

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 197 of 2023

[Arising out of Order dated 07.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in CP (IB)-674(PB)/2021]

In the matter of:

Harinder Bashista

...Appellant

Vs.

Sanjib Kumar & Ors.

...Respondents

For Appellant:

Mr. Saurabh Kirpal, Sr. Advocate with Mr. Sidhant Kumar, Ms. Anushka Shah, Ms. Manyaa Chandok, Ms. Harleen K. Rait and Ms. Adya Rajkotia, Advocates.

For Respondents:

Mr. Abhishek Anand, Mr. Karan Kohli, Mr. Palak Katra, Advocates for RP
Mr. Aditya Gauri, Mr. Amar Vivek and Ms. Damini Srestha for Respondent Nos. 145, 146

J U D G M E N T
(31st May, 2024)

Ashok Bhushan, J.

This Appeal by a Suspended Director of the Corporate Debtor- 'M/s. Vardhman Estates & Developers Pvt. Ltd.' has been filed challenging the order dated 07.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi admitting Section 7 application filed by the Respondents- allottees of Real Estate Project. Aggrieved by the admission order, this Appeal has been filed.

2. Brief facts necessary to be noticed for deciding the Appeal are:-

2.1. Greater Noida Authority by Lease Deed dated 26.12.2008 allotted Plot No.26/1 to M/s. Zestha Projects Pvt. Ltd. A joint Agreement was entered between M/s. Zestha Projects Pvt. Ltd. and the Corporate Debtor on 16.04.2007 for development of Plot of 40470 Sq. Mts. located in Knowledge Park-III, Greater Noida (U.P). The Corporate Debtor launched Real Estate Project on the lease land by name and style of Vardhaman I Valley. Project comprised of IT/ ITES office, Residential Units, Commercial Spaces and other facilities. The Respondents herein applied for allotment and after year 2007 have been allotted different units. Respondents-allottees have also paid 70% -100% of consideration and entered into respective Builder Buyer Agreements. Corporate Debtor had promised to complete and handover the possession in three to four years and further promised assured return @ 12% during the intervening period. A revised dates of possession was informed to the allottees as 2018-19 which was also not honoured. The project was registered with Real Estate Regulatory Authority, Uttar Pradesh on 30.09.2017. Corporate Debtor having failed to complete the project and handover the possession, an application under Section 7 was filed by 117 Financial Creditors representing 104 allotted units being CP (IB) No. 674(PB)/2021. IA No.2524 of 2022 and IA No. 2624 of 2022 were filed by 22 Financial Creditors and two Financial Creditors respectively seeking impleadment in Section 7 application as Real Estate Allottees which applications were allowed by the Adjudicating Authority vide order dated 01.08.2022. An IA No.4993 of 2022 was filed seeking permission to file amended Section 7 application which was allowed by order dated 07.10.2022. Applicants were also permitted to file amended memo of parties. As per

amended application, there were 146 Financial Creditors representing 122 allotted units. Notices were already issued in Section 7 application and the Corporate Debtor had also been allowed time to file reply to the impleadment applications.

2.2. The Corporate Debtor filed a reply to Section 7 application raising various objections. In the reply, Corporate Debtor pleaded that the threshold as provided in Section 7 of the IBC of 100 allottees is not fulfilled. There were many defects in the application. It was pleaded that calculation of 100 allottees has to be made on the basis of units and not by number of the applicants. Reliance on No Dues and No Claim Certificate issued by Financial Creditors was also made in the reply and copy of No Dues Certificate issued in the year 2019 by some of the Financial Creditors were also brought on record along with the reply. Reply to the impleadment applications MA No.691 of 2022 filed by the applicants was also filed by the Corporate Debtor. After the order passed by the Adjudicating Authority permitting the Applicants to file amended Section 7 application with Schedule-1, amended Section 7 application with Schedule-1 was filed.

2.3. Adjudicating Authority heard the parties and by the impugned order dated 07.02.2023 admitted Section 7 application. Adjudicating Authority in the impugned order held that number of allottees who have filed the applications are able to cross the threshold of 100. It was held that the Corporate Debtor has not been able to honour commitment of giving possession. Adjudicating Authority also returned a finding that looking to the RERA Reports and site photographs given as late as 02.07.2021 clearly

established the incomplete construction till date. Aggrieved by the order, this Appeal has been filed.

