

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 864 of 2019

IN THE MATTER OF:

Navin Raheja **....Appellant**

Vs.

Shilpa Jain and Others **....Respondents**

Present:

For Appellant: **Mr. Salman Khurshid, Senior Advocate with Mr. Abhijeet Sinha, Mr. Saurabh Kalia, Ms. Amna Darakhshan, Ms. Saloni Purohit, Mr. Saikat Sarkar, Mr. Kamesh Ved, Mr. Rohan Mazumdar and Mr. Aditya Shukla, Advocates.**

For Respondents: **Mr. Arunav Patnaik, Ms. Mahima Sinha, Ms. Shikha and Ms. Anandini Kumar, Advocates for R1 & 2.**

Mr. Neeraj Sharma, Advocate.

Mr. Arvind Nayar, Senior Advocate with Mr. Samarjit, Mr. Rohan, Ms. Malika, Ms. Bomita Singh and Ms. Aparjita, Advocates.

Mr. Piyush Singh and Mr. Aditya, Advocates in I.A. No. 2724/2019.

Mr. Sanajeet Patnaik, Mr. Setyan Chaturvedi, Mr. Vikas and Mr. Sumit Malhotra, Advocates for I.A. No. 2746/2019.

Mr. Sukrit Kapoor, Advocate in I.A. No. 2869/2019.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

Pursuant to an application filed by Ms. Shilpa Jain and Mr. Akash Jain (allottees) (1st and 2nd Respondents) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short), the Adjudicating Authority (National Company Law Tribunal), Special Bench, New Delhi, by impugned order dated 20th August, 2019 initiated ‘Corporate Insolvency Resolution Process’ against ‘Raheja Developers Ltd.’- (‘Corporate Debtor’).

2. The Appellant, Shareholder/ Promoter has challenged the order alleging fraudulent and malicious initiation of proceedings with an intent for any purpose other than for the resolution of insolvency or liquidation. It was also alleged that the application under Section 7 was barred by limitation and was otherwise not maintainable on different grounds.

Brief facts of the case:-

3. The 1st and 2nd Respondents- allottees had booked an apartment in the Residential Project- ‘Raheja’s Sampada’ being developed by the ‘Corporate Debtor’. In pursuance of the same, the ‘Corporate Debtor’ issued a joint allotment letter dated 3rd August, 2012 and executed a Flat Buyer’s Agreement dated 3rd August, 2012. They disbursed total

Rs.86,62,691/- to the 'Corporate Debtor' on different dates as mentioned in Part-IV of Form-1 (application under Section 7). In support of the claim, receipts issued by the 'Corporate Debtor' and ledger account of the 'Corporate Debtor' were enclosed.

4. It was alleged that as per Clause 4.2 of the Buyer's Agreement, possession of the Apartment was to be provided within 36 months commencing from 3rd August, 2012 which came to an end on 3rd August, 2015 but the construction was not completed.

5. As per Clause 4.2, in case the construction is not complete within time the 'Corporate Debtor' is under obligation to pay the allottee(s) compensation @ Rs.7/- per sq. ft. of the super area per month for the entire period of such delay. The said Clause 4.2 also postulates that the aforesaid compensation @ Rs. 7/- per sq. ft. of the super area per month for the entire period of such delay was to be adjusted at the time of conveying the apartment and not earlier and it will be treated as distinct charge.

6. On filing of the application under Section 7, the 'Corporate Debtor' took specific plea that the notice of possession was issued as back as on 15th November, 2016 and in spite of repeated request to take possession, the allottees have refused to take possession.

