

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI BENCH-II**

I.A.2142/ND/2020

IN

Company Petition No. (IB)667(ND)/2019

IN THE MATTER OF:

M/s. Renu Proptech Pvt. Ltd.

...Financial Creditor

Versus

M/s. Red Topaz Real Estate Pvt. Ltd.

...Corporate Debtor

AND IN THE MATTER OF:

- 1. Abhishek Garg**
- 2. Anita Garg**
- 3. Neha Garg**

**All resident of:
N-3, Kailash Colony,
New Delhi-110048**

- 4. Parul Mittal**
House No. 95 H-4/5, Suvidha Kunj
Pitampura Delhi-110034

...Applicants

Versus

M/s. Red Topaz Real Estate Pvt. Ltd.
Through Resolution Professional
Sh. Vekas Kumar Garg
Gopi Ram Building Khasra No.300,
Sultanpur Village, New Delhi110030

...Respondent

Order Delivered on: 26.08.2020

SECTION : 60(5) of the Insolvency and Bankruptcy Code, 2016

CORAM:

CH. MOHD. SHARIEF TARIQ, MEMBER (J)

SHRI. L. N. GUPTA, HON'BLE MEMBER (T)



PRESENTS:

For the Applicants : Mr. Piyush Singh, Mr. Aditya Parslia and
Mr. Akshay Shrivastava, Advocates
For the Respondent : Mr. Rakesh Kumar, Ms. Preeti Kashyap and
Mr. Vekas Garg, Advocates

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

IA No. 2142/2020 is filed by Mr. Abhishek Garg, Ms. Anita Garg, Ms. Neha Garg and Ms. Parul Mittal (hereinafter referred as 'Applicants') against Sh. Vekas Kumar Garg, Resolution Professional of the Corporate Debtor i.e., Red Topaz Real Estate Pvt. Ltd. (hereinafter referred as 'Respondent').

2. That the prayers made in IA No. 2142/2020, which is taken up for consideration, are reproduced below :

- "i) Allow the instant Application.*
- ii) Direct the Resolution Professional to freshly adjudicate the claim of applicants and include them in the list of the Financial Creditors in a class, and/or*
- (iii) Direct the Resolution Professional to produce and supply the documents, if any, on the basis of which the claim of the Applicants was rejected to the extent that they would not be treated as Financial Creditors in a Class; and/or*
- (iv) Direct the Resolution Professional to invite fresh resolution plans in accordance with law after the Applicants are included in the list of Financial Creditors in a Class; and/or*



(v) *Direct the Resolution Professional to defer the meeting of Committee of Creditors with respect to putting the already received Resolution Plans to vote before the already constituted Committee of Creditors till the adjudication of the present application; and/or.....”*

3. Facts in brief are that the Financial Creditor, M/s Renu Propotech Pvt. Ltd. filed an application bearing No. IB-667(ND)/2019 under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, M/s Red Topaz Real Estate Pvt. Ltd. The said application was admitted by this Tribunal vide Order dated 23.08.2019 and Mr. Vekas Kumar Garg was appointed as the Interim Resolution Professional (IRP).

4. It is submitted by the Applicants that in the year 2015, the Corporate Debtor approached them to invest in its project “NINEX MALL” being developed at Sector 70A in Gurugram, Haryana. The building plan for the Ninex Mall included a shopping Mall, office and a hotel.

5. It is further submitted that the Applicants agreed to the proposal of the Corporate Debtor and invested their money in the aforesaid project. It is added that the Applicants were allotted various units in the project. The details of the allotments as submitted by the Applicants and as reflected in the MoU dated 10.06.2019 are reproduced overleaf :



