

Flat Buyers Association Winter ... vs Umang Realtech Pvt. Ltd on 4 February, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 926 of 2019

IN THE MATTER OF:

Flat Buyers Association Winter Hills - 77, Gurgaon ...Appellant

Vs

Umang Realtech Pvt. Ltd through IRP & Ors.Respondents

Present:

For Appellant: Mr. Manoj Kumar, Ms. Shweta Bharti, Mr.
Shantanu Mallik, Ms. Nanki Arora and Ms. Katyani
Mahendru, Advocates.

For Respondents: Mr. L.C.N, Shahdeo, Advocate for RP.
Mr. Manoj Kr. Singh, Mr. Vijay K. Singh, Ms. Daizy
Chawla and Ms. Kanishka Prasad, Advocates for
the Intervenor - Uppal Housing Pvt. Ltd.

ORDER

04.02.2020: This is a peculiar case in which the 'Flat Buyers Association of Winter Hills -77, Gurgaon' and now the original applicants 'Mrs. Rachna Singh' and 'Mr. Ajay Singh' (Allottees) though want Corporate Insolvency Resolution Process for resolution but do not want approval of any plan of a third party (Resolution Applicant).

FACTS OF THE CASE:

2. Mrs. Rachna Singh and Mr. Ajay Singh (Allottees) - Financial Creditors moved application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process of 'M/s Umang Realtech Pvt. Ltd.' (Corporate Debtor), a real estate company constructing flats/ apartments for allottees. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 20th August, 2019 admitted the application and directed the Financial Creditor(s) to deposit a sum of Rs.2 Lakhs with the Interim Resolution Professional to meet out the expenses for performing functions assigning to him. As per the I&B Code, after initiation of the Corporate Insolvency Resolution Process it is duty of the Interim Resolution Professional/ Resolution Professional to keep the company a going concern. In the case of a real estate infrastructure company to keep the company going concern, the flats/ apartments are to be completed. However, a

sum of Rs.2 Lakhs as ordered to be deposited by the Financial Creditor(s) with the Interim Resolution Professional cannot meet the expenses for keeping the company a going concern for completion of the flats/apartments.

PROBLEMS IN FOLLOWING CERTAIN PROCESS IN THE CASES OF INFRASTRUCTURE COMPANIES (FOR ALLOTTEES):

3. The Parliament made amendment of Section 30(2) & (4) of the 'I&B Code' to give weightage to the 'Secured Creditors' which came into force on 16th August, 2019.

4. In "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. 1 ", the Hon'ble Supreme Court made a distinction between the 'Secured' and 'Unsecured Creditors' and observed that protecting 2019 SCC OnLine SC 1478 Company Appeal (AT) (Insolvency) No. 926 of 2019 creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important. If an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the Corporate Debtor is liquidated. This would defeat the objective of the Code which is resolution of distressed assets and only if the same is not possible, should liquidation follow. The amended Regulation 38 does not lead to the conclusion that 'Financial Creditors' and 'Operational Creditors', or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of Operational Creditors rights under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of Operational Creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

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5. In "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.2", the Hon'ble Supreme Court upheld the Explanation below Section 5(8) (f) to hold that allottees (Homebuyers) of Infrastructure Company are 'Financial Creditors'. It further observed that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Therefore, provisions of the Code would apply in addition to RERA.

6. The following are the problems which have now cropped up. There is a difference in Form B and Form C for submission of proof claims by the Operational Creditors and the Financial Creditors. Prior to the Notification dated 27th November, 2019, Form B which is for submission of proof of claims by Operational Creditors before the Interim Resolution Professional, did not have any column for details of any security held by them, unlike Form C which had such a separate column. The inclusion of this column vide the aforesaid notification acknowledges the fact that Operational Creditors can also be secured and that earlier, due to absence of any such specific column, the Operational Creditors were deprived from submitting their claims and to state whether any security is held by them either by annexing it by way of supplementary documents. Hence, there was a need for this inclusion. (2019) SCC OnLine SC 1005 Company Appeal (AT) (Insolvency) No. 926 of 2019

7. On the other hand, since inception of the Insolvency and Bankruptcy Code, 2016, at the time of liquidation, Forms B & C provided column for details of any security held by 'Operational Creditors' and the 'Financial Creditors'.

