

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI

BENCH- III

IB-1066/ND/2020

IA-5701/2021, 5702/2021, 5703/2021 & 5704/2021

Section: Captioned Petition is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF

Devinder Yadav & Ors.

...Financial Creditor/Applicant

Versus

M/s GRJ Distributors and Developers Private Limited

Registered Address:

64, Scindia House, Connaught Place,
NEW DELHI – 110001

...Corporate Debtor/Respondent

In the matter of 5701/2021

Mr. Mukesh Agarwal

...Applicant

In the matter of 5702/2021

Mr. Devinder Yadav

...Applicant

In the matter of 5703/2021

Mr. Ranganathan Parthiban

...Applicant

In the matter of 5704/2021

Mr. Namit Chawla

...Applicant

Coram:

Shri Bachu Venkat Balaram Das
Hon'ble Member (Judicial)

Shri Narender Kumar Bhola
Hon'ble Member (Technical)

Delivered on:03.06.2022

Appearances:

Financial Creditor : Adv. Piyush Singh and Adv. Aditi Sinha

Corporate Debtor :Adv Sandeep Bhuraria and Adv. Aman Anand

Applicants : Mr. Lokesh Bhola

ORDER

Per: Narender Kumar Bhola, Member (Technical)

1. The captioned application filed by the Financial Creditors in class against the corporate debtor namely, M/s GRJ Distributors and Developers Pvt. Ltd. under section 7 of the IBC, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. The applications IA-



5701/2021, 5702/2021, 5703/2021 and 5704/2021 filed by the applicants for seeking direction of the Hon'ble Tribunal to withdraw as financial creditor in CP (IB)-1066/ND/2020 in view of these homebuyers having sold their units to new buyers.

2. The transaction leading to filing of application under consideration is as follows:

a. It is the case of the Financial Creditor is that they had primarily booked Units in 2013 to 2014 in the project being developed by the Corporate Debtor herein, namely 'Avalon Regal Court' (hereinafter referred to as 'Project') located at Alwar Bypass Road, Bhiwadi, Rajasthan. That vide Allotment Letters, the Financial Creditors were allotted units in the Project after depositing the booking amount in lieu of the Units. It is stated that captioned petition is being preferred by the homebuyers holding 38 units in the project. Total no. of units in the project as per the filing before RERA by the corporate debtor is 338 and the present application is being preferred by over 10% of the total allottees in compliance of amended provisions.



b. It is submitted that the payments were made by the financial creditors as per the agreement terms. As per Article 4 of the Agreement, the corporate debtor was liable to give possession of the units to the financial creditors within a period of 42 months from the execution of the Apartment Buyer's Agreement, thus corporate debtor was obligated to deliver the possession of the Units by January 2018, tentatively. It is further stated that Corporate Debtor failed to provide the possession of the Units within the stipulated time. Furthermore, there was an additional grace period of 6 (Six) months given to the Corporate Debtor to provide the possession of the Units and the Corporate Debtor failed to provide the possession of the Units even in the extended time i.e., maximum by July 2018. It is further stated that the Financial Creditors had made payments aggregating to a substantial portion of sale consideration for the Units. The Corporate Debtor unilaterally kept extracting money from the Financial Creditors without offering the equivalent returns in terms of the timely construction milestones and eventually with the timely possession of



the Units. The Corporate Debtor has enjoyed an interest free loan, as they have gone about collecting money from the financial creditors without adhering to their contractual obligations and the financial creditors has also availed the loan to pay for the total consideration of the units. The corporate debtor was duty bound to deliver the possession of the unit to the financial creditors by July 2018, however, the Corporate Debtor failed to deliver the possession of the Unit.