Sl. No	Name of the Allottee	Date of Allotment	Unit No.	Total Consideration (In Rs.)	Total Amount Paid (In Rs.)
1.	Abhishek Garg	24.02.2016	G-38	1,47,40,800	45,00,000/-
2.	Abhishek Garg	24.02.2016	G-65	60,60,600/-	15,00,000/-
3.	Abhishek Garg	24.02.2016	G-66	79,80,000/-	30,00,000/-
4.	Abhishek Garg	24.02.2016	G-79	1,23,35,400/-	40,00,000/-
5.	Abhishek Garg	21.10.2016	G-80	1,22,06,700/-	50,00,000/-
6.	Abhishek Garg	21.10.2016	F178	68,80,900/-	25,00,000/-
7.	Abhishek Garg	21.10.2016	F179	98,43,400/-	34,35,000/-
8.	Abhishek Garg	Un-Allotted			56,43,000/-
9.	Anita Garg	14.01.2015	F101	2,63,48,800/-	95,64,672/-
10	Anita Garg	14.01.2015	F101A	2,04,97,600/-	74,39,542/-
11	Neha Garg	14.01.2015	G-78	94,93,900/-	34,46,077/-
12	Parul Mittal	14.01.2015	G-56	2,09,64,500/-	76,09,652/-

6. It is added by the Applicants that one of the units reflected at Sl. No. 8 of the table was not allotted. It is further stated by them that the total consideration amount of the allotted and one unallotted unit was Rs.14,73,52,600, out of which the Applicants paid an amount of Rs.5,76,37,943 only.

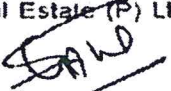
7. It is further added by the Applicants that there was a change in the building plan and as a result, the hotel having 83 Rooms was being converted into Service Apartments. It is added that the Corporate Debtor thereafter approached the Applicants with another proposal of allotting Service Apartments against the Units (as per the table above) allotted in the 'NINEX MALL'. After having agreed to the proposal, the Corporate Debtor and the Applicants entered into a Memorandum of Understanding dated 10.06.2019. The relevant clauses of the MOU are reproduced over leaf :

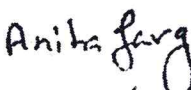




NOW THIS MOU WITNESSETH AS UNDER:

- 1) AKG Group has understood that presently the buildings plan for NINEX MALL is for a shopping mall, office & hotel and they have also understood that the Developer is trying to convert the building plans of the said NINEX MALL into Service Apartments in place of Hotel having 83 rooms.
- 2) The parties herein have agreed to take service apartments as above said in lieu of allotted units in the same Ninex Mall with the specifications as shown to individuals in the AKG Group and accepted by them.
- 3) The allotment of allotted units shall become cancelled with the issuance of Letter of Allotment individually for each service apartment in Ninex Mall.
- 4) The amount paid by the individuals in AKG Group to the Developer shall be adjusted towards each service apartment and the differential amount payable by the individuals in AKG Group shall be paid by them to the Developer on receipt of intimation regarding receipt of Occupation Certificate from the Director General Town and Country Planning, Haryana, Chandigarh.
- 5) AKG Group assures the Developer that the allotted units which is being now surrendered are free from all registered & unregistered encumbrances, prior sale/allotment, hypothecation, mortgage, WILL, Gift, attachments, court orders, litigation, lien etc. and shall remain so till the execution of Conveyance Deed.
- 6) That the individuals in AKG Group shall return all the original documents pertaining to the allotted units to the Developer at the time of issuance of Letter of Allotment for service apartment in lieu of it.
- 7) The physical possession of the service apartments shall be given to the individuals in AKG Group Second Party only after receipt of Occupation Certificate from the concerned authorities.
- 8) It is agreed between the parties herein that in case the DEVELOPER fails to get the said buildings plan converted into Service Apartments in place of Hotel, the individuals in AKG Group will be provided or allotted 40% stake in the hotel presently approved under the said buildings plan.

For Redtopaz Real Estate (P) Ltd.


 Director/Authorised Signatory


 Anika Garg

 Neha Garg


Page 4 of 5

8. It is submitted by the Applicants that in addition to the aforesaid MOU, one 'Addendum to the MoU' dated 12.06.2019 was also executed between the Applicants and the Corporate Debtor, wherein it was agreed that in case the Developer fails to deliver either the allotted commercial units or 40 Service Apartments or 40% stake in the hotel project as far as its area is concerned, the Developer, (the Corporate Debtor) shall refund the Applicants, the total amount invested by them along with 21% interest per annum from the date of receipt of money.

9. It is stated by the Applicants that since the CIR Process was initiated against the Corporate Debtor, a Public Announcement was made by the Resolution Professional for inviting the claims, pursuant to which', the Applicants filed their claim in form CA with the Respondent.

