

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

**C.P. NO. IB-1248(PB)/2018**

**IN THE MATTER OF:**

Mr. Shinoj Koshy .....**Financial Creditor/Petitioner**  
**v.**  
M/s. Granite Gate Properties Pvt. Ltd.  
.....**Corporate Debtor/Respondent**

**SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016**

**Judgment delivered on 10.01.2019**

**Coram:**

**CHIEF JUSTICE (RTD.) M.M. KUMAR**  
**Hon'ble President**

**SHRI S.K. MOHAPATRA**  
**Hon'ble Member (T)**

**PRESENTS:**

For the Petitioners: Mr. Sanjay Kumar and Mr. Kaushank  
Sindhu, Advocates  
For the Respondent: Mr. Rajnish Sinha, Mr. Nikhil Jain and  
Ms. Shreya Kohli, Advocates

**M.M. KUMAR, PRESIDENT**

**JUDGMENT**

Mr. Shinoj Koshy claiming to be a 'financial creditor' has filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of

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Corporate Insolvency Resolution Process in respect of respondent company, M/s. Granite Gate Properties Private Limited, who is claimed to be the corporate debtor.

2. The Respondent company-the Corporate Debtor, M/s. Granite Gate Properties Private Limited (CIN U45200DL2007PTC202952) was incorporated on 16.05.2007 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at C-23, Greater Kailash Enclave, Part- I, New Delhi-110048. Its authorized share capital is Rs. 6,00,00,000/- and the paid up share capital is Rs. 5,05,43,450/- which is based on the details given in master data obtained from the official website of Registrar of Companies (Annexure-K). Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal being Adjudicating Authority has territorial jurisdiction in respect of respondent corporate debtor as per the provisions of sub-section (1) of Section 60 of the Code.

3. The 'Financial Creditor'-Petitioner has proposed the name of Interim Resolution Professional, Shri Prabhjit Singh Soni, GG-1/144/C, Vikas Puri, Near PVR, New Delhi-110018, email id – psgurleensoni@gmail.com. He has registration No. IBBI/IPA-

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002/IP-N00065/2017-18/10143. A written communication sent by him in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record [Annexure-M (colly)]. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or Indian Institute of Insolvency Professionals of ICSI-IPA. In addition, further necessary disclosures have been made by Mr. Soni, as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

4. It is the case of the petitioner that he had purchased a residential apartment No. 804 with Super-Built up Area 181.62 Sq. Mt. along with car park at GH-005 in Sector-110, Noida, District Gautam Budh Nagar, Uttar Pradesh for the total consideration of Rs. 1,33,62,895/- under the project namely "Lotus Panache" of the respondent company. The petitioner has paid a total amount of Rs. 72,20,852.61/- of the total consideration on various dates as mentioned in the cheques issued by the petitioner in favour of the Respondent/Corporate Debtor. A flat buyer agreement (Annexure-D) was executed between the parties on 10.02.2014. According to the terms incorporated in clause 5.2 of the agreement, the



Respondent Company undertook to hand over the possession of the said apartment to the petitioner within a period of thirty nine (39) months from the date of allotment of the Apartment i.e. by 09.05.2017. However even construction of the said apartment has not been commenced so far. The Corporate Debtor on various occasions unilaterally extended the date of delivery of the said Apartment by sending information in this regard to the Financial Creditor through email dated 13.05.2016 (Annexure F) and email dated 29.04.2017 (Annexure G). Lastly vide email dated 20.07.2018 (Annexure H) the Corporate Debtor unilaterally extended the date of delivery of the said Apartment to November, 2020.

5. There was apparently inordinate delay in delivering the possession of the said flat. As a result, a letter dated 17.07.2018 (Annexure I) was sent by the petitioner to the Corporate Debtor seeking refund of the entire amount along with interest and compensation for mental trauma and harassment etc. within 7 days from the date of receipt of the said letter but all in vain.

6. It is also the case of the petitioner that in terms of clause 5.5 of the Agreement (Annexure D), the Corporate Debtor was liable to pay compensation to the Financial Creditor upon delay in

completion of construction. The relevant extract of the Agreement reads thus:-

“5.5 Subject to the Buyer having complied with its obligation under this Agreement as well as the Allotment Letter, including but not limited to timely payment of the Consideration and other charges as per Payment Plan opted by the Buyer, in the event of any wilful delay in construction of the Apartment for reasons attributable solely to the Company, delay charges would be payable to the Buyer, in the manner and to the extent specified hereinbelow:

Period of Delay (Months)	Penalty Per Month (Rs. Per Sq. ft.)
1-3	5.00
4-6	7.50
7 onward	10.00

It is hereby clarified that the abovesaid delay charges shall be payable, subject to a demand being made by the Buyer for the same (and be calculated from the date of the said demand), till the date when possession of the Apartment is offered to the Buyer. Further, all payments towards the delay charges, as due from the Company would be adjusted from payments due to the Company from the Buyer at the time of the final settlement thereof.