- c. It is submitted that the money given by the allottees was treated as commercial effect of borrowing under IBC, 2016 as the money paid by Financial Creditor had been raised in lieu of the real estate project. It is stated that in view of the considerable delay being caused by the Corporate Debtor in completion of the project and the same having frustrated the purpose of purchasing the Unit, the Financial Creditors have even asked for the refund of their monies. Despite the Financial Creditors asking for refund and compensation the Corporate Debtor has failed to revert on the queries of the Financial Creditors. The Financial Creditors being bona fide



Creditors have a vested interest in the Project. However, to a great detriment to the interests of the Financial Creditors the Corporate Debtor has failed to portray a similar interest in the Project, which had been touted by the Corporate Debtor as being a great and luxurious residential Project. It is averred that in terms of the Rajasthan Real Estate (Regulation and Development) Rules, 2017, the corporate debtor is liable to refund the principal amount with 9.8% p.a., which amounts to Rs.14,61,80,026/-. It is further submitted that as per the judgment of Hon'ble NCLAT in the matter of Flat Buyers Association Winter Hills-77, Gurgaon v. Umang Realtech Private Limited through IRP & Ors bearing company Appeal (AT) (Insolvency) No.926/2019, the CIRP may be initiated in a particular project (in this case 'Avalon Regal Court') in order to ensure the viability of the real estate company.

- d. At the end, it is averred that since the petitioner falls within the definition of financial creditor as defined u/s 5(7) of the Code, there is no discrepancy in the petition, has also fulfilled the requirement of law. There is default



on the part of the corporate debtor and there is no disciplinary proceeding pending against the proposed IRP. Hence, the petition may be admitted in view of the finding of the Hon'ble Supreme Court in the case of Innoventive Industries Ltd. vs. ICICI Bank and Another (2018) 1 SCC 407. It was held that the moment the Adjudicating Authority is satisfied that there is default being committed by the Corporate Debtor, Application is complete and no disciplinary action is there against IRP then the Adjudicating Authority has to admit the Petition u/s 7 of IBC, 2016.

3. The Corporate Debtor has filed its reply and submitted that the Petitioners have failed to fulfil the threshold as laid down under the second proviso to section 7(1) of IBC, 2016 for initiating the CIRP. It is stated that from 2017 to 2020 there were no means to update the details of the projects registered with Rajasthan RERA on their website. Keeping this issue in regard, the Rajasthan RERA vide its Order dated 1.01.2021 provided means for updating information at the website of the RRERA through 'Quarterly Progress



Report'. Further, vide another Order dated 4.01.2021, a window till 31.03.2021 has been provided to the promoters for updating details of their real estate projects on the website of the RRERA. It is submitted that the Respondent Company had no means at its end to update information at the RERA website even at the time of filing of the instant Application. However, the Respondent Company is in the process of submitting the requisite details and updating information through 'Quarterly Progress Report' at the website before the deadline of 31.03.2021. It is stated that the total number of units sold with respect to the said Project is 420 (Four Hundred Twenty). However, the fact that the Application is being preferred by 38 Unit holders and 10% of the total number of units sold i.e., 10% of 420 would be 42, and the fact that the Application has been filed by 38-unit holders, since the 10% of 420 would be 42, therefore, the petitioners have failed to fulfil the threshold laid down under second proviso to Section 7(1) of the I&B Code. In view of the above, the application is liable to be dismissed. It is averred that the default has actually been done by the allottees of the project and payment were not

made as per schedule mutually agreed at the time of execution of the Apartment Buyers Agreement. Therefore, the petition is liable to be dismissed particularly in the light of Hon'ble Supreme Court in the matter of Pioneer Urban Land and Infrastructure Limited and Anr. Vs. Union of India & Ors. in WP (C) No. 43/2019. The relevant extract of the judgment is as follows:

“57...] We may mention here that once this prima facie case is made out, the burden shifts to the promoter/ real estate developer to point out in their reply and in the hearing before the NCL T, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief, including payment of compensation and/or refund, entitling a dismissal of the petition.”

It is further averred that all the proceeds raised by the Corporate Debtor were utilised for development of the project. The Corporate Debtor further argued that project cannot be completed due to certain reasons like ban on sand/bajri mining in the state of Rajasthan, frequent bans on construction activity in the area of Delhi-NCR, Covid-19

Pandemic. It is finally submitted that grave prejudice would be caused to the Corporate Debtor if the applications were not rejected.