8. The 'allottees' (Homebuyers) come within the meaning of 'Financial Creditors'. They do not have any expertise to assess 'viability' or 'feasibility' of a 'Corporate Debtor'. They don't have commercial wisdom like Financial Institutions/ Banks/ NBFCs. However, these allottees have been provided with voting rights for approval of the plan. Many of such cases came to our notice where the allottees are the sole Financial Creditors. However, it is not made clear as to how they can assess the viability and feasibility of the 'Resolution Plan' or commercial aspect/ functioning of the 'Corporate Debtor' in terms of the decision of the Hon'ble Supreme Court in "Innoventive Industries Limited v. ICICI Bank and Anr.3" followed by "Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors.4" and "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.5".

9. In terms of the 'I&B Code' and the decisions of the Hon'ble Supreme Court, the 'Resolution Plan' must maximise the assets of the Corporate Debtor and balance the stakeholders (secured and unsecured creditors- Financial Creditors/ Operational Creditors).

(2018) 1 SCC 407 2019 SCC OnLine SC 73 2019 SCC OnLine SC 1478 Company Appeal (AT) (Insolvency) No. 926 of 2019

10. The Infrastructure which is constructed for the allottees by Corporate Debtor (Infrastructure Company) is an asset of the Corporate Debtor. The assets of the Corporate Debtor as per the Code cannot be distributed, which are secured for 'Secured Creditors'. On the contrary, allottees (Homebuyers) who are 'Unsecured Creditors', the assets of the Corporate Debtor which is the Infrastructure, is to be transferred in their favour ('Unsecured Creditors') and not to the 'Secured Creditors' such as Financial Institutions/ Banks/ NBFCs.

Normally, the Banks/ Financial Institutions/ NBFCs also would not like to take the flats/ apartments in lieu of the money disbursed by them. On the other hand, the 'unsecured creditors' have a right over the assets of the Corporate Debtor i.e. flats/ apartment, assets of the Company.

11. In most cases, the Committee of Creditors take 'haircut'. The Resolution Applicants satisfy them most of the time with lesser amount than the amount as determined. In the case of allottees (Financial Creditors), there cannot be a haircut of assets/ flats/ apartment.

The law is to be explained now again in a reverse way.

REVERSE CORPORATE INSOLVENCY RESOLUTION PROCESS:

12. In "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. (2019 SCC OnLine SC 1478)", Hon'ble Supreme Court observed as follows:

Company Appeal (AT) (Insolvency) No. 926 of 2019 "90. In Swiss Ribbons (supra) this Court was at pains to point out, referring, inter alia, to various American decisions in paras 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. In para 120 of the said judgment, this Court held:

"120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also Company Appeal (AT) (Insolvency) No. 926 of 2019 seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.""

In view of the observation of the Hon'ble Supreme Court, we experimented as to whether during the Corporate Insolvency Resolution Process the resolution can reach finality without approval of the third party resolution plan.

13. One of the Promoter - 'Uppal Housing Pvt. Ltd.'/ Intervenor agreed to remain outside the Corporate Insolvency Resolution Process but intended to play role of a Lender (Financial Creditor) to ensure that the Corporate Insolvency Resolution Process reaches success and the allottees take possession of their flats/apartments during the Corporate Insolvency Resolution Process without any third party intervention. The Flat Buyers Association of Winter Hill - 77 Gurgaon also accepted the aforesaid proposal. It is informed that 'JM Financial Credit Solutions Ltd' one of the financial

institution has also agreed to cooperate in terms of agreement with the condition that they will get 30% of the amount paid by the allottees at the time of the registration of the flat/apartment.

