

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-710(PB)/2019

IN THE MATTER OF:

Babita Gupta & Ors. Financial Creditors/Petitioners
v.

Rajesh Projects (India) Private Limited
..... Corporate Debtor/Respondent

SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 19.09.2019

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA
HON'BLE MEMBER (T)

PRESENT:

For the Petitioner: Mr. Piyush Singh, Mr. Kumar Pradyuman
& Ms. Aditi Sinha, Advocates
For the Respondent: Mr. Vivek Kohli, Mr. Sandeep Buraria, Mr.
Aman Anand, Mr. Mudit Gupta, Advocates
For the Applicants: Mr. Vivek Sibbal, Mr. Pankaj Agarwal,
Advocates in C.A. No. 1742(PB)/2019

M.M. KUMAR, PRESIDENT

JUDGMENT

Ms. Babita Gupta including two others claiming themselves to be a 'financial creditors' have filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the

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Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, Rajesh Projects (India) Private Limited, who is stated to be the corporate debtor.

2. The Petitioners are an allottee of a real estate project. The petitioners are ex-facie financial creditors in terms of the provisions of Section 5(8)(f) and explanation inserted by the Second Amendment Act, 2018 w.e.f. 06.06.2018. The challenge to the aforesaid amendment has been repelled by Hon'ble the Supreme Court in the judgment rendered in the case of Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019, decided on 09.08.2019). Therefore, no doubt is left that the petitioners are Financial Creditors.

3. The Respondent company-the Corporate Debtor, Rajesh Projects (India) Private Limited (CIN U45201DL1999PTC101984) was incorporated on 14.10.1999 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at 1601, RG Trade Tower, Plot No. B7, Netaji Subhash Place, Pitampura, New Delhi-110034. Its authorized share capital is Rs. 16,00,00,000/- and the paid up

share capital is Rs. 10,58,24,000/- which is based on the details given in master data placed before us (Annexure P-12). Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal being Adjudicating Authority has territorial jurisdiction in respect of respondent corporate debtor as per the provisions of sub-section (1) of Section 60 of the Code.

4. The 'Financial Creditors'-Petitioners have proposed the name of Resolution Professional, Shri Gaurav Katiyar with the address D-32, East of Kailash, New Delhi-110065. He has registration No. IBBI/IPA-001/IP-P00209/2017-18/10409. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

5. It is the case of the petitioners that vide Provisional Allotment Letters (Annexure P-1 & P-6) dated 27.08.2012 & 06.09.2012 they had booked two Residential Apartments bearing No. A-1207 & A-907 (one by petitioner Nos. 1 & 2 jointly and another by petitioner No. 3) in Tower A, in the project, RG Luxury Homes, at Plot No. GH-07 A, Sector- 16B, Greater Noida which was being developed by and promoted by 'the Corporate Debtor'. The petitioners have paid a total amount of Rs. 43,32,151/- (by petitioner Nos. 1 & 2) & Rs.

43,32,270/- (by petitioner No.3) on various dates to the Respondent/Corporate Debtor as per ledger (Annexures P-3 & P-8. The said Residential Apartments were purchased by the Petitioners under the 'Assured Return/Monthly Rent'. Apartment Buyer's Agreement (Annexure P-2 & P-7) were executed between the parties on 17.10.2012 & 04.11.2012.

6. According to clause 11(a) of the Apartment Buyer's Agreement (Annexure P-2 & P-7), the Respondent Company undertook to complete the construction of Towers A, F & M and hand over the possession of the said Residential Apartments to the petitioners by 31.03.2016 with grace period of three (3) months i.e. by 30.06.2016. At this stage it would be profitable to read clause 11(a) of the said Agreement which is as under:

"11(a) Schedule for possession of the Said Apartment

Subject to the other terms of this Agreement and the Company's present plans and estimates and to all just exceptions, timely payment of the Total Sale Price and other amounts, charges and dues as may be applicable, the Company shall endeavour to complete the construction of the Tower B,C,D & E by 30th September, 2015 and Tower A, F & M by 31st March, 2016, which may vary by + 3 months. Thereafter, the Company shall offer the possession of the said Apartment to the Allottee, subject to the terms and conditions of this Agreement. In case of delay except due to Force Majeure conditions and due to the reasons mentioned in Clause 11(b) and (c), herein below in completion of

the construction of the said Apartment, the Company shall pay compensation @ Rs. 10/- per sq. Ft. per month of the built up area of the said Apartment to the Allottee, which both the parties agree a just and equitable estimate of the damages that the Allottee, which both the parties agree a just and equitable estimate of the damages that the Allottee may suffer. The Allottee agrees that he shall have no other rights/claims whatsoever, provided that Allottee is not in breach of any of the term of this Agreement. The adjustment of such compensation shall be done at the time of execution of the Sub-Lease deed.”

7. However even after expiry of sufficient long time possession of the said Residential Apartments have not been handed over to the petitioners. Copies of statement of bank accounts of the Financial Creditors where deposits are made or credits received normally by them have been placed on record (Annexure P-5 & P-11).

8. There was apparently inordinate delay in delivering the possession of the said Residential Apartments. As a result, multiple e-mails dated 05.09.2018, 27.06.2018, 04.08.2018 & 04.01.2019 [Annexures P-4 (colly) & P-10 (colly)] were sent by the petitioners terminating the Agreement and seeking refund of the amount paid along with the interest but all in vain. The petitioners have landed before Adjudicating Authority-NCLT.

9. It is claimed that the Respondent is liable to pay an amount of Rs. 1,33,22,944/- (Rupees One Crore Thirty Three Lacs Twenty

Two Thousand Nine Hundred and Forty Four only) to the petitioners.

10. Mr. Vivek Kohli, learned counsel for the Corporate Debtor has made valiant attempt to resist the admission of the petition by arguing as under:-

1. There were proceedings concerning land acquisition and the delay in completion of project is imputable to the aforesaid proceedings. In that regard our attention has been invited to a Full Bench judgment of the Hon'ble Allahabad High Court rendered in the case of **Gajraj and Ors. v. State of U.P. & Ors.**, 2011 (11) ADJ 1. Specific reliance has been placed on paras 17, 36, 155 (4) & (14), 230, 271, 274 to argue that the NOIDA Authority could not have carried out development, utilise the land acquired as per its Master Plan 2021 without approval/clearance by National Capital Regional Planning Board.

However, on queries raised by the Bench, Mr. Kohli was unable to rebut that once the Master Plan of 2001 was in vogue when the lease deed was executed on 03.11.2010 then where is the question of any



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impediment created by the Master Plan of 2021. We also asked that as per the direction issued by the Hon'ble Full Bench in para 482 sub para 3 how the judgment has delayed the project which was to follow the Master Plan of 2001. At one stage an attempt was made to argue that on account of an interim order of stay in land acquisition proceeding, the delay has occurred. There was no judgment placed on record nor any order of interim stay shown to us. Moreover, the Apartment Buyer's Agreement in many cases is dated 04.11.2012 (Annexure P-2) and the Full Bench judgment in Gajraj Singh's case (supra) is dated 21.10.2011. We find that the argument is wholly misplaced and is thus liable to be rejected.

2. The other argument raised by Mr. Kohli is based on definition of expressions 'default', 'debt' and 'claim' as given in Section 3 (6), 3 (11) & 3 (12) of the Code. According to the learned counsel 'default' would mean non-payment of a debt whole or any part or instalment of the amount of debt, which means a liability or obligation in respect of a claim which is due from any



person. According to the learned counsel expression 'claim' would necessarily mean a right to payment or right to remedy for breach of contract. The argument seems to be that firstly there is no debt and it was a transaction of sale and purchase of apartment.

The argument is wholly unfounded because for Corporate Insolvency Resolution Process Part-II (chapter-I) has been carved out and in Section 5 (8) (f) of the Code the expression 'financial debt' has been defined to mean a debt along with interest, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction including the sale or purchase agreement, which has commercial effect of a borrowing. The explanation has clarified that any amount raised from an allottee under a 'real estate project' was to be considered as an amount having the commercial effect of a borrowing and the expression 'allottee' and the 'real estate project' are to have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016.



It is the aforesaid provision which was subject matter of challenge before Hon'ble the Supreme Court in a bunch of petitions. In the lead case titled as Pioneer Urban Land and Infrastructure Limited (supra) in para 86 the conclusion of detailed discussion has been recorded by Hon'ble the Supreme Court which read as under:-

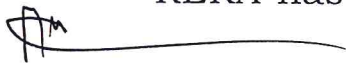
“Conclusion

- 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.”



A perusal of conclusion (i) shows that the explanation added to Section 5 (8) (f) by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 w.e.f. 06.06.2018 has been upheld and it does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India. Conclusion (iii) further shows that Section 5 (8) (f) as originally incorporated in the Code was a residuary provision and always subsumed within it allottees of flats/apartments and the Amendment Act is only clarificatory of the position of law. Therefore, we find no force in the argument of Mr. Kohli.

3. The last argument raised is based on para 50 of the judgment rendered in Pioneer Urban Land and Infrastructure Limited (supra). According to the learned counsel once the project of the Corporate Debtor is registered with RERA under Section 4 then the principle of harmonious construction, as laid down in the Pioneer Urban Land and Infrastructure Limited (supra), has to be applied and the timeline given by Authorities under RERA has to be respected. In that regard reliance has



also been placed on Rules 15 and 16 of the Real Estate (Regulation and Development) Rules as quoted by Hon'ble the Supreme Court in para 50.