4. Before going into the merits of the captioned petition, it is imperative to discuss the IAs filed by the applicants. The captioned petition is filed on 08.10.2020. All the four interlocutory applications were filed on 08.12.2021. It is imperative to mention that 4 unit holders out of 38 have filed IAs 5701/2021, 5702/2021, 5703/2021 and 5704/2021 seeking direction of the Hon'ble Tribunal to withdraw as financial creditor in CP (IB)-1066/ND/2020 in view of these homebuyers having sold their units to new buyers. Here, it is important to discuss that these interlocutory applications were filed one day prior to the final arguments in the captioned petition. In order to deal with the consequences to be followed in case following 4 IAs are allowed and to see whether there will be any impact on the maintainability of the main petition, it is pertinent to discuss the Hon'ble Supreme Court finding in the Manish Kumar vs. Union of India and Anr (Writ Petition (C) No. 26 of 2020). It was held that if an allottee is able to, in other



words, satisfy the requirements as on the date of the presentation, the requirement of the impugned law is fulfilled. For the sake of convenience, the relevant paragraph of the judgment is reproduced:

“143. In the matter of presentation of an application under Section 7, if the threshold requirement, under the impugned provisos, stands fulfilled, the requirement of the law must be treated as fulfilled. The contention, relating to the ambiguity and consequent unworkability and the resultant arbitrariness, is clearly untenable and does not appeal to us. If an allottee is able to, in other words, satisfy the requirements, as on the date of the presentation, the requirement of the impugned law is fulfilled...”

The applicants in aforesaid four IAs have admittedly transferred their interest in respective units in favour of third parties against proper consideration/documentation. Therefore, we allow their applications, and henceforth the said homebuyers shall not form part of applicants before us. However, as on filing of the present petition, their presence shall be duly counted in and recognised for the purpose of limit of 10 % homebuyers. Now the question before this Authority is whether 38-unit holders fulfil the mandate of amended Section 7 of IBC, 2016.

5. The Financial Creditors also filed the written submission and reiterated all the facts as already stated in the petition

and further submitted that FCs had filed the Section 7 Application on 08.10.2020. The information annexed as Annexure P-2 with the Section 7 Application reflecting the total number of Units sold in the Project as 336 is the information that was provided by the CD itself with Rajasthan RERA which was available as on the date of filing this application. Also, the date of the said information can be evidenced from the date appearing at the top left of Annexure P-2 at page 106 of the Section 7 Application. Further, the RERA Order dated 01.01.2021 relied on by the CD had only started an online facility for uploading the QPRs and the CD was at all times obligated under the RERA Act, 2016 to submit the QPRs in paper/physical form Hence, the CD had clearly failed to submit the QPRs from 2017 to 2020 and has only submitted the same belatedly after 4 years in 2021 (after filing of this Application), whereas the FCs had come armed with the information as was provided by the CD with RERA as on the date of filing the Section 7 Application. Be that as it may, it was the CD that had failed to submit the QPRs with RERA as on the date of filing the Section 7 Application and the FCs cannot



be made to suffer when evidently it is the CD that is in default. Also, it is pertinent to note that it is the admitted case of the CD that they had filed the QPRs only in March 2021 for all the quarters from July 2017 till March 2021 and now showing the total allotment to be 420. It is pertinent to mention that these QPRs were filed belatedly after this Section 7 Application was filed on 08.10.2020. In the above quoted judgments of the Hon'ble Supreme Court in Pioneer and Manish Kumar, it has been held that the information provided by the developer to RERA for a real estate project shall act as an information utility for the purposes of IBC. It is further argued that there is no default in payment and the amount were paid as the construction linked plan, therefore, the defence of the CD is sham. Hence, the petition is fit for admission.