3. Appeal was entertained on 21.02.2023 and an interim order was passed directing the IRP to ensure that the Corporate Debtor run as a going concern and IRP to take steps for completion of project with the assistance of suspended directors/ex-management and employees and further the CoC was not to be constituted in pursuance of the impugned order.

4. We have heard Shri Saurabh Kirpal, Learned Senior Counsel for the Appellant, Shri Abhishek Anand, Learned Counsel for the Resolution Professional and Learned Counsel appearing for the allottees.

5. Shri Saurabh Kirpal, Learned Senior Counsel appearing for the Appellant challenging the impugned order submits that for completing the threshold of 100 allottees as required by Section 7 of the IBC, number of Financial Creditors are not to be counted and it is the units which are to be counted. It is submitted that the application was not filed by 100 unitholders and they were actually 99 unitholders only. It is submitted that subsequent impleadment of further unitholders shall not make the application maintainable since the date on which threshold is to be looked into is the date of filing of the application. Large number of allottees who have given No Dues Certificates had also taken possession. 23 unitholders have taken possession. If the number of persons who had taken possession is excluded, 100 unitholders are not in Section 7 application. Learned Counsel for the Appellant has placed reliance on the judgment of the Hon'ble Supreme Court

in ***“Manish Kumar vs. Union of India And Anr.- (2021) 5 SCC”***. It is submitted that the Hon’ble Supreme Court has held that the date for consideration of the application is the date of filing application and it is unitholders to be counted for fulfilling the threshold under Section 7. It is submitted that those who have given No Dues Certificate has also entered into Agreement. He has referred to one of the No Objection Certificate issued by Shri Kunal Bhardwaj dated 05.03.2020 as well as the Agreement entered with Kunal Bhardwaj. It is submitted that the various objections raised by the Corporate Debtor regarding fulfilment of threshold has not been examined or considered and the Adjudicating Authority without recording any finding regarding fulfilment of threshold after considering the material on record admitted Section 7 application. Counsel for the Appellant has also referred to the IRP’s Report dated 11.10.2023 which has been submitted in this Appeal in pursuance of the order passed by this Tribunal to submit Status Report where as per the Status Report, 23 units in the commercial blocks/ Tower were having Flex boards/notice/Address Board which indicate that 23 units were in possession of the unitholders. Shri Saurabh Kirpal, Learned Senior Counsel has referred to in paragraph 12 (e) of the report to support his submission that 23 units are in possession.

6. Learned Counsel for the allottees refuting the submissions of the Counsel for the Appellant submits that the application was filed by 117 financial creditors representing 104 allotted units, hence, the application fulfils the threshold of 100 allottees as required by Section 7 of the Code. It is further submitted that the Adjudicating Authority had allowed applications

IA No.2524 of 2022 and IA No. 2624 of 2022 impleading 22 and 2 allottees respectively and after impleadment of further allottees, number of Financial Creditors are 146 who represent 122 allotted units. It is submitted that the Adjudicating Authority has returned a finding that there are 122 allottees who have filed the applications. It is submitted that the Adjudicating Authority permitted amended memo of parties to be brought on record by order dated 12.09.2022, hence, the amended application can also be looked into to find out number of allottees. It is submitted that the project is neither completed nor any Occupancy Certificate has been given to the Corporate Debtor. Appellant himself has brought material on record to indicate that Greater Noida Authority has raised various objections with regard to claim of Corporate Debtor of Occupancy Certificate. Occupancy Certificate having not yet been issued, there is no occasion of handing over possession to the allottees. It is submitted that the Status Report filed by the IRP dated 11.10.2023 clearly indicate that all works pertaining to residential tower, IT block, commercial block are pending. Detailed report given by the IRP clearly indicate that No Occupancy or Completion Certificate has been received by the Corporate Debtor. Several NOCs are still waiting. It is submitted that the fact that certain commercial units have put their flex board/ address board does not prove that possession has validly been handed over. It is submitted that No Objection Certificate claimed by the Corporate Debtor which have been given by certain allottees in no manner affect the entitlement of those allottees to be part of Section 7 application. It is submitted that even the lease of land by Greater Noida has been cancelled, project registration is no more in existence. Applicants' applications filed by the allottees fulfils threshold as

prescribed under Section 7 and the Adjudicating Authority has rightly admitted Section 7 application.

