

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1481(PB)/2019

IN THE MATTER OF:

Mr. Satyajeeet Panda & Anr.Financial Creditors/Petitioners
v.

M/s. ANS Apartments Private Limited

.....Corporate Debtor/Respondent

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

Judgment delivered on 06.12.2019

Coram:

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

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

PRESENT:

For the Petitioners:

Mr. Aditya Parolia, Mr. Piyush Singh &
Mr. Atul Kumar Singh, Advocates

For the Respondent:

Mr. Akhil Nene & Mr. Praveen Mahajan,
Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The Petitioners claiming to be 'Financial Creditors' have filed the instant petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of M/s. ANS Apartments Private Limited, who is stated to be the 'Corporate Debtor'.

2. The Petitioners are an allottees of a real estate project. They are ex-facie financial creditors in terms of 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., (2019) 8 SCC 416. Therefore, no doubt is left that the petitioners are Financial Creditors.

3. The Respondent company-the Corporate Debtor, M/s. ANS Apartments Private Limited (CIN U45201DL2004PTC129290) was incorporated on 21.09.2004 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at Shop No. 108, First Floor, Vardhman Mayur Market, Mayur Vihar, Phase-III, New Delhi-110096.

4. The 'Financial Creditors'-Petitioners have proposed the name of Interim Resolution Professional, Shri Ram Phal Bhardwaj, CA with the address 310/25, Onkar Nagar-B, Tri Nagar, Delhi-110035. His Registration number is IBBI/IPA-001/IP-P01308/2018-19/12053. 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. The case of the petitioners in nutshell is that they had booked two units being flats, in the project known as Alstonia, Sector-Pi, Pocket 1 & 2, Greater Noida, District G.B. Nagar which was being allegedly developed by and promoted by 'the Corporate Debtor'. A perusal of Part-IV of Form-1 discloses that the total amount of Rs. 2,40,000/- & Rs. 4,65,075/- was paid by the petitioner Nos. 1 & 2 respectively to the Respondent/Corporate Debtor on various dates vide different cheques (Annexure A-7 & A-8) and in this regard receipts (Annexure A-1, A-4, A-9) were given by the respondent. The total cost of both the said units was Rs. 18,64,625/- & Rs. 28,47,813/-. A builder buyer agreement dated 05.06.2009 (A-11) was signed and executed between the petitioner No. 2 and one Nitishree Infrastructure Limited.

6. It is pertinent to mention that the case of petitioner No. 2 is that firstly flat was booked in Shouryapuram NH-24 project which was developed by Shourya Towers Private Limited. Thereafter the said project was taken over by Nitishree Infrastructure Limited but it also failed to complete the project. Afterwards ANS

Apartments Private Limited-the Respondent took over the development of the project. An agreement dated 01.05.2011 (Annexure A-3) was signed and executed between Nitishree Infrastructure Limited, the Respondent and the Petitioner. According to the terms incorporated in the said agreement the Respondent is shown as Second Party-the lawful allottee of the plots.

7. According to clause 9 of the aforesaid builder buyer agreement, the Respondent Company undertook to complete the construction of the said residential unit and hand over the possession of the same to the petitioners by April, 2011 with a grace period of three months. At this stage it would be profitable to read clause 9 of the said agreement which is as under:

“9. The company based on its present plans and estimates and subject to all just exception, expects to complete construction of the said apartment and the Residential Complex and deliver possession of the said apartment to the Allottee(s) by April 2011 with a grace period of 3 (three) months.....”

8. There was apparently inordinate delay in delivering the possession of the said residential units as well as in making

payment towards compensation by the Respondent. The petitioners have availed the remedy under Section 7 by filing the instant petition.

9. The Petitioners have thus claimed that the total amount in default due to the Petitioners as on 31.05.2019 is Rs. 18,35,071/- inclusive of interest @ 24% per annum.

10. Learned counsel for the Corporate Debtor has advanced numerous arguments to resist the admission of the petition by submitting as under: -

1. There is no financial debt due and even the petitioners are not the financial creditors.
2. The petitioners have only filed present petition for the purpose of recovering the alleged amount due to them from the Respondent by exerting the pressure of the Code.
3. If the petition is admitted then it would cause harm and delay to the other flat buyers who are much more in number than the petitioners, who are ready and waiting for the delivery of the possession of their flats.



4. On a combined reading of Section 7 (3) (1) (a) & 215(2) of the Code the Financial Creditors are mandatorily required to submit financial information with information utility while filing a petition, whereas the petition has been filed without complying with the said mandatory requirement. They have not disclosed any record of default with the information utility, thereby providing incomplete information in the said petition, despite the information utility being operational.
5. The petitioners have also failed in submitting combined or individual copy of calculation sheet in order to substantiate or prove their claim, which is an essential procedural requirement.
6. The petitioners have not produced any statement of the account or balance sheet of the Respondent wherein the amount alleged to be claimed are shown as admitted or acknowledged as debt.
7. The said project was delayed since inception on account of no fault on the part of the Respondent since the land allotted by the Greater Noida Authority was having the disputes with local villagers. The project

work has been hampered time to time by nearby villagers. Case relating to some khasra numbers of the land on which some plots/flats were proposed to be established, is pending before Hon'ble Allahabad High Court.

8. The Respondent during course of discussion repeatedly called upon the petitioners to take the possession of alternative flats at same location at some project after paying the balance consideration but they failed to come forward and insisted on refund. However, the contract entered between the parties provides for the alternative allotment. Even as on day subject to receipt of balance consideration the Respondent is always willing to allot the alternative flats.
9. The builder buyer agreement in an incomplete document, as there is no witness who has signed the said builder buyer agreement and is same is also not notarized and thus same has no legal standing to sustain the present proceedings.
10. As per the petitioners the Respondent was to provide possession of the flat before 2012, but the present

petition has been filed in year 2019 and therefore, the claim of the petitioners would be stale or infructuous as it is beyond the period of limitation.

