

**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**CP (IB) – 350 (PB)/2021
IA-946/2023**

**ORDER UNDER SECTION 7 OF THE INSOLVENCY
AND BANKRUPTCY CODE, 2016 R/W RULE 4 OF
THE INSOLVENCY AND BANKRUPTCY (APPLICATION
TO ADJUDICATING AUTHORITY) RULES, 2016.**

IN THE MATTER OF:

Mr. AMIT JOSHI & Ors

..... Applicant/Financial Creditor

Versus

Gayatri Infra Planners Pvt. Ltd

..... Respondent/Corporate Debtor

REGISTERED ADDRESS: Shop No.
46, Municipal Market Conn. Place,
New Delhi, Central Delhi CIN No.:
U45400DL2011PTC300950

ORDER PRONOUNCED ON: 28.03.2023

CORAM:

**JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Financial : Adv. Pooja M. Saigal, Adv. Anshul Bajaj
Creditor & Mr. Simrat Singh Pasay
For the Corporate : Mr. U.K. Chaudhary, Sr. Adv., Adv.
Debtor Sidharth Chopra, Adv. Vineet Kumar Sid,
Adv. Abhishek Anand, Adv. Gaurav Mitra
& Adv Manas Bhatnagar

ORDER

PER : AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

1. This is an application, jointly filed by **Mr. Amit Joshi & Others** as homebuyers (Financial Creditor/Applicant) 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., M/s Gayatri Infra Planners Pvt. Ltd, for a total financial default of **Rs. 25,13,10,207 (Rupees Twenty-Five Crore Thirteen Lakhs Ten Thousand Two Hundred and Seven Only)**.
2. The Corporate Debtor was Incorporated on **16/12/2011**, having CIN:U45400DL2011PTC300950, under the Companies Act, 1956, with the purpose of doing business of Building Completion (Includes activities that contribute to the completion or finishing of a construction). The registered office is at Shop No. 46, Municipal Market Conn Place, New Delhi Central, Delhi- 110001, India. 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 P-3**.
3. The present application was filed on 16.06.2021 before this Adjudicating Authority on the ground that the Corporate Debtor is currently in default to 90 financial creditors for an aggregate amount of **Rs. 25,13,10,207 (Rupees Twenty-Five Crore Thirteen Lakhs Ten Thousand Two Hundred and Seven Only)**. which is the amount paid by

the said financial creditors in respect of their allotments. A copy of the workings for computation of amount and days and details of default to the financial creditors, their booking details, amounts paid etc. have been set out in detail in a tabulated statement marked as **Annexure P-1** which may be treated as part and parcel of the present application as a part of details required to be disclosed under **Part IV**.

4. It is submitted that the present petition is being preferred on behalf of more than 100 allottees, total 113 in number, through the petitioners herein, who have been duly authorized to institute and prosecute the present petition on behalf of other allottees of the project.
5. It is submitted that the Corporate Debtor is in default of handing over possession of the allotted flats to the petitioners herein, also that the default amount towards the Petitioners No. 1 to 5 itself exceeds Rs. 1 Crore i.e. Rs. 1,97,29,320 (Rupees One Crore Ninety-Seven Lakhs Twenty-Nine Thousand Two Hundred and Thirty-One Only) and meets the threshold required for initiation of corporate insolvency resolution process in respect of the Corporate Debtor.
6. It is submitted that the default of the Corporate Debtor is computed on the basis of amounts already paid to the Corporate Debtor in terms of the Builder Buyer Agreements and the applicant as well as other financial creditors reserve their right to claim additional interest as well as other amounts as part of their claims as and when the interim resolution professional is appointed by this Tribunal.

7. It is submitted that the Corporate Debtor had undertaken to complete the construction of the individual flats to each petitioner within 40 months from the date of execution of the allotment agreement with a 6 month grace period and that the said period of 40 months as assured has long expired for most home buyers and even after giving the Corporate Debtor the extension of 6 months as per the Agreement, the default in completing the construction and handing over of possession has occurred much prior to 24th March, 2020.
8. It is submitted that the default/debt contended by the petitioners has arisen on account of failure on part of the Corporate Debtor to complete construction and hand over possession of the residential flats and towers with all amenities as promised by the assured date of possession as identified/specified in the Builder Buyer agreement.

Submissions made in Reply by the Corporate Debtor

9. That the proviso of Section 7 of the Insolvency & Bankruptcy Code, 2016 clearly says that an application for initiating corporate insolvency resolution process against the Corporate Debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten percent of the total number of such creditors in the same class, whichever is less. The applicants have themselves admitted in Part IV para 2 of the present application that out of the 103 (correct number is 113) financial creditors the corporate debtor is in default to 90 financial creditors and therefore by the said admission the present application is not maintainable as it has not been instituted by more than 100 home buyers and thus deserves to be set aside on this ground alone.

10. That it is pertinent to mention that out of the 113 Applicants admittedly, the possession of close to 15 of the above-mentioned allottees is scheduled to be delivered in the year 2022-2023 and thus their claim in the present application is pre-mature and the present application deserves to be set aside on this ground alone.
11. That as far as the remaining 90 allottees/applicants are concerned the case of most allottees/applicants is time barred under Article 137 of the limitation act, as the present application has been preferred by them after 3 years from the alleged date on which the right to file the present application accrues and thus the present application deserves to be dismissed on the grounds of limitation.
12. That the aforesaid fact can be further corroborated from a bare perusal of Part IV para 2 of the present application wherein the applicants have partially admitted that default has occurred much prior but have consciously not specified any date upon which the alleged default had occurred so as to wriggle out of the period of limitation as enumerated under Article 137 of the Limitation Act i.e. of 3 years.
13. That it is further submitted that it is a well settled law that an 'Allottee' of Real Estate comes within the meaning of 'Financial Creditor' but if such an allottee does not pay the full amount, then in that eventuality the allottee cannot allege default on the part of the 'Corporate Debtor' and in the present application some of the allottees have not paid even paid the entire sale consideration and the said allottees/applicants do not fall within the ambit of Financial Creditors. A Copy of the list of allottees who have

not paid the entire sale consideration is also annexed and marked as **Annexure R-4**.

14. That the Hon'ble Supreme Court in the case of "*Pioneer Urban Land and Infrastructure Limited & Anr*" noticed the relevant provisions of the RERA including the Rights and duties of allottees as mentioned in Section 19 of the RERA and that the allottees are themselves defaulters and would, therefore, on reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the present petition.
15. That it is further submitted without prejudice that the alleged delay in the present case is not solely attributable to the 'Corporate Debtor' but is due to Force Majeure Clause which is reproduced as herein (clause j of the allotment letter) as:

*War and hostilities of war, riots, bandh, act of terrorism or civil commotion. **The promulgation of or amendment in any law, rules or regulation or the issue of any injunction, court order or direction from any government authority that prevents or restricts the party/company from complying with any other authority** or if any competent authority refuses, delays, withholds, denies the grant of necessary approvals for the said complex/said building or if any matters, issues relating to such approvals, permissions, notices, notifications by the competent authority becomes subject matter of any suit/writ before a competent court or any*

other Quasi-Judicial Body or for any other reason whatsoever.

16. That it is submitted without prejudice that the Hon'ble National Green Tribunal in October, 2017 and Hon'ble Supreme Court in 2018 & 2019 issued a slew of directions to deal with the worsening air quality in Delhi and neighboring states, banning construction and industrial activities and the entry of trucks and the order of Supreme Court was operational till February, 2020 and thereafter a complete lockdown was imposed by the Government of India due to pandemic situation of Covid-19 during which construction was not allowed to be carried and thus the Corporate Debtor cannot be held responsible for the delay in handing over possession.
17. It is submitted that the delay in handing over possession was not on behalf of the Corporate Debtor but due to the court/government orders and the present application is not maintainable and a similar view has also been taken by Hon'ble NCLAT in the case of "**Parvesh Magoo v. IREO Grace Realtech Pvt Ltd.**" wherein the Hon'ble NCLAT dismissed the application of the allottee noting the force majeure and the fact that the apartment of the allottee was ready for possession.
18. It is submitted that despite the aforesaid hindrance in carrying out the construction, the Corporate Debtor has almost completed the construction of the said project and shall soon initiate the process of handing over possession to valid allottees and if the present application is allowed then not only will the Corporate Debtor suffer but also the other bonafide allottees will suffer as the process of handing over possession would get delayed.

19. It is submitted that the Hon'ble Supreme Court in the case of "Pioneer Urban Land and Infrastructure Ltd v. Union of India, (2019) 8 SCC 416", para 56 specifically stated that ***"in a Section 7 application made by an allottee, the NCLT's satisfaction will be with open eyes open- the NCLT will not turn a Nelson's eye to legitimate defenses by a real estate developer"*** and therefore this Hon'ble Tribunal can dismiss an application if the real estate developer raises viable defenses just like in the facts of the present case.

IA-946/2023

20. IA- 946/2023 has been filed by the Corporate Debtor on 09.02.2023 seeking the following relief:

- a. *Allow the present application and pass an appropriate direction/order keeping the matter sine die adjourned in view of the oral settlement arrived between the parties.*
- b. *Pass an appropriate direction/order keeping the present matter in abeyance in view of the oral settlement arrived between the parties.*
- c. *Pass such other or further order(s) as may be deemed fit and proper in facts and circumstance of the present case.*

This Adjudicating Authority had on 31.01.2023 after hearing the parties reserved the section 7 application i.e CP(IB) 350(PB)/2021 for pronouncement of order, Thereafter, on 01.03.2023, IA-946/2023 was listed for hearing in which we passed the following order:

"Ld. Counsels for the parties are present.

*On the assurance given by Ld. Sr. Counsel Mr. U.K. Chaudhary that the Corporate Debtor is taking steps to settle the matter with Petitioners, which is agreed to by Ld. Counsel for the Petitioners, we are inclined to postpone pronouncement of order in main **(IB)-350(PB)/2021** up to 27.03.2023.*

List the main matter along with the pending application i.e. IA-946/2023 for a physical hearing on 27.03.2023.”

21. Despite giving opportunity to the Corporate Debtor for settling with the applicant, he has not filed a settlement agreement. Ld. Counsel Mr. Abhishek Anand appeared through VC on behalf of the Corporate Debtor in the hearing on 27.03.2023 and stated that he has filed an affidavit giving the present status and progress of the project and sought another 10 days time to settle the matter with the petitioners. On the other hand, Ld. Counsel Ms. Pooja Saigal appeared on behalf of the applicant/petitioners and stated that no settlement has been reached. This Adjudicating Authority is not persuaded by the Corporate Debtor to grant any further time.

Accordingly, we have decided to proceed further with the application based on the records and pleadings available with us.

Analysis and Findings

22. We have heard the Ld. Counsel for the petitioner and respondents and perused the documents submitted. We find that the present petition is jointly filed on behalf of more than 100 allottees, total 113 in number and therefore

satisfies the minimum threshold required for filing a section 7 petition in case of real estate allottees. The details of homebuyers/ financial creditors who have joined the present petition, in respect of whom default has occurred as on date of filing of the petition is attached as Annexure P-1 (Page-53) of the petition.

23. The project was to be completed within 40 months from the date of booking with an extension of 6 months. Corporate Debtor has defaulted in completing the construction and delivering the possession on time. The stand taken by Corporate Debtor in his reply that the claims of most of the homebuyers are time barred as per Article 137 of Limitation Act cannot be accepted as it is very clear that in case of home buyers/ 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.

In view of the above, we are inclined to allow this Petition

24. 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:

“The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the application to rectify the defect within 7 days receipt of a notice from the adjudicating authority.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of 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 it may reject an application and not otherwise”

25. Therefore, we are satisfied that the present petition is maintainable and is within the period of limitation. Also, that the financial debt is due and there is a default in payment of debt.

ORDER

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

- i. The Application bearing **C.P. (IB) – 350/(PB)/2021** filed by Mr. Amit Joshi and others, the Applicant/(FC), under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **GAYATRI INFRA PLANNER PRIVATE LIMITED**, the Respondent/(CD), is hereby admitted.
- ii. **IA-946/2023 is rejected.**
- iii. As a consequence of the Application CP (IB) 350(PB)/2021 being admitted in terms of Section 7 of the Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.

- iv. The Applicant/(FC) has proposed the name of **Mr. Nilesh Sharma** as the IRP. His email id is nilesh.sharma@rrrinsolvency.com. His registration number is **IBBI/IPA-002/IP-N00104/2017-18/10232**. He has filed his written communication, **(Page 576, Volume 3 of the Application)** as per the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or in the (ICSI) Institute of Insolvency Professional. In addition, further necessary disclosures have been made by Mr. Nilesh Sharma as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of the Section 7(3)(b) of the code. Hence we appoint **Mr. Nilesh Sharma** as the IRP of the Corporate Debtor.
- v. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case may be 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.
- vi. During the CIRP period, the management of the CD shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the IBC. The officers and managers of the CD 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 opportunities in this regard.
- vii. The IRP is expected to take full charge of the CD's assets, and documents without any delay whatsoever. He is also free to take

police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.

- viii. 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.
 - ix. The FC shall deposit a sum of **Rs 2,00,000/- (Rupees Two Lakhs only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to the approval of the Committee of Creditors (CoC).
 - x. In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the FC, the CD, the IRP and the Registrar of Companies, NCR, New Delhi, by Speed Post and by email, at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of the CD and specific mention regarding admission of this petition must be notified.
 - xi. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
26. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

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**RAMALINGAM SUDHAKAR
(PRESIDENT)**

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**AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)**