7. We have considered the submissions of the Counsel for the parties and perused the record.

8. The main ground of challenge of Appellant in this Appeal is that the application filed by the allottees did not fulfil the threshold. There being less than 100 allottees, hence, the application did not deserve to be admitted and the Adjudicating Authority without adverting to the objection raised by the Corporate Debtor regarding fulfilment of threshold has admitted Section 7 application.

9. Section 7 application which was filed by the Respondents- allottees have been annexed by the Appellant itself which is Annexure A2 of the Appeal. Annexure A2 indicate that the application was filed by 117 Financial Creditors. The issue that for fulfilling the threshold under Section 7, it is number of allottees which is relevant and not the number of financial creditors is well settled. The Hon'ble Supreme Court in ***"Manish Kumar vs. Union of India And Anr.- (2021) 5 SCC"*** has laid down following in paragraphs 186, 187 and 188:-

"186. We cannot read the Explanations in Sections 14 and 15 into the definition of "allottee" in Section 2(d), as, in Sections 14 and 15, a perusal of Explanations, makes it clear that they are enacted for the purpose of Sections 14 and 15, respectively.

We would have to take the definition of the "allottee" from Section 2(d), as it is. Therefore, it does not matter whether a person has one or more allotments in his name or in the name of his family members. As long as there are independent allotments made to him or his family members, all of them would qualify as separate allottees and they would count both in the calculation of the total allotments, as also in reckoning the figure of hundred allottees or one-tenth of the allottees, whichever is less.

187. As far as the situation projected about, there being no clarity regarding whether, if there is a joint allotment of an apartment to more than one person, is it to be taken as only one allottee or as many allottees as there are joint allottees, it would appear to us, on a proper understanding of the definition of the word "allottee" in Section 2(d) and the object, for which the requirement of hundred allottees or one-tenth has been put, and also, not being oblivious to Section 399(2) of the Companies Act, 1956, as also the Explanation in Section 244(1) of the Companies Act, 2013. in the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment can only be treated as a single allotment. This for the reason that the object of the statute, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that the time is ripe to invoke the Code and to submit to the inexorable processes under the Code, with all its attendant perils.

188. The object of maintaining speed in the CIRP and also the balancing of interest of all the stakeholders,

would be promoted by the view that as in the Case of the Companies Acts, 1956 and 2013, that for the purpose of complying with the impugned provisos in Section 7(1), while the allottee can be of any of the categories, fulfilling the description of an allottee in Section 2(d) of RERA. as interpreted earlier by us joint allottees of a single apartment, will be treated as only one allottee. Any other view can lead to clear abuse and defeating of the object of the Code. If, for instance, a single apartment is taken in the name of hundred persons, a single allottee, who in turn comprises of relatives or family members or friends, can move an application, even though the position ante would be restored, which means that only the allottee qua one apartment, plot or building, is before the Authority and it would not really represent a critical mass of the allottees in the real estate project concerned. Therefore, we have no hesitation in rejecting the contentions of the petitioner on having made the said interpretation.”

10. We, thus, for finding out as to whether threshold is fulfilled or not under Section 7 has to be look into number of allottees. A copy of the application which has been filed by the allottees indicate that in the application, document of the financial creditors including copy of the agreement were brought on record. Annexure-D Part-I which contains a list of financial creditors, along with details of allotted units was filed which indicate that in Column 4, unit number of each financial creditor has been mentioned. Annexure D, Part-I indicate that several financial creditors have been allotted more than one unit which is apparent from Sr. No.5- Sahil Gupta who were

allotted 4 units, Sr. No.6- Sunil Gupta who have been allotted 6 units, Sr. No.7- Sangeeta Gupta, who was allotted 4 units, Sr. No.11- Brig. Amarjeet Singh Dhillon & Smt. Joginder Dhillon, who were allotted two units, Sr. No.12- Anju Gupta who allotted 4 units and Sr. No. 13- Mahesh Kumar Garg, Santosh Garg, Mahesh Garg, Monika Garg, who were allotted 4 units. When we count the units as reflected in Annexure D Part-I, the units which are represented by the Financial Creditors are more than 100.

