

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

CP No.: IB 457(PB)/2022

(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:

Lt. Col (Retd.) SPS AURORA & Ors.

...Financial Creditor / Applicant

VERSUS

M/s SENIOR BUILDERS LIMITED

...Corporate Debtor / Respondent

Pronounced on: 04.07.2024

CORAM:

**SHRI MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE
MEMBER (JUDICIAL)**

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

Present:

For Applicant : Adv. Neha Sharma

For Respondent : Adv. Diksha Goswami

ORDER

PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)

1. This Petition is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 by a total of 34 Financial Creditors holding 25 (twenty five) allotted units out of a total of 44 (forty four) units of office/cum shop space

in Senior Builder Mall, Sector-32, Noida under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (Adjudicating Authority Rules), for initiating the Corporate Insolvency Resolution Process (CIRP), declaring moratorium and for appointment of Interim Resolution Professional (IRP), against the Corporate Debtor (CD) viz., for the dues of principal amount without interest of **Rs. 11,94,29,229** (Rupees Eleven Crores Ninety-Four Lakhs Twenty-Nine Thousand Two Hundred Twenty-Nine Only).

2. The Corporate Debtor was Incorporated on **25/09/1996**, having CIN:U70101DL1996PLC082239, under the Companies Act 1956, The registered office is at 1/1, Shanti Niketan, New Delhi, South Delhi, Delhi-110021. Therefore, this Bench has jurisdiction to deal with this application. A copy of the master data of the Corporate Debtor as accessed from the MCA website is annexed at **Annexure -2**.
3. The present application was filed on 08.06.2022 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make payment of **Rs. 11,94,29,229** (Rupees Eleven Crores Ninety-Four Lakhs Twenty-Nine Thousand Two Hundred Twenty-Nine Only).

4. **Facts of the Case:**

- a) The Applicants/Financial Creditors have together invested a principal amount of **Rs. 11,94,29,229** (Rupees Eleven Crores Ninety-Four Lakhs Twenty-Nine Thousand Two Hundred Twenty-Nine only) between the year 2004-2008, and also entered into agreements with the Corporate Debtor for purchasing shops/units in the Senior Builders Mall, Sector-32 Noida.

- b) As per the agreements between the Corporate Debtor and Financial Creditor, the Corporate Debtor had to deliver possession of the shops/units to the applicants, which the Corporate Debtor failed to do and therefore, the Corporate Debtor has defaulted under the IBC.
- c) In the year 2015 the Corporate Debtor offered to return the money to some of the allottees (including some applicants herein) in return for them surrendering their units as a one-time settlement (OTS).
- d) Further, an association formed by the buyers of the units had earlier filed a section 7 petition titled as “Shop Owners Association Senior Builders Vs. Senior Builder Ltd” CP I.B No. 1110/2019 and Vide order dated 14.03.2022 this Adjudicating Authority dismissed the Section 7 petition as it was filed by the association with granting liberty to the allottee to jointly file a fresh petition in terms of the present Section 7 of IBC, 2016.

5. Submission made by the Ld. Counsel appearing for the Financial Creditor:

- a) That 34 financial creditors have jointly filed the present application and out of the 44 total units allotted by the Corporate Debtor under this project, the applicants herein are allottees of 25 units i.e. more than 50% & herein meet the minimum threshold required under the second proviso of section 7 of the Insolvency and Bankruptcy Code, 2016.
- b) That the claim of the applicants is not time-barred or beyond limitation as alleged as the Corporate Debtor was obliged/bound under the contract to provide a shop and give possession thereof to

the applicants and a continuous cause of action runs, till the actual delivery of shops.

- c) That Hon'ble Supreme Court while dealing with a similar submission being made by a builder has held that the cause of action continues to run till the delivery of possession ("**Lata Construction & Ors. Vs. Dr Ramesh Chandra Ramniklal Shah**" reported in (2000) 1SCC 586).
- d) That in the present case none of the applicants have given up their rights under the respective agreements and therefore, the Corporate Debtor continues to remain obliged to provide shop and handover possession and cannot both retain the money of the Applicant/Financial Creditors and also refuse to hand over possession.
- e) Further, it is denied that MMT is a necessary party in the present proceedings as alleged or at all and as per the agreement entered into by and between the applicant and the Corporate Debtor, it was the obligation of the Corporate Debtor herein to construct and deliver the possession of the shops/unit and therefore the debt under the IBC is that of the Corporate Debtor and not MMT.

6. Submissions of the Ld. Counsel appearing for the Corporate Debtor are:

- a) That there are pre-existing disputes with individual allottees wherein the amount claimed in the present petition is not an admitted debt or liability on part of the corporate debtor and the amount of the debt in default is a totally hypothetical figure without any basis and has been calculated at the personal wish and desire of the applicants.

