

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

**I.A./5486(ND)2023
AND
I.A./6126(ND)2023
IN
C.P. NO. (IB) 284 OF 2021**

IN THE MATTER OF:

Vivek Khanna & Ors

...Applicant/Financial Creditor

Versus

Spaze Towers Pvt Ltd.

...Respondent/Corporate Debtor

AND IN THE MATTER OF:

Amrit Lal Jain & Anr.

...Applicants

Versus

Spaze Towers Pvt Ltd.

...Respondent/Corporate Debtor

AND IN THE MATTER OF:

Mr. Om Prakash Arora

...Applicants

Versus

Spaze Towers Pvt Ltd.

...Respondent/Corporate Debtor

CORAM:

**SH. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN,
HON'BLE MEMBER (TECHNICAL)**

Order Delivered on: 21.10.2024

PRESENT:

For the Applicant : Mr. Satyam Vidyarthi, Adv

For the Financial Creditor : Ms. Aparajita Singh, Adv.

ORDER

PER: MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (J)

1. The aforesaid applications are filed under Rule 11 of the NCLT Rules, 2016 on behalf of applicants i.e., Mr. Om Prakash Arora applicant in I.A. 5486/ND/2023, and Mr. Amrit Lal Jain and Mr. Uppal Jain in LA. 6126/ND/2023, inter-alia seeking direction from this Adjudicating Authority to delete the name of the Applicants herein, being the Applicant No. 2, Applicant No. 30, Applicant No. 31, respectively from the Memo of Parties of the Company Petition (IB)/284(PB)/2021 case titled Vivek Khanna & Ors. v. Spaze Towers Private Limited.
2. Briefly stated the main contention of the applicants is that due to certain development of facts, the applicants do not wish to further pursue and will not be continuing with the proceedings against the Respondent and do not wish to seek the initiation of CIRP of the Respondent. Further, the applicants submit that they want to withdraw their consent to be a party to the Company Petition (IB/284/(ND)/2021) pending against the Respondent Company.
3. We have heard the parties and perused the case records, since the factual grounds and the relief sought in these two applications are identical, we are dealing with all the application in the same order.
4. During the arguments, the Ld. Counsel for the petitioners/ financial creditors objected to the present applications on the ground that the withdrawal of the name of the applicants from the main IB No.284/ND/2021 will have no effect on the maintainability of the main petition in view of the threshold limit as envisaged under second proviso to the Section 7(1) of the Code and in view of Orders passed by **Hon'ble Supreme Court in Manish Kumar v Union of India and Ors. (2021) 5 SCC 1 and Hon'ble NCLAT in Mist Avenue Pvt. Ltd. vs. Nitin Batra & Ors. Company Appeal (AT) (Insolvency) No. 127 of 2023.**

5. We are of the view that the question regarding the maintainability of the main IB No.284/ND/2021 shall be dealt in CP IB No.284/ND/2021 and in the interest of justice and request of the applicants we do not find any reason to interfere in the prayers prayed herein by the Applicants.
6. In view of the aforementioned facts and circumstances, the prayer of the applicants is hereby allowed and the name of all the applicants shall be deleted from the array of parties in the main IB No.284/ND/2021. Therefore, interlocutory applications i.e., I.A. 5486/ND/2023, and I.A. 6126/ND/2023 stands allowed.
7. Accordingly, the names of Applicant No.2 (Mr. Om Prakash Arora), Applicant No. 30 (Mr. Amrit Lal Jain), Applicant No. 31 (Mr. Uppal Jain) stands deleted from the Memo of Parties of the Company Petition (IB)/284(PB)/2021 case titled Vivek Khanna & Ors. V. Spaze Towers Private Limited.
8. The registry is directed to place on record the present order along with the main petition.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (T)

Sd/-
(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

C.P. NO. (IB) 284 OF 2021

**Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read
with Rule 4 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority), Rules, 2016.**

IN THE MATTER OF

1. Vivek Khanna

L-17/7 DLF -II,

Gurgaon, Haryana -122001

....Applicant/Financial Creditor

2. Om Arora

122, 3rd floor

Jor Bagh, New Delhi

....Applicant/Financial Creditor

[Deleted from Memo of parties vide Order dated 21.10.2024]

