

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 93/7/JPR/2020

IN THE MATTER OF:

NARESH KUMAR AGARWAL

...FINANCIAL CREDITOR

VERSUS

M/S SNG REALESTATE PRIVATE LIMITED

...CORPORATE DEBTOR

MEMO OF PARTIES

MR. NARESH KUMAR AGARWAL

Through its Power of Attorney Holder
Mr. Dinesh Kumar Agarwal
R/0- 12-4-126/7 Pragathi Nagar, Road
No. 7, Moosapet, Hyderabad-500018

...Financial Creditor

VERSUS

SNG REALESTATE PVT. LTD.

CIN: U45201RJ2008PTC027756
Registered office at: 707, Paris
Point Bani Park, Jaipur- 302016
(Rajasthan)

...Corporate Debtor

FOR THE FINANCIAL CREDITOR(S) : Anuroop Singhi, Adv.

FOR THE CORPORATE DEBTOR(S) : Naresh Kumar Sejvani, Adv.

Order Pronounced On:22.12.2023

ORDER

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Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application has been filed by *Mr. Naresh Kumar Agarwal*, through his Power of Attorney Holder *Mr. Dinesh Kumar Agarwal* ('Applicant/ 'Financial Creditor') against the Corporate Debtor namely *M/s SNG Realestate Private Limited* ('Respondent'/ 'Corporate Debtor') under Section 7 of Insolvency and Bankruptcy Code, 2016 (the 'IBC'/ 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of the Corporate Insolvency Resolution Process ('CIRP'), pursuant to default in repayment of loan amount by the Corporate Debtor to the Applicant.
2. The Corporate Debtor is a Private Limited Company, incorporated under the Companies Act, 1956 on 17.11.2008 and duly registered with the Registrar of Companies, Jaipur, having CIN: U45201RJ2008PTC027756. The registered office of the company is situated at 707, Paris Point, Bani Park, Jaipur. The authorized share capital of the company is Rs.10,00,00,000/- (Rupees Ten Crores Only) and paid-up share capital of the Company is Rs. 4,99,00,000/- (Rupees Four Crores Ninety-Nine Lacs Only). The details have been verified from the online database maintained by the Ministry of Corporate Affairs.
3. The details of the transactions leading to the filing of this application averred by the Applicant are as follows:

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- 3.1. The Corporate Debtor acquired development rights of the Land situated at Plot No. O-13, Ashok Marg, C- Scheme, Jaipur vide Registered Development Agreement on which a residential group housing project was developed in the name and style of 'SUNRISERS'. The Applicant agreed to invest in the said project subject to assurances by Corporate Debtor of Minimum Guaranteed Returns and entered into three different Memorandum of Undertakings ('MoU') dated 04.11.2016 with the Corporate Debtor with regard to three different flats in that project.
- 3.2. The mechanism of all the MoU's entered into by Financial Creditor for the investment in the flats through which Corporate Debtor offered the minimum investment return are tabulated as under:

<i>Flat No.</i>	<i>Token Amount paid by FC</i>	<i>Loan taken from the Bank</i>	<i>Assured Returns</i>
302	Rs. 1,00,000/-	Rs. 1,16,00,000/-	16% p.a. on Rs. 1,17,00,000
303	Rs. 1,00,000/-	Rs. 1,15,20,000/-	16% p.a. on Rs. 1,16,20,000/-
304	Rs. 1,00,000/-	Rs. 1,20,60,000/-	16% p.a. on Rs. 1,21,60,000/-

- 3.3. The Corporate Debtor failed to pay the assured returns, thus entered into settlement agreement with the Applicant. The Corporate Debtor vide Settlement Agreement agreed to sell Flat No. 304 to the Applicant, whereby the assured return of all the three MoU's were adjusted into the total cost of Flat No. 304 and further the MoU for Flat Nos. 302 & 303 were extended for the period of 12.93 months.

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The Corporate Debtor again defaulted in payment of assured returns after renewal of MoU and also failed to transfer the possession of flat No. 304.

