Amit Katyal vs Meera Ahuja & Anr on 9 November, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 1380 of 2019
[Arising out of Order dated 28th November 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench Delhi, Bench-III in Company Petition (I.B.) No. 1722/ND/2018]

IN THE MATTER OF:
Shri Amit Katyal
S/o Shri O.P. Katyal
R/o 406, 4th Floor, Elegance Tower
8, Jasola District Centre
New Delhi - 110025 Appellant

Versus

1. Mrs Meera Ahuja
W/o Dr S.C. Ahuja
R/o 290, Asiad Games Village
New Delhi - 110049 Respondent No.1
2. Mrs Ruby Sachdev
D/o Dr S.C. Ahuja
R/o 290, Asiad Games Village
New Delhi - 110049
Through their Power of Attorney Holder Respondent No.2
3. Mr Hemant Ahuja
S/o Dr S.C. Ahuja
R/o 290, Asiad Games Village
New Delhi - 110049 Respondent No.3
4. Jasmine Buildmart Pvt Ltd
Through Jugraj Singh Bedi
Interim Resolution Professional
IBBI/IPA-001/P-P00731/2017-18/11208
IRP Regd. Address:
B-36, Jhilmil Industrial Area
Delhi - 110091
Email ID - jb@jsba.in Respondent No.4

Present:
For Appellant : Mr Saurabh Kalia, Ms Bina Gupta, Ms Sheena Taqui and Mr Shashi Shekhar, Advocates
For Respondent : Mr Neeraj Malhotra, Sr Advocate alongwith Mr Lokesh Bhola and Mr Sanchit Gawri, Advocates for R-1 & 2.
Mr Jugraj Singh Bedi, IRP

J U D G M E N T

[Per; V. P. Singh, Member (T)] This Appeal emanates from the Order dated 28th November 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Delhi Bench, Delhi in

Company Petition (I.B.) No. 1722/ND/2018, whereby the Adjudicating Authority has admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code'). The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. The brief facts of the case are as follows:

> The Corporate Debtor is a builder of High-end Project in the name of "Krish Provence" in Gurgaon wherein booking of Flat No. C-1101, Tower-C, Floor-11 admeasuring 5800 sq. ft. for a total sale consideration of Rs.3,80,10,000/-.Booking of the flat was made under a Construction linked plan. The respondents are the Second Purchasers of the above stated flat booked vide Apartment Buyer Agreement (in short 'ABA') dated 07th August 2011, which was executed on 07th August 2012. As per Agreement, the completion period was 36 months plus six months as a grace period, i.e. February 2015.

3. The Appellant contends that after adjusting the payments made by the Original buyer, the Respondent has paid a total sum of Rs.2,75,55,186/- as against the total cost of the flat as Rs.3,80,10,000/-. The last payment was made by the Respondents on 26th August 2013, and after that, despite several reminders, no payment was made. The Respondents had opted for a Company Appeal (AT) (Insolvency) No. 1380 of 2019 2 of 33 Construction linked plan but failed to pay the instalments on time, even though time was the essence of Agreement.

4. The Appellant contends that the Respondents are defaulters. Therefore, the Corporate Debtor was constrained to cancel their Allotment vide letter dated 26th June 2015.

5. The Appellant contends that the Respondents are defaulters, and they have initiated the proceedings against under Section 7 of the I&B Code against the Appellant/Corporate Debtor.

6. The Respondents have filed an Application under Section 7 of the Code for the realisation of amounts Rs.6,93,02,755/- on 06th December 2018, as against the payment of Rs.2,75,55,186/-.The Appellant has pleaded that the proceedings initiated by the Respondents No.1 &2 are against the provisions of the Code and have been done so, to pressurise the Corporate Debtor. The Appellant/Corporate Debtor further contends Rs.26,10,000/- was payable on costing of internal finishing, which was communicated to the Respondents vide its letter dated 19th December 2014. After that, demand letter dated 19th December 2014 was issued for making a total payment of Rs.58,93,394/-, which included the previous dues of Rs.31,86,615/-, which was payable by 12th November 2013.

7. The Corporate Debtor vide its letter dated 26th June 2015 communicated to the Respondent No.1 to pay the outstanding Amount of Rs.58,93,393/- within 15 days from the receipt of the Notice. It was expressly Company Appeal (AT) (Insolvency) No. 1380 of 2019 3 of 33 stated in the letter dated 26th June 2015 that failure on the part of the Respondent No.1, may result in cancellation of the Allotment.

8. The Appellant further contends that the Project is at the final stage and ready for habitation. The Respondent No.1& 2 herein have committed default in making payment of instalments. After the cancellation of the Allotment dated 26th June 2015, the Respondent No.1 has filed the petition under Section 7 of the Code.

9. The Respondent No.1/Home Buyer/Financial Creditor submits that as per Agreement dated 07th August 2012, possession was to be handed over within 36 months from the date of commencement of the Construction or execution of the Agreement, whichever is later. After expiry of the said period, the Corporate Debtor was entitled to a grace period of 180 days for obtaining the Occupation Certificate from the concerned Authority. As per Agreement, possession of the flat was to be handed over to the Respondent No.1/Financial Creditor by the first week of February 2016. However, the said unit of Respondent No.1 and 2, as well as Tower-C was not ready for possession till 28th November 2018, when the internal finishing was still going on. Despite the assurances, the Appellant failed to deliver the possession of the said unit to the Respondents. Therefore, the Respondents/Financial Creditor had filed the Application under Section 7 of the Code on 06th December 2018.