11. It is the case of the parties that applications of impleadment were filed which was allowed by the Adjudicating Authority and in view of the orders, allowing the impleadment applications 22+2 Financial Creditors were further added. In this context, we may refer to the orders passed by the Adjudicating Authority. On 01.08.2022, IA No. 2524 of 2022, following order was passed:-

“IA-2524/2022

This is an application filed by the Twenty Two (22) allottees claiming to be real estate allootees, seeking impleadment in the Section 7 Petition i.e., CP (IB)-674(PB)/2021.

Notice was ordered on 19.07.2022, at the request of the Ld. Counsel for the Respondent, time was granted to file his reply. He further submits that Reply is filed.

Reply is taken on record.

In view of the fact that the section 7 petition is not admitted so far, IA-2524/2022 is allowed and disposed.”

12. Further IA No.2624 of 2022 filed by the two allottees was allowed by same order dated 01.08.2022 which is as follows:-

“IA-2624/2022

This is an application filed by the two (2) allottees claiming to be real estate allootees, seeking impleadment in the Section 7 Petition i.e., CP (IB)-674(PB)/2021.

Notice was ordered on 19.07.2022, at the request of the Ld. Counsel Respondent, the time was granted to file his reply.

Reply is filed, considered the same.

In view of the fact that the section 7 petition is not admitted so far, IA-2624/2022 is allowed and disposed.”

13. It is further relevant to notice that the applicant filed an application, the Adjudicating Authority allowed the application IA No. 4285 of 2022 for bringing amended memo of parties on record which was allowed on 12.09.2022 which order is as follows:-

“New IA-4285/2022

This is an application for bringing amended memo of parties on record. The same is taken on record,

amendment to be carried out to the main petition. For completion of pleadings, list again on 10.10.2022.

New IA-4285/2022 is allowed and disposed of.”

14. In the reply which has been filed in the appeal, Counsel for the Appellant has brought on the record the amended Section 7 application containing names of 146 Financial Creditors along with Schedule-I which gives the details of units and Schedule-I mentions 122 units which were allotted to the applicants which figures have also been taken by the Adjudicating Authority in the impugned order.

15. Now we come to the submissions of the Counsel for the Appellant that 23 units having already been given in possession, those unitholders cannot be part of the application and their names need to be deleted. Counsel for the Appellant has referred to Status Report filed by the IRP dated 11.10.2023 in the appeal. By our order dated 08.08.2023, we have directed the IRP to submit a report. In the order dated 08.08.2023, submission of the Appellant was also noticed that 22 homebuyers have already taken possession and sub-lease has also been executed. Appellant has also made submission that 90% project is already completed. Counsel for the Appellant during his submission has relied on paragraph 12(e) of the Report.

16. The Report dated 11.10.2023 is report submitted by the IRP after inspection along with Government Approved Valuer and Surveyor. Paragraph 8 of the Report gives the details of the project and pendency of work in

percentage. Paragraphs 8, 9 and 10 which are relevant for the present case has been stated as follows:-

“8. In pursuance of the order dated 08.08.2023, Answering Respondent in order to submit a Report before this Hon'ble Appellate Tribunal appointed a Govt Approved Valuer & Surveyor i.e. Mr. Ajay Kumar Sharma in order to assist the IRP to inspect the project site namely i.e., Vardhman I Valley wherein five (5) Towers are to be constructed namely i.e., Residential Tower, 1.T Block, Hotel, Club Block and Commercial Block known as Galleria and assist the IRP to evaluate the status of completion of the Project for submission of report before this Hon'ble Appellate Tribunal. The status of each Block / Tower of the Project as per the Report submitted by the Surveyor is produced herein below:

Sr. No.	Tower/Block Name	Pendency of Work in Percentage	Observation noted by the Surveyor
1.	Residential Tower: Studio (Basement), Apartment Ground floor and 13 floors.	65%	a) The Residential Tower is not currently ready for inhabitation. b) The Residential Tower is not ready for possession.
2.	I.T Block: Basement, Ground Floor and Total 9 Floor.	52%	a) The IT. Block is not ready for functioning.
3.	Hotel: Basement, Ground Floor and 8 Floors.	34%	a) The Hotel tower is not ready for possession b) The Hotel tower is not ready for functioning.
4.	Club Block: Basement, Ground Floor and 9 floors.	91%	a) Construction of the Ground and 9 floors of Club towers has not started yet (Only basement outer civil structure Present)

5.	Commercial Block (Galleria): Basement, Ground Floor and 2 Floors	48%	Many pendencies have been noted.
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9. Furthermore, as per the report of the Surveyor, the following in the project is pending:

Sr. No.	Certificate Name	Status
1.	Tree Plantation for the Entire Project	100% pending
2.	Overall External Plumbing Work for the Entire Project	100% pending
3.	Sewage Treatment Plant for the Entire Project	100% pending
4.	Corporation Water Supply to the Site for the Entire Project	100% pending
5.	Waste Water Disposal Management for the Entire Project	100% pending
6.	Street Lighting for the Entire Project	100% pending
7.	Electricity Connection/Transformers for the Entire Project	100% pending (Temporary Transformer installed in IT Building.
8.	Power Backup/ DG Sets	100% pending
9.	Borewells-67% Average Pendency	Only 1/3 Bore well visible at Project Site 67% pending
10.	De Silting Chambers	50% Pending
11.	Rain Water Harvesting 50% Pending	50% Pending
12.	CCTV in Individual Towers	100% Pending
13.	CCTV on Project Site	100% Pending
14.	There's no CCTV's Installed Surveillance at Site or on any Individual Towers	
15.	Survey/ Inspection done without Electricity & Lighting at the Site	

16.	<i>HT Panels & LT Panels not Present for Electricity Transmission/Distribution.</i>
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*A Copy of Survey Report submitted by the Surveyor is annexed herewith and marked as **ANNEXURE R-7**.*

10. It is submitted that the following certificate which is necessary to the Project site is also pending, cancelled or not available:

Sr. No.	Certificate Name	Status
1.	<i>Occupation & Completion Certificate</i>	<i>Pending</i>
2.	<i>Land Allotment</i>	<i>Cancelled by the GNIDA</i>
3.	<i>Fire NOC</i>	<i>Not Available</i>
4.	<i>Environmental NOC</i>	<i>Not Available</i>
5.	<i>Structure Stability Certificate</i>	<i>Not Available</i>

17. Paragraph 12(e) on which reliance has been made by the Appellant is as follows:-

“e. Commercial Block (Galleria): Basement, Ground Floor and 2 Floors:

The Shutters of the various Units in the said Tower/Block were down and were locked. The Status of the possession of the Units in the said Block could not be determined. However, Flex Boards/notices of various Professionals/ businesses were affixed in some of the Units of the said Tower/Block. Around 23 units in the said Block/Tower were having Flex boards/notice/Address Board on them. While none of these units were open and shutters of all these units were closed during all the visits made at the Project site by the Answering

*Respondent, it can be assumed that the said Units were in the possession to the Unit holders/ buyers of the Corporate Debtor. A copy of the Photographs taken in respect of such Units is annexed herewith as **Annexure R-9 (Colly)**.*”

18. When we look into the Report of the IRP, it was clearly mentioned that there were no possession of the unitholders noticed except Unit No.10A in the IT Block which was open and in possession of PAN Security Services and BLS Developer Pvt. Ltd. In paragraph 12, the aforesaid statement has been made by the IRP. Paragraph 12(e) which was relied by the Appellant only mentions that the status of the possession of the units in the commercial block could not be determined. However, Flex Boards/notices of various professionals/businesses were affixed in some of the units in the said tower/block. It was observed “*Around 23 units in the said Block/Tower were having Flex boards/notice/ Address Board on them. While none of these units were open and shutters of all these units were closed during all the visits made at the Project site by the Answering Respondent.*”

19. From the aforesaid report, it is clear that for none of the units have been given Occupation Certificate or Completion Certificate and application for Occupancy Certificate is pending. In this context, we may also refer to the reply filed by the Respondent/allottees. Respondent has brought on record letter dated 16.11.2021 issued by the Greater Noida Industrial Development Authority to the allottees which was in reference to request of the allottees for completion certificate. There being no Occupancy Certificate issued by