7. It was also brought to the notice of the Adjudicating Authority (National Company Law Tribunal) that the 'Corporate Debtor' had filed a

Writ Petition before the Hon'ble Supreme Court of India challenging the constitutional validity of explanation to Section 5(8)(f), Section 7, Section 21(6A)(b) and Section 25A of the 'I&B Code', **“Raheja Developers Limited & Anr. v. Union of India & Ors.-[W.P. (Civil) No. 173 of 2019]”**. It was filed against the Company Petition preferred by allottees in CP No. (IB) 1321 (PB) of 2018. The said Writ Petition was listed before the Hon'ble Supreme Court on 18th February, 2019 on which date, the Hon'ble Supreme Court while issued notice stayed further proceedings before the Adjudicating Authority.

8. In spite of the same and without taking into consideration 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”**, the impugned order was passed on 20th August, 2019.

9. The 'Corporate Debtor' brought to the notice of the Adjudicating Authority that as per the terms of the 'Flat Buyers Agreement' dated 3rd August, 2012 entered into by and between the 'Corporate Debtor' and Respondents, the possession of the apartment/ unit was to be handed over to the allottees within a period of thirty-six months from the date of execution of the said Agreement subject to the 'force majeure conditions'.

10. It was specifically pleaded that the construction was complete in all respects by the 'Corporate Debtor', in advance, and the Occupation Certificate was applied by the year 2013, the 'Corporate Debtor' had duly complied with all set of obligations under the said Agreement and Allotment letter was issued on 3rd August, 2012.

11. Further, the 'Corporate Debtor' stated that as far as the processing of its application for obtaining an Occupation Certificate was concerned, the same was under the control of the concerned Government/ Competent Authority and any delay on account of the actions inactions and omissions on the part of the Government/ or Authority it was beyond the reasonable control of the 'Corporate Debtor'/ Promoter. In the circumstances, in terms of Clause 4.2 of the Flat Buyer's Agreement a 'force majeure' condition will be applicable.

12. It was stated that despite all impediments, with the constant efforts of the 'Corporate Debtor', the Occupation Certificate was duly obtained by the 'Corporate Debtor' in the year 2016 whereinafter possession of the unit was offered on 15th November, 2016 which has been enclosed.

13. Counsel for the Appellant submitted that the 'Corporate Debtor' vide the notice of possession dated 15th November, 2016 informed the Respondents to take the possession of their apartment/ unit as the same was ready for possession and also requested the Respondents to

comply with formalities in respect of the possession of the unit. However, despite receiving the notice of possession from the 'Corporate Debtor' along with an intimation regarding the set of formalities to be complied with by the Respondents, they very cleverly and conveniently chose to file a petition under Section 7 of the 'I&B Code' after expiry of a period of two years from the notice of possession of the 'Corporate Debtor' and did not bother to comply with the formalities sought for by the 'Corporate Debtor' in its notice of possession. Thus, the said conduct of Respondents goes to show the *malafide* intention of the Respondents to which the Respondents have kept silent before the Adjudicating Authority.

14. Along with the notice of possession dated 15th November, 2016, the 'Corporate Debtor' also annexed a Demand Letter seeking payment of an outstanding amount of Rs.8,62,851/- which they defaulted to pay and was deliberately suppressed by the Respondents before the Adjudicating Authority.

15. The aforesaid fact was brought to the notice of the Adjudicating Authority. However, the allottees sought for a refund of the entire amount of Rs.86,62,691/- along with an interest at the rate of 18% p.a. making the total amount of interest comes to Rs.87,32,108.05/- which was even higher than the actual principal amount paid by the Respondents- allottees.

16. It was further submitted that the Judgment was pronounced by the Hon'ble Supreme Court on 9th August, 2019, staying the order of the Adjudicating Authority. Till 20th August, 2019, the Adjudicating Authority had not passed final order in view of the stay of the Hon'ble Supreme Court. Thereafter, no hearing and argument ever took place between the order dated 21st February, 2019 passed by the Adjudicating Authority and the impugned order dated 20th August, 2019.

17. Learned counsel for the Appellant submitted that despite receiving the notice of possession along with the demand letter seeking outstanding payment of Rs.8,62,851/- and information regarding certain formalities, the Respondents- allottees turned a deaf ear and neither took the possession of the unit/ apartment on the other hand they defaulted to pay rest of the amount and filed malicious, frivolous petition under Section 7, after expiry of two years of receiving of notice of possession.

