
(2023) 09 NCLT CK 0032

In the National Company Law Tribunal

Case No : IA (IBC) No. 285/JPR/2020 In IB No. 36/7/JPR/2018

Gajraj Jain & Ors Vs Shiv Gyan Developers Pvt. Ltd ?

Date of Decision : 19-09-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(7), 5(8), 7, 7(1), 11(1)(b)

Citation : (2023) 09 NCLT CK 0032

Hon'ble Judges : Deep Chandra Joshi, Member (T); Atul Chaturvedi, Member (T)

Bench : Division Bench

Advocate : Amrita Sarkar, Sandeep Pathak, Vartika Mehra

Final Decision : Allowed

Judgement

Deep Chandra Joshi, Judicial Member

1. This Application has been filed by the Applicants ('Petitioners'/ 'Financial Creditors') under Rule 11 of the NCLT Rules seeking impleadment of additional Financial Creditors to initiate Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor namely M/s Shiv Gyan Developers Pvt. Ltd. under Section 7 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in accordance with the Order passed by the Hon'ble Supreme Court in Civil Appeal No. 422/2020 titled as 'Gajraj Jain & Ors. Vs. Shivgyan Developers Pvt. Ltd.' dated 18.05.2022.

2. The main petition under Section 7 of the Code was filed by the Applicants seeking initiation of CIRP against Corporate Debtor which came to be dismissed vide Order dated 11.10.2019 passed by this Authority. Thereafter, the order dated 11.10.2019 was challenged by the Applicants before the Hon'ble NCLAT, New Delhi in Company Appeal (AT) (INS) No. 1265 of 2019 titled as 'Gajraj Jain & Ors. Vs. Shivgyan Developers Pvt. Ltd.'. The Hon'ble NCLAT dismiss the said Appeal vide order dated 18.11.2019. Afterwards, the Applicants approached the Hon'ble Supreme Court and vide Order dated 18.05.2022, the Hon'ble Supreme Court set aside the order dated 18.11.2019 and further allowed the Applicants to implead 10% of the homebuyers to the main application so as to comply with the

requirements of the Code.

3. The Applicants submit that in compliance of order of the Hon'ble Supreme Court, this application has been filed seeking impleadment of additional number of homebuyers through their authorised representatives so as to meet the threshold and form 10% of the allottees of the Corporate Debtor's concerned project on the following grounds:

3.1. The Corporate Debtor has an accumulated debt of Rs. 5,92,43,958/- (Rupees Five Crore Ninety-Two Lakhs Forty-Three Thousand Nine Hundred Fifty-eight) towards the additional Financial Creditors and therefore the Financial Creditors are seeking initiation of CIRP against the Corporate Debtor in the present joint impleadment application in accordance with the liberty granted by the Hon'ble Supreme Court. The amended memo of parties has been annexed with this Application as Annexure A-9.

3.2. It is submitted by the Applicant that when the present Application was listed before this Adjudicating Authority on 18.07.2022, this Adjudicating Authority directed Mr. Archit Bohra, learned counsel for the Applicant to file a compliance affidavit with respect to meeting the threshold requirement. It is submitted that the Original Petitioners have now engaged Lex Alliance Law Firm to represent themselves along with the impleaded Applicants before this Adjudicating Authority in the proceedings. The list of Impleaded Applicants are as follows:

S.

No.

Applicant

Flat No.

Financial Debt along with Interest

(In Rs.)

I-VI

I. Sh. Mayank Mandhana S/o Sh. Kishan Lal Mandhana

II. Sh. Abhishek Mandhana S/o Sh. Kishan Lal Mandhana

III. Smt. Neha Mandhana W/o Mr. Mayank Mandhana

IV. Smt. Annu Shree Mandhana W/o Mr. Abhishek Mandhana

V. Smt. Veena Mandhana W/o Sh. Kishan Lal Mandhana

VI. Sh. Kishan Lal Mandhana

A-402

1,71,79,737.39

VII

Pinkcity Advertising Company Pvt. Ltd. Through its Managing Director,
Shri Alok Kumar Jain S/o Sh. Jamoo Kumar Jain