3. Nawal Kumbhat

Villa no.363, Applewoods Villas

SP Ring Road, Ahmedabad-380058

....Applicant/Financial Creditor

4. Chhandita Warkare

H.No.222, Sector- 14

Gurgaon, Haryana – 122001

....Applicant/Financial Creditor

5. Ritesh Jain

13 Truesdales, Ickenham

London UB10 8FJ

....Applicant/Financial Creditor

6. Veenu Guwalani

C-24 2nd Floor

East of Kailash

New Delhi 110065

....Applicant/Financial Creditor

7. Rajeev Chandwani

C-22, Second Floor, Shivalik

Malviya Nagar New Delhi 10017

....Applicant/Financial Creditor

8. Davinder Kaur

F-103, Jhulelal Apartments,
Pitam pura, Delhi-110034

....Applicant/Financial Creditor

9. Parminderjit Singh

F-103, Jhulelal Apartments,
Pitam pura, Delhi-110034

....Applicant/Financial Creditor

10. Rajender Kumar Maurya

D-801 A Maple Crescent
Sushant Lok -1,
Block -C Gurgaon – 122009

....Applicant/Financial Creditor

11. Kavita Maurya

D-801 A Maple Crescent
Sushant Lok -1,
Block -C Gurgaon – 122009

....Applicant/Financial Creditor

12. Anjali Bhatnagar

Flat No. 22, Lok Vihar Apartment,
Phase-I, Vikaspuri,
New Delhi- 110018

....Applicant/Financial Creditor

13. Pradeep Bhatnagar

Flat No. 22, Lok Vihar Apartment,
Phase-I, Vikaspuri,
New Delhi- 110018

....Applicant/Financial Creditor

14. Amit Jain

House No. 868 Sector 40,
Gurugram, Haryana

....Applicant/Financial Creditor

15. Neeru Madhuri Parti

226 sector-17A,
Lane 6B, Gurgaon

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 01.08.2022]

16. Rewan Rai Parti

226 sector-17A,
Lane 6B, Gurgaon

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 01.08.2022]

17. Subodh jain

C-587, Shushant Lok -I

Gurgaon Haryana

....Applicant/Financial Creditor

18. Rajni Jain

C-587, Shushant Lok -I

Gurgaon Haryana

....Applicant/Financial Creditor

19. Saurabh Sirohi

EFS-B-T-SF Topaz 200, Second floor,

Emaar Emerald Hills, Sector 65,

Gurgaon, Haryana 122101

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 18.08.2022]

20. Komal Monga

Q-302, Ajmera Infinity Electronic City 1,

Bangalore-560100

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 01.08.2022]

21. Vishal Kamra

Husband of Late Smt Meetu Kamra

N 48 Mayfield Gardens,

Sector 51, Gurgaon

....Applicant/Financial Creditor

22. Bajamahal Phanikumar

2 Swift Close,

Workingham RG413SF, UK

....Applicant/Financial Creditor

23. Amit Bhatnagar

A-74, Sector-22, Noida – 201301

....Applicant/Financial Creditor

24. Ruchika Behl

A-3/196, A-3, Block

Pacshim Vihar, New Delhi

....Applicant/Financial Creditor

25. Neelu Gora

A-1/436, Sushant Lok-II,

Sector-55, Gurgaon-122011

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 01.08.2022]

26. Rekha Saith

9-C, Anand Lok

New Delhi -110049

....Applicant/Financial Creditor

27. Mohd. Tufel Zama

G-6, Gandhi Nagar

Naka Madar Ajmer

....Applicant/Financial Creditor

28. Mohd. Sakib Zama

G-6, Gandhi Nagar

Naka Madar Ajmer

....Applicant/Financial Creditor

29. Mohd. Suhel Zama

G-6, Gandhi Nagar

Naka Madar Ajmer

....Applicant/Financial Creditor

30. Amrit Lal Jain

92, 1st Floor, Sector 4

Gurugram, Haryana -12201

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 21.10.2024]

31. Uppal Jain

92, 1st Floor, Sector 4

Gurugram, Haryana -12201

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 21.10.2024]

32. Manoj Kumar

A-64, First Floor,

Inderpuri, New Delhi

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 29.08.2022]

33. Virender Singh Gehlot

671, Sector 9A

Gurugram 122001

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 01.08.2022]