- 3.4. After repeated reminders and request to the Corporate Debtor for payment of due amount, the Applicant was left with no other alternative but to deposit the cheque given by the Corporate Debtor in lieu of return of investment clause as mentioned in the MoUs for the amount equivalent to bank loan and token money paid by the Applicant for the investment in all flats. The details of the cheques as under got dishonoured with the remark that '*payment stopped by drawer*' are as below:

<i>Flat No.</i>	<i>Cheque No.</i>	<i>Amount</i>	<i>Date of dishonour</i>
302	004088	Rs. 1,17,00,000/-	21.11.2019
303	004089	Rs. 1,16,20,000/-	21.11.2019
304	004090	Rs. 1,21,60,000/-	21.11.2019

- 3.5. As per the penalty clause of MoU of the Corporate Debtor was to bear the penalty of 24% pa of the total invested amount, if in any case cheque gets dishonoured within 7 days of occurrence of default, but till date no such amount has been paid by the Corporate Debtor. Even after repeated requests and reminders, the Corporate has failed to make the payments due towards the MoU.

- 3.6. As a consequence of the aforementioned default, this Application has been filed seeking initiation of CIRP against the Corporate Debtor

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in the project *SUNRISERS* being undertaken by the Corporate Debtor on 30.09.2016 and paid an amount of Rs. 1,00,000/- against each flat. After entering into the Agreement to sale, the Applicant entered into three Tripartite Agreements with State Bank of India on 03.11.2016 and SBI disbursed the substantial amount against the aforesaid flats, subsequent to which MOUs dated 04.11.2016 were executed , the details of the same are tabulated below:

<i>Flat No.</i>	<i>Sale Consideration</i>	<i>Amount Disbursed by SBI + Rs. 1 Lakh Advance given by the Applicant</i>	<i>Outstanding Amount</i>
302	1,85,33,317/-	1,17,00,000/-	68,33,317
303	1,83,42,394/-	1,16,20,000/-	61,82,394
304	1,87,54,895/-	1,21,60,000/-	71,34,895
TOTAL	5,56,30,606/-	3,54,80,000/-	2,01,50,606/-

4.2. The Corporate Debtor has contended that the Applicant does not meet the minimum threshold criteria under Section 7 of the Code, being the allottee as per the provisions of the RERA Act. It has been brought on record that as per the available information on web portal of RERA, the said project has 38 flats, 2 stilt floors, 1 club house and 2 commercial units, therefore the said petition deserves to be dismissed in light of 1st and 3rd proviso of Section 7(1) of IBC, 2016. Also, as per the Tripartite Agreement, the Applicant has already subrogated his all right in favour of SBI. According to clause 2, 4, 13 & 18 of the agreement, in the event of default by the Applicant, SBI may at its

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discretion enforce the security, in furtherance of which the SBI has already on 19.10.2019, in the capacity of creditor, had already proceeded against the Corporate Debtor by filing an Original Application No. 1356/2019 (recovery suit) and claiming the security interest over the flats of the Applicant. Therefore, SBI is in the shoe of creditor standing against the Corporate Debtor for same set of debt before the DRT against which the Applicant is also claiming amount due under Section 7 of this Application.

4.3. It is submitted that no cause of action survives in favour of the Applicant and the Corporate Debtor is entitled to recover the amount of Rs. 1,30,15,711/- (Rupees One Crore Thirty Lakhs Fifteen Thousand Seven Hundred and Eleven Only) towards the Flat Nos. 302 & 303 for the balance sale consideration.

5. The Applicant also preferred Written Submissions vide Diary No. 2885/2023 dated 05.12.2023 wherein it has been contended that the Financial Creditor entered into three MOUs with the Corporate Debtor dated 04.11.2016 for Flat No. 302, 303 and 304 in the project named *SUNRISERS* for aggregate sale amount of Rs. 1,85,33,317/- (One Crore Eighty-Five Lakhs Thirty-Three Thousand Three Hundred and Seventeen Only), Rs. 1,83,42,394/- (Rupees One Crore Eighty-Three Lakhs Forty-Two Thousand Three Hundred and Ninety-Four Only) and Rs. 1,87,54,895/- (Rupees One Crore Eighty-Seven Lakhs Fifty-Four

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Thousand Eight Hundred and Ninety-Five Only). As per the MOUs an advance of Rs. 1,00,000/- (Rupees One Lakh) for each flat was paid by the Financial Creditor and respective Loan amount against the three flats i.e. Flat No. 302, 303 and 304 was paid by availing loan facility from SBI. In consonance with the RoI clause in the MOU, it has been submitted that the Applicant is an investor in the present set of circumstances.