Provided specifically that, the Company shall be entitled (without the payment of any delay charges) to not offer possession of the Apartment, to the Buyer, till all amounts due and payable by the Buyer to the Company, as of such date (including all default interest specified above), have been paid by the Buyer.”

7. The ‘Financial Creditor’ has also attached a list of other documents to the application to prove the financial debt, the total amount due and the date of default.

8. It is claimed that the Respondent is liable to pay an amount of Rs. 72,20,852.61/- plus 18% interest per annum compounded annually to the petitioner.

9. Learned counsel for the Corporate Debtor has opposed the admission of the application and has advanced the following arguments:-

- (i) The present application is not maintainable under Section 7 of the Code because there is no default on the part of the Respondent Company in terms of Section 3 (12) of the Code and further there is no debt due and payable within the meaning of Section 3 (11) of the Code.



- (ii) There is a non-compliance of the provisions of the Code as the petitioner has failed to attach the copies of entries in a Bankers book in accordance with the Banker's Book Evidence Act, 1891, as required under the part V for the Form I.
- (iii) No financial debt exists between the petitioner and the respondent as the claimed amount was neither borrowed by the respondent company nor disbursed as a loan to the respondent, and the claimed amount was merely in the nature of risk capital investment on the basis of arrangement and understanding between the parties that the consideration amount being paid to the respondent company was for the purpose of allotment of the project being developed and constructed by the respondent company in the name and style of "Lotus Panache".
- (iv) A premature demand is made by way of present application because as per clause 5.1 of the Agreement, it was specifically agreed with mutual consent by and between the parties that the Respondent would





endeavour to complete the construction of the Apartment within 39 months from the allotment of the Apartment as per the Allotment letter, subject to grant of necessary approvals/NOC's, timely payments and subject to clause 5.2. It is submitted that delay occurred in completion of the said Apartment on various reasons like injunction order dated 11.01.2013 passed by Hon'ble National Green Tribunal whereby the builders were restrained from extracting ground water for the purpose of construction. The unrest and agitation by the farmers against acquisitions of the land by the Noida authority/U.P. Govt. On account of lack of availability of sand in light of the Maa Durga Shakti Nagpal's case whereby various executive orders were passed prohibiting excavation of sand from Yamuna river bed. In view of the order dated 14.08.2013 passed by Hon'ble NGT whereby preventing the builder from carrying on construction activity within 10 km radius of the Okhla Bird Sanctuary. Effect of demonetization due to which the pace of construction got affected. Lastly on account of order dated 09.11.2017 passed by NGT whereby



preventing the builder from carrying the construction activity on account of heavy smog in Delhi NCR. By taking shelter of the aforesaid reasons it was highlighted by the Corporate Debtor that the delay in completion of the project is totally beyond the control of the Respondent company.

- (v) Clause 5.2 of the Agreement provides the *force majeure* factors that are treated to be beyond the control of the Corporate Debtor. Under this clause if delay in handing over possession to the petitioner is occurred then the Respondent was to entitle to a reasonable extension of time for the said purpose. The reasons mentioned above in committing delay in handing over the possession covers under the spirit and language of word *force majeure* as categorically defined in the agreement.
- (vi) The petitioner has not placed on record even a single document indicating that the arrangement between the parties was such that the petitioner is entitle to claim an 18% interest compounded annually.



- (vii) The present petition is contrary to the object and scheme of the Code.
- (viii) The project is near completion with 75% (approx.) of work already completed, and therefore the maximisation of asset could only be achieved once the project is completed and operational, and the completion of project will promote the availability of credit and shall be in the best interest of all the stakeholders.
- (ix) There is a non-compliance of the terms and conditions of the Apartment Buyer Agreement dated 10.02.2014 as there is no demand made by the petitioner in terms of the Clause 5.5 of the Agreement which provides for the payment of delay charges, and when the said delay charges were to be payable.
- (x) There is no issuance of any legal notice in eyes of the law as the purported notice dated 17.07.2018 was not sent to the Respondent in the registered office address as per the own admission of the petitioner.



10. A rejoinder to the reply has been filed by the Financial Creditors reiterating the submissions made in the application and controverting the assertions in the reply.

11. Now we deal with the submissions made on behalf of the Petitioners.

12. Mr. Sanjay Kumar, learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the application is complete as per the requirements of Section 7 (2) of the Code and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. He has further submitted that the details of default along with its dates have been clearly stated in part IV along with all the minute details. There is overwhelming evidence to prove default and name of the resolution professional has also been clearly specified.

13. Having heard the learned counsel for the parties it would first be necessary to examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-





**“Initiation of corporate insolvency resolution process by financial creditor.**

7 (1) .....

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3) .....

7 (4) .....

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) .....

14. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed.

It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. We are satisfied that a default amounting to lacs of rupees has occurred. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

15. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (amendment) Ordinance, 2018 with effect from 6<sup>th</sup> June, 2018. In view of the revised definition, any amount raised from an allottee under a real estate project is deemed to be an amount having the commercial effect of a borrowing and thus is covered by the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has been amended to specifically include dues of home buyers i.e. Real Estate (Residential). The amendment Act also recognizes home buyers as "Financial Creditor". Accordingly, the home buyers can initiate Corporate Insolvency Resolution Process against defaulting builder or developer, as "Financial Creditor" in



terms of Explanation to Section 5 (8) (f) of the Code with effect from 06.06.2018. Therefore, the submission made to the contrary by respondent would not require any serious consideration.

16. It is pertinent to mention that on 10.02.2014 a flat buyer agreement was executed between the Petitioner & Corporate Debtor whereby the petitioner was allotted by ear marking residential apartment No. 804 with Super-Built up Area 181.62 Sq. Mt. along with car park at GH-005 in Sector-110, Noida, District Gautam Budh Nagar, Uttar Pradesh for the total consideration of Rs. 1,33,62,895/- under the aforesaid project of the Corporate Debtor. In the light of the said agreement, the petitioner have paid a total amount of Rs. 72,20,852.61/- to the Corporate Debtor of the total sale consideration. According to the terms of the agreement, the Corporate Debtor was to handover physical possession of the aforesaid unit to the petitioner within a period of thirty nine (39) months from the date of allotment of the Apartment i.e. on or before 09.05.2017. The petitioner is thus covered by the expression 'Financial Creditor' as has been used in the amended definition of Section 5 (8) (f) of the Code and the explanation appended thereto. In that regard we draw support from the observations made by Hon'ble the Appellate Tribunal in the case of



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passed in Appeal (AT) (Insolvency) No. 187/2018 wherein it has been held as under:

*“By the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 No. 6 of 2018 dated 6th June, 2018 followed by the Act, in clause (8), in Sub-clause (f), of Section 5 an explanation has been inserted as per which 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. **Thereby, after amendment of the Act, the allottees of real estate project have been treated as ‘Financial Creditors’.**”* (Emphasis supplied).

A bare perusal of the aforesaid paragraph of the judgment would show that even without any element of ‘assured return’ an allottee in the real estate project has to be regarded as a ‘Financial Creditor’. The petitioner eminently fulfills the aforesaid condition.

17. The petitioner has filed copy of the ledger (at pg. 53) in the name of the petitioner of the Corporate Debtor maintained by the Commercial Department. The total amount received by the Corporate Debtor from the petitioner since 06.01.2014 upto 03.02.2015 is Rs. 7,278,310.61/- which is patent from a perusal

of the said ledger. The amount has been raised from the petitioner/allottee under a real estate project. In such a situation not only the debt has a commercial effect of borrowings and come within the scope of 'financial debt' but also the petitioner is covered by the definition of expression 'financial creditor'. Moreover, it could not be successfully contested that the building project has not been completed.

18. Therefore, petitioner being financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the respondent corporate debtor in case of default in repayment of financial debt.

19. As a sequel to the aforesaid discussion and the material placed on record shows that applicant-financial creditor had disbursed the money to the respondent corporate debtor as consideration for purchase of a residential Apartment. Though a considerable long period has lapsed even the principal amount disbursed has not been repaid by the respondent corporate debtor. It is accordingly held that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one Lakh. Thus, the application warrant admission as it is complete in all respects.



20. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

21. Mr. Prabhjit Singh Soni, having registration number IBBI/IPA-002/IP-N00065/2017-18/10143, resident of GG-1/144/C, Vikas Puri, Near PVR, New Delhi-110018 with email id – psgurleensoni@gmail.com is appointed as an Interim Resolution Professional.

22. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to 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.

23. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:





- “(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 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 Securitisation 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.”

24. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator;

(b) a surety in a contract of guarantor to a Corporate Debtor.

Additionally, the supply of essential goods or services to the

Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

25. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the 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 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/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional/Resolution Professional shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

26. The office is directed to communicate a copy of the order to the Financial Creditors, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

Sd/-

**(M.M. KUMAR)**  
**PRESIDENT**

Sd/-

**S.K. MOHAPATRA**  
**MEMBER (TECHNICAL)**

10.01.2019  
Vineet

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