18. Learned counsel for the Appellant submitted that there was no default on the part of the 'Corporate Debtor' who offered possession to allottees. The alternative offer was also given to accept the money, if they do not intend to take the possession on payment of dues.

19. Notices were issued to Respondents. When asked Mr. Arunav Patnaik, Advocate appearing on behalf of Ms. Shilpa Jain and Mr.

Akash Jain- allottees ('Financial Creditors') on instruction refused to accept any amount already deposited by them.

20. The questions arise for considerations in this appeal are:

- i. Whether the 'Corporate Debtor' can be held to have committed default, if apartment/ flat/ premises is otherwise ready but offer of possession was delayed due to the reasons beyond the control of 'Corporate Debtor' such as absence of clearance by the Competent Authorities/ Government(s), etc.? and;
- ii. Whether application under Section 7 was filed by the 1st and 2nd Respondents 'fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation' as defined under Section 65 of the 'I&B Code' called for any penal action?

Relevant facts of the Case:

21. The 'Flat Buyer's Agreement- Sampada' was reached between Ms. Shilpa Jain and Mr. Akash Jain with the 'Corporate Debtor' on 3rd August, 2012. Article-4 relates to 'Possession'. Clause 4.1 therein deals with 'Condition-precedent' and Clause 4.2 deals with 'Possession Time and Compensation'. Clause 4.3 deals with 'failure to provide

infrastructure facilities'; whereas Clause 4.4 is 'Force Majeure', as under:

**ARTICLE 4
POSSESSION**

4.1 Condition-precident

The Allottee shall before taking possession of the Apartment must clear all the dues towards the allotted Apartment and have the Conveyance Deed for the said Apartment executed in his favour after paying Registration fee / charges, stamp duty and other charges / expenses. The Allottee shall pay, as and when demanded by the Company, the Stamp duty, Registration charges and all other incidental and legal expenses for execution and registration of Conveyance Deed of the Apartment in favour of the Allottee which shall be executed and got registered after receipt of the total Sale Consideration, other dues, viz all the statutory charges, taxes including service tax, etc. etc. and including payment of IFMS payable to the Company or the Maintenance Agency, as the case may be and the said charges and expenses as may be payable or demanded from the Allottee in respect of the Apartment and Parking space(s) allotted to him / her. In case the Allottee fails to deposit the Stamp duty, Registration charges and all other incidental and legal expenses etc. so demanded within the period mentioned in the demand letter, the Company shall be free to appropriate the part of sale price paid by the Allottee towards the said charges and expenses and the Allottee shall forthwith deposit the shortfall in the Sale Consideration so caused together with interest @ 12% per annum for period of delay in depositing the Sale Consideration so appropriated according to payment plan. The Allottee undertakes to execute the Conveyance Deed within a period of sixty (60) days from the date of Company intimating in writing the receipt of the certificate for use and occupation of the said building from the competent authority failing which the Allottee authorizes the Company to cancel the allotment and forfeit the earnest

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money, brokerage/commission paid, interest on delayed payment etc. and refund the remaining amount without any interest upon realization of money from resale / allotment to any other party.