10. It is further stated by the Applicants that that the Respondent after verifying the said claims informed the Applicants that they can't be treated as 'Financial Creditor in Class' and will be treated as 'independent Financial Creditors'. It is added that the Respondent, in a mechanical manner, has denied the said request of the Applicants and till date, he has not provided any justification for taking such a decision of treating the Applicants as independent Financial Creditors.



11. That the Respondent through its written submissions has opposed the application filed by the Applicants and added that the Applicants are undisputedly related parties to the Corporate Debtor.

12. It is submitted by the Respondent that the 12 units, for which the Applicants are agitating about, were also subject to the double allotment by the Corporate Debtor. Out of the said 12 units, some of the units were double sold or mortgaged to other parties.

13. It is further stated by the Respondent that the MoU dated 10th June 2019 and the Addendum to the MoU dated 12th June 2019 seem to be of suspicious nature as these were executed just two months prior to passing of the CIRP order of the Corporate Debtor on the 23rd August 2019.

14. That the Respondent while placing emphasis on the 'Addendum to the MOU' dated 12.06.2019, submitted that the Applicants are entitled only for the monetized claim since the other obligations are not met by the Corporate Debtor as mentioned in the addendum dated 12.06.2019. It is added by him that the hotel has not been constructed and moreover, no stake in lieu of such a small amount can be allotted to the applicants by the Respondent. In view thereof, as per the terms of 'Addendum of MoU', the Applicants at best can be given a monetized claim. The relevant extracts of the 'Addendum to MoU' are reproduced below :



"1) The parties to the Memorandum of Understanding (MOU) have agreed, confirmed and accepted that in case the Developer fails to delivery either the commercial units as above said or 40 service apartments or 40% stake in the hotel project as far as its area is concerned, the Developer shall refund to the individuals in the AKG Group along with interest @21% p.a. from the date of receipt of money from them, after deducting applicable taxes, if any."

15. During the Course of hearing, as regards the objection pertaining to double allotment and subsequent mortgage, the Ld. Counsel appearing on behalf of the Applicants submitted that the Applicants were the first ever allottee of the allotted Units.

16. Since the written submissions filed by the Respondent did not disclose the full factual position, this Bench had sought the following clarifications from the Respondent on 17.08.2020 :

"1. RP in his submissions has indicated that out of the 12 Units allotted to the Applicants, some of the units were double sold or mortgaged to other parties. In this context, the RP shall specify :

- (a) The Units in which double sale or mortgaged is documented.*
- (b) The Units out of (a) in which the Applicants are the first allottee.*
- (c) The Units in which the applicants are the second or subsequent allottees.*
- (d) The Units in which there is a clear allotment in favour of the Applicants.*

2. Pursuant to execution of the MoU on 10.06.2019 and addendum to MoU on 12.06.2019, whether any letters allotting Service Apartments were issued by the CD in favour of the Applicants. If yes, the same be placed before this Bench.



3. Whether any letters of cancellation of the commercial units allotted in favour of the Applicants by the CD in 2015 and 2016 were issued?

4. RP to provide aforesaid clarifications by way of Affidavit within three days.”

17. That the Respondent filed its Affidavit on 21.08.2020 and submitted in response to the query at Sl. no.1 (a), that in respect of the following units allotted to the Applicants, there were double allotment or mortgage :

Sr. No.	Floor	Shop No.	Units as claimed by the Applicants	Other Buyer / Mortgage
1	Ground	G-56	Abhishek Garg DOB - 14.01.2015	1. BDR Finvest Private Ltd. (DOM - 18/05/2018) 2. Sandeep & Preeti Puri (DOB - 11/07/2019) - However, claim Not Received by the Resolution Professional
2	Ground	G-65	Abhishek Garg DOB 24.02.2016	BDR Finvest Private Ltd. (DOM - 18/05/2018)
3	Ground	G-66	Abhishek Garg DOB 24.02.2016	BDR Finvest Private Ltd. (DOM - 18/05/2018)
4	Ground	G-78	Neha Garg DOB 14.01.2015	BDR Finvest Private Ltd. (DOM - 18/05/2018)
5	Ground	G-79	Abhishek Garg DOB 24.02.2016	BDR Finvest Private Ltd. (DOM - 18/05/2018)
6	Ground	G-80	Abhishek Garg DOB 21.10.2016	BDR Finvest Private Ltd. (DOM - 18/05/2018)
7	First	101	Anita Garg DOB 14.01.2015	Jitendra & Manu Nayyar (DOB - 30/07/2019)