- b) The amount in default cannot be treated to be a financial debt owned by the Corporate Debtor to the applicants and any claim of the flat buyers as on today would be barred by limitation.
- c) The land of the project in question is otherwise owned by a separate company i.e. MMT Amusement Parks Pvt. Ltd which has not been impleaded as a party to petition and any dispute qua the project is incomplete without involving M/s. MMT Amusement Parks Pvt. Ltd and therefore the present petition is also bad for the non-joinder of necessary parties and a litigation of M/s MMT Amusements Park Pvt Ltd. With the NOIDA Authority is already pending before the **Hon'ble High Court of Allahabad in WRIT (C) No. 56336 of 2005.**
- d) The Corporate Debtor has not siphoned off any amount deposited by the Applicants/ Allottees. The Corporate Debtor has in fact invested more than Rs. 55,00,00,000/- (Rupees Fifty-Five Crores Only) in the project namely Senior Builder Mall, Sector-32 Noida and completed almost 95% of the said Mall but could not get the completion certificate in time as the Noida Authority has cancelled the lease deed executed in favour of M/s MMT Amusement Park Pvt. Ltd.
- e) The present petition under section-7 of the Insolvency and Bankruptcy code is not maintainable as the applicants in the present petition have already availed multiple remedies such as they have filed complaint before Real Estate Regulatory Authority (RERA) and other judicial forums and they cannot be allowed to harass the Corporate Debtor by approaching multiple forums.
- f) That claims of 34 flat buyers which are subject matter of the present petition are all stale and time barred claims under the provisions of Limitation act and the applicants are trying to raise

and agitate certain totally time barred claims pertaining to cause of action which admittedly had arisen to the applicants at the time when they entered into various agreements i.e. around the year 2004-2007 for allotment of space by the Corporate Debtor.

7. The Financial Creditor has placed the following documents on record:

- a) List of Financial Creditors showing the principal amount invested and the date of default at **Annexure 6, Volume-I**
 - b) Copies of the Builder Buyer Agreement/Builder Allottee Agreement/ MOU with the Corporate Debtor at **Annexure 8, Volume II**
 - c) Copies of the proof of payment made by applicants to the Corporate Debtor at **Annexure 9, Volume IV**
 - d) Copy of One Time Settlement offered by the director of the Corporate Debtor in 2015 at **Annexure 11, Volume V**
 - e) A List of allottees under the real estate project on the letter head of the Corporate Debtor at **Annexure 13, Volume V**
 - f) Copy of the judgment of Hon'ble Supreme Court in the case of Lata Construction & Others Vs. Dr Ramesh chandra Ramniklal Shah at **Annexure A-1 of written submissions on behalf of Financial Creditors**
 - g) Copy of calculation of interest due to each Applicant as per the respective agreement at **Annexure 7, Volume I**
8. Further vide an order dated 23.05.2023, this Adjudicating Authority had appointed Adv. Parth Shekhar and CA Shyam Kishan Saraf as Court Commissioners. The report of the Court Commissioners dated 12.01.2024 is on record. The Court Commissioner Report details the independent technical inspection and valuation of Senior Builder Mall, Sector-32,

Noida, as ordered by this Adjudicating Authority on 04.09.2023. The report was necessitated after allottees rejected the financial compensation offered by the Corporate Debtor, deeming it insufficient. The Court Commissioners appointed A.G.S. Buildcon Pvt. Ltd. and The Architectural Studio to conduct the inspection and prepare a detailed "Condition Assessment & Estimation" report. This report analyses the current state of the mall and estimates the funds needed for completion. Despite presenting the findings to the Applicants/Financial Creditors, no consensus was reached on financial compensation or pooling funds for project completion, leaving the resolution of the case to this Adjudicating Authority.

Findings & Analysis:

9. We have heard the Ld. Counsel for both the Petitioners and the Respondent and have carefully perused the documents submitted by them. Upon consideration of the submissions made and the documents placed on record, we observe that the present petition has been filed by allottees holding twenty-five (25) allotted units out of a total of forty-four (44) units of office-cum-shop space in Senior Builder Mall, Sector-32, NOIDA.
10. In view of the foregoing, we find that the present application is in compliance with the provisions of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, which mandates that an application under Section 7 for a real estate project must be filed by either ten percent (10%) of the allottees or by one hundred (100) allottees of the same project, whichever is lesser. Consequently, we hold that the present petition is maintainable.