4.2 Possession Time and Compensation

That the Company endeavors to give possession of the Apartment to the Allottee within thirty six (36) months from the date of the execution of this Agreement and after providing of necessary infrastructure in the sector by the Government, but subject to force majeure conditions or any Government/Regulatory authority's action, inaction or omission and reasons beyond the control of the Company. The Company on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Apartment to the Allottee for his / her occupation and use and subject to the Allottee having complied with all the terms and conditions of this Flat Buyer Agreement. In the event of his / her failure to take over and/ or occupy and use the Apartment provisionally and / or finally allotted within thirty (30) days from the date of intimation in writing by the Company, then the same shall lie at his / her risk and cost and the Allottee shall be liable to pay compensation @ Rs. 5/- sq. ft. of the super area per month as holding charges for the entire period of such delay. If the Company fails to complete the construction of the said building / Apartment within thirty six (36) months from the date of execution of this Agreement and after providing of necessary infrastructure in the sector by the Government for any reason other than the reasons stated above, then the Company shall be liable to pay to the Allottee compensation @ Rs. 7/- sq. ft. of the super area per month for the entire period of such delay. The adjustment of compensation shall be done at the time of conveying of the Apartment and not earlier. The said compensation shall be a distinct charge in addition to maintenance charges and not related to any other charges as provided in this Agreement. If there is any delay in payments / remittances by the Allottee or in order to comply with any specific request of the Allottee such as providing additional fittings in his / her Apartment, then the above said period of thirty six (36) months will automatically and correspondingly get extended by the period of such delay and in that case Company shall not be liable for any such delay.

4.3 Failure to provide infrastructure facilities

The said project falls within the new Master Plan of Gurgaon and the site of the project may not have the infrastructure in place as on the date of booking or at the time of handing over of possession as the same is to be provided / developed by the Government/nominated government agency. Since this is beyond the control of company, therefore, the Allottee shall not claim any compensation for delay/ non-provision of infrastructure facilities and /or consequent delay in handing over the possession of the apartment(s) in the project.

4.4 Force Majeure

The Allottee agrees and accepts that construction/continuation/completion of the said building/ said complex is subject to Force Majeure Conditions which inter-alia include delay on account of non availability of steel and/or cement or other building materials or water supply or electric power or slow down, strike, lock out or due to any dispute with the construction agency employed by the Company, non-availability of necessary infrastructure facilities being provided by the government for carrying development activities, pollution clearances, court injunction, civil commotion or by reason of war, enemy or terrorist action, earthquake, any act of God and delay in grant of completion / occupation certificate by the Government and / or any other public or

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competent authority or if non delivery of possession is beyond the control of the Company and in any of the aforesaid events, the Company shall be entitled to a reasonable extension of time for delivery of possession of the said Apartment, depending upon the contingency /prevailing circumstances at that time. The Company as a result of such a contingency arising thereto reserves, its right to alter or vary the terms and conditions of allotment or if the circumstances beyond the control of the Company so warrant the Company may suspend the scheme for such period as it may consider expedient and no compensation of any nature whatsoever may be claimed by the Allottee for the period of suspension of scheme.

22. Article 5 of the 'Flat Buyer's Agreement- Sampada' relates to 'Allotment'. Clause 5.1 therein relates to 'Right of the Company' to cancel the allotment after refunding the payment along with interest calculated @9% per annum whereas Clause 5.2 relates to 'Compliance of Rules, Regulations and By-laws'.

23. As per Clause 4.1 of Article-4, which is 'Condition-precedent', the Allottee shall before taking possession of the Apartment must clear all the dues towards the allotted Apartment and have the Conveyance Deed for the said Apartment executed in his favour after paying Registration fee/ charges, stamp duty and other charges/ expenses.

24. Clause 4.2 of Article-4, as noticed above, deals with 'possession time and compensation' which is subject to 'Force Majeure' as stated in Clause 4.4.

25. As per Clause 4.4 of Article-4 ('Force Majeure'), construction/ continuation/ completion of the building/ complex is subject to Force Majeure Conditions which *inter alia* include delay on account of non

availability of steel and/ or cement or other building materials or water supply or electric power or slow down, strike, lock out or due to any dispute with the construction agency employed by the Company, non-availability of necessary infrastructure facilities being provided by the Government for carrying development activities, pollution clearances, court injunction, civil commotion or by reason of war, enemy or terrorist action, earthquake, any act of God and **delay in grant of completion/ occupation certificate by the Government and/ or** any other public or competent authority or if non delivery of possession is beyond the control of the Company and in any of the aforesaid events, the Company shall be entitled to a reasonable extension of time for delivery of possession of the said Apartment, depending upon the contingency/ prevailing circumstances at that time. The Company as a result of such a contingency arising thereto reserves, its right to alter or vary the terms and conditions of allotment or if the circumstances beyond the control of the Company so warrant the Company may suspend the scheme.