6. We have heard the Ld. Counsels for the parties and perused the averments made in the Petition, Reply, Written Submissions and Applications along with the documents enclosed therein.
7. This Adjudicating Authority having perused all the relevant papers and found them in order is passing this order as below. The Registered Office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the debt fell due in 2017, and the Application was filed before this Adjudicating Authority in 2018. Hence, the period of three years after the default occurred had not exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
8. The first thing which has to be determined is the nature of the transactions which undertook between the Corporate Debtor and the Applicant. It is an admitted fact the as per chronology, first, the Tripartite Agreements dated 03.11.2016 were executed between the Applicant, the Corporate Debtor

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and SBI. After the execution of the Tripartite Agreements, the Applicant entered into MOUs dated 04.11.2016 with the Corporate Debtor, the details of which are tabulated as below:

<i>Flat No.</i>	<i>Consideration</i>	<i>Loan Amount</i>
302	Rs. 1,85,33,317/-	Rs. 1,16,00,000/-
303	Rs. 1,83,42,394/-	Rs. 1,15,20,000/-
304	Rs. 1,87,54,895/-	Rs. 1,20,60,000/-

9. The Applicant has submitted that he is not a homebuyer and to substantiate the same, reliance has been placed upon the RoI Clause of the MOU. For reference, the RoI clause as mentioned in the MOUs is reiterated as below:

Relevant Portion of the RoI clause with respect to the Flat No. 302 as mentioned in MOU dated 04.11.2016:

“1. That first party to this MOU will pay the return on investment on the above mentioned residential flats @ 16% p.a. (i.e. Rs. 18,72,000/-) on the same date of transferring the funds (LOAN AMOUNT) in the account of the first party and details of which is mentioned in the schedule attached herewith on the total invested amount (Rs. 1,17,00,000/-) payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly bank EMI.”

Relevant Portion of the RoI clause with respect to the Flat No. 303 as mentioned in MOU dated 04.11.2016:

“1. That first party to this MOU will pay the return on investment on the above mentioned residential flats @ 16% p.a. (i.e. Rs. 18,59,200/-) on the same date of transferring the funds (LOAN AMOUNT) in the account of the first party and details of which is mentioned in the schedule attached herewith on the total invested amount (Rs. 1,16,20,000/-) payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly bank EMI.”

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Relevant Portion of the RoI clause with respect to the Flat No. 304 as mentioned in MOU dated 04.11.2016:

“1. That first party to this MOU will pay the return on investment on the above mentioned residential flats @ 16% p.a. (i.e. Rs. 19,45,600/-) on the same date of transferring the funds (LOAN AMOUNT) in the account of the first party and details of which is mentioned in the schedule attached herewith on the total invested amount (Rs. 1,21,60,000/-) payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly bank EMI.”

10. To determine the nature of the transaction executed between the parties, it is relevant to refer to the terms of the MOUs entered between the parties on 04.11.2016. The MOUs state that the Sale Agreement has been executed in favour of the Applicant for the purchase of the respective Flats in the project of the Corporate Debtor *SUNRISERS* for which advance payment has been made through Home Loan availed from the State Bank of India via the Tripartite Agreements. Besides the MOUs, it is an undisputed fact that the Applicant has confirmed that he had purchased three flats in the project of the Corporate Debtor. It is important to refer to Section 2(d) of The Real Estate (Regulation And Development) Act, 2016 (‘RERA 2016’), which reads as under:

“2(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;”