6. The Corporate Debtor also filed written submission and raised all the contentions as already raised in the reply and further submitted that to showcase the actual total no. of units sold by the Corporate Debtor pertaining to the Project as on the date of filing of the Insolvency Application an Interlocutory Application bearing No. 3984 of 2021

("Interlocutory Application") was filed on 02.09.2021. Through the said IA, the Quarterly Progress Reports ("QPR(s)") from July-September 2017 till January- March, 2021 in order to demonstrate the documentary evidence on the number of units sold as on the date of filing of the Instant Application and the same application was taken on record vide order dated 08.10.2021. It is argued that from the contents of IA-3984/2021, it is clear that the total units sold by the corporate debtor in the month of October 2020 i.e., in the month of filing of captioned petition is 420 units. Hence, the petition is not maintainable in the light of amended section 7 of IBC, 2016. It is further stated that the burden of proof rests on the allottees to gather true and correct information regarding the number of units sold as on the date of the filing of Insolvency Application. Furthermore, force majeure conditions have also led to delay in projects.

7. This Adjudicating Authority has perused the pleadings and arguments advanced by the counsel on behalf of Financial Creditors and Corporate Debtor. The question before this Authority is whether as on date of filing the present petition

the financial creditors fulfil the requirements of amended section 7 of IBC, 2016 or not. From the perusal of the contents of petition, it is clear that the petition has been filed by the Petitioner holding 38 units. Now, it is to be seen whether 38-unit holders constitute 10% of the total units of project as on date of filing of captioned petition. The only platform through which the petitioners can get the details about the project is from RERA website and admittedly, as per the details available on the date of filing of captioned petition on the Rajasthan RERA website was that the total units in the project is 338. Furthermore, it is the duty of the corporate debtor to keep updated list of the total units of the project on RERA website. However, the corporate debtor has failed to produce any evidence to show that it has tried to get the updated list published on the RERA website before the filing of captioned petition or in the alternative filed hardcopy of the updated total units of the project before Rajasthan RERA. Therefore, we conclude that as on the date of filing of captioned petition i.e., 8.10.2020 the total units in the project is 338 and the financial creditors have crossed the threshold of 10% as mandated by the law,



as there being total of 38 homebuyers collectively filing the present petition. As per the agreement, the corporate debtor was supposed to give possession of units on or before July, 2018, which it defaulted, hence, in light of the catena of judgments of Hon'ble Supreme Court and facts of the present case this Adjudicating Authority is inclined to **admit** this application and initiate the process of CIRP of the 'Avalon Regal Court' (hereinafter referred to as 'Project') located at Alwar By Pass Road, Bhiwadi, Rajasthan of the Corporate Debtor. The financial Creditor has also proposed the name of the Resolution Professional for appointment of IRP.

8. Mr. Gaurav Katiyar having Regn. No.- IBBI/IPA-001/IP-P00209/2017-18/10409 (Email ID - cagauravkatiyar@gmail.com) is hereby appointed as IRP as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as evident from the Form-2 dated 05.10.2020. The IRP is directed to take charge of the said project of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC,



2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

9. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all the following, namely:

- 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's 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 (54 of 2002);

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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.

10. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

11. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

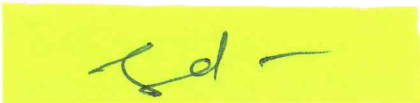
12. The financial Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.



13. The financial Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.
14. Further each of applicant representing 34 units shall provide initial finance to tune of Rs. 5,883 totalling to Rs. 2,00,000/- (Rs. 2,00,000 divided by 34) to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately its constitution by the IRP.
15. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.
16. Further in view of findings given in para 4 above all the four IAs i.e., 5701/2021, 5702/2021, 5703/2021 and 5704/2021 stands **allowed**.



17. The order is pronounced by this Adjudicating Authority
through Virtual Hearing



(BACHU VENKAT BALARAM DAS) (NARENDER KUMAR BHOLA)
MEMBER (JUDICIAL) MEMBER (TECHNICAL)