B-503

11,21,030

VIII

Suresh Khubchandani S/o Sh. Chandru Khubchandani

A-104

10,77,775

IX

M/s Akash Consulting Engineers

Pvt. Ltd. Through its Director

B-907

9,60,168

Dwarka Prasad Gupta S/o Sh. Magati Ram Gupta

X

Ashish Katewa S/o Sh. Dharamveer Katewa

B-1005

22,46,433

XI

Rajan Jhiriwal S/o Sh. Kamal Kumar Jhiriwal

A-603

29,63,231

XII & XIII

Sunil Sharma S/o Sh. Dinesh Chandra Sharma and Ms. Kumud Sharma W/
o Mr. Dinesh Kumar Sharma

B-405

19,25,096

XIV

& XV

Sunil Sharma S/o Sh. Damodar Prasad Sharma and Ms. Hempushpa
Sharma W/o Mr. Sunil Sharma

B-704

8,29,272

XVI

Gulerana Khudabaksh

B-802

49,92,248

XVII

Jitendra Balani

B-801

65,97,111,97

XVIII

& XIX

Madhu Sudan Sharma & Anita Sharma

A-404

20,45,175

XX

Laxman Palsani

B-302

24,57,000

XXI

Sudhir Kumar Bansal

B-1006

19,21,844

XXII

Poonam Prakash Mulchandani

W/o Mr. Prakash Mulchandani

B-607

44,59,32881

XXIII

Ram Kurani S/o Sh. Meghraj Kaurani

B-701

54,17,255

XXIV

Sushila Kumari W/o Sh. Rakesh Kumar

B-1002

11,21,018

XXV

Bela Sharma W/o Mr. Pradeep Sharma

A-102

26,45,823.075

Total Debt of impleaded flat owners

5,99,59,546

3.3. After enjoining the above mentioned 25 Applicants, who are owners of 17 flats along with the Original Financial Creditors (who hold two Flats), the percentage of total 19 Flats comes to 16%. The total number of flats in the concerned project floated by the Respondent are 120, therefore, the Applicants along with the Original Applicants fall well above threshold of 10% prescribed by IBC. Now the total debt stands at Rs. 9,06,29,850/- (Rupees Nine Crores Six Lakhs Twenty-Nine Thousand Eight Hundred and Fifty Only) including Rs. 3,06,70,304/- (Rupees Three Crores Six Lakh Seventy Thousand Three Hundred and Four Only) Debt of Main Applicants/ Original Financial Creditors. The abovementioned Applicants are allottees of the project floated by the Corporate Debtor and at present on allowing the present application, the main petition would be supported by total 28 allottees thereby satisfying the requirements of Section 7 of the Code.

3.4. As per the code, the total number of allottees to support a petition filed under Section 7 of the Code would require atleast 10% of the allottees of the concerned project falling in the same class. Therefore, the order dated 18.05.2022 passed by the Hon'ble Supreme Court is duly complied with.

4. The Corporate Debtor has filed the Counter-Affidavit to the Affidavit filed by the Applicants stating the following:

4.1. In the present case, to be competent to invoke the provision of Section 7 of the Code, the Applicants were required to either implead 100 allottees or 10% of the total number of allottees in the Real Estate Project, whichever is less, to

qualify under the provisions of the Code. However, such impleaded allottees are required to fulfil the requirement under Section 7(1) of the Code, i.e., there is a 'financial debt' which is in 'default'. In the present matter, the basic requirement to be eligible to invoke the provision of Section 7(1) of the Code is absent in all of the Financial Creditors- the proposed creditors as well as the Original Financial Creditors.

4.2. The 23 number of prospective Financial Creditors cannot qualify to be termed as allottees in their individual capacity since, in many of the cases, individual units have been allotted to more than one person. Therefore, to reach the threshold of 10%, each unit is required to be considered as one and not each allottee. Moreso, when a single unit has been allotted to more than one person, such unit is jointly owned by co-allottees. In the present case, the total number of units are 17.

