been registered. Further, it has been held that the Act is prospective in operation. Accordingly, it is apparent that the Act cannot have any retrospective operation and will only apply to those projects which have been completed and registered either prior to commencement of the Act or in the case of ongoing projects, the project or a phase thereof have been completed and received the occupancy certificate/part occupancy certificate within the window of three months from the date of commencement of Section (3) of the Act i.e. 1st May, 2017…"*

44. For the petitioner to qualify the threshold limit 100 or 10% to initiate a CIRP under the purview of Section 7 of IBC, it must primarily satisfy the requisite of an Allotee which the Petitioner has failed in the instant case. Proviso of Section 7 of IBC states:

> *"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"*

45. Further, even if we consider that the Petitioner is a Allotee, in line to the Hon'ble NCLAT's decision in ***Navin Raheja v. Shilpa Jain & Ors.,***

Company Appeal (AT) (Insolvency) No.864 of 2019, we are inclined to reject this petition. In the above case, the Hon'ble NCLAT held:

> *"37…in a large number of cases in the language of the Hon'ble Supreme Court the allottees are speculative investor and not a person who is genuinely interested in purchasing a flat/ apartment. They do not want to go ahead with its obligation to take possession of the flat/ apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it."*

46. The petitioner has failed to provide substantial proof of his intent to take possession of the flat. Merely, showing receipts of the transaction amount could not be considered as a surety that the person shall necessarily take possession of the Flat/Apartment, even if that person is considered as an allotee.

47. The relief as sought by the Petitioner under the provisions of the Indian Contract Act, 1872 are to be presented in front of appropriate Authority as it falls out of the scope of this court.

48. It is, accordingly, hereby ordered as follows: -

a. Therefore, the Petition bearing CP (IB) 1726/MB/C-II/2017 filed by **Amish Jaysukhlal Sanghrajka & Anr.**, under section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Akshar Shanti Realtors Private Limited**, the Respondent, is **Rejected**.

Dated the 5th October, 2021

Sd/-
SHYAM BABU GAUTAM
Member (Technical)

Sd/-
ASHOK KUMAR BORAH
Member (Judicial)

SAM