

Jurisprudence Surrounding Homebuyers

Introduction

The Insolvency and Bankruptcy Code, 2016 ('Code') has been amended from time to time in respect of the home buyers. As elucidated in our earlier excerpt, the challenge to the constitutionality of the latest amendment to Section 7 of the Code, remains pending. However, in the meanwhile, the Learned National Company Law Tribunal and the Hon'ble National Company Law Appellate Tribunal have been posed with various intriguing questions and have applied various unprecedented theories. We have discussed two of these case studies and their consequences on the legal jurisprudence applicable to home buyers and them being labeled as a 'financial creditor'.

The Rahejas

Sooner, than later, came the time to apply the tests suggested by the Hon'ble Apex Court in the Pioneer Urbans Judgment (supra) before the Hon'ble National Company Law Tribunal, New Delhi (Hon'ble Tribunal) in Shilpa Jain and Anr. v. Raheja Developers Ltd.[\[1\]](#)

In the said petition, the allottees of Raheja Developers Limited had filed an application under Section 7 of the Code alleging the default in timely delivery of the possession of the flat. The objection raised by Corporate Debtor were that there was no default on their part as the Occupation certificate has been received back in 2016 and the delay was only on the part of government authorities as the water and sewage lines were not provided. It was claimed that they had already offered possession to the Applicants.

The Learned NCLT relied on the provisions of the Flat Buyer agreement and held that the Corporate Debtor had failed in delivering the possession of the flat (which was due upon completion of 36 months, which got over on 30.08.2015). It also held that the notice of possession issued by the Corporate Debtor could not be regarded as delivery of possession since the Corporate Debtor sought a further period of four weeks to handover the possession and thereafter, another period of three weeks for registration. It was held that the Corporate Debtor had failed to show compliance of the conditions provided in the NOC dated 11.11.2016. The reliance on the Pioneer Urbans judgment (supra) by the Corporate Debtor was held to be baseless and directions were passed to initiate CIRP vide Order dated 20.08.2019.

The promoter/shareholder of the Corporate Debtor filed an appeal before the Hon'ble Appellate Tribunal in Navin Raheja vs Shilpa Jain[\[2\]](#) alleging fraudulent and malicious initiation of proceedings.

The Hon'ble Appellate Tribunal vide Order dated 27.08.2019 issued notice to the respondents; but directed the IRP not to issue public notice if not yet issued or not to constitute CoC if not yet constituted. During the pendency of the petition, several intervention applications were being filed by other allottees, being the creditors of the

Corporate Debtor. In light of these circumstances, the Hon'ble Appellate Tribunal vide Order dated 03.09.2019, directed the IRP to issue public notice inviting claims in order to assess the total number of such claimants/allottees. Meanwhile, as per the directions of the Hon'ble Appellate Tribunal, the suspended board of directors, officers and employees continue to function in respect of the affairs of the Corporate Debtor and in fact were directed ensure that the Corporate Debtor remains a going concern.

The Hon'ble Appellate Tribunal vide Final Order dated 22.01.2020, set aside the Order dated 22.08.2019 passed by the Learned NCLT (whereby directions were passed initiating CIRP against the Corporate Debtor). The Hon'ble Appellate Tribunal relied on the Supreme Court judgment Pioneer Urban Land (supra) and made the following observation:

"It has come to our notice that in 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. Such case of allottee is covered under Section 65 of the Code."

"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)."

"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 wherein an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent, of the total number of such creditors in the same class, whichever is less."

As per our information derived from the public records, no appeal has been filed before the Hon'ble Apex Court to challenge the Final Order passed by the Hon'ble Appellate Authority.

However, the matter of Raheja Developers Limited definitely stands out as an example of a Corporate Debtor, where despite passing of an admission order, no CoC could be formed and the Corporate Debtor was run by the promoters itself and the admission order was set aside after a period of five (5) months. In fact the Hon'ble Appellate Tribunal was also not put to consider the question of offering possession without obtaining the Occupation Certificate. The Hon'ble Apex Court has held that the receipt of the Occupancy Certificate is a condition precedent to offering possession to the allottees possession offered, in the absence of the Occupancy Certificate, does not amount to transfer of 'possession'.

This matter also brings to light a scenario where due to non-handing over of charge from the promoters to the Interim Resolution Professional; numerous actions which require

immediate action by the CoC get postponed. For example, compliances with respect to appointment of valuers, undertaking of auditing of the books of the Corporate Debtor in respect of the preferential transactions, extortionate transactions, etc. The flip side to the argument remains that in a case where the admission order has been incorrectly passed, then the management of the Corporate Debtor ought not to be made to suffer and accordingly, interim orders to protect the same deserve to be passed.

Applicability of Theory of Commercial Wisdom to Home Buyers: The Paradox (Umang Realtech)

This brings us to the theory of 'commercial wisdom' of the Committee of Creditors. This theory is based on the assumption that CoC had the requisite business expertise to evaluate a resolution plan and assess its viability feasibility. An interesting change in jurisprudence was observed in the judgment rendered by the Hon'ble Appellate Tribunal in the case of Flat buyers Association Winter Hills – Sector 77 Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP and Ors.^[3] In this case, the concept of 'commercial wisdom' came up in case of a corporate debtor where only homebuyers were the members of the CoC.

The matter reached for consideration before Learned NCLT when the allottees of Corporate Debtor i.e. Umang Realtech Private Limited filed an application under Section 7 titled as 'Rachna Singh & Anr. vs Umang Realtech Private Limited' for initiation of CIRP process (arising out of failure to deliver possession of flat in the project 'Winter Hill- Sector 77, Gurgaon'). Objections were raised by the Corporate Debtor that there was no willful default on its part and that it was entitled to extension of time under the force majeure clause. It was further contended that the Applicants have willfully defaulted in making timely payments of the installments.