14. The other development is that 'Rachna Singh' and 'Ajay Singh' (Allottees), who moved application under Section 7 of the I&B Code, joined hands with the Company Appeal (AT) (Insolvency) No. 926 of 2019 Appellant - 'Flat Buyers Association Winter Hill -77, Gurgaon' and became its members. During the last few months the Corporate Insolvency Resolution Process has progressed and a number of allottees including 'Rachna Singh' and 'Ajay Singh' have already taken possession of their respective flats and sale deed(s) have been registered in their favour.

15. 'Uppal Housing Pvt. Ltd.' invested certain amount as an outsider Financial Creditor and as Promoter cooperating with the Interim Resolution Professional, having expertise of real estate project, so we asked it to give time frame for completion of the flats/apartments of the project and time frame for providing common area facilities like Swimming Pool, Club House etc. as per the agreement. They were directed to provide a chart showing the amount as due from different allottees and default, if any, committed by allottee(s). The progress report has also been taken on record.

Following facts have been highlighted by 'Uppal Housing Pvt. Ltd.', which is also accepted and endorsed by Mr. Manish Kr. Gupta, Interim Resolution Professional, who is present and always remain present in person.

(i) There are 706 number of flats/apartments in Winter Hills - 77, Gurgaon project. Out of 706 flats/apartments, 624 flats/apartments have been booked/agreed to be sold which includes 3 bookings done during CIRP. The Corporate Debtor offered possession to all 624 allottees through the Interim Resolution Professional and asked them to pay their respective outstanding dues.

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(ii) There are 453 number of allottees who have paid their respective consideration amount in full and have taken possession. The list of 453 Allottees who have taken the possession after making payment as per the demand notice issued has been annexed and marked as Annexure -1. There are 26 allottees who have paid the consideration amount in full, but have not taken possession of their respective apartment/flat from the Corporate Debtor through IRP. The list of these 26 Allottees who have paid the amount as per the demand notice issued has been annexed and marked as Annexure-2.

(iii) There are 142 allottees who have defaulted in making payment of their installments due to the Corporate Debtor. The IRP has issued demand notices to make the payment of the outstanding amount. However, they have neither paid the outstanding amount nor have come forward to take possession. The list/ details of the defaulter-allottees along with date of default, amount in default and percentage of default has been annexed and marked as Annexure-3.

(iv) As on 16.01.2020, the Corporate Debtor has received NOC in respect 123 number of allottees for execution of the sale deeds from JM Financial Credit Solutions Ltd. Further, 92 number of sale

deeds have been registered in favour of the allottees as on 16.01.2020. The list of 92 allottees in whose favour the sale deeds have been registered has been annexed as Annexure - 4.

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(v) Uppal Housing Pvt. Ltd. in the additional affidavit dated 03.01.2020 had sought 5 months' more time for completion of Winter Hills - 77 Gurgaon Project in all respects including necessary amenities and common services. This Appellate Tribunal directed Uppal Housing Pvt. Ltd. to state the time frame for completing the facilities like Club House and Swimming Pool etc. and completing the project.

(vi) Uppal Housing Pvt. Ltd. after discussing with the Contractor(s) involved in the execution of the work at Winter Hills - 77 Gurgaon Project and the Interim Resolution Professional reasonably believes that the construction work and essential services like electricity, water fit-outs would be completed within a period of 3 more months. Swimming Pool and playgrounds are structurally ready and will be functional once enough allottees start actually residing in their respective flats. Further, Club House would be completed within a period of 4 months.

(vii) The Corporate Debtor has already applied for water connection and are in process of applying electricity connection. The Corporate Debtor is following up with the statutory authority(ies) so that water and electricity connections provided expeditiously.

(viii) The Corporate Debtor has already installed two lifts each in every tower. Lifts would be functional as per the requirement of the allottees. Company Appeal (AT) (Insolvency) No. 926 of 2019

(ix) It is submitted that Air condition, Kitchen, Wardrobes, fans, Chimney, Geyser would be installed in the respective flats before the allottees actually starts residing in their respective flats. Approximately 40-42% allottees have taken possession without the fit-outs and they will do necessary fit-outs on their own. Such allottees have made payment to the Corporate Debtor after deducting the cost of the fit-outs. The Corporate Debtor would provide necessary fit-outs in rest of the flats expeditiously and the entire work would be completed within 4-5 months depending upon fund follow and delivery of necessary material from the suppliers, subject to final payment by each of the allottees.