11. Upon perusal of the Builder Buyer Agreements executed between the Developer and the Financial Creditors, we observe that the Developer had committed to deliver possession of the allotted units to the Financial Creditors within a period ranging from October 2005 to January 2008, depending upon the specific agreement with each allottee. Furthermore, the agreements stipulated that an interest rate ranging from 8% to 12% per annum would be payable by the Developer on the total amount received, in the event that the Developer failed to deliver possession by the scheduled date.
12. In light of the present circumstances, we find that a continuous cause of action arises, given that the Developer has not offered possession of the units till date. Our position is further reinforced by the judgment of the Hon'ble Supreme Court in the case of **Lata Construction and Others v. Dr. Rameshchandra Ramniklal Shah (2000) 1 Supreme Court Cases 586**, wherein it was held that:

*4. A perusal of the agreement dated 23-2-1991 would show that it was specifically stated therein that the rights under the agreement dated 27-1-1987 would remain unaffected. It was for this reason that in the claim petition filed before the Commission, it was clearly mentioned that their rights under the agreement dated 27-1-1987 as also those under the agreement dated 23-2-1991 may be enforced. It was also specifically mentioned in the second agreement that the first agreement of 1987 would be treated as terminated only on full payment of the stipulated amount of Rs. 9,51,000 to the respondents. **Since the rights under the agreement of 1987 had not been given up and the appellants were constantly under an obligation to***

provide a flat to the respondents and deliver possession thereof to them, the commission rightly treated “Cause of action” to be a “continuing cause of action” and came to the right conclusion that the claim was not beyond time.

13. Furthermore, the defense raised by the Developer, asserting that the present petition is deficient due to the non-inclusion of M/s. MMT Amusement Parks Pvt. Ltd., on the grounds that the land in question belongs to the latter company, is untenable. It is pertinent to note that the Financial Creditors entered into the Builder Buyer Agreements with the Corporate Debtor, and not with M/s. MMT Amusement Parks Pvt. Ltd. Therefore, the absence of M/s. MMT Amusement Parks Pvt. Ltd. does not affect the maintainability of the present petition.
14. The Financial Creditors have placed on record sufficient documents to establish that the debt owed by the Corporate Debtor exceeds the statutory limit of one crore rupees under the Insolvency and Bankruptcy Code (IBC). These documents include a list of Financial Creditors detailing the principal amount invested and the date of default, copies of the Builder Buyer Agreement, Builder Allottee Agreement, or Memorandum of Understanding (MOU) with the Corporate Debtor, copies of proof of payment made by the applicants to the Corporate Debtor, a copy of the One Time Settlement offer made by the director of the Corporate Debtor in 2015.
15. Therefore, it can be concluded that a default has occurred on the part of the Corporate Debtor, who has, till date, neither delivered possession of the allotted units nor refunded the total invested amount along with the interest as stipulated in the Builder Buyer Agreements executed between the Developer and the buyers.

16. In light of the above facts and circumstances, it is ordered as follows: -

a) The Application bearing **IB-457(PB)/2022** filed by the Applicant/Financial Creditors, under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Corporate Debtor is **admitted**.

b) 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, Adjudicating Authority, 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 Securitization 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.

(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.

c) 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.

- d) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.
- e) The Applicant has proposed the name of **Mr. Umesh Gupta** as the Interim Resolution Professional (“IRP”) having address: Ground Floor, 221-A/19, Onkar Nagar B ,Tri Nagar ,North West, Delhi ,110035. His Email id is **umesh@vamindia.in**. His registration number is **IBBI/IPA-001/IP-P00848/2017-2018/11431**. The Applicant has filed a copy of the consent issued by **Mr. Umesh Gupta** in Form 2 and Written Communication by proposed IRP, as per the requirement of Rule 9(1) of the Adjudicating Authority Rules along with the Certificate of Registration and Authorization for Assignment in Form B (*Attached to the Petition as Annexure-5 colly*). Accordingly, **Mr. Umesh Gupta** is appointed as IRP.
- f) In pursuance of Section 13(2) of the Code, we direct the IRP to make a public announcement immediately with regard to the 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.

- g) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.
- h) The IRP shall perform all his functions as contemplated, interalia, by Sections 17, 18, 20 & 21 of the Code. He is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- i) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- j) The Financial Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakh Only) with the IRP to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week 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 IRP and shall be paid back to the Financial Creditor.

- k) 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 IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today.
- l) The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.
- m) The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- n) A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Accordingly, the present petition bearing CP No. **IB-457(PB)/2022** is **admitted**. No order as to cost.

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(DR. SANJEEV RANJAN)

MEMBER (TECHNICAL)

-sd-

(MANNI SANKARIAH SHANMUGA SUNDARAM)

MEMBER (JUDICIAL)