34. Nathu Ram Yadav

Plot No. 150, Street No. 07, Mohalla Sadhwada

VPO-Khaira, Najafgarh

New Delhi – 110043

....Applicant/Financial Creditor

35. Jyoti Rawal

J-108, Wembeley Estate

Sector-50, Gurugram

....Applicant/Financial Creditor

36. Mahendra Singh

C-9, Jasvilas, Bani Park

Jaipur – 302016

....Applicant/Financial Creditor

37. Nichhattar Singh Kabba

H. No. 507, Sector -22

Pocket B, Gurugram – 122015

....Applicant/Financial Creditor

[Deleted from Memo of Parties vide Order dated 18.08.2022]

Versus

Spaze Towers Private Limited

Having its Registered Office at

UG-39, Upper Ground Floor,

Somdatt Chamber-II, 9, Bhikaji Cama Place,

New Delhi - 110066

...Respondent/Corporate Debtor

CORAM:

SH. MANNI SANKARIAH SHANMUGA SUNDARAM,

HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN,

HON'BLE MEMBER (TECHNICAL)

Order Delivered on: 21.10.2024

PRESENT:

For the Applicant : Ms. Aparajita Singh, Adv.

For the Respondent: Mr. Sumesh Dhawan,
Ms. Vatsala Kak
Mr. Shaurya Shyam, Adv.

ORDER

PER: MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (J)

1. The instant Company Petition is filed by Mr. Vivek Khanna, and 36 other person who are allottees of 29 Units ('Applicant'/ 'Financial Creditors') under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating the Corporate Insolvency Resolution Process ('CIRP') against M/s. Spaze Towers Private Limited ('Respondent/Corporate Debtor') having CIN:U45201DL2006PTC145529 on the ground that the Corporate Debtor had committed a default in payment of Rs. 23,37,64,560/- (Rupees Twenty Three Crore Thirty Seven Lakh Sixty Four Thousand Five Hundred and Sixty Only) as the Corporate Debtor has cumulatively defaulted the Financial Debt paid by the Applicants towards the purchase of their respective units, for the defaults committed against the Financial Debts being the non-delivery of the shops/non-payment of the amount paid by the Applicants in lieu of the units purchased.
2. The Corporate Debtor i.e., M/s. Spaze Towers Private Limited having CIN: U45201DL2006PTC145529 is incorporated dated 27.01.2006 under the provisions of the Companies Act, 1956 having its registered office situated at UG-39, Upper Ground Floor, Somdatt Chamber-II, 9, Bhikaji Cama Place New Delhi 110066. Since the registered office of the Corporate Debtor at the time of filing of this Application was in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi

is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. Briefly stated the facts of the present case as averred by the Applicant/ Financial Creditor are: -

- a) That the Corporate Debtor is engaged in the business of Real Estate and Infrastructural development including construction and development of residential & commercial complexes. That the Financial Creditors herein had primarily booked Shops from 2012-2016 in the project being developed by the Corporate Debtor herein, namely **“Spaze Arrow”** located at Sector 78, Gurugram, Haryana.
- b) The Financial Creditors were allotted units in the Project through Allotment Letters after depositing the booking amounts for shops. The Corporate Debtor represented the Project as a high-end commercial complex, comprising retail shops, showrooms, restaurants, and a tower block with offices and serviced apartments. The Project was promoted as a state-of-the-art facility expected to attract elite clientele and heavy footfall due to its unique infrastructure. The Corporate Debtor assured having the necessary expertise, ownership, and permissions to develop a world-class project. These assurances prompted the Financial Creditors to invest their hard-earned money with the Corporate Debtor.

- c) That, the Buyer's Agreement which were executed by and between the Financial Creditors and the Corporate Debtor encapsulated detailed terms and conditions governing the Shops in the Project. That the detailed terms comprised of the payment plans opted by the respective Financial Creditors as well as the date for delivery of possession of the respective Units. That the Financial Creditors have opted for construction linked payment plan since it was assured by the Corporate Debtor that the payments shall be collected as per the stages of construction.
- d) That during 2016-2019, the Financial Creditors made payments to the Corporate Debtor as per the agreed payment plans, diligently following the terms in anticipation that the Corporate Debtor would honor its assurances and deliver possession of the Shops on time.
- e) That in terms of the Clauses under the Possession Clause of the Agreement, the Corporate Debtor was obligated to deliver the possession of the Shops to the Financial Creditors within 42 (forty-two) months from the date of signing of the Agreement.
- f) The Applicants Submitted that in many that in few of the Agreements, the Possession Clause does not even mention any definite date of offer of possession. That the Corporate Debtor failed to provide the possession of the Shops within the stipulated time period. The Corporate Debtor could only deliver the legal possession of the Shops once it had attained all the

necessary approvals. That it has recently come in the notice of the Financial Creditors that the Corporate Debtor has not been able to procure several necessary licenses qua the Project which are mentioned herein below:

- i. The Accused Company has till date not received approval for construction of roads from GMDA.
 - ii. The Accused Company has till date not received approval for water supply from GMDA.
 - iii. The Accused Company has till date not received approval for electricity from DHVBN.
 - iv. The Accused Company has till date not received approval for sewage disposal from GMDA.
 - v. The Accused Company has till date not received approval for storm water drainage from GMDA.
 - vi. Environment Clearance and consent to operate was received as late as in the year September, 2019.
- g) The Applicant has submitted that the Corporate Debtor's failure to obtain necessary approvals and deliver possession of the Shops within the stipulated time highlights its default, frustrating the Financial Creditors' purpose for purchasing the units. Despite investing their hard-earned money, the Financial Creditors have been left without the promised properties due to the Corporate Debtor's failure to meet its assurances.

- h) The Applicant has further submitted that since the Corporate Debtor has failed to offer the refund of the money and thus the time value of money has accrued on the Corporate Debtor. That the amount invested by the Financial Creditors clearly qualifies as 'commercial borrowings.' That the Financial Creditors have made payments aggregating to the amount of Rs.14,57,18,583/- (Rupees Fourteen Crores Fifty Seven Lakhs Eighteen Thousand Five Hundred and Eighty Three Only) till date. That the Corporate Debtor has till date failed to offer any reasonable explanation for the delay in providing the possession of the Shops. That the Corporate Debtor has time and again cited arbitrary contentions and excuses which were not related at all to the primary objective of giving the timely possession of the shops.
- i) As per the Agreement, the Corporate Debtor was obligated to deliver possession of the units to the Financial Creditors within 42 months of execution. In some cases, the Corporate Debtor has deliberately omitted any specific delivery date. It has relied that as per the judgment of the Hon'ble Supreme Court in the case of **Fortune Infrastructure and Anr. v. Trevor D'Lima and Ors [(2018) 5 SCC 442]**, it was observed by the Hon'ble Supreme Court that:

“15. Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid

by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014.”

4. Submissions of the Ld. Counsel appearing for the Respondent/Corporate Debtor are:

- a) The Respondent/Corporate Debtor appeared through its counsel and filed Reply denying various averments made in the Application. The Respondent/Corporate Debtor has alleged that the present application under Section 7 of Insolvency and Bankruptcy Code, 2016 has been filed in violation of the law as neither the application is filed by one hundred of such creditors in the same class nor ten per cent of the total number of such creditors in the same class.
- b) The respondent submitted Respondent company is registered under the provisions of the Companies Act, 1956 having its registered office at Spaze Edge, Sector 47, Tower C, Gurgaon Sohna Road engaged in the business of real estate in Haryana. The Respondent is a well-established enterprise in the field of real estate development with several delivered as well as on-going residential, retail and commercial projects in Gurgaon. The Respondent has successfully delivered various projects in the residential and commercial sector. The Respondent is a financially stable company that is not in default of its financial obligations.
- c) The Respondent further submitted that the applicants are allottees in a real estate group-housing project known as 'Spaze Arrow', being developed by the Respondent for construction and development of the commercial complex on the land

admeasuring 27 Kanal 3 Marlas situated in Village Nauranpur, District Gurgaon falling in Sector 78 as per Gurgaon Manesar Master Plan 2021.

- d) That the Respondent is a reputable developer in the National Capital Region and is a solvent Company with good financial well-being and has duly completed 12 (twelve) Projects in and around the Gurugram region. It is also pertinent to mention that the Respondent has already obtained the Completion Certificate/ Occupancy Certificate for all the 12 Projects developed by the Respondent
- e) The Respondent has submitted that s per the list of Allottees submitted by the Respondent before HRERA at the relevant time, there were total 282 sold units in the Project.
- f) The Respondent submitted that as per the Collaboration Agreement dated 19.06.2010, the area of the Project was to be shared in the ratio 33:67 i.e., 33% of the area was of Mr. Ishan Singh (Co-Promoter) and remaining 67% area was of the Corporate Debtor, and both the parties were to sell their respective areas.
- g) The respondent further submitted that out of the 29 Allottees in the present application, 10 Allottees are a part of the share of Mr. Ishan Singh (Co-Promoter) and were only sold by the Respondent herein on behalf of Mr. Ishan Singh in terms of the Marketing Agreement dated 02.11.2012 entered into between the Respondent and Mr. Ishan Singh read with the Registered General Power of Attorney dated 16.01.2014.
- h) The Respondent stated that Mr. Ishan Singh sought the Respondent's assistance in selling 28 units, even though both parties were free to sell their own shares. Buyers of 24 of Mr. Singh's units, as per their Buyer's Agreements, were aware that these units are part of his share under the Collaboration Agreement (19.06.2010) and its Addendum. Subsequently, it stated that Mr. Ishan Singh has already been paid an amount of

upwards of Rs. 6.6 Crores for the sale of his share of the Units in the Project.

- i) The Respondent has submitted that Nine allottees have settled their dues with the Respondent and filed applications to remove their names from the case. By orders dated of this Adjudicating Authority dated 01.08.2022, 18.08.2022, and 26.08.2022, six of these allottees were deleted from the array of parties. Accordingly, the Respondent has submitted that the Applicants do not meet the threshold as envisaged in the Code.
- a) The respondent has submitted that the project is stalled due to disputes with Mr. Ishan Singh, co-promoter. He canceled the General Power of Attorney, preventing the Corporate Debtor from proceeding with the Collaboration Agreement. This led the Respondent to seek arbitration, but a status quo order halted construction. Subsequently, allottees filed a complaint, resulting in an order from the Haryana Real Estate Regulatory Authority (HREERA) directing both parties to jointly complete the project. This was upheld by the High Court of Punjab and Haryana. Following this judgment, the Respondent resumed construction to ensure timely completion.
- j) Further it submitted that the Corporate Debtor is committed to completing the project but faces multiple legal challenges initiated by co-promoter Mr. Ishan Singh. He has filed proceedings in various courts and tribunals, obtaining interim orders that prevent the Respondent from proceeding with construction.

5. Rejoinder on behalf of the Applicant/ Financial Creditor

- b) The Applicants have submitted that The Corporate Insolvency Resolution Process was previously initiated against the Corporate Debtor in the case of Vandana Raheja & Ors. v. Spaze Towers Pvt. Ltd. (I.B. No. 889 (ND) of 2020) due to defaults in its

project "Spaze Corporate Parkk," questioning its solvency. Despite claiming to be financially stable, the Corporate Debtor has failed to address its defaults, and its claims should be rejected.

- c) The Allottees submit that the petition satisfies the 10% threshold under the second proviso to Section 7 of the Code, as HRERA's inspection on 18.11.2020 confirmed 258 units sold in the project. With 29 allottees filing the petition, this meets the required threshold. However, the Corporate Debtor's submission to HRERA lists 282 sold units, indicating a deliberate misstatement in the petition regarding the total units sold.
- d) The Financial Creditors submit that the Section 7 application meets the requirement of being filed by 10% or 100 allottees of the same project. The Corporate Debtor remains liable for units within 33% of Mr. Ishan Singh's Floor Space Index (FSI). As per Clauses 23, 42, and 50 of the Collaboration Agreement, it was the Corporate Debtor's obligation, as the Developer, to construct and complete all units within the stipulated time, regardless of their allocation within Mr. Ishan Singh's FSI. Relevant clauses of Collaboration Agreement dated 19.06.2010 are reproduced for reference:

“23. That it is however understood and agreed that the DEVELOPER shall construct and complete portion belonging to the OWNER simultaneously with the DEVELOPER's portion in the proposed commercial complex.

.
.

42. That the DEVELOPER and OWNER reserve the right to sell I assign some I all portion of the proposed commercial complex. If the OWNER desires, the DEVELOPER can assist the OWNER in selling of some I all of the OWNERS share for which the OWNER will be liable to pay brokerage charges to

the DEVELOP. The DEBELOPER shall sell the OWNERS share simultaneously with the DEVELOPERS share.