(x) Uppal Housing Pvt. Ltd. has requested to stay all the recovery proceedings and the Corporate Debtor and/or Uppal Housing Private Limited may not be burdened with additional amount in satisfying the order passed by the Court/Consumer Forum/ RERA Authority till the works mentioned are complete. Further, necessary directions is required so that the amount deposited by the allottees is utilized exclusively for the purpose of providing amenities, facilities and completion of work in the respective projects. It is stated that some of the allottees are adopting arm twisting tactics against Uppal Housing for recovery of the amount as they are not willing to take possession of their flats/apartments.

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16. List of 453 allottees who have taken possession, is detailed:-

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17. Another list of 26 allottees who have made payment but not taken possession has been provided:-

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18. Details of 92 allottees who have already paid the amount for registration and in whose favour registration has been made are:-

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19. Summary status as on 17.01.2020 with regard to Winter Hill - 77 Gurgaon is shown below:-

20. We have already noticed that the Financial Creditors like 'JM Financial Credit Solutions Ltd.', their claim is also satisfied at the time of final registration of the flats. Mr. Manoj Kr. Singh, learned counsel appearing on behalf of 'Uppal Housing Pvt. Ltd.', on instructions from Mr. Sanjeev Jain, Director Finance of Uppal Housing Pvt. Ltd., assured that the dues of the 'Financial Institutions' such as 'JM Financial Credit Solutions Ltd.' and others, if any, with regard to the present project i.e. Winter Hills - 77, Gurgaon will be also satisfied within six months.

Company Appeal (AT) (Insolvency) No. 926 of 2019 OBSERVATIONS ON FINDINGS OF THIS APPELLATE TRIBUNAL:

21. In Corporate Insolvency Resolution Process against a real estate, if allottees (Financial Creditors) or Financial Institutions/Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where separate plan(s) are approved by different authorities, land and its owner may be different and mainly the allottees (financial creditors), financial institutions (financial creditors, operational creditors are different for such separate project. Therefore, all the asset of the company (Corporate Debtor) are not to be maximized. The asset of the company (Corporate Debtor - real estate) of that particular project is to

be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority. Any other allottees (financial creditors) or financial institutions/ banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained.

Company Appeal (AT) (Insolvency) No. 926 of 2019 So, we hold that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not other projects which are separate at other places for which separate plans approved. For example - in this case the Winter Hill - 77 Gurgaon Project of the 'Corporate Debtor' has been place of Corporate Insolvency Resolution Process. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised.

22. Further, a 'Secured Creditor' such as 'financial institutions/ banks', cannot be provided with the asset (flat/apartment) by preference over the allottees (Unsecured Financial Creditors) for whom the project has been approved. Their claims are to be satisfied by providing the flat/apartment. While satisfying the allottees, one or other allottee may agree to opt for another flat/apartment or one tower or other tower if not allotted to any other. In such case their agreements can be modified by the Interim Resolution Professional/ Resolution Professional with the counter signature of the Promoter and the allottees, so that the allottees (financial creditors), who are on rent or paying interest to banks may like to get earlier possession and are relieved from paying rent or interest to banks.

23. There may be some allottees who may ask for refund. But that prayer cannot be allowed by the Adjudicating Authority (National Company Law Company Appeal (AT) (Insolvency) No. 926 of 2019 Tribunal) or by this Appellate Tribunal in view of the decision of the Hon'ble Supreme court in "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.□(2019) SCC OnLine SC 1005", wherein the Hon'ble Supreme Court observed as follows:-

"57. It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, prima facie at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief

including payment of compensation and/or refund, entailing a dismissal of the said application. Company Appeal (AT) (Insolvency) No. 926 of 2019 At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death."