4.3. It is submitted that none of the Financial Creditors, including the Original Petitioners and the Additional Financial Creditors proposed to be impleaded qualify as "Financial Creditors" since there is no financial debt, as defined under Section 5(8) of the Code. With respect to each 'Financial Creditor', submissions are being made as under:

a. Unit No. A-402:

i) The said unit was allotted to Financial Creditors No. 4-9 for a total sale consideration of Rs. 1,61,01,000/- (Rupees One Crore Sixty-One Lakhs One Thousand Only). The allottees have made payment of Rs. 1,00,15,501/- (Rs. One Crore Fifteen Thousand Five Hundred One Only) till date. Without making complete payment towards consideration for the unit in question, the Financial Creditors cannot claim any debt owed by the answering Respondent and no default can be said to have been committed by the answering Respondent.

ii) The 'Financial Creditors' had also executed a Tripartite Loan Agreement dated 12.03.2015 for availing loan facility for purchase of the unit in question. By way of the said Tripartite Agreement executed between Mr. Mayank Mandhana, one of the co-allottee, Answering Respondent and Corporation Bank, lien has been created over the said unit by the bank and all rights in relation to the said unit have been subrogated in favour of the Bank which states that on failure of execution of sale deed or completion of sale transaction, the right to recover any amount from the answering Respondent lies solely with the Bank.

iii) The said allottees have also filed consumer complaint before the Hon'ble National Consumer Dispute Redressal Commission in relation to the subject Flat being Consumer Case No. 1786/2019 titled 'Krishan Lal Mandhana & Ors. vs. Shivgyan Developers Pvt. Ltd. & Ors.'

b. Unit No. B-503:

i) The said unit was allotted to Financial Creditor No. 10 for a total sale consideration of Rs. 60,58,216/- (Rs. Sixty Lakhs Fifty-Eight Thousand Two

Hundred Sixteen Only). On payment of the complete sale consideration, Sale deed dated 27.03.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 27.03.2019. Further, vide letter dated 27.03.2019, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottees.

c. Unit No. A-104:

i) The said unit was allotted to Financial Creditor No. 11 for a total sale consideration of Rs. 64,00,000/- (Rs. Sixty-Four Lakhs Only). On payment of the complete sale consideration, Sale deed dated 29.07.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 29.07.2019. Further, vide letter dated 29.07.2019, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2019. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottees.

d. Unit No. B-907:

i) The said unit was allotted to Financial Creditor No. 12 for a total sale consideration of Rs. 51,31,613/- (Rs. Fifty-One Lakhs Thirty-One Thousand Six Hundred Thirteen Only). On payment of the complete sale consideration, Sale deed dated 28.03.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 28.03.2019. Further, vide letter dated 28.03.2019, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2019. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottees.

e. Unit No. B-1005:

i) The said unit was allotted to Financial Creditor No. 13 for a total sale consideration of Rs. 1,46,69,250/- (Rs. One Crore Forty-Six Lakhs Sixty-Nine Thousand Two Hundred Fifty Only). On payment of the complete sale consideration, Sale deed dated 02.08.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 02.08.2019. Further, vide letter dated 02.08.2019, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2019. On execution of sale deed and further handing over the possession to the

allottees, no outstanding financial debt can be claimed by the allottees.

f. Unit No. A-603:

i) The said unit was allotted to Financial Creditor No. 14 for a total sale consideration of Rs. 77,06,713/- (Rs. Seventy-Seven Lakhs Six Thousand Seven Hundred Thirteen Only). On payment of the complete sale consideration, Sale deed dated 08.07.2021 has also been executed in favour of the allottee. Prior to execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 30.12.2020. Further, vide letter dated 30.12.2020, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the February 2022. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottees.

g. Unit No. B-405:

i) The said unit was allotted to Financial Creditor No. 15 for a total sale consideration of Rs. 83,98,176/- (Rs. Eighty-Three Lakhs Ninety-Eight Thousand One Hundred Seventy-Six Only). On payment of the complete sale consideration, Sale deed dated 13.03.2020 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 13.03.2020. Further, vide letter dated 13.03.2020, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2020. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottees.

h. Unit No. B-704:

i) The said unit was allotted to Financial Creditor No. 16 for a total sale consideration of Rs. 90,30,000/- (Rs. Ninety Lakhs Thirty Thousand Only). On payment of the complete sale consideration, Sale deed dated 09.06.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 10.06.2019. Further, vide letter dated 10.06.2019, the allottees have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2019. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottee.