10. The Respondent No.1 and 2 contend that the Allotment of the said flat was under Construction linked plan, but the Appellant/Builder inordinately delayed the Construction. The Adjudicating Authority has observed that due to non-performance of the Corporate Debtor, the balance payment was not Company Appeal (AT) (Insolvency) No. 1380 of 2019 4 of 33 made by the Financial Creditor, as the Corporate Debtor failed to honour the commitment in terms of the Agreement.

11. The Adjudicating Authority has observed that the Corporate Debtor has not handed over the possession of the flat to the Financial Creditor, as the construction work could not be completed within the stipulated time and there is no proof of extension of time by the concerned Authority. There is a debt of more than Rs One Lac (Rs 100,000) due and payable, which the Corporate Debtor failed to pay. Thus, the default of the part of Corporate Debtor is established. In the circumstances, the Application was admitted by the Adjudicating Authority, which is challenged in this Appeal.

12. Based on the pleadings of the parties, following issues arise for consideration:

> i) Whether the Corporate Debtor has committed default in not completing the Construction of the flat in time and handing over possession of the same in terms of Agreement?
>
> ii) Whether Financial Creditor/Home Buyer committed default in making payment of the instalments as per 'ABA' under construction link Plan?
>
> iii) Whether the Application U/S 7 of the Code is filed fraudulently with malicious intent for the purposes other than for the Resolution of Insolvency or liquidation, as defined under Section 65 of the I&B Code, 2016?

iv) Whether the Application is barred by limitation? Company Appeal (AT) (Insolvency) No. 1380 of 2019 5 of 33

13. We have heard the arguments of the Learned Counsel for the parties and perused the records.

For the sake of convenience Issue, No4 is firstly.

Issue No 4;

14. The Appellant contends that the default occurred on the date when Respondents stopped paying the instalments of the due Amount, as per construction Link Plan. It is further claimed that the present case is not a case of the continuous cause of action, as the Allotment was terminated by the Appellant vide letter dated 26th June 2015, on the default of the Respondent, i.e. much before the enforcement of I&B Code, 2016.

15. The above contention of the Appellant cannot be accepted because the date of default for financial creditor cannot be a date when the Respondent No.1 & 2 stopped paying the instalments. Admittedly, in this case, possession was to be handed over latest by 07th February 2016. There is nothing on record to show that the Corporate Debtor has ever offered possession of the flat and that the occupation certificate was applied for within the stipulated time of handing over possession. When the Corporate Debtor failed to complete the Construction and could not deliver the possession, the default was committed. The petition is filed within three years from the date, when possession was scheduled to be delivered. Thus, it is clear that the objection of the Appellant regarding limitation is not sustainable. Issue No 1 & 2;

16. The Allottee/Financial Creditor contends that the Corporate Debtor has committed default in not completing the Construction of the flat in time and Company Appeal (AT) (Insolvency) No. 1380 of 2019 6 of 33 handing over possession of that in terms of Agreement. Per contra, the corporate debtor pleaded that Financial Creditor/Home Buyer committed default in making payment of the instalments, as per Agreement under construction link Plan. Thus, the Financial Creditor/Allottee itself committed default by not paying the instalments.

17. The Appellant has placed reliance on the law laid down by the Hon'ble Supreme Court in case of Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 wherein it is held ;

> "56. 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 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. 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 Company Appeal (AT) (Insolvency) No. 1380 of 2019 7 of 33 Insolvency. This the real estate developer may do by pointing out, for example, that the Allottee who has knocked at the doors of 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 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."

(emphasis supplied)

18. Based on the law laid down by Hon'ble Supreme Court in the above case, it is clear that once the prima-facie case is made out by the home buyer, the burden shifts on the Promoters/Real Estate Developer to point out in the reply that the Allottee is itself a defaulter.

19. The Appellant further pleaded that it has been calling the Respondents to collect the refund amount vide letter dated 05th March 2019 and its reminder dated 04th April 2019. The Appellant drew our attention on the order sheet of this Appellate Tribunal dated 18th December 2019, wherein it is recorded that the "Appellant brought cheques amounting to Rs.1.51 crores shows the intention of the Appellant to settle". It is further submitted that vide letter dated 04th January 2020 the Appellant again offered the same Amount, which was rejected by the Respondent vide its letter dated 04th January 2020. Company Appeal (AT) (Insolvency) No. 1380 of 2019 8 of 33

20. The Appellant/Corporate Debtor further pleaded that the Occupation Certificate has been obtained and letters of possession to 75 Allottees has also been issued. More than 40 people have already taken possession. It is contended that due to the unreasonable demand of one person, the interest of 175 Home Buyer shall be jeopardised. It is claimed that the Respondent did not make any payment after August 2013. It is not the case where the date of possession had expired and the builder failed to complete the Project and hence, the allottees stopped paying the instalments. It is contended that the Respondents are defaulters themselves, and they cannot be allowed to take advantage of their wrong. The flat allotted to the Respondents has been sold. That the Corporate Debtor is a debt-free company as a loan of Rs.70 Crores of the Bank has been repaid long back.

