

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB- 936(PB)/2018

IN THE MATTER OF:

SANJEEV MEMORIAL FOUNDATION

..... Financial Creditor/Applicant

vs.

KAMRUP HOUSING PROJECTS PVT. LTD.

.....Corporate Debtor/Respondent

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

Judgment delivered on: 13.02.2019

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

DR. DEEPTI MUKESH

HON'BLE MEMBER (J)

PRESENTS:

For the Petitioner:

Mr. Vanket Rao, Adv. with Mr. Satya
Prakash Singh, A.R.

For the Respondent:

Mr. Dinesh Rastogi & Ms. Himanshi,
Advs.

JUDGMENT

DR. DEEPTI MUKESH

1. Sanjeev Memorial Foundation claiming to be 'financial creditor' has filed this application through its chairman Sh. S.K. Goyal vide Board resolution dated 10.07.2018, 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 Kamrup Housing Projects Private Limited, who is stated to be the corporate debtor.
2. The Respondent company-the Corporate Debtor, M/s Kamrup Housing Projects Private Limited (CIN U45201DL2004PTC124303) was incorporated on 23.01.2004 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at L-1/7, Hauz Khas Enclave, New Delhi- 110016. Its authorized share capital is Rs. 2,00,00,000/- and the paid-up share capital is Rs. 1,00,00,000/- which is based on the

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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. It is the case of the applicant that they had made bookings for two residential flats in a Residential Project being developed by the Corporate Debtor herein, namely "Durva Greens" situated at plot no. GH-08A, Sector CHI V, Greater Noida, District Gautam Budh Nagar, Uttar Pradesh vide their Application form dated 20.08.2015. Thereafter the corporate debtor issued two Allotment letters dated 30.08.2015 to the applicant wherein the applicant was allotted two residential apartments details of which are as follows:

- i. Flat 1 bearing No. 503, Block A having a Super Built Up Area of 2670 sq. ft for a total sale consideration of Rs. 71,55,600/-. As per the said allotment letter, applicant paid a booking amount of Rs. 1,00,000/- on 20.08.2015

vide cheque number 000494 drawn on Kotak Mahindra bank, Greater Noida Branch.

- ii. Flat 2 bearing No. 505, Block A having a Super Built Up Area of 2740 sq. ft for a total sale consideration of Rs. 73,43,200/-. As per the said allotment letter, applicant paid a booking amount of Rs. 10,00,000/- on 20.08.2015 vide cheque number 000493 drawn on Kotak Mahindra bank, Greater Noida Branch.

4. According to clause 14 of the said allotment letter, the Respondent Company undertook to hand over the possession of the said apartments to the applicants by 30.06.2016. However even after expiry of sufficient long-time, possession of the said apartments has not been handed over to the applicant. Copies of the receipts/acknowledgement of the amount issued by the Corporate Debtor have been placed on record.

5. There is apparently inordinate delay in delivering the possession of the said apartments. As a result, a notice dated 31.05.2017 was sent by the applicant seeking the

penalty amount for inordinate delay of 11 months in handing over the possession amounting to Rs. 17,85,300/- calculated @Rs. 30 per sq. ft. per month. Consequently, the corporate debtor acknowledged the receipt of the said letter vide letter dated 31.05. 2017 wherein the corporate debtor admitted the delay in completing the project and further assured that penalty amount will be paid at the time of registration of the sub-lease in favour of the foundation.

6. It is claimed that the Respondent is liable to pay an amount of Rs. 2,78,44,572/- (Rupees Two Crores Seventy-Eight Lakhs Forty- four Thousand Five Hundred and Seventy- Two Only) to the applicant

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

- (i) 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 14 of the allotment letter dated 30.08.2015, the Corporate Debtor was entitled to reasonable extension of time if the delay caused was due to force majeure factors. It is further submitted by the corporate debtor that applicant vide letter dated 23.05.2018 expressed its desire for completion of the project at the earliest. The applicant has neither cancelled/ terminated the provisional allotment letters dated 30.08.2015 nor demanded refund of the payment.

- (ii) The Corporate debtor has further submitted that the penalty amount is payable subject to the fulfilment of all the conditions by the applicant including timely payments of all dues/ instalments. But applicant has wilfully defaulted in making timely payments of instalments, therefore the applicant is not entitled to any interest.
- (iii) It is further submitted by the corporate debtor that Mr. Vineet Kumar, who was an employee of the respondent company, had purportedly issued a letter to the applicant dated 30.08.2015 wherein the rate of penalty was increased from Rs.5/- per square feet per

month to Rs. 30/- per square feet per month. The increase in penalty rates was carried out without any authority of the respondent company and hence the same is void ab initio.

- (iv) It is further submitted by the corporate debtor that Greater Noida Industrial Development Authority (for brevity GNIDA) vide order dated 28.05.2012 had directed all its allottees to stop the construction and not to implement the Master Plan 2021. In October 2012, the GNIDA issued further letters informing that the construction/ development shall be resumed.
- (v) The corporate debtor has further submitted that the Hon'ble Allahabad High Court directed the authority i.e. GNIDA for payment of additional compensation to the farmers. Therefore, the respondent company requested the applicant for payment of Rs. 2,32,035/- towards the enhanced compensation payable by the Respondent company to GNIDA, however the said payment has yet not been paid by the applicant.

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8. Before embarking upon the legal issues, we deem it appropriate to first refer to the material clauses of the allotment letter. According to clause 14 of allotment letter, the Corporate Debtor had undertaken to handover the possession by 30th June 2016. It is further postulated by clause 14(b) of the allotment letter that in case the Corporate Debtor defaulted in compliance of clause 14(a) 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 built up area of the apartment.

9. The total booking amount of Rs. 11,00,000/- was paid on 20.08.2015 for both the apartments and allotment letters were issued on 30.08.2015. 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. Hence, in the absence of express termination of the agreement the Financial Creditor-allottee would not have any right to claim that default has occurred.

10. Though the period for delivery of possession of the said apartments 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 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. In fact, there is a fundamental breach of the terms of the contract by not delivering the possession within the reasonable period. The possession should have been offered by June, 2016 and therefore, the principal amount along with compensation and interest becomes payable.

11. 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)

12. 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 CIRP 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.

13. 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.

14. Therefore, applicant being financial creditor 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.

15. 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 apartments. Though a considerable long period has lapsed even the principal amount disbursed has not

been repaid by the respondent corporate debtor as per the allotment letter. 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.

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

17. The 'Financial Creditor'-Petitioners has proposed the name of Resolution Professional, Sh. Sumit Shukla, address at B-4/702, Krishna Apra Garden, Plot number 7, Vaibhav Khand, Indirapuram, Ghaziabad, U.P, email id- sumit_shukla@rediffmail.com. He has registration No. IBBI/IPA-003/IP- N00064/2017-18/10550.

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. 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.

18. 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.

19. 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.”

20. 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.

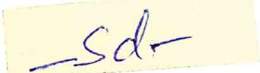
21. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency 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

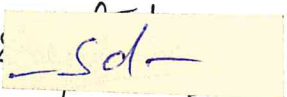
committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else the Interim Resolution Professional/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional/Resolution 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.

22. 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.

23. 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. The Registrar of Companies shall update his website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.


(M.M. KUMAR)
PRESIDENT


(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)