The Learned NCLT refused to accept the argument of the Corporate Debtor in respect of 'force majeure' (as the grace period of six months had already expired on June, 2016) and that yet there had been an inordinate delay of two and a half years. It was further observed that as the amount raised from an allottee under real estate project had the commercial effect of a borrowing, it was covered under the definition of 'financial debt' under the Code. It was held that the observations given by the Supreme Court in Pioneer Urbans judgment (supra) did not apply in the present case (as the Corporate Debtor had at no stage offered the possession of the said unit to the Applicants). Holding this view, the Learned NCLT Tribunal admitted the application of the allottees thereby initiating CIRP process against the Corporate Debtor vide Order dated 20.08.2019 and directed the applicants to deposit the initial amount of INR 2,00,000/- (Rupees Two Lakhs Only) for conducting the CIRP.^[4]

An appeal was filed against the said order dated 20.08.2019. The issue that arose before the Hon'ble Appellate Tribunal was that although the Learned NCLT had ordered the financial creditors/ allottees to deposit the said amount; however, the same was insufficient to keep the Corporate Debtor a going concern. A promoter/ shareholder of the Corporate Debtor i.e. Uppal Housing Pvt. Ltd had filed an intervention application and proposed to act as lender (financial creditor) to ensure that resolution was achieved. During the CIRP, various allottees including the Applicants received the possession of their flats and the Intervenor was asked to give a time frame for completion of the other facilities.

Addressing these issues, the Hon'ble Appellate Tribunal observed as follows:

“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 in “Innoventive Industries Limited v. ICICI Bank and Anr.”^[5] followed by “Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.”^[6] and “Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.”^[7]

The Hon'ble Appellate Tribunal further went onto hold that in case of a real estate corporate debtor, if an application is filed in respect of one project, the same cannot have any effect on the other projects. The Appellate Tribunal proceeded to hold that home buyers/ allottees of the other project cannot file their claims before the Interim Resolution Professional. It also held that ‘Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority’. Strangely, the following was observed by the Hon'ble Appellate Tribunal:

21. ...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.”

This judgment has also added another theory in the jurisprudence of insolvency law in respect of Corporate Debtors dealing in real estate developers, i.e. concept of Reverse CIRP. The Hon'ble Appellate Tribunal used this case as an experiment “as to whether during the Corporate Insolvency Resolution Process the resolution can reach finality without approval of the third party resolution plan”. In the Final Order it is recorded that the applicant before the Learned NCLT (and various other allottees) had already taken possession of their flats and sale deeds had been registered.

The Hon'ble Appellate Tribunal permitted the promoter of Corporate Debtor to disburse the amount ‘from the outside’ as a lender (and not as a promoter) required to complete the projects and provided for a time frame for the same as a part of the concept of ‘Reverse CIRP’. Intriguingly, by considering the submissions of the intervenor and applicant, timelines have been fixed for completing the relevant project and the following direction has been passed in case the timelines are duly complied with:

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..

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.

....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.

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 -34- 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."

As per our information derived from the public records, no appeal has been filed before the Hon'ble Apex Court to challenge the Final Order passed by the Appellate Authority. However, this Final Order of the Hon'ble Appellate Tribunal is ingenious in its various aspects of observing that:

- Home Buyers do not have the requisite commercial wisdom.
- CIRP could relate to only one project of the Corporate Debtor (and not all of its assets),
- The promoter could be permitted to infuse further monies and complete the projects and if so completed within the time frame prescribed, the CIRP would be considered to have been achieved and IRP would move Learned NCLT for seeking disposal of the application under Section 7.

Furthermore, the striking part of this Final Order is its non-consideration of the applicability of Section 29A of the Code to the said case. The intervenor if was a shareholder and thus, prohibited from submitting a resolution plan under Section 29A and also to submit a scheme under Section 230 of the Companies Act, 2013; then whether he could be permitted to by this 'indirect devise' to retain and take back control of the company (despite CIRP having been commenced).

The other striking feature of this Final Order is non-reference to the Committee of Creditors. It appears in this case, the CoC was not formed/ had not taken control of the Corporate Debtor and operations were being run through the IRP.

Conclusion

Like the Code, the concomitant of 'Home Buyers' and the jurisprudence around it has been ever evolving. The Tribunals have surprised us with their efforts at ensuring maximization of assets, by non-orthodox methods. Hence, validity of these surprises and experiments will have to be tested in future litigations (of appeal and/ or cases where they are cited as precedents).

[1] Company Petition (IB) No. 1321 (PB)/2018, Also available at:
https://nclt.gov.in/sites/default/files/Interim-order-pdf/Shilpa%20jain%20anr%20Vs.%20Raheja%20Developers%20Ltd%20_2.pdf.

[2] 2020 SCC OnLine NCLAT 46, Also available:
<https://nclat.nic.in/Useradmin/upload/5887186925e281fd62be13.pdf..>

[3] Company Appeal (AT) (Insolvency) No. 926 of 2019, Also available at
<https://nclat.nic.in/Useradmin/upload/18011332575e3d0b157e29a.pdf>.

[4] Company Petition (IB) No. 1564 (PB)/2018; Also available at
https://nclt.gov.in/sites/default/files/Interim-order-pdf/Rachna%20Singh%20%26%20Anr%20Vs.%20Ms.%20Umang%20Realtech%20Pvt%20Ltd%20_6.pdf.

[5] Judgment dated 31.08.2017, reported at 2018 1 SCC 407.

[6] Judgment dated 25.01.2019, reported at (2019) 4 SCC 17.

[7] Judgment dated 15.11.2019, reported at 2019 SCC OnLine SC 1478.