

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1564(PB)/2018

IN THE MATTER OF:
RACHNA SINGH & ANR.

..... Financial Creditors/Petitioners

v.

UMANG REALTECH PVT. LTD.

.....Corporate Debtor/Respondent

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

Judgment delivered on 20.08.2019

Coram:

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

DR. DEEPTI MUKESH
HON'BLE MEMBER (J)

PRESENTS:

For the Petitioner:	Mr. Nishank Tyagi, Adv.
For the Respondent:	Mr. Rajesh P., Adv.

JUDGMENT

DR. DEEPTI MUKESH, MEMBER (J)

Mrs. Rachna Singh and Mr. Ajay Singh claiming to be '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 Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, M/s Umang Realtech Private Limited, who is stated to be the corporate debtor.

2. The Respondent company-the Corporate Debtor, M/s Umang Realtech Private Limited (CIN U45400DL2007PTC163070) was incorporated on 08.05.2007 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at D-64, Second Floor, Defence Colony, New Delhi- 110024. Its authorized share capital is Rs. 1,50,00,00,000/- and the paid-up share capital is Rs. 1,44,96,64,420/- which is based on the details given in master data obtained from the official website of Registrar of Companies. 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.

3. The 'Financial Creditor'-Petitioners has proposed the name of Resolution Professional, Shri Manish Kumar Gupta having his office at 404, 4th Floor, Laxmideep Building, 9, Laxmi Nagar, District Centre, Vikas Marg, Near V3S Mall, New Delhi -110092, email id- manishvivek@yahoo.com. He has registration No. IBBI/IPA-001/IP-P00225/2017-18/10424.

A written communication sent by him in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record (Annexure-I). There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or ICAI. In addition, further necessary disclosures have been made by Mr. Manish Kumar Gupta, as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

4. It is the case of the petitioners that they had made a booking in a Residential Project being developed by the Corporate Debtor herein, namely "Winter Hills 77" situated in Sector 77, Gurgaon Haryana, India vide their Application form dated 27.08.2012.

Thereafter the corporate debtor issued an Allotment Letter dated

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Mrs. Rachna Singh and Anr. Vs. M/s Umang Realtech Pvt. Ltd.

06.09.2012 to the financial creditors wherein the Financial creditors were allotted residential apartment bearing No. 1503, 14th Floor, Tower-G having a Super Built Up Area of 180.230 sq. mtrs. for a sale consideration calculated at the rate of Rs.4900/- per Sq. Ft. of super area of the said apartment (Annexure-A). As per the said allotment letter, petitioners paid a booking amount of Rs. 9,50,600/- on 19.08.2012 vide cheque number 868023 drawn on ICICI bank, Gurgaon Branch.

5. Subsequently the financial creditors executed an Apartment Buyer's Agreement dated 04.03.2013 (Annexure-B) with the corporate debtor for the said apartment for a total sale consideration of Rs. 1,09,83,100/-. The petitioners have made payments aggregating to Rs.1,01,25,734/- on various dates to the Respondent/Corporate Debtor (Annexure- E). According to clause 7.1 of the said agreement, the Respondent Company undertook to complete the construction and apply for completion certificate by 31.12.2015 and as and when the completion certificate is received, possession of the said apartment had to be offered to the financial creditors. However even after expiry of sufficient long-time possession of the said apartment has not been handed

over to the petitioner. Copies of the receipts/acknowledgement of the amount issued by the Corporate Debtor have been placed on record (at pgs. 54-70).

It is further submitted by the petitioners that they had also applied for a loan of Rs. 74,90,000/- for purchasing said apartment and hence entered into the Tripartite Agreement dated 30.03.2013 with the Corporate Debtor and the State Bank of India. The State Bank of India vide Sanction letter dated 20.03.2013 through its Gurugram RACPC branch sanctioned loan of Rs. 74,90,000/- (Annexure-D).