50. That if the project is abandoned, neglected or fails due to the breach of the contract and default on the part of the DEVELOPER, then the OWNER will not be bound to discharge any liability arising out of the same."

ANALYSIS AND FINDINGS

6. We have heard the Ld. Counsel on behalf of the Applicant/Financial creditor and further perused the averments made in the application, reply filed by the Corporate Debtor, rejoinder and written submission presented by Financial Creditor and Corporate Debtor. Since, the registered office of the Respondent/ Corporate Debtor was in Delhi at the time of filing of this present application, this Adjudicating Authority has the territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 7 of The Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor.
7. Adverting to the facts of the present case, the primary objection raised by the Respondent is that the application is not maintainable as the threshold for filing such Petition by allottees in terms of second proviso to Section 7 of the Code has not been satisfied.
8. At this stage, it is pertinent to refer to the definition of the expression "Financial Debt" defined in sub-section 8 of Section 5 of the Code. Section 5(8)(f) along with its explanation reads as follows:
Section 5: Definitions

.....

“(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—

(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);]

9. Examining whether the applicants, being the Financial Creditors/ allottees fulfil the threshold limit as prescribed under section 7 of IBC, 2016. At this stage, we consider it appropriate to refer to the Proviso of Section 7(1) of the IBC, 2016, which lays down as under:

Section 7: Initiation of corporate insolvency resolution process by financial creditor.

“(1) A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.”

The 2nd proviso to Section 7(1) reads as follows:-

“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”

10. For better understanding of the preceding paragraph, we may refer to the definitions of “Allottee” defined under Section 2(d) and “Real Estate Project” defined under Section 2(zn) of the RERA Act, 2016.

Section 2(d) and Section 2(zn) reads as follows:

2. Definitions —

(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;”

(zn) “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;”

11. As per the Contentions of the Respondent it has been stated that 9 Allottees from the Petitioners have settled their alleged dues with the Respondent and subsequently, the said Allottees filed separate Applications seeking the deletion of their names from the array of parties. That this Hon’ble Adjudicatory Authority vide separate Order(s) dated 01.08.2022, 18.08.2022 and 26.08.2022. It is pertinent

to mention herein that a total 6 Allottees out of the 9 settled Allottees have been deleted from the array of parties of the captioned Petition.

12. On this note we are inclined to refer to the Judgement passed by the **Hon'ble NCLAT in Mist Avenue Pvt. Ltd. vs. Nitin Batra & Ors. [Company Appeal (AT) (Insolvency) No. 127 of 2023]** dated 21.10.2022, wherein it was held that the requirement of threshold limit needs to be fulfilled at the time of filing the application only. In the present case, as on date of filing the application, the Corporate Debtor is in default qua all the Petitioners, thus we cannot countenance the plea of the Corporate Debtor that 9 out of 29 Petitioner should not be treated as Financial Creditors. the relevant part of the judgment in Mist Avenue Pvt. Ltd. vs. Nitin Batra & Ors. (supra) reads thus:-

“45. Ld. Counsel for the Appellant has also contended that eight allottees have settled their matters hence they should be excluded from number of 100 which need to be fulfilled. Hon'ble Supreme Court has answered the said question as to what is the point of time when the threshold requirement has to be proved. In Manish Kumar itself it has been answered that requirement of threshold under proviso in Section 7(1) must be fulfilled as on the date of filing of the Application. The fact that eight allottees have settled the matter is thus inconsequential and eight allottees cannot be excluded in the counting of 100 allottees which are required to be fulfilled as threshold. The provision of Section 7(1) Second Proviso inserted by Act No. 1 of 2020 having been explained by the Hon'ble Supreme Court, the law is well settled that all applicants who have joined the Section 7 Application have not fulfilled the threshold individually nor claim of all the applicants individually has to be within time in event there is default of more than Rs. 1 Crore and default of Rs. 1 Crore on basis of which the application is filed is

well within time. The mere fact that claim of some other barred by time is insignificant. Application under Section 7 of the Code triggered when default of Rs. 1 Crore qua some of the applicant or some other financial creditors is fulfilled, Insolvency Resolution Process under Section 7 can commence.”

13. Therefore, the Corporate Debtor settling with certain allottees and their subsequent filing of withdrawal application is inconsequential and in no manner, otherwise, stood fulfilled when the main Application was filed. affect the threshold stipulated under the second proviso to Section 7 of the Code which

14. It is submitted that the project in question namely “Spaze Arrow”, a Commercial Colony project, situated at Sector 78, Gururgam has total 486 Units in the Project out of which 256 Units has been sold/allotted to the buyers as per the records available with the HRERA Gurugram. The present application has been preferred over by 29 allottees of the aforesaid project. Even if the Respondent’s claim of 282 units sold is considered, the application remains maintainable under the threshold limit established in Section 7 of the Code. As per the settled law, the Financial Creditors/homebuyers are entitled to file petition under Section 7 of the Code against the Corporate Debtor for its failure to hand over the possession in terms of the Builder Buyer Agreement by claiming the Principal Amount along with Interest payable (delay penalty as well as Interest payable for the delay). In the present case, as a matter of fact, the Corporate Debtor is liable to make payment to all the allottees for the delay in handing over the possession along with

the Interest. Apparently, the threshold limit as prescribed under the provisions of the code is satisfied.

15. Moreover, the project was to be completed in near about 42 months from the date of signing of Buyer's Agreement executed between respective Applicants and Corporate Debtor. Corporate Debtor has defaulted in completing the construction and delivering the possession on time. As per the Applicant the Default occurred on 16.04.2019, as per the Buyers agreement. The present Application was filed on 19.05.2021. Though, it is made clear that in case of Financial Creditors/ allottees who have a booked a unit/flat, the cause of action for filing a petition continues to run till the actual delivery is given.

16. Thus, from the facts which are borne on record, as narrated above, we are of the considered view that the 'financial debt' is not barred by limitation. Hence, in all respects the 'debt' as claimed by the Financial Creditor is well within the period of limitation and the Corporate Debtor has committed 'default' in repayment of the said 'financial debt'.

17. Further, we are supported by the judgment of the Hon'ble Supreme Court in the **Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (2018) 1 SC 407**, which clearly held that:

“29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or

copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

18. Thus, it is clear that when a default takes place i.e., the debt becomes due and is not paid, the Insolvency Resolution Process shall begin against the corporate debtor. Therefore, on the basis of discussion in the

aforesaid paragraphs, we are satisfied that the present application is complete in all respects. The Applicant/financial creditor is entitled to move the application against the corporate debtor in view of outstanding financial debt in default above the pecuniary threshold limit as provided under Section 4 of the Code, 2016. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the instant petition **I.B./524/2021 stands admitted and CIRP of M/s Spaze Towers Private Limited shall be initiated.**

19. The applicant in Part-III of the application has proposed the name of Mr. Gaurav Katiyar as Interim Resolution Professional, having Registration Number - IBBI/IPA-001/IPP00209/2017-18/10409 having email id cagauravkatiyar@gmail.com. Accordingly, Mr. Gaurav Katiyar is appointed as an Interim Resolution Professional (IRP) for initiation of CIRP for Corporate Debtor. The consent of the proposed interim resolution profession in Form-2 is taken on record. The IRP so appointed shall file a valid AFA and disclosure about non-initiation of any disciplinary proceedings against him, within three (3) days of pronouncement of this order.

20. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed

- 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 in respect of Corporate Debtor;

- b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein in respect of Corporate Debtor.
- 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in respect of Corporate Debtor;
- 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 in respect Corporate Debtor.
- e) The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period in respect of Corporate Debtor.

21. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force

w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

22. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (within 3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

23. We direct the Applicant/Financial Creditor to deposit a sum of Rs. 2,00,000/- (Two Lakh Rupees Only) with the Interim Resolution Professional namely Mr. Gaurav Katiyar 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 said amount, however, is subject to adjustment towards Resolution Process cost as per applicable rules.

24. The Interim Resolution Professional shall perform all his functions as contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.

25. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor in respect of 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 day-to-day 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 would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders.

26. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' in respect of Corporate Debtor as a part of his obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

27. In terms of section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.

28. Accordingly, the instant application filed under Section 7 of the Code, 2016 bearing I.B./284/2021 stands **admitted**.

Sd/
(DR. SANJEEV RANJAN)
MEMBER (T)

Sd/-
(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)