• The abbreviations DOM has been used to show the date of mortgage wherein any charge has been create on such unit in case of any credit facility being availed

• The abbreviations DOB has been used to show the date of booking in case of sale of unit

18. The Respondent has further submitted in its Affidavit, in response to the query at Sl. No.1 (b) that the Applicants were the first allottees in the abovementioned 7 units. In response to the query at Sl no.1 (c) he has added that there are no units, where the Applicants are the second allottees.

19. That the Respondent has stated in reply of query at Sl. No.1(d) that in respect of the following units, there was clear allotment in the favour of the Applicants :

Sr. No.	Floor	Shop No.	Units as claimed by the Applicants	Date of Booking
1	Ground	G-38	Abhishek Garg	DOB 24.02.2016
2	First	101-A	Anita Garg	DOB 14.01.2015
3	First	178	Abhishek Garg	DOB 21.10.2016
4	First	179	Abhishek Garg	DOB 21.10.2016

20. That the Respondent has stated in his Affidavit, in reply to the query at Sl. No. 2, that there is no document on record regarding allotment of the Service Apartments pursuant to the MOU dated 10.06.2019 or addendum to MOU dated 12.06.2019. The Respondent has further added, in response to the query no. 3, that there is no letters of cancellation on record of the commercial units as allotted in favour of the applicants in 2015 and 2016.



21. The main prayer for adjudication before us is that whether the claim of the Applicants shall be admitted as 'independent Financial Creditor' or a 'Financial Creditor in a class'.

22. That as it appears from submissions of the Respondent, the claims of the Applicants were admitted by the Respondent on the basis of the 'Addendum to MOU' dated 12.6.2019. However, the Respondent himself has been of the opinion that the MOU and Addendum to MOU having been executed just before the initiation of CIRP were of suspicious nature. Therefore, the Respondent has blown hot and cold at the same time.

23. That from the contents of the Clause 3 of the MOU dated 10.06.2019, it is amply clear that the Allotment of the earlier allotted units shall stand cancelled with the issuance of Letter of Allotment individually for each Service Apartment in the Ninex Mall.

24. However, in actual neither any allotment letter for Service Apartments were issued nor the earlier letters of allotment of the commercial units issued in 2015-16 were cancelled by the Corporate Debtor. The same has been confirmed by the Respondent in its Affidavit dated 21.08.2020.

25. That the plea taken by the Respondent, during the course of arguments, with respect to double allotment too does not merit consideration since the Respondent himself has submitted on affidavit



dated 21.08.2020 that the Applicants were either the first allottees (in respect of seven units) or holding clear allotment (in respect of four units). None of these letters of allotment of the commercial units have been cancelled. Therefore, this Bench of the view that the earlier allotment letters issued in respect of 11 units by the Corporate Debtor in favour of applicants in the year 2015 and 2016 stand valid and cannot be treated as null and void.

26. Since the letters of allotments were issued in favour of Applicants for allotment of commercial units and there has been no cancellation of the same, the Applicants fall under the definition of allottee as defined under Section 2(d) of Real Estate (Regulation & Development) Act 2016, which is reproduced below :

"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"

27. In view of the discussion above, this Bench is of the opinion that the claims of the Applicants from Sl. No. 1 to 12 except the Applicant at Sl. No. 8 as mentioned in Para 5 of this Order, being the allottees of commercial units will fall under the Category of 'Financial Creditor in a class'.



28. The Respondent is directed to categorise the claims of the Applicants from Sl No 01 to 07 and 09 to 12 of the table as given in para 5 of this order, who were allotted commercial units in the Ninex Mall Project, as 'Financial Creditor in a class'. However, the Applicant mentioned against the Sl. No. 8, to whom no unit was allotted, shall be treated as a 'Financial Creditor' only.

29. The Application is allowed accordingly.



(L. N. Gupta)
Member (T)



(Ch. Mohd. Sharief Tariq)
Member (J)