6. There was apparently inordinate delay in delivering the possession of the said apartment. As a result, a legal notice dated 25.09.2018 (at pgs. 71-75) was sent by the petitioners through their counsel seeking to refund the entire amount of Rs. 1,01,25,734/- towards principal amount along with interest @ 18% per annum from the date of payment within 15 days from the date of receipt of the notice but all in vain.

7. It is claimed that the Respondent is liable to pay an amount of Rs. 1,04,36,134/- (Rupees One Crore Four Lakhs Thirty-Six Thousand One Hundred and Thirty-Four Only) to the petitioner.

8. Learned counsel for the Corporate Debtor has opposed the admission of the application and has advanced the following arguments: -

- (i) The real intent and spirit of the legislature in bringing about the special act namely the Real Estate Regulation Act, 2016 was to include home-buyers in the list of creditors, should any Company go into insolvency process so that they could get their monies back in case the resolution process failed and liquidation was the only recourse left.
- (ii) The present application is not maintainable under Section 7 of the Code because there is no wilful default on the part of the Corporate debtor in terms of section 3(12) of the Code. It is submitted that as per clause 7.2 of the agreement, the Corporate Debtor was entitled to reasonable extension of time if the delay caused was

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due to force majeure factors. It is further submitted that as per Clause 7.1 of Apartment Buyer Agreement, due date for possession of Apartment was 31st December, 2015 plus a grace period of 180 days i.e. 30th June, 2016, the same is reproduced as under:

“7.2: If the completion of the construction of the Complex is delayed by reason of civil commotion or by reason of war or enemy action or earthquake or any Act of God, or if non delivery of possession is a result of any statute, notice or notification of the Government and /or authority, or for any other reason beyond the control of the Developer, therein any of the aforesaid events the Developer shall be entitled to a reasonable extension of time for offering delivery of possession of the said Apartment”.

- (iii) The applicants have wilfully defaulted in making timely payments of instalments as per the Construction Linked Payment Plan opted by them, they have paid a sum of Rs.1,01,25,734/- inclusive of govt. dues and are liable to pay interest for delayed timely payments

amounting to Rs. 43,829/-. It is further submitted that the Applicants are also liable to pay an amount of Rs. 78,999/- against demand raised for external plaster on 10th July, 2018 and also liable to pay an amount of Rs. 7,38,883/- against demand raised for internal plaster on 28th September, 2018.

- (iv) The relief which has been sought for by the petitioner in the petition is beyond the terms and conditions incorporated in the Apartment Buyer agreement and this Tribunal does not have power to modify the terms of a valid contract.
- (v) A joint reading of clauses 7.1 & 7.2 of the Apartment Buyer Agreement makes it clear that delivery of possession of the said unit was not the essence of the contract.
- (vi) Since there is an Apartment Buyer's Agreement in place, the occurrence of default has to be seen in light of the agreed terms and conditions of the contract between the parties. Assuming that the applicant wishes to opt out of the Project and surrender his

allotment, the terms of forfeiture would apply and no interest would be payable on such amount at all.

(vii) The Buyer's Agreement must be read as a whole and in case of any disputes thereunder, the dispute redressal mechanism is also built into the Buyer's Agreement which has not been explored by the applicant and he is trying to pressurize the respondent into caving into his undue and unlawful demands.

(viii) The registration of the Project with RERA (Real Estate Regulation Act, 2016), would deem the timelines under the Buyer's Agreement to be extended/modified in consonance with the revised timelines mentioned under the undertaking given to the authority under RERA.

9. A rejoinder to the reply has been filed by the Financial Creditor dated 24.10.2019 reiterating the submissions made in the application and controverting the assertions in the reply.

10. Before embarking upon the legal issues, we deem it appropriate to first refer to the material clauses of the agreement.