i. Unit No. B-802:

i) The said unit was allotted to Financial Creditor No. 17 for a total sale consideration of Rs. 1,03,67,299/- (Rs. One Crore Three Lakh Sixty-Seven Thousand Two Hundred Ninety-Nine Only). On payment of the complete sale

consideration, Sale deed dated 04.04.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 04.04.2019. Further, vide letter dated 04.04.2019, the allottee have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2019. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottee.

j. Unit No. B-801:

i) The said unit was allotted to Financial Creditor No. 18 for a total sale consideration of Rs. 1,13,13,500/- (Rs. One Crore Thirteen Lakhs Thirteen Thousand Five Hundred Only). The allottee has made payment of Rs. 37,16,501/- (Rs. Thirty- Seven Lakhs Sixteen Thousand Five Hundred One Only) till date. Without making complete payment towards consideration for the unit in question, the Financial Creditors cannot claim any debt owed by the answering Respondent and no default can be said to have been committed by the answering Respondent.

ii) It is pertinent to submit that the allottee has previously approached the Hon'ble Real Estate Regulatory Authority by way of Complaint No. RAJ-RERA-C-2018-2186 titled "Jitendra Balani vs. Shivgyan Developers Pvt. Ltd.". The said complaint has been dismissed vide order dated 03.07.2019 passed by the Hon'ble RERA.

iii) After dismissal of the complaint by Hon'ble RERA, the allottee has now approached the Hon'ble National Consumer Dispute Redressal Commission by way of Consumer Case No. 706/2020 titled 'Jitendra Balani versus Shivgyan Developers Pvt. Ltd.' and the same was pending consideration before the Hon'ble NCDRC.

k. Unit No. A-404:

i) The said unit was allotted to Smt. Bharti and Smt. Rekha Vasudev for a total sale consideration of Rs. 68,60,000/- (Rs. Sixty-Eight Lakhs Sixty Thousand Only). On payment of the complete sale consideration, Sale deed dated 10.01.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 10.01.2019. Further, vide letter dated 10.01.2019, the allottee had further submitted undertaking of satisfaction with respect to the unit in question. The subsequent purchasers have also obtained electricity connection in the said unit way back in the year 2021.

ii) The said unit has been subsequently sold by the original allottee to the Financial Creditor No. 20 vide sale deed dated 01.03.2021. Having purchased the said unit from the original allottee, the present Financial Creditors claim any financial debt to be owed. to the answering respondent since neither any

payment with respect to the said unit has been received nor any Agreement / Sale Deed with respect to the said unit has been executed by the answering respondent.

l. Unit No. B-302:

i) The said unit was allotted to Financial Creditor No. 21 for a total sale consideration of Rs. 91,00,000/- (Rs. Ninety-One Lakhs Only). On payment of the complete sale consideration, Sale deed dated 14.06.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 14.06.2019. Further, vide letter dated 14.06.2019, the allottee have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the month of April 2022.

ii) It is pertinent to mention that the said unit has been purchased by the allottee after completion of construction. The said unit was booked by the allottee on 04.05.2019 and Sale Deed was executed and possession was handed over within a period of 45 days from booking. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottee.

m. Unit No. B-1006:

i) The said unit was allotted to Financial Creditor No. 22 for a total sale consideration of Rs. 1,11,70,000/- (Rs. One Crore Eleven Lakhs Seventy Thousand Only). On payment of the complete sale consideration, Sale deed dated 15.03.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 15.03.2019. Further, vide letter dated 15.03.2019, the allottee have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2019. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottee.

ii) Further, the said allottee has also issued a letter dated 12.08.2022 conveying his satisfaction with respect to the said unit and further confirming that possession has been handed over.

n. Unit No. B-607:

i) The said unit was allotted to Financial Creditor No. 23 for a total sale consideration of Rs. 1,44,78,628/- (Rs. One Crore Forty-Four Lakhs Seventy-Eight Thousand Six Hundred Twenty-Eight Only). The allottees have made payment of Rs. 25,09,412/- (Rs. Twenty-Five Lakhs Nine Thousand Four Hundred Twelve Only) till date. Without making complete payment towards consideration for the unit in question, the Financial Creditors cannot claim any debt owed by

the answering Respondent and no default can be said to have been committed by the answering Respondent.