However, we find that the aforesaid argument lacks content and the obligation undertaken in the Apartment Buyer's Agreement dated 04.11.2012 could not be abrogated. The obligation assumed under the Apartment Buyer's Agreement required that the construction was to be completed in Tower A, F & M by 31.03.2016. There was an addition of three months which would bring it to June, 2016. Mr. Kohli argued that the expression 'endeavour' used in clause 11(a) which provide for Schedule to deliver possession of the Apartment would not mean that there is a positive commitment and a reasonable construction has to be adopted. According to the learned counsel time is also not essence of the contract for sale of immovable property and has placed reliance on the Constitution Bench judgment of Hon'ble the Supreme Court rendered in the case of **Chand Rani (Smt) (Dead) By Lrs v. Kamal Rani (Smt) (Dead) By Lrs**, (1993) 1 SCC 519. It

is true that the expression 'endeavour' has been used and March, 2016 plus three months have been stipulated for completion. When we asked Mr. Kohli that what would be the reasonable period in cases where no stipulation has been made that the time will be the essence of the contract, Mr. Kohli lowered his eyes. On perusal of the judgment we find that the law requires to take into consideration the substance of the agreement not the letter. The Constitution Bench in para 22 of the judgment has quoted ***Hind Construction Contractors v. State of Maharashtra***, (1979) 2 SCC 70 case. The aforesaid para would show that even in the cases where time has not been made essence of the contract then a reasonable time for completion of the work has to be fixed and on a failure the contract can be determined. In the present case the project was required to be completed by June, 2016. By giving reasonable time it could have been extended by one year. By adopting reasonable construction on clause 11 (a) of the Apartment Buyer's Agreement we find that the non-completion of the project even today is wholly



unreasonable and cannot be continece. The argument is absolutely unacceptable and the petition cannot be thrown out on the ground that time was not essence of the contract and the Corporate Debtor could have completed the construction any time.

11. It is surprising that the settlement in another matter namely IB-1309(PB)/2019, Ms. Sangeeta Rustagi & Another v. M/s. Rajesh Projects (India) Pvt. Ltd. (Corporate Debtor) has taken place vide Settlement Deed dated 09.02.2018 and the Corporate Debtor has failed to comply with the terms of the settlement. It is a classical illustration of lack of liquidity and lack of funds. Therefore, the default in delivery of possession stand established.

12. It is pertinent to mention that on account of stay order passed by Hon'ble the Supreme Court in Pioneer Urban Land and Infrastructure Limited's case on 11.03.2019, hearing in this matter was deferred on various occasions.

13. Now we deal with the submissions made on behalf of the Petitioners-Financial Creditors.

14. Learned Counsel for the petitioners has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditors stand

fulfilled and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It is further submitted that the details of default along with its dates have been clearly stated in part IV along with all the minute details. There is overwhelming evidence to prove default. The name of the resolution professional has also been specified.

15. We may now examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-

“Initiation of corporate insolvency resolution process by financial creditor.

7 (1)

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3)

7 (4)

7 (5) Where the Adjudicating Authority is satisfied that—



- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
- (b)

16. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. We are satisfied that a default amounting to lacs of rupees has occurred. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

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17. Mr. Vivek Sibal, learned Counsel on behalf of a set of applicants has argued that the petitions filed by various petitioners



are malicious as large number of homebuyers are happy with the date given by the RERA and would like to wait. Firstly, as per the judgment of the Hon'ble NCLAT rendered in the case of **IDBI Bank Ltd. v. Odisha Slurry Pipeline Infrastructure Ltd.**, Company Appeal (AT) (Insolvency) No. 51 of 2019 decided on 15.01.2019 no third party could intervene at admission stage to oppose admission. Secondly if some homebuyers are satisfied with the breach of obligation then it cannot be a lawful ground to resist those who have vested right to invoke the provisions of Section 7 of the Code. Such a course is wholly unwarranted and would not be sustainable in the eye of law. For these reasons we dismiss the application.

18. As a sequel to the above discussion, this petition is admitted and Mr. Gaurav Katiyar is appointed as an Interim Resolution Professional.

19. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation



to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

- “(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 Securitisation 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.”

21. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other services or supplies as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

22. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor,



erstwhile directors, 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 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/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional/Resolution Professional shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

23. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

24. We direct the Financial Creditors to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional 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 Creditors. The amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.

25. Before parting we must notice the complaint made against Financial Creditors in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditors as it is only fair to do so.

26. The office is directed to communicate a copy of the order to the Financial Creditors, the Corporate Debtor, the Interim

Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

Sd/-

19.09.2019

(M.M. KUMAR)
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER(TECHNICAL)

19.09.2019
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