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11. Bare perusal of the provision and the matter at hand, shows that the Applicant falls within the definition of allottee as mentioned under the provisions of the RERA Act, 2016. The three MOUs executed on 04.11.2016 between the Applicant and the Corporate Debtor for the sale of the flats in the project of the Corporate Debtor *SUNRISERS* have referred to the Applicant as allottees.
12. From the above-noted paras, it is determined that the Applicant is allottee in the Real Estate Project of the Corporate Debtor named *SUNRISERS*. As per the provisions of the IBC, 2016, an allottee is covered under the definition of a Financial Creditor under Section 5(8)(f) of the Code. Now that it is established that the Applicant is an allottees under the RERA Act, 2016, it is relevant to determine whether the transactions fall under the nature of a Financial Debt under the provisions of the Code. To conclude the same, it is pertinent to refer to the definition of 'Financial Creditor' and 'Financial Debt' as envisaged under Section 5(7) and Section 5(8) of the Code respectively, which are being reproduced as under:

"Section 5(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"

"Section 5(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–

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*

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- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (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);
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank of financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

13. Therefore, an allottee in a real estate project is a Financial Creditor. Hence, the nature of transaction falls within the scope of a financial debt as envisaged under the provisions of the Code. Now we come to Section 7 of the Code, under which for the purpose of initiation of the CIRP, a threshold

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limit is specified with respect to the number of allottees, who can jointly file a petition to initiate CIRP of the Corporate Debtor. The Insolvency and Bankruptcy (Amendment) Act, 2020 ('Amendment') added certain provisos to Section 7 of the Code; whereby special conditions were included for real estate allottees to qualify as Financial Creditors under the provisions of the Code. The amendment included is as under:

“Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

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:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.”

14. Accordingly, an Application filed under Section 7 of the Code shall be modified to comply with the requirements of the first or second proviso within 30 days of the commencement of the IBC Amendment Act, 2020

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failing which the Applicant shall be deemed to be withdrawn before its admission. The present Application was filed on 27.05.2020 after the *Insolvency and Bankruptcy Code (Amendment) Act, 2020*. The said amendment came into force w.e.f. 28.12.2019. The Applicant ought to have modified the present Application in accordance with the amended provisions of the Section 7 of the Code.

15. In view of the foregoing, there is no iota of doubt that the Applicant in the case, who is an allottee, has applied for commencement of the CIRP against the Corporate Debtor, does not meet the benchmark mentioned under Section 7 of the Code. The Application does not meet the benchmark of either having jointly filing of the Application by 100 allottees or jointly filing by not less than 10% of the number of allottees, whichever is less. Therefore, this Petition filed by an applicant homebuyer, does not qualify the threshold in accordance with Section 7 of the Code, as amended from time to time, so as to make it fit to be considered for CIRP.

16. The Hon'ble Supreme Court in the matter of *Manish Kumar vs. Union of India, Writ Petition(C) No.26 of 2020* has held the following:

“135.in terms of the Explanation in sub-Section 7(1), a financial debt need not be owed to the applicant, and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under section 7, provided that they are financial creditors and there is a default in a sum of Rs. 1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the

provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants.”

17. Therefore, it is pertinent to state that Section 7(1) of the Code, 2016 mandates the Financial Creditors, who are allottees under a Real Estate Project, to file an Application for initiating CIRP against the Corporate Debtor jointly 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.
18. Keeping in view the ratio of the aforementioned Judgment and having regard to the terms and conditions of the Memorandum of Understandings along with the Tripartite Agreement entered between the parties, this Adjudicating Authority is of the considered view that the present Petition filed by the Applicant cannot be admitted and therefore, is liable to be rejected.
19. The Order in the present matter is made in terms of Section 7 of IBC, 2016 based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority. This order shall not act as a bar to the Applicant in pursuing any other remedies available to it, under the prescribed provisions of law.



20. Accordingly, in the circumstances, CP No. (IB) 93/7/JPR/2020 is dismissed as rejected. Any other Applications, if any, also stand disposed off in terms of the order in the main Application.
21. The registry is directed to provide a copy of this Order to the parties to the case.


DEEP CHANDRA JOSHI,
JUDICIAL MEMBER


RAJEEV MEHROTRA,
TECHNICAL MEMBER