21. In the Pioneer case (supra), Hon'ble Supreme Court observed that in a case when a Section 7 Application made by an allottee, NCLT's satisfaction should be with both eyes open. The NCLT shall not turn Nelson's eye to legitimate defences taken by a Real Estate Developer.

22. In light of ratio of the Judgment of Hon'ble Supreme Court as held in Pioneer's case, it is clear that the NCLT should be cautious in admitting the petition filed by the Home Buyer so that the Insolvency Code could not be misused as a weapon for recovery of Debt.

23. The Appellant contends that the Allottee Home Buyer/Financial Creditor has committed default in making payment of the instalments. The Company Appeal (AT) (Insolvency) No. 1380 of 2019 9 of 33 details of default in a chart form, as submitted by the Appellant in its written submissions are as under:

S. No.	Demand Dated	Due Date	Paid on	Remarks
1.	Rs.38,31,103/-	20.03.2013	01.07.2013	The demand was for 15th floor. (delayed payment)
2.	Rs.76,78,335/- (including the previous demand) 14.06.2013	05.07.2013	26.08.2013	The demand was for 15 floor. th (delayed payment)
3.	Rs.32,68,579/- 23.10.2013	12.11.2013	Not paid	The demand was on the initiation ofthe 24th floor.
4.	Rs.58,93,394/- (including the previous demand) 12.12.2014	14.01.2015	Not paid	The demand was for commencing of internal furnishing.

24. The Appellant contended that the Respondents are defaulters; thus, the Corporate Debtor was constrained to cancel their Allotment vide letter dated 26th June 2015 by making a final call upon the Respondents.

25. In reply to the above allegations, the Respondent No.1 and 2 submitted that the Corporate Debtor miserably failed to complete the Construction of the said Project as per the timeline envisaged in the said Agreement 'ABA', and the said Project is yet not complete. It is submitted that for the same reason, further payment was not made by the Respondent No.1 and 2. The Respondent

No.1 and 2 had already paid a substantial amount to the tune of Rs.2,75,55,186/- way back in the year 2013, and the same was brought to the knowledge of the Corporate Debtor vide its reply dated 28th July 2015. Company Appeal (AT) (Insolvency) No. 1380 of 2019 10 of 33

26. It is evident that Rs 2,75,55,186/- was paid out of the total sale consideration of Rs.3,80,10,000/- (Rupees Three Crore Eighty Lakhs Ten Thousand only). Despite the said Agreement being dated 07th August 2011, the Appellant/Corporate Debtor vide its letter dated 25th October 2018 informed that in the Agreement, the date of 07th August 2011would be read as 07th August 2012.

27. Given the Agreement, the Appellant/Corporate Debtor proposed to handover the possession of the unit within 36 months alongwith a grace period of 6 months from the date of the execution of said Agreement. Hence, the possession of the said unit was to be handed over latest by07th February 2016. It is also evident from the reply of Notice dated 05th November 2018 that the Project was incomplete up to that time. The Corporate Debtor has stated in its reply that:

> "We may also clarify at this juncture that IBC, 2016 does not apply in the facts and circumstances as there is no debt whatsoever and therefore the question of there being default or parts of our clients does not arise. Just for the sake of information, we may enlighten you that unlike most builders who have abandoned the projects or stopped work, our client had completed the Project. Hence, at this final stage when your client is aware that everything is in place and the flooring and finishing is underway of the Apartment. The present Notice is motivated and smacks of malafide, being a desperate attempt to extort monies from our clients by threatening under IBC."

(emphasis supplied) Company Appeal (AT) (Insolvency) No. 1380 of 2019 11 of 33

28. Based on the above admission of the Corporate Debtor, it is clear that till 22nd November 2018, flooring and finishing work of the Apartment was still going on. The Appellant has annexed the copy of a letter dated 29th October 2019 by which the concerned authorities granted permission for the occupation of the said building. The Corporate Debtor had applied for issuance of Occupation Certificate on 03rd July 2019, which was granted on 29th October 2019.

29. Regarding the demand raised by the Appellant on 26th February 2013, the payment by the allottee/financial creditor was delayed by five months. Similarly in respect of demand raised on 14th June 2013, the payment was delayed by 45 days in making.

30. Regarding the above-stated delay in payment, it is contended by the Respondent No 1,that the Appellant had accepted the payment without any protest, which is evident from the copy of ledger account, which is issued by the Appellant, wherein the Appellants has not charged any interest whatsoever from the Respondents on the said delayed payments. Besides the same, even till 25th October 2018, the ledger entries do not depict any interest charged on the delayed payments. The Respondents pleaded that since the possession could not be handed over on the Schedule; therefore,

interest was not being charged from the Allottee/Home Buyer.

31. Based on the ratio of the judgement of Hon'ble Supreme Court in Pioneer's Urban Land Infrastructure (supra) the Appellants submits that from the facts of this case it is evident that default is on the part of Company Appeal (AT) (Insolvency) No. 1380 of 2019 12 of 33 Applicant/Financial Creditor and not on the part of the Appellant/Corporate Debtor. Thus Application filed U/S 7 of the Code should be dismissed. The action should further be taken U/S 65 of the Code against the allottee/financial creditor.