Greater Noida Authority and as per the Report of the IRP, Occupancy Certificates are pending. We cannot accept the submission of the Appellant that the possession of 23 unitholders have been handed over. Even for argument sake, it is accepted that 23 unitholders have given possession, they will not lose their status as allottees till occupancy certificate is issued and possession is regularised. When no valid possession has been handed over to the allottees, we are not persuaded to accept the submission of the appellant that names of 23 units need to be deleted from the name of applicants who had filed Section 7 application. Counsel for the Appellant has also relied on No Objection Certificates issued by certain allottees. No Dues Certificates by Kamal Bhardwaj has been brought on record along with the Agreement to sub-lease. No Dues and No Claim Certificate dated 05.03.2020 filed along with the Rejoinder Affidavit is as follows:-

"To,

**Vardhman Estate & Developers Pvt. Ltd.
401-411, 4th Floor, Plot No-58, Block-C,
Shahpuri Tirath Singh Tower, DDA Community
Centre, Janak Puri, New Delhi-110058**

Date: -05/03/2020

NO DUES & No Claim Certificate

I, Kamal Bhardwaj Son of Shri Jagdish Bhardwaj Resident of House No-839/10, Naiyon Wali Gali, Main Bazar, Jind, Haryana-126102 had booked Office Space Unit no.115-C measuring 370Sq. Ft. (Super Area) in your project "**Vardhman i-V@lley**" (**IT Square**) situated at Plot No.26/1, Knowledge Park-III, Greater Noida (UP) of M/s Vardhman Estate & Developers Pvt. Ltd., i.e. the Company.

I, hereby expressly agreed and forgo all my claim such as interest/ delay interest/ charges/ penalty etc. against the company in relation to said unit as per the builder buyer agreement and also any claim under the provision of RERA.

Kamal Bhardwaj”

20. The above No Dues and No Claim Certificates at best can be read as certificates given by allottees to forego all claims such as delay interest charges penalty etc. relating to said unit. The said No Dues and No Claim Certificate cannot in any manner be read as the person giving no dues certificate is no more allottee of the unit. Sub-Lease Agreement which has been executed by corporate debtor in favour of Kamal Bhardwaj dated 05.03.2020 although mentions Agreement to Sub-Lease with possession but execution of Sub-Lease in no manner can lead to deletion of the status of the allottees. Thus, No Dues and No Claim Certificate relied by the appellant and Sub-Lease Agreement is not a ground on which the name of those who have given No Dues and No Claim Certificate should be deleted from number of the applicants who have filed Section 7 application. Adjudicating Authority has also in the impugned order has held that the construction is incomplete and the applicant fulfils the threshold of minimum 100 allottees. Adjudicating Authority also rejected the submission raised before it that 36 unitholders who have claimed assured return are speculative allottees and their names should be deleted from the application. In paragraph 3 of the judgment, Adjudicating Authority returned following findings:-

“3. The list of 36 units submitted was perused wherein the rate of assured return is varying from 9.5% to as high as 40%. The second argument presented by the earlier Ld. Counsel for the CD is that the Financial Creditors include several RERA decree holders who as per his contention would no longer qualify as real estate allottees. On the contrary, Ld. Counsel for the Financial Creditors rebutted that the number of units having such a high rate of assured return is very limited and most of them are genuine buyers and they would still be able to cross the threshold of 100 or more. The test of speculative investors is not satisfied by each one of the units mentioned in the list provided by the CD. As regards the submission of the counsel for the CD w.r.t. RERA decree holders no longer being an allottee, this issue is no longer res-integra as we have already held in M/s Jones Lang Lasalle Building Operations Private Limited vs. M/s Celebration City Projects Private Limited 2022 ibclaws.in 825 NCLT dated 26.09.2022 and the Hon'ble NCLAT in Mukul Agarwal vs. Royale Resinex Private Limited in Company Appeal (AT) (Insolvency) No.777 of 2020 dated 30.03.2022. In the M/s Jones Lang (supra), we have held that a RERA decree holder would not lose the original character of being an allottee and a decree is just a measure of the debt amount.”