According to clause 7.1 of the agreement the Corporate Debtor had undertaken to complete the construction and apply for the completion certificate by 31st December 2015. A grace period of six months to apply and obtain the completion certificate/occupation certificate has also been stipulated. It is further postulated by clause 7.9 of the agreement that in case the Corporate Debtor defaulted in compliance of clause 7.1 regarding construction and possession, then the Financial Creditor-allottee is entitled to payment of compensation for delay @ Rs.5/- per square foot per month of the super area .The compensation was to be paid to the Financial Creditor-allottee only if they did not default or breached the terms of the buyer's agreement or defaulted in payments.

11. It is not disputed that the agreement was signed on 04.03.2013. The booking amount of Rs. 9,50,600/- was paid on 19.08.2012 (Annexure-E). According to the Buyer's Agreement, the Corporate debtor was liable to complete the construction of the said project by 31.12.2015, further grace period of six months to apply for and obtaining the completion certificate as per the provisions of clause 7 of the Apartment buyer agreement. The

maximum period would be completed on 30th June, 2016. The Financial Creditor-allottee has not been paid any amount of compensation @ Rs. 5/- per square feet per month nor the possession has been offered. The argument raised on behalf of the Corporate Debtor is that the agreement continues to operate and neither of the two parties has terminated/cancelled the agreement. The argument seems to be that in the absence of express termination of the agreement the Financial Creditor-allottee would not have any right to claim that default has occurred.

12. The aforesaid argument suffers from a basic fallacy. The period for completing the construction work with grace period of six months came to an end in the June, 2016 and possession of the unit was required to be delivered. A reasonable period of delay of six months to one year might be acceptable. However, the facts in the present case shows that the project is not complete and the occupation certificate has not been obtained till date. In construing the terms of such like contract, it must be remembered that the Financial Creditor-allottee enjoy hardly any bargaining power to negotiate a clause in the agreement and these are standard form. The principles of reasonableness are

implied in such like contract. There is extraordinary delay of about two and half years in delivering the possession and the Financial Creditor-allottee cannot be put to ransom by strict construction that the contract is not determined. A host of factors like the bargaining power of the parties, the choice available to the Financial Creditor-allottee and his knowledge about the contract would be relevant consideration in relation to construing the contract as a whole. In fact, there is a fundamental breach of the terms of the contract by not delivering the possession within the reasonable period. It cannot be argued by the Corporate Debtor that although I undertake to perform the contract but his liability is excluded if he fails to do so. The principles of fundamental breach have been laid down in Section 39 of the Indian Contract Act, 1872 which have been examined in details in chapters V and VI of the book titled as 'Control of Exclusion Clauses in England and India' by M.M. Kumar. Therefore, we are of the view that by no terms or clauses of the Apartment buyer's agreement the obligation to deliver possession of the apartment within reasonable period could be excluded and the argument advanced on behalf of the Corporate Debtor is hereby rejected. The amount in fact become payable on 31.12.2015 plus grace

period of six months and; a maximum period of further one year could be granted. The possession should have been offered by June, 2016 and therefore, the principal amount along with compensation and interest becomes payable.

13. In the context of aforesaid discussion, it may now be necessary to 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)"

14. 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.

15. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (amendment) Ordinance, 2018 with effect from 6th June, 2018. In view of the revised definition, any amount raised from an allottee under a real estate project is deemed to be an amount having the commercial effect of a borrowing and thus is covered by the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has been amended to specifically include dues of home buyers i.e. Real Estate (Residential). The amendment also recognizes home buyers as "Financial Creditor". Accordingly, the home buyers can initiate Corporate Insolvency Resolution Process against defaulting builder or developer, as "Financial Creditor" in terms of Explanation to Section 5 (8) (f) of the Code with effect from 06.06.2018. Therefore, the submission made to the contrary by respondent would not require any serious consideration.

16. It is pertinent to mention that on 04.03.2013 an Apartment buyer agreement was executed between the Petitioners & Corporate Debtor whereby the petitioners were allotted residential apartment bearing No. 1503, 14th Floor, Tower-G having a Super Built up area of 180.230 sq. metres under the aforesaid project of

the Corporate Debtor. In the light of the said agreement, the petitioners have paid the total amount of Rs. 1,01,25,734/- to the Corporate Debtor which is almost the total sale consideration. According to the terms of the agreement, the Corporate Debtor was to handover physical possession of the aforesaid unit to the petitioners by 30th June, 2016 inclusive of grace period of six months. The petitioner is thus covered by the expression 'Financial Creditor' as has been used in the amended definition of Section 5 (8) (f) of the Code and the explanation appended thereto. In that regard we draw support from the observations made by Hon'ble the Appellate Tribunal in the case of **Rajendra Kumar Saxena V. Earth Gracia Buildcon Pvt. Ltd.** passed in Appeal (AT) (Insolvency) No. 187/2018 wherein it has been held as under:

*"By the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 No. 6 of 2018 dated 6th June, 2018 followed by the Act, in clause (8), in Sub-clause (f), of Section 5 an explanation has been inserted as per which 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. **Thereby, after***

amendment of the Act, the allottees of real estate project have been treated as 'Financial Creditors'.

(Emphasis supplied).

A bare perusal of the aforesaid paragraph of the judgment would show that even without any element of 'assured return' an allottee in the real estate project has to be regarded as a 'Financial Creditor'. The petitioner eminently fulfills the aforesaid condition.

17. Therefore, petitioners being financial creditors can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the respondent corporate debtor in case of default in repayment of financial debt.

18. The judgment in this matter could not be pronounced earlier as the issue concerning Constitutional validity of explanation to sub section 8(f) of Section 5 of the Code, 2016 was subject matter of challenge before the Hon'ble Supreme Court in a bunch of petitions. In the lead case titled as Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) the order has now been pronounced

on 09.08.2019. We have gone through the order and find that the directions issued by the Hon'ble Supreme Court do not in any manner advance the case of the Corporate Debtor and the petition deserves to be admitted. It may also be noticed that at no stage possession has been offered and the denial of possession does not arise.

19. It is true that the proceedings under the Code are not in the nature of recovery. In the present application the Financial Creditor is seeking initiation of Corporate Insolvency Resolution Process by making prayer that all the Financial Creditor, Operational Creditor and others may raise their claims and if Corporate Financial Restructuring is possible then within the stipulated period it may be explored failing which the due process of law is to take its course. Therefore, by initiation of Corporate Insolvency Resolution Process the Financial Creditor is only highlighting the default committed by the Corporate Debtor with respect to its inability to pay. The same is required to be remedied. Therefore, it cannot be concluded that the filing of the present petition would amount to recovery of the debts by the Financial Creditor.

20. As a sequel to the aforesaid discussion and the material placed on record it is confirmed that applicant-financial creditor had disbursed the money to the respondent corporate debtor as consideration for purchase of a residential apartment. Though a considerable long period has lapsed even the principal amount disbursed has not been repaid by the respondent corporate debtor as per the provision of the Apartment Buyer's Agreement. It is accordingly held that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one Lakh. Thus, the application warrant admission as it is complete in all respects.

21. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

22. Shri Manish Kumar Gupta, Office No. 404, 4th Floor, Laxmideep Building, 9, Laxmi Nagar, District Centre, Vikas MARG, Near V3S Mall, New Delhi-110092 and email id - manishvivek@yahoo.com, Registration No. IBBI/IPA-001/IP-P00225/2017-18/10424 is appointed as an Interim Resolution Professional.

23. 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.

24. 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.”

25. 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

supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

26. 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.

27. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Manish Kumar Gupta 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 amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

28. The office is directed to communicate a copy of the order to the Financial Creditor, 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.

Sd/-

22.08.2019

(M.M.KUMAR)
PRESIDENT

Sd/-

(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)