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24. However, after offering allotment it is open to an allottee to request the Interim Resolution Professional/Promoter, whoever is in-charge, to find out a third party to purchase said flat/apartment and get the money back. After completion of the flats/project or during the completion of the project. It is also open to an allottee to reach agreement with the Promoter (not Corporate Debtor) for refund of amount.

25. In the light of aforesaid discussion, as we find it is very difficult to follow the process as in normal course is followed in a Corporate Insolvency Resolution Process, we are of the view, that a 'Reverse Corporate Insolvency Resolution Process' can be followed in the cases of real estate infrastructure companies in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganized workmen.

DIRECTIONS:

26. The 'Uppal Housing Pvt. Ltd.' - Intervenor (One of the Promoter) is directed to cooperate with the Interim Resolution Professional and disburse amount (apart from the amount already disbursed) from outside as Lender (financial creditor) not as Promoter to ensure that the project is completed with the time frame given by it. The disbursement of amount which has been made by 'Uppal Housing Pvt. Ltd.' and the amount as will be generated from dues of the Allottees (Financial Creditors) during the Corporate Insolvency Resolution should be Company Appeal (AT) (Insolvency) No. 926 of 2019 deposited in the account of the Company (Corporate Debtor) to keep the Company a going concern. The amount can be utilized only by issuance of cheque signed by the authorised person of the Company (Corporate Debtor) with counter signature by the Interim Resolution Professional. The Bank in which the Corporate Debtor (Company) has account the

amount should be deposited only for the purpose of completion of the Winter Hill - 77 Gurgaon Project. Banks will allow the cheques for encashment only with the counter signature of the Interim Resolution Professional.

27. The flats/apartments should be completed in all aspect by 30th June, 2020. All internal fit outs for electricity, water connection should be completed by 30th July, 2020. The Financial Institutions/ Banks should be paid simultaneously. The allottees are directed to deposit their balance amount and pay 90% without penal interest, if not deposited, by 15th March, 2020. The Allottees in whose favour possession has been offered and clearance has been given by the competent authority are bound to pay the cost for registration and directed to deposit registration cost to get the flats/apartments registered after paying all the balance amount in terms of the agreement.

28. Common area such as Swimming Pool, Club House etc. as per the agreement, be also completed by 30th August, 2020. The allottees are allowed to form 'Residents Welfare Association' and get it registered to empower them to claim the common areas.

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29. All these processes should be completed by 30th August, 2020. If it completed, the Corporate Insolvency Resolution Process be closed after intimating it to the Adjudicating Authority (National Company Law Tribunal). The resolution cost including fee of the Interim Resolution Professional will be borne by the Promoter. Only after getting the certificate of completion from the Interim Resolution Professional/ Resolution Professional and approval of the Adjudicating Authority (National Company Law Tribunal) unsold flats/ apartments etc. be handed over to the Promoter/ Uppal Housing Pvt. Ltd.

30. It is made clear that even during the Corporate Insolvency Resolution Process, the Interim Resolution Professional can also sell the unsold flats/apartments, by way of a Tripartite Agreement between the Purchaser, Interim Resolution Professional/ Resolution Professional and Promoter (Uppal Housing Pvt. Ltd.). The proceeds as may be generated from such sale should be utilized for completion of the project and payment to Financial Institutions/Banks and Operational Creditors. Once the project is completed, the Interim Resolution Professional will mover application before the Adjudicating Authority (National Company Law Tribunal) with the report of completion and ask for disposal of application under Section 7, 'Rachna Singh' and 'Ajay Singh' (Allotees - Financial Creditors) having already occupied their flats.

31. However, if the 'Promoter' fail to comply with the undertaking and fails to invest as financial creditor or do not cooperate with the Interim Resolution Company Appeal (AT) (Insolvency) No. 926 of 2019 Professional/ Resolution Professional, the Adjudicating Authority (National Company Law Tribunal) will complete the Insolvency Resolution Process. The appeal stands disposed of with aforesaid observations and directions.

[Justice S. J. Mukhopadhaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) am/gc
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