26. As per Clause 5.1 of Article-5, the Appellant has right to cancel the allotment after refunding the payment along with interest calculated @9% per annum. Therefore, it cannot be said that allottee is remedy less.

27. Right of allottees and developer fell for consideration before the Hon'ble Supreme Court in **"Pioneer Urban Land and Infrastructure**

Limited & Anr. v. Union of India & Ors. – (2019) SCC OnLine SC 1005” in which the present ‘Corporate Debtor’ was also one of the Appellants. The Hon’ble Supreme Court taking into consideration the ‘Real Estate (Regulation and Development) Act, 2016’ (“RERA” for short) observed and held that there being no provision similar to that of Section 88 of RERA in the Code, it is meant to be a complete and exhaustive statement of the law insofar as its subject matter is concerned. The ‘non-obstante clause’ of RERA came into force on 1st May, 2016, as opposed to the ‘non-obstante clause’ of the Code which came into force on 1st December, 2016. Therefore, they are complimentary to each other. 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, the provisions of the ‘I&B Code’ would apply in addition to the RERA.

28. In **“Pioneer Urban Land and Infrastructure Limited & Anr.”** (Supra), the Hon’ble Supreme Court noticed that the relevant provisions of the RERA including ‘rights and duties of allottees’ as mentioned in Section 19 and quoted therein, as follows:

“19. Rights and duties of allottees.— (1) *The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along*

with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the

promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

(8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as

provided under sub-section (1) of section 17 of this Act.”

29. As per Section 19(4) of the RERA, the allottee is entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, **in accordance with the terms of agreement for sale** or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of the Act.

30. As per sub-section (6) of Section 19 of the RERA, every allottee, who has entered into an agreement or sale to take an apartment, plot or building, as the case may be, under Section 13, is **responsible to make necessary payments** in the manner and within the time as specified in the said agreement for sale and is also required to pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

31. In terms of sub-section (7) of Section 19 of the RERA, the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in making payment towards any amount or charges to be paid under sub-section (6).

32. In terms of sub-section (10) of Section 19 of the RERA, it is also the duty of the allottee to take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be. Thereafter, in terms of sub-section (11) of Section 19 of the RERA, the allottee is also required to participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be.

33. The Hon'ble Supreme Court also noticed the Rules framed by 'Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016' which includes 'interest payable by promoter and allottee' and the 'timelines for refund' and observed:

“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. 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."

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.

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 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 15th November, 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 11th November,

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.

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 1st and 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 3rd August, 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 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 15th November, 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 1st and 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) 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 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.”

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.

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.

56. In the present case, we asked the Appellant, who is the Chairman cum Managing Director of 'Raheja Developers Limited'- ('Corporate Debtor') to provide the time frame of completion of the project, which has been filed by way of an Affidavit with enclosures and extracted below:

Raheja Developers Limited
Project Details: Units, Sales, Cost & Debt etc.
(Figures in Rs. Crores)