11. The petitioner No.1 has suppressed the fact of the date of occurrence of debt which is a fundamental requirement for triggering the process.
12. The Petitioner No. 2 has stated that against the allotted flat he executed builder buyer agreement dated 05.06.2009 but the said agreement has been executed between Petitioner No. 2 and M/s. Nitishree Infrastructure Pvt. Ltd. who is no longer associated with the project in question and in view of the same the Respondent has made various follow-ups with Petitioner No. 2 to come to their office so that a tripartite agreement as executed with Petitioner No. 2 can be made. Despite of regular follow-ups Petitioner failed to come at the Respondent's office to execute the tripartite agreement and has filed the present petition on the basis of earlier builder buyer agreement which cannot be taken into consideration in present case.



11. Having heard learned counsel for the parties we are of the considered view that the Financial Creditor has succeeded in establishing a case for triggering the Corporate Insolvency Resolution Process.

12. Before discussing the legal issues raised, we deem it appropriate to first refer to the material clauses of the agreement. According to clause 9 of the builder buyer agreement the Corporate Debtor had proposed to complete the construction of the aforesaid residential unit and hand over the possession of the same to the petitioner No. 2 by April, 2011 with a grace period of three months. It is further postulated by the said clause that in case the Corporate Debtor is not able to handover the possession within the time as stipulated in the aforesaid agreement than the Financial Creditor No. 2 are entitled to payment of compensation for delay.

13. It is not disputed that the agreement dated 05.06.2009 (Annexure A-11) was signed and executed between the parties. However, the stand taken by the Respondent is that it has made various follow-ups with Petitioner No. 2 for the purpose of executing a tripartite agreement and the aforesaid party namely M/s. Nitishree Infrastructure Pvt. Ltd. is no longer associated



with the project in question. It is not disputed by the Respondent that an agreement dated 01.05.2011 (Annexure A-3) was signed and executed between Nitishree Infrastructure Limited, the Respondent and the Petitioner. According to the terms incorporated in the said agreement the Respondent is shown as Second Party and therefore is a lawful allottee of the plots. True copies of cheques as well as receipts issued by the Respondent clearly speak about the acknowledgment and acceptance of money by the Respondent. The Financial Creditors-allottees have not been paid any amount of compensation as agreed by the Respondent in aforesaid clause 9 of the agreement nor the possession has been offered.

14. As per the builder buyer agreement dated 05.06.2009 the Financial Creditors were required to be given possession by April, 2011 plus grace period of three months. The aforesaid fact is clear from clause 9 of the builder buyer agreement executed on 05.06.2009. A long period of more than eight years have gone by. There is no occupation certificate in sight and the present management is unable to perform its obligation in accordance with the builder-buyer agreement. It not unwarranted to infer that the Petitioner has lost faith in the Corporate Debtor. Therefore,

the Financial Creditor would be well within his right to trigger the Corporate Insolvency Resolution Process because it was such a process alone that a new management may come in and perform its obligations as per law. In that regard pertinent observations in para 39 in Pioneer Urban Land and Infrastructure Limited (supra) in so far as applicable to the facts and circumstances of this case would read as under:-

“39. It is also important to remember that the Code is not meant to be a debt recovery mechanism [see paragraph 28 of Swiss Ribbons (supra)]. It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code, i.e. that it must be

approved by at least 66% of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such home buyer/allottee may have to wait for a very long period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. ***Thus, given the bona fides of the allottee who moves an application under Section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the NCLT under the Code hoping that some other developer takes over and completes the project, while always***

taking the risk that if no one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up. Given the reasons of the Insolvency Committee Report, which show that experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse, i.e. failure of the project itself,.....”

(emphasis added)

15. Even otherwise 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. Even when the principles of reasonableness are implied in this case. There is unreasonableness prevailing all through. There is extraordinary delay of about 8 years in delivering the possession. In fact, there is a fundamental breach of the terms of the contract by not delivering the possession within the reasonable period even after expiry of stipulated time carved out in the agreement i.e. April, 2011 plus grace period of three months. The default has occurred because the payment made for the allotment of residential unit

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has the commercial effect of borrowing within the meaning of Section 5(8)(f) of the Code. The amount in fact becomes due and payable on the completion of period by April, 2011 plus grace period of three months and; a maximum period of further one year could be granted. The possession should have been offered by July, 2012 and therefore, the principal amount along with compensation and interest becomes payable.

16. As a matter of fact, each of the petitioner waited to the maximum time postulated in the agreement and the possession was not delivered till June, 2019 i.e. date of filing of the petition.

17. 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) the conclusion of detailed discussion has been recorded in para 86 by Hon'ble the Supreme Court which reads 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 by holding that 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.

18. We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our order dated 27.11.2018 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt. Ltd. (IB-1039(PB)/2018).

19. After a reading of Section 7 of the Code along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is



complete. The IRP proposed does not have any disciplinary proceedings pending against him.

20. As a sequel to the above discussion, this petition is admitted and Shri Ram Phal Bhardwajis appointed as an Interim Resolution Professional.

21. 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.

22. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. 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.



23. 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 her 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.

24. 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.

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.

27. A copy of this order shall also be sent to the Secretary, Ministry of Corporate Affairs, New Delhi for compliance of directions issued in para 26 above.

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(M.M. KUMAR)
PRESIDENT

06.12.20

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(S.K. MOHAPATRA)
MEMBER (T)

06.12.2019
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