32. In the Pioneer Urban Land Infrastructure case, Hon'ble Supreme Court has observed that Real Estate Developers are, in substance, persons who avail finance from the allottees who then fund the real estate development project. Once a prima facie case is made out by an allottee in an Application under Section 7, the burden shifts on the promoter/real estate developer to point out in their reply and the hearing before NCLT, that the Allottee is himself a defaulter and not entitled to any relief. The remedies available to allottees under RERA shall not affect on the remedies available under the Insolvency Code. The remedies under the Consumer Protection Act, RERA and Insolvency Code, 2016 are concurrent, and in case the Allottee himself is a defaulter under RERA Rule's, the Allottee will not be entitled to any relief including payment of compensation and/or refund. It is further held that under Section 65 of the Code the real estate developer can point out that the Allottee who has knocked the door of 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 allottees does not want to go ahead with its obligation to take possession of the flat/Apartment under RERA, but want to jump ship and get back, by way of this coercive measure, monies already paid by it.

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33. In this case, the Appellant's vehemently argued that the Allottee/Financial Creditor is himself a defaulter. But the Allottee contended that due to non-performance of the Corporate Debtor, the balance payment was stopped, as the Corporate Debtor failed to honour the commitments in terms of Agreement. It is also noticed that there is a default in payment of instalments, when there was a delay in the completion of the Project. The Respondent No.1 and 2 had already paid Rs.2,75,55,186/- way back in the year 2013 out of total sale consideration of Rs.3,80,10,000/-. Given the terms of Agreement dated 07th August 2011, the possession was due to hand over within three years from the date of Agreement, with a grace period of 6 months. The Corporate Debtor by its letter dated 25th October 2014 changed the date of Agreement as 07th August 2012 instead of 07th August 2011 by intimating the allottee financial creditor. The Allottee contends that as substantial Amount of the flat was paid upto 2013 and the Project was delayed. Therefore it had stopped payment of instalments. There is not an iota of evidence by which it can be inferred that the Financial Creditor is a speculative buyer and is not interested in possession of the flat.

34. It is pertinent to mention that the Corporate Debtor itself has conceded in its reply to notice, dated 05th November 2018, that while most builders have abandoned the projects or stopped work, but he is completing the Project which is at its final stage, where everything is in place, and the

flooring and finishing work are underway. This may be one of the reason, as to why the Allottee stopped the payment of Instalment to the Corporate Debtor. We cannot deny from the fact that in many of the Real Estate Projects, the Company Appeal (AT) (Insolvency) No. 1380 of 2019 14 of 33 builders have either left the Project abandoned or had stopped the work and a general sense of insecurity has developed among allottees home buyers. From facts of this case, it is evident that the corporate debtor has failed to honour its promise in completing the Project and handing over possession in time as per terms of the Agreement. Therefore due to non-payment of an instalment on account of delay in Construction cannot be treated as default committed by the Allottee.

35. From the reply of the Corporate Debtor dated 22nd November 2018, it appears that till submission of a response, work of flooring and finishing was undergoing. It is also clear that the Corporate Debtor applied for occupation certificate only in July 2019. It is evident that Application for granting occupation certificate was submitted on 03rd July 2019, which was granted on 29th October 2019. Thus, it is clear that the Project which was to be completed within 3 years from the date of Agreement and possession was to be handed over latest by 1stweek of February 2016. The position that emerges is that the Project was incomplete, even after expiry of two years from the stipulated date of possession. It is also clear that delay in handing over possession on the stipulated date, was not on account of delay by the statutory authorities in granting occupation certificate.

36. The Appellant contended that since the Allotment had been cancelled; therefore, the Respondents are entitled to refund of the consideration amount, after deduction of the earnest money. Therefore, the Appellant proposes to deduct more than 45% of the paid Amount, as earnest money. Company Appeal (AT) (Insolvency) No. 1380 of 2019 15 of 33

37. The Appellant contends that after issuing reminder dated 08th December 2015, the allotment of the said unit stands cancelled.

38. In its reply to this Notice, the Financial Creditor submits that on 20th December 2016 the Appellant requested for payment of VAT dues amounting to Rs.3,00,615/-, which was paid by the Financial Creditor on 30th January 2017, which is admitted in Appeal. Further, the Appellant has issued a copy of the ledger account of the Corporate Debtor dated 25th December 2018. This ledger entry is in the name of Financial Creditor/Respondent No.1, and 2, which shows that the said unit of the Respondents was not cancelled till 25th October 2018. The Respondents further laid emphasis on observation of the Hon'ble Delhi High Court in case of Neeru Jain & Others Vs. Jasmine Buildmart Private Limited being OMP(I)(COMM.) No.280 of 2019. In para Nos.36 to 38 of the said judgement, the conduct of the Appellant regarding cancellation of the unit and the Allotment on the same day, relating to the same Project, to the Director of the Appellant was noticed.

39. The Learned Counsel for the Appellant has also placed reliance on the Judgment of this Appellate Tribunal in case of Navin Raheja Vs. Shilpa Jain and Others in Company Appeal (AT) (Insolvency) No. 864 of 2019. In this Appellate Tribunal has held that:

> "34. As per the aforesaid decision of the Hon'ble Supreme Court, the 'Corporate Debtor' can refer to Section 65 and point out that insolvency resolution process has

been invoked fraudulently, with malicious intent, for any purpose other than the resolution or Insolvency.

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35. The Real Estate developer may do so 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. The Developer 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.

36. From the aforesaid findings, it is clear that the Adjudicating Authority (National Company Law Tribunal) before admitting a case can find out whether the Application filed 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.

37. It has come to our notice that in a large number of cases, in the language of the Hon'ble Supreme Court, the allottees are speculative investor and not a person who is genuinely interested in purchasing a flat/ apartment. They do not 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.

38. The Adjudicating Authority noticed the letter dated 15thNovember, 2016 relating to delivery of possession but refused to accept the same. In the said Notice of possession, a further period of four weeks to handover the possession and three months for registration have been sought. In the No Objection Certificate dated 11thNovember, 2016, the 'Corporate Debtor' showed that it applied for water connection but having not received, till then at least potable water through tankers was required to be supplied to the residents.

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39. The Adjudicating Authority also noticed the stand taken by the 'Corporate Debtor' that for disposal of sewerage and storm water till the time services were made available by HUDA/ State Government as per the Scheme.

40. The Appellant agreed to pay the Amount with interest but the Respondents-allottees before this Appellate Tribunal refused to accept the payment and wanted higher percentage of money @ 18% p.a. which was even higher than the actual principal Amount paid by the Respondents- allottees.

41. The 1stand 2nd Respondents have not denied that they were offered possession on 15th November, 2016, but they refused to take possession and after two years they wanted money back.

42. As per Clause 4.4 of the 'Flat Buyer's Agreement- Sampada' dated 3rdAugust, 2012, delay on account of non availability of necessary infrastructure facilities being provided by the Government for carrying development activities, such as outside water discharge system by HUDA or State Government as noticed by the Adjudicating Authority, for that the 'Corporate Debtor' cannot be made responsible. The occupation certificate by the Government/Central Government/Competent Authority not given within time as specifically pleaded by the Appellant and the 'Corporate Debtor' before the Adjudicating Authority and not denied by the 1st and 2nd Respondent, it squarely comes within Clause 4.4 of the Flat Buyer's Agreement (Force Majeure).

43. Learned counsel for the Appellant submitted that there was Order of stay passed by the National Green Tribunal for which the 'Corporate Debtor' cannot be blamed if there is a delay in non- completion.

44. All the facts aforesaid clearly show that the 1st and 2nd Respondents, in spite of offer of flat, wanted refund of the Amount Company Appeal (AT) (Insolvency) No. 1380 of 2019 18 of 33 with more interest and refused to take the actual Amount in terms of Agreement.

45. The aforesaid facts also make it clear that the 1st and 2nd Respondents filed the Application under Section 7, fraudulently with malicious intent for the purpose other than for the resolution or liquidation and they knocked at the doors of the Adjudicating Authority for refund of money and not for the Flat/ premises and thereby wanted to jump ship and really get back the Amount, by way of coercive measure (Refer the decision of the Hon'ble Supreme Court in "Pioneer Urban Land and Infrastructure Limited & Anr.").

46. Apart from the fact that the 'Corporate Debtor' has offered the possession of flat on 15thNovember, 2016 and obtained completion certificate immediate thereafter. Therefore, delay in granting approval by the Competent Authority cannot be taken into consideration to hold that the 'Corporate Debtor' defaulted in delivering the possession. The Adjudicating Authority failed to appreciate the fact and also ignored the decision of the Hon'ble Supreme Court though rendered prior to the admission of the Application which is binding on all the Court(s) and Tribunal(s).

47. The case of the 1st and 2nd Respondents is covered by Section 65 of the 'I&B Code' and are liable for imposition of penalty. However, in the facts and circumstances of the case, we are not imposing such penalty on 1stand 2nd Respondents, who even in presence of this Appellate Tribunal refused to accept the

money in terms of the Agreement and also refused to take possession of the flat.

48. In view of the aforesaid findings, we have no other option but to set aside the impugned Order dated 20th August, 2019. The Application preferred by 1st and 2nd Respondents under Section 7 of the 'I&B Code' is dismissed. The appellant' Corporate Debtor' Company Appeal (AT) (Insolvency) No. 1380 of 2019 19 of 33 (company) is released from all the rigours of 'Moratorium' and is allowed to function through its Board of Directors from immediate effect. The 'Interim Resolution Professional'/ 'Resolution Professional' will provide and intimate the fees for the period he has functioned and costs of 'Corporate Insolvency Resolution Process' incurred by him to the Appellant/'Corporate Debtor' and Amount, if any, already received. The Appellant will pay the Amount to the 'Resolution Professional' after adjusting any amount already paid by Respondents or any other party. The 1st and 2nd Respondents being the individual Allottee, we have not directed them to pay the 'Corporate Insolvency Resolution Process costs' of 'Interim Resolution Professional'/ 'Resolution Professional', and Amount, if any, paid by them to the 'Resolution Professional'. The 'Interim Resolution Professional' will hand over the assets and records to the Board of Directors.

49. Before parting with the Judgment, it is desirable to refer some of the development.

50. Taking into consideration the fact that many of the allottees are filing applications under Section 7 fraudulently or with malicious intent for any purpose other than for the resolution of Insolvency, or liquidation, the Hon'ble President of India has recently promulgated an Ordinance further making amendment in the 'Insolvency and Bankruptcy Code, 2016' by published in the Gazette of India extraordinary Part II- Section 1 dated 28th December, 2019.

51. In Section 7 of the principal Act, in sub-section (1), before the Explanation, the following provisos have been inserted:□"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 Company Appeal (AT) (Insolvency) No. 1380 of 2019 20 of 33 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 or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such Application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the Application shall be deemed to be withdrawn before its admission.
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> 52. The aforesaid provisos inserted in sub-section (1) of Section 7 came into force since 28th December, 2019 though not applicable in this Appeal, but the Adjudicating Authority is required to notice the said provisions.
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>
> 53. Before admitting such case, it will be desirable to find out whether the allottees have come for refund of the money or to get their apartment/flat/premises by way of resolution. If the intention of the allottees only for refund of money and not possession of apartment/ flat/ premises, then the 'Corporate Debtor' may bring it to the Notice of the Adjudicating Authority as held by the Hon'ble Supreme Court.
>
> 54. The Adjudicating Authority before admitting an application under Section 7 filed by Allottee (s) will take into consideration the decision of the Hon'ble Supreme Court in "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors"

(Supra), as noticed in Paragraph 33 of this Judgment.

55. If the delay is not due to the 'Corporate Debtor' but force majeure, as noticed above, it cannot be alleged that the 'Corporate Debtor' defaulted in delivering the possession."

(verbatim copy)

40. The Learned Counsel for the Appellant further emphasised on Judgment of this Appellate Tribunal in case of Navin Raheja (supra). But we find that the facts of this case are entirely different from the Navin Raheja case on the following points:

> a) In Navin Raheja case the possession was offered to the Respondent/Allottee after Occupation Certificate being applied by the Developer after completing the Project in all aspects and delay was only on account of non-grant of Occupation Certificate by the competent Authority. In the present matter, the said Project was still incomplete, and the offer of possession has not been made to date. Even the Company Appeal (AT) (Insolvency) No. 1380 of 2019 22 of 33 Occupation Certificate is applied in July 2019, which is about after four years from the promised date of possession.

b) In the matter of Navin Raheja, the default occurred after the completion of the Project and after receiving Occupation Certificate.

However, in the present case, the completion certificate was not received up to the filing of Section 7 Application.

c) In Navin Raheja case, Allottee had refused to take possession despite the same being offered by the developer time and again. However, in the present case, the offer of possession has not been made to date by the Appellant. On the other hand, the Appellant contends that the unit allotted to Respondent No.1 and 2 have already been cancelled and sold to the third party.

d) In Navin Raheja case the Developer had offered possession to the Allottee even before the Adjudicating Authority, which was refused by the Allottee. However, in the present matter, the Appellant had not made any offer of possession.

e) In the matter of Navin Raheja case, the Developer has even offered to refund the consideration amount. But, the Allottee just to realise higher interest on refund amount, refused to accept the refund amount. In the present matter, no offer has been made by the Appellant to refund the deposited Amount alongwith interest.

Company Appeal (AT) (Insolvency) No. 1380 of 2019 23 of 33 Thus, it is clear that the instant case is in no manner similar to Navin Raheja (supra) case. Therefore, it is to be decided on the facts and merits of this case.

41. The Applicant/Financial Creditor is an allottee/home buyer, who had already paid an amount of Rs.2,75,55,186/- out of the total sale consideration of Rs.3,80,10,000/-, i.e. almost 75% of the total sale consideration. It is also apparent that Construction was not moving ahead and the Corporate Debtor failed to honour its commitment to complete the Project in time. The Corporate Debtor has not procured the completion certificate and occupancy certificate till the stipulated date of possession as per Agreement. The Allotment in the name of Financial Creditor/Respondent No.1 and 2is alleged to have been terminated, whereas the Corporate Debtor had accepted the VAT dues Rs 300615 on 20th December 2016,i.e. after the alleged the cancellation of Allotment.

42. In this case, the Appellant vide its letter dated 05th March 2019, admitted a part of its Debt. It offered to repay part of the debt amount (i.e. 45% of the total Amount paid by the Respondent No.1 and 2, which is an admission of its Debt. It is also evident that the Corporate Debtor failed to repay the admitted Amount of Debt. Thus, the admitted debt amount is more than Rs.1 lakh, and the Appellant has committed the default in paying the same.

43. Based on the above, it is clear that the Corporate Debtor had committed default in not completing the construction work of the flat in time and failed Company Appeal (AT) (Insolvency) No. 1380 of 2019 24 of 33 to deliver the possession on the stipulated date as per Agreement. The Corporate Debtor himself has admitted in its reply to notice dated 15th November 2018, that unlike most builders who have abandoned the Project and stopped the work, it is completing the Project

which is at the final stage where flooring and finishing work is underway. It is also evident that flat was to be delivered by 2nd week of February 2016, but the Corporate Debtor failed to honour its promise and could not deliver the flat in time. The Appellant admits the overall situation prevailing everywhere; therefore, in such a situation, there would have been reasonable apprehension in the mind of Allottee that building may not be completed. Therefore, the possibility cannot be ruled out that in the circumstances stated above the Allottee might have stopped further payment after 2013. It is also on record that in 20th December 2016 the Corporate Debtor raised a demand of VAT charges of Rs.3,00,615/, which was paid by the Allottee.

44. The Learned Counsel for the Allottee placed reliance on the Agreement 'Apartment Buyers Agreement'. The relevant clauses of the Agreement are as under:

> "2.10 In case the Seller is unable to deliver the Apartment to the Purchaser(s) because of the reason of absolute deletion of the Apartment/tower/floor on account of reduction in the overall number of units or floors in the Project, due to any regulatory/legal reasons or reasons beyond the control of the Seller, no claim, monetary or otherwise, shall be raised by the Purchaser(s) or shall not be accepted by the Seller but however, the payments made towards the Sale Consideration received from the Purchaser(s) will be refunded to the Purchaser(s) in full along with an interest rate Company Appeal (AT) (Insolvency) No. 1380 of 2019 25 of 33 of 12% (twelve percent) per annum, and no other compensation of any nature whatsoever shall be payable by the Seller to the Purchaser(s).
>
> 2.19 In every case of delayed payment and irrespective of the type of payment plan, acceptance of such delayed Instalment
>
> (s)/payments along with interest, as stated hereinabove, shall be without prejudice to the rights of the Seller including the right to terminate this Agreement at the sole and absolute discretion of the Seller. The acceptance of the delayed payment and, or interest due thereon shall not be deemed to be a waiver of the rights of the Seller accrued as a result of not making the payments on or before the respective due dates.

2.21 The Seller and the Purchaser(s) hereby agree that 15% (fifteen percent) of the Basic Sale Price on the Super Area of the Apartment shall constitute the "Earnest Money". Timely of each Instalment of the Sale Consideration as stated herein is the essence of this Agreement. In case the payment of any instalment as may be specified is delayed, then the Purchaser (s) shall pay interest on the Amount due at the rate of 24% (twenty four percent) per annum compounded at the time of every succeeding Instalment due or three (3) months, whichever is earlier. However, if the Purchaser(s) fails to pay any of the instalments within three (3) months from the due date of the outstanding instalments, the Seller may, at its sole option, forfeit Earnest Money, from the Amount paid already by the Purchaser(s) to the Seller, along with other charges including the payment charges and interest deposited by the Purchaser(s) and in such an event the Allotment shall stand cancelled, this Agreement shall stand terminated, the Allotment shall stand revoked and the Purchaser(s) shall be left with no right, lien or interest on the Apartment and the Seller shall have the sole right to sell the

Apartment to and other person in its sole and absolute discretion. In the event, the Purchaser(s) want to Company Appeal (AT) (Insolvency) No. 1380 of 2019 26 of 33 surrender the Allotment, for any reason whatsoever at any point of time, then the Seller, in its sole and absolute discretion, may be cancel/terminates this Agreement and after forfeiting the Earnest Money and other charges including interest towards late payment of instalments as stated hereinabove, may refund the balance amount to the Purchaser(s) without any interest and compensation whatsoever after resale of the Amount."

> "Non-refundable Amount" shall mean the amounts paid towards interest paid or due on delayed payment, late payment charges and deduction of brokerage paid by the Seller with respect to the Allotment of the Apartment to the Purchaser(s), if any. Any monetary benefits given by the Seller to the Purchaser(s) under any of the schemes floated by the Seller from time to time shall also be taken into account for calculating the Non-refundable Amount e.g. scheme allowing discounts for all the customers making timely payments;
>
> "Notice of Offer of Possession" shall mean a written notice given by the Seller offering to the Purchaser(s) to take over the physical possession of the Apartment within thirty (30) days from the date of such Notice on payment of such charges as may be found due and payable by the Purchaser(s) to the Seller;
>
> The Relevant part of the Agreement which deals with the consequences of default of payment under Construction linked plan, as per Annexure-D of the Agreement, which is given as under for ready reference:
>
> 2.17 In case, the Purchaser(s) has opted for a construction linked payment plan as mentioned in the Annexure D, the Seller shall send call/demand notices for instalments on commencement of the respective stages of Construction at Company Appeal (AT) (Insolvency) No. 1380 of 2019 27 of 33 the address of the Purchaser(s) available in the records of the Seller. The call/demand notices shall be sent by speed post/courier and shall be deemed to have been received by the Purchase(s) within five (5) days of dispatch by the Seller.
>
> 2.18 Except the case of Construction linked payment plan for demand notices for instalments on commencement of the respective stage of Construction as per Annexure D, it shall not be obligatory on the part of the Seller to send demand notices/reminders whatsoever regarding payments of instalments as may be due from the Purchaser(s), who shall be liable to pay interest on such delayed payments at the rate of 24% (twenty four percent) per annum from the date of Instalment due until the date of actual payment received by the Seller.

Thus, it is clear that under Construction linked payment plan, as mentioned in Annexure-D of the Agreement it is mandatory to issue demand notice for instalments on commencement of respective stages of Construction by speed post or courier. In this case, there is no evidence to show that the

demand notice at respective stages of Construction was ever sent to the Allottee. Clause 2.18 of the Agreement makes it mandatory to send the Notice to the Allottee under Construction linked plan. But in this case, compliance of conditions of Clause 2.17 and 2.18 have not been made. Therefore, in the present case, it is difficult to ascertain as to when Instalment became due, at the start of the respective stage of the Construction. Annexure-D, which is part of the Agreement, deals with the payment plan under the Agreement, is given hereunder. Company Appeal (AT) (Insolvency) No. 1380 of 2019 28 of 33 Based on the above terms of the Agreement, under Construction Linked Payment Plan, it is clear that at the commencement of internal finishing and flooring work 7.5% of BSP + PLC was due against Allottee. Company Appeal (AT) (Insolvency) No. 1380 of 2019 29 of 33 It also appears that before the start of finishing and flooring work about 75% payment in instalments were to be made. Undisputedly, the Allottee had paid Rs.2,75,55,186/- out of the total sale consideration of Rs 3,80,10,000, which comes to about 72.49% of the total sale consideration. As per reply to the Notice, dated 05th November 2018, up to that time, internal finishing and flooring work was going on. The Corporate Debtor had not placed any record to show as to when the internal finishing and flooring work started. Mandatory condition of issuing Notice through speed post or courier to the Allottee, at every stage of Construction as per Agreement has not been followed. Therefore in terms of Clauses 2.17 &2.18 of the Agreement, it cannot be said that the Allottee/Financial Creditor has committed default in paying the instalments when due. It is undisputed that flat was to be delivered latest by 2nd week of February 2016, but construction work was still going on in the year 2018.

Justification for Invoking Sec 65 of the Code

45. The Learned Counsel for the Corporate Debtor emphasised for the action against the Allottee under Section 65 of the Code. It is contended that Hon'ble Supreme Court in Pioneer's Urban Land Infrastructure case has specified that Section 65 shifts the responsibility on the Corporate Debtor to furnish details of default. Hon'ble Supreme Court in case of Pioneer's case held that;

> "Under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code Company Appeal (AT) (Insolvency) No. 1380 of 2019 30 of 33 has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of Insolvency. 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. 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."

46. It is not impertinent to mention that we often notice that despite fulfilling all the requirements for Section 7 and 9 of the Code, the petitions are rejected only on the pretext that the petition is filed for recovery of Debt and not for the resolution of Insolvency. It is necessary to keep in mind that Sec 65 of the Code is not meant to negate the process U/S 7 or 9 of the Code. Penal action U/S Sec 65 can be taken only when the provision of the Code has been invoked fraudulently, with malicious intent. The Hon'ble Supreme Court in Pioneer's case has given an instance of Home Buyer/ Allottee,

who does not have an interest in taking the possession and is only an investor, it has initiated the proceeding with malicious intent. The Allottee does not want to go ahead with its obligation to take possession of the flat/Apartment under RERA but wants to jump ship and wants to get back the monies already paid, by way of this coercive measure. In such cases, the use of Sec 65 is held justified, because one 'Home Buyer' by misusing his position could not stall the entire Real Estate Project. But it does not mean that any 'Insolvency Application' satisfying the requirements of Sec 7 or 9 of the I&B Code, could be dismissed Arbitrarily under the guise of Sec 65 of the Code. Company Appeal (AT) (Insolvency) No. 1380 of 2019 31 of 33

47. In the case of Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17: 2019 SCC OnLine SC 73 at page 73 Hon'ble Supreme Court has held that;

> "59. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows:
>
> 65. Fraudulent or malicious initiation of proceedings.--(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of Insolvency, or liquidation, as the case may be, the adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."

48. Thus, it is clear that the Code provides stringent action U/S 65 against the person who initiates proceeding under the Code fraudulently or with malicious intent, for the purpose other than the resolution of Insolvency or liquidation under the Code. To levy a penalty under Section 65 of the Code, a 'prima facie' opinion is required to be arrived at that a person has filed the petition for initiation of proceedings fraudulently or with malicious intent. No penalty can be saddled either under Section 65(1) or (2) of the Code without Company Appeal (AT) (Insolvency) No. 1380 of 2019 32 of 33 recording an opinion that a prima facie case is established to suggest that a person 'fraudulently' or with malicious intent for the purpose other than the resolution of Insolvency or Liquidation or with an intent to defraud any person has filed the Application.

49. Coming to the facts of this case, we find that the Appellant /Real Estate Developer has failed to prove that Allottee is a speculative Investor and is not genuinely interested in purchasing the flat/Apartment and has initiated proceeding under the Code to pressurise the Corporate Debtor. Thus we do not find any justification to invoke Section 65 of the I&B Code against the Allottee.

50. Based on the above discussion we find that the Order of Adjudicating Authority in admitting the petition filed U/S 7 of the Code needs no interference. Hence Appeal fails. No order as to costs.

[Justice Venugopal M.] Member (Judicial) [V. P. Singh] Member (Technical) [Shreesha Merla] Member (Technical) NEW DELHI 09th NOVEMBER, 2020 pks Company Appeal (AT) (Insolvency) No. 1380 of 2019 33 of 33