ANNEXURE - C

S.No	Project Name	Total Units	Units booked/ Sold	Sales Value of booked area	Amount Collected	Committed Cash flow	Cost to Redeem	Estimated Value of Unsold Inventory	Surplus Amt	Target Date of Completion/ OC/ REBA	available un- disbursed Amt	Principal loan O/s Amt
A Project Nearing Completion/ Part OC												
1	Raheja Revanta - Low Rise	214	177	280.23	216.01	64.20	55.00	75.27	84.47	Jul-22	17.26	187.74
2	Raheja Revanta - High Rise	618	473	782.58	657.64	125.04	166.94	307.00	265.10	Jul-22	-	-
3	Raheja DMA - Low Rise	103	64	48.49	40.10	8.40	23.00	41.72	29.09	Oct-20	-	33.00
4	Raheja Shree - Ind Floors	94	94	99.65	76.95	13.70	2.00	-	11.70	Oct-19	-	-
5	Ashra E.81- DDAAN 1	188	187	32.53	17.66	14.87	3.00	2.00	15.87	CC obtained	-	-
6	Ashra E.81- DDAAN 2	180	53	13.19	7.43	5.76	6.50	28.00	27.26	CC obtained	-	-
7	Krishna Affordable Housing	1,790	1,542	259.66	176.14	83.52	81.00	35.60	28.12	Mar-20	22.00	9.00
8	Raheja Aranya- Ph-II	313	171	307.61	284.40	23.21	84.55	81.00	46.66	Aug-22	-	60.72
9	SCO - Sector 83 B&B						20.00	57.75	37.75	Aug-24	-	-
10	SCO - Sector 114						30.00	84.81	54.81	Mar-20	-	-
		3,509	2,762			338.79	431.99	715.19	621.99			285.46
B Project Under Construction (in next 24- 30 months by September' 2021/ March' 2022)												
1	Raheja Vanya	699	299	252.46	107.64	144.82	332.00	315.00	237.82	Dec-23	30.15	66.15
2	Raheja Maheshwara	539	103	55.70	25.23	30.47	133.00	126.00	123.47	Apr-23	50.00	50.00
3	Raheja DMA - Highrise	315	109	16.00	27.98	28.02	130.14	154.77	32.85	Oct-22	-	-
4	Kathwani EMS Flats	2,600	2,800	-	-	-	287.00	-	-	Dec-20	-	-
5	Navin Mirar	321	31	194.25	37.92	156.33	304.20	400.00	232.13	As per Dev Agree't with DDA	87.14	162.86
6	Delhi Mall		39	48.20	16.72	31.98	267.10	575.00	339.88	As per Dev Agree't with DDA	-	-
7	Raheja Trinity	215	133	64.37	34.56	29.81	55.60	80.00	54.81	Dec-22	-	-
		4,793	3,514			421.43	1,408.44	1,750.77	1,059.76			279.01
C Projects in pipeline/ Future Projects												
1	Sector 99A			developable/ monetizable (13.63 Acres)				100.00	100.00	Sep-24	-	38.00
2	Industrial Colony			developable/ monetizable (107 Acres)			70.00	485.00	415.00	Sep-24	88.15	153.33
3	TDD Zone Sector 88A			developable/ monetizable (20.50 Acres)			80.00	435.00	355.00	Sep-24	-	130.00
4	Ayana Plotted Sector 290			Plotted/ monetizable (5.168 Acres / 12320 sq. Yards)				36.33	36.33	Sep-24	-	24.00
		8,208	6,276			760.22	1,840.43	3,523.29	2,579.08			509.80
D * Ready Inventory												
The Ready to Move (RTM) Flats, Ready Plots and Ready Commercial Spaces can be sold at the earliest (in 12 months period)												
Properties available in R-Mail, Raheja Square, Highway Arcade, Ego Mall, Residential Plots and ready flats in various completed projects												
Which is mortgaged to various lenders can be sold out at discounted price with the permission of the lenders and repay to them.												

57. The Appellant has also given the details of amount sanctioned by one or other 'Financial Creditors' and time frame to pay the amount within prescribed time. We expect that the 'Corporate Debtor' will stick to the time frame given before this Appellate Tribunal.

58. It is to be noticed that there is Intervention Application filed by 'L&T Infrastructure Finance Co. Ltd. & L&T Finance Ltd.' and some other interveners, but we have not deliberated on their claim, as on merit we have allowed the appeal.

The appeal is allowed with aforesaid observations and directions.

No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI
22nd January, 2020

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