21. No Dues Certificate which was claimed by the appellant was also noted and referred to Adjudicating Authority in paragraph 4 which is as follows:-

“4. The third contention of the earlier Ld. Counsel for the CD that some of the allottees of units have taken

back the money and No Due certificates have been issued in favour of the CD. Therefore, they did not remain allottees and therefore they cannot make claim. However, it is to be noticed that the agreements signed by the CD with those intending unit holders continue to remain on record and have not been cancelled so therefore the agreements are valid in law. This contention too does not merit consideration.”

22. The application under Section 7 filed by the Financial Creditors claimed amount of debt of Rs.39,18,80,005.35/- which included principal and interest. The issue pertaining to fulfilment of threshold by allottees was elaborately considered by the Hon’ble Supreme Court in Manish Kumar Case (supra). The Hon’ble Supreme Court has held that application under Section 7 can be moved provided applicants are Financial Creditors and there must be a default of Rs.1 Crore. It was held that only change which has been brought after the amendment is that the application can be presented by the allottees in those requisite number introduced by the proviso and default can be qua any of the applicants. In paragraphs 170 and 171, following was held:-

“170. It is indisputable that in order to successfully move an application under Section 7 that there must be a default which must be in a sum of Rs 1 crore. It is equally clear that the amount of Rs 1 crore need not be owed by the corporate debtor in favour of the applicant. It must be noted that the Explanation existed even prior to the provisos being inserted. It is open to a financial creditor, to move an application in the company of another financial creditor or more than

one other financial creditor. In fact, a perusal of the Rules, which we have already extracted, would indicate that irrespective of the number of applicants the court fee would remain Rs 25,000. This answers the alleged vagueness about court fees where the provisos are given effect to. Thus, *dehors*, impugned provisos in terms of the Explanation in Section 7(1), a financial debt need not be owed to the applicant and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under Section 7 provided that they are financial creditors and there is a default in a sum of Rs 1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants. We have taken an extreme example to illustrate how the Code can possibly be worked.

171. In practice, it may be unlikely, however, that persons would come together as applicants under the Code, if they are real estate allottees, particularly knowing what the admission of application under Section 7 entails, and the destiny of an application

which has reached the stage of compulsory winding up under Section 33. However, taking a more likely example viz. of the corporate debtor operating in the real estate sector and an allottee moving an application upon there being amounts due to him, prior to the amendment, undoubtedly, a single allottee could set the ball in motion and all he had to satisfy is default to him or any other financial creditor. The change that is brought about is only that apart from establishing the factum of default, he must present the application endorsed by the requisite number introduced by the proviso. Since, default can be qua any of the applicants, and even a person, who is not an applicant, and the action is, one which is understood to be in rem, in that, the procedures, under the Code, would bind the entire set of stakeholders, including the whole of the allottees, we can see no merit in the contention of the petitioner based on the theory of default, rendering the provisions unworkable and arbitrary.”

23. The submission advanced by the Counsel for the Appellant that application did not fulfil the threshold of 100 allottees, thus, is factually incorrect and cannot be accepted. Applicants who had filed the application represented more than 100 units, hence, the application could not be said to be deficient in any manner. It is also relevant to notice that application was filed in October, 2021 and more than 2 ½ years have lapsed and we had passed an interim order on 21.02.2023. Paragraph 5 of the interim order, is as follows:-

“5. List this Appeal on 20th March, 2023. In the meantime, IRP shall ensure that the Corporate Debtor is run as a going concern and it shall be open for the IRP to take steps for completion of project with the assistance of suspended directors/ex-management and employees. Committee of Creditors shall not be constituted in pursuance of the Order impugned.”

24. In view of the foregoing discussions and our conclusion, we are of the view that the Adjudicating Authority did not commit any error in admitting Section 7 application. Taking the note of the fact that the interim order was passed by this Tribunal on 21.02.2023 and this appeal is being decided on 31.05.2024, we direct for exclusion of period from 21.02.2023 till 31.05.2024 in the CIRP of the Corporate Debtor. There is no merit in the appeal. The appeal is dismissed subject to exclusion of time from 21.02.2023 till 31.05.2024. The CIRP against the Corporate Debtor may proceed in accordance with law.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali