

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 3398/IBC/MB/2019

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

**Mrs. Rajshree Vora & Ms. Prachi
Vora**

1250, Nash Lee Drive, LILBURN, GA
30047-7640

.....**Financial Creditor**

Vs

**Makwana Properties Private
Limited**

2 Grd. Floor, Om Shree Labh A TPS
Road, Borivali (West) Mumbai, City
Mh 400092

.....Corporate Debtor

Order delivered on: 16.07.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Chandra Bhan Singh, Member (Technical)

For the Applicant: Adv. Umang Mehta,

For the Respondent: Adv. Arvind Giriraj

Per: Shri: *Chandra Bhan Singh, Member (Technical)*

ORDER

1. This Company petition is filed by Mrs. Rajshree Vora & Ms. Prachi Vora (hereinafter called “Financial Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Makwana Properties Limited (hereinafter called “Corporate Debtor”) alleging that the Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code (hereinafter called “Code”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of INR. 30,36,344/- (Indian Rupees Thirty Lakh Thirty-Six Thousand Three Hundred and Thirty-Four only). The total principal amount includes INR 19,03,188/- (Indian Rupees Nineteen Lakh Three Thousand One Hundred Eighty-Eight only) and INR 68,990 (Indian Rupees Sixty-Eight Thousand Nine Hundred and Ninety Only). Interest on the principal amount and tax @ 15% as per the terms and conditions of the Agreement. INR 10,64,166/- (Indian Rupees Ten Lakh Sixty-Four Thousand One Hundred and Sixty-Six only).

Submissions of the Financial Creditor

- a. The Financial Creditor has filed the present petitioner under Section 7 of the Code in relation to defaults committed by the Corporate Debtor in repayment of

investment made in the Corporate Debtor as per the Investment Agreement dated 25.06.2016.

- b. In the year 2016, on the basis of the representation and assurance given by the Corporate Debtor, the Financial Creditor evinced interest in the project layout proposed to construct by the Corporate Debtor at New Link Road, Goregaon (West), Mumbai- 400104 to be known as “The Lion Park”. Accordingly, the agreement dated 25.01.2016 (Agreement) was executed between Financial Creditor and the Corporate Debtor.
- c. By the said Agreement Financial Creditor had agreed to invest an amount of Rs. 95,15,940/- (Rupees Ninety-five Lakhs Fifteen Thousand Nine Hundred and Fourth Only) as and by way of investment in the said project, which was to be paid in slabs as per the schedule of payment set out in the said agreement.
- d. To the shock and surprise of the Financial Creditor after execution of the said agreement and even after expiry 18 months no progress was made by the Corporate Debtor to obtain the IOA or CC in relation to the construction on the plot for the said project.
- e. In view of the fact that no progress was made by the Corporate Debtor in respect of the said project the Financial Creditor sought refund of the said payment in pursuance of Clause 10 of the said Agreement.

“...It is agreed that you are an investor and hence in the event if we do not obtain anyone i.e. LOI or IOA or CC in relation to construction on the plot within a “Lock in period” of 18 months plus 6 months i.e. grace period of 24 months from the date hereof, subject to force majeure, then and in such event, you shall terminate this proposal by claiming

refund from us with interest thereon calculated at the rate of 15% p.a. from the date of this writing till the date of termination/cancellation.

- f. The financial Creditor replied to the same through her husband's email dated 06.05.2019; stating that the Corporate Debtor's email fails to address the concerns raised by the Financial Creditor over the telephonic conversation. The Financial Creditor by this email also expressed their dismay over the unexplained delay caused by the Corporate Debtor in the said project.
- g. Since no payments were received from the Corporate Debtor the Financial Creditor was constrained to address a legal notice dated 25.07.2019 through her advocate. The legal notice states that because of the Corporate Debtor's failure to comply with its obligation under the said agreement.
- h. Further, the Corporate debtor addressed an email dated 08.08.2019 to the advocate for the Financial Creditor and admitted its liability.
- i. The Financial Creditor further submitted that the Financial Creditor is entitled the refund of the said payment, which is now due and payable by the Corporate Debtor to the Financial Creditor. However, despite acknowledging the it's liability, the Corporate Debtor has failed, evaded and ignored for reasons best known to the corporate Debtor, to re-pay the said payment along with interest admittedly payable to the Financial Creditor.
- j. However, the Corporate Debtor has miserably failed to repay the admitted and acknowledged liability. This clearly evidence the Corporate Debtor's inability to pay the amounts due to the Financial Creditor amount to a

Financial Debt as defined under Section 5(8) of the IBC, 2016.

Submissions of the Corporate Debtor

- a. The Corporate Debtor submitted in this reply that a sum of Rs. 19,03,188/- is the amount due and payable by the Corporate Debtor to them, as the said amount has been paid by the applicants for the purpose of purchasing a Flat being Flat No. 1907, 19th Floor, in 'B' Wing having a carpet area of 621 sq. ft. in the property known as Lion Park, New link Road, Goregaon (West), Mumbai 400104.
- b. Firstly, it is submitted that the present petition pertains to refund of money in a Real Estate project which squarely falls within the scope and ambit of the Real Estate Regulation Act, 2016 ("RERA"). The said statute has been created for the purpose of dealing with the type of cases that has been filed in the present instance. By virtue of Section 12 read with section 18 of the RERA Act, 2016, any person who has paid money in a real estate project would come within the ambit and scope "allottee" and if there is delay in the project or the terms and conditions of the project have not been met, then such person may file an application to withdraw from the project and accordingly claim such amounts. The present instance, as per the applicant, squarely falls within section 12&18 of the said RERA Authority and not this Tribunal.
- c. The corporate Debtor further submitted that non-receipt of I.O.D. C.C and other approvals are due to circumstances which are beyond the control of the

Respondent and not on account of reasons within the control of the respondent. In that event the principles akin to force majeure will apply. The respondent had made all possible efforts to obtain such documents, but such an event of force majeure beyond the control of the Respondent has occurred and as such I crave leave to refer to and rely upon the events of force majeure as and when necessary.

Findings

1. This petition has been filed on 30.08.2019 under Section 7 of the IBC, 2016 by the applicant seeking initiation of CIRP against the Makwana Properties Pvt. Ltd. (Corporate Debtor). The applicant had extended an amount of Rs. 19,03,188/- towards the payment for purchase of Flat No. 1907 in B-wings having Carpet Area of 621 Sq. Ft. in the Real Estate Project. The applicant/Financial Creditor mentions that in terms of agreement signed between the parties he is not a homebuyer but an investor/ Financial Creditor. The buttress his argument, the applicant draws the attention of the Bench on Para No. 10 of the agreement which is reads as follows:

“...It is agreed that you are an investor and hence in the event if we do not obtain anyone i.e. LOI or IOA or CC in relation to construction on the plot within a “Lock in period” of 18 months plus 6 months i.e. grace period of 24 months from the date hereof, subject to force majeure, then and in such event, you shall terminate this proposal by claiming refund from us with interest thereon calculated at the rate of 15% p.a. from the date of this writing till the date of termination/cancellation...”

2. The Bench notes that as per Para 10 of the agreement, the flat is to be constructed within a period of 18 months plus 6

months grace. The Applicant/Financial Creditor claimed that he is not a homebuyer but an Investor in this project because of Para 10 of the agreement only. However, the bench notes that this agreement is actually an agreement between a homebuyer Mrs. Rajshree Vora and Ms. Prachi Bora in the “Lion Park” Project in Goregaon (West) for the purchase of a Flat No. 1907 on the 19th floor, B Wings Tower. The Bench further notes that the payment schedule of money which is mentioned in the agreement is a typical homebuyer Agreement where the schedule of payment is dependent of the level of construction. In this regard the payment schedule as mentioned at Para 3 of the agreement is as under:

“...in consideration of the total investment for reserving the said area, you shall pay to us a Total Lump Sum Consideration of Rs. 95,15,940/- (Rupees Ninety Five Lac Fifteen Thousand Nine Hundred Forty only) plus service tax, VAT & any other taxes as per Government regulation out of which we have received Rs. 19,03,188/- (Rupees Nineteen Lac Three Thousand One Hundred Eighthly Eight only) and balance is to be paid by you as per schedule. You shall also bear the stamp duty & Registration fees as may be applicable at the time of registration, appurtenant to the said area after it can be registered on obtaining requisite approvals. The total lump sum consideration for acquisition of the proposed flat shall be payable by you in the following manner:

Payment Schedule:

| Sr. No. | Schedule of Payment | Percentage of consideration |
|----------------|---|------------------------------------|
| 1. | On Execution of this Investment document | 20% |
| 2. | On obtaining the first IOD in the plot | 10% |
| 3. | On obtaining the first CC in the plot | 10% |
| 4. | On plinth | 10% |
| 5. | Slabwise- 1 st Podium to Last Slab | 40% |
| 6. | On Completion of civil Work | 5% |
| 7. | On fit-Out Possession | 5% |

3. The bench notes that the applicant is basically an allottee in the Real Estate project. Therefore, the agreement cited by the Financial Creditor is effectively an allotment letter of the flat with the schedule of the payment of the flat. Further, the return of investment as provided in Clause 10, does not provide for any fixed return but is conditional upon completion of the project. It has also provided that the payment will not be due in the event of force majeure issue.
4. The Bench is clear that the petitioner is an allottee and the flat purchaser in a Real Estate Project as the petitioner has been allotted flat no. 1902 in the said project.
5. As per the IBC, 2016 an allottee is covered under the definition of Financial Creditor by section 5(8)(f) of the Act. The definition in this regard is as under:

“Section 5(8) of the Code defines Financial Debt as means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. –*For the purposes of this sub-clause, –*

(i) 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; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

6. Therefore, an allottee in a real estate project is a Financial Creditor. However, under Section 7 for the purposes of initiation of CIRP there is a threshold limit with regard to number of allottee who can jointly file petition to initiate CIRP against the Corporate Debtor. Section 7 in this regard reads as under:

Section-7. (1) *A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

Explanation: *For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*

(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.

(3) The financial creditor shall, along with the application furnish— (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (b) the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

*(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) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application: Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.*

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate— (a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor; (b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

7. The Insolvency and Bankruptcy (Amendment) Act, 2020 (**Amendment**), added certain provisos to section 7 of the Insolvency and Bankruptcy Code, 2016 (**Code**) whereby special conditions were added for real estate allottees to qualify as a financial creditor under the Code. The amended Section 7 reads as under:

“In section 7 of the principal Act, in sub-section (1), before the Explanation, the following provisos shall be inserted, namely:— "Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, 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 per cent. of the total number of such creditors in the same class, whichever is less: Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less: Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.”

8. In view of the above, there is no iota of doubt that the applicant in this case who is an allottee and who has applied singly for

commencement of CIRP against the Corporate Debtor does not meet the bench mark of jointly filling by 100 allottee or not less than 10% of number of allottee. Therefore, this petitioner filed by the single homebuyer does not qualify as a fit Application as per Section 7 of IBC, 2016 as amended from time to time to be considered under CIRP. In view of this, this bench dismisses the petition of a single allottee to commence the CIRP against the Corporate Debtor.

Sd/-

**CHANDRA BHAN SINGH
MEMBER (TECHNICAL)**

Sd/-

**H.V. SUBBA RAO
MEMBER (JUDICIAL)**