ii) It is pertinent to submit that the allottee has previously approached the Real Estate Regulatory Authority by way of Complaint No. RAJ-RERA-C-2018-2187 titled "Poonam Prakash Moolchandani vs. Shivgyan Developers Pvt. Ltd.". The said complaint has been dismissed vide order dated 03.07.2019.

iii) After dismissal of the complaint, the allottee has now approached the Hon'ble National Consumer Dispute Redressal Commission by way of Consumer Case No. 707/2020 titled 'Poonam Prakash Moolchandani versus Shivgyan Developers Pvt. Ltd.' and the same was pending consideration.

o. Unit No. A-701 (wrongly stated as B-701):

i) The said unit was allotted to Financial Creditor No. 24 for a total sale consideration of Rs. 63,41,669/- (Rs. Sixty-Three Lakhs Forty-One Thousand Six Hundred Sixty-Nine Only). On payment of the complete sale consideration, Sale deed dated 16.10.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 16.10.2019. Further, vide letter dated 16.10.2019, the allottee have further submitted undertaking of satisfaction with respect to the unit in question. The allottee has also obtained electricity connection in the said unit way back in the year 2020. On execution of sale deed and further handing over the possession to the allottees, no outstanding financial debt can be claimed by the allottee.

p. Unit No. B-1002:

i) The said unit was allotted to Sh. Sunil Bang for a total sale consideration of Rs. 69,07,322/- (Rs. Sixty-Nine Lakhs Seven Thousand Three Hundred Twenty-Two Only). On payment of the complete sale consideration, Sale deed dated 21.02.2019 has also been executed in favour of the allottee. Along with execution of the Sale Deed, possession of the unit in question has also been handed over vide possession letter dated 21.02.2019. Further, vide letter dated 21.02.2019, the allottee have further submitted undertaking of satisfaction with respect to the unit in question. The original allottee had also obtained electricity connection in the said unit which has been transferred in the name of the present allottee.

ii) The said unit has been subsequently sold by the original allottee to Financial Creditor No. 25 vide sale deed dated 06.04.2021. Having purchased the said unit from the original allottee, the present Financial Creditor cannot claim any financial debt to be owed to the answering respondent since neither any payment with respect to the said unit has been received nor any Agreement / Sale Deed with respect to the said unit has been executed by the answering respondent.

q. Unit No. B-1002:

i) The said unit was allotted to Sh. Suresh Kumar Sawalka for a total sale consideration of Rs. 54,11,000/- (Rs. Fifty-Four Lakhs Eleven Thousand Only). On payment of the complete sale consideration, Sale deed dated 14.09.2016 has also been executed in favour of the allottee. Subsequently, vide Sale deed dated 08.01.2020, the said unit has been sold by the original allottee to the Financial Creditor No. 26. Further, original allottee has also been handed over possession to the subsequent purchaser vide possession letter dated 06.01.2020 and has also received letter of satisfaction dated 06.01.2020. The subsequent purchaser had also obtained electricity connection in the said unit way back in the year 2019.

ii) Having purchased the said unit from the original allottee, the present Financial Creditor cannot claim any financial debt to be owed to the answering respondent since neither any payment with respect to the said unit has been received nor any Agreement / Sale Deed with respect to the said unit has been executed by the answering respondent.

r. Unit No. B-803 and B-804:

i) The unit No. B-803 was allotted to Financial Creditors No. 1 & 2 for a total sale consideration of Rs. 1,01,45,000/- (Rs. One Crore One Lakh Forty-Five Thousand Only). Unit No. B-804 was allotted to Financial Creditors No. 2 & 3 for a total sale consideration of Rs. 1,03,25,000/- (Rs. One Crore Three Lakh Twenty-five Thousand Only). The allottees have made payment of Rs. 90,05,314/- (Rs. Ninety Lakhs Five Thousand Three Hundred Fourteen) with respect to Unit No. B 803 and Rs. 81,12,134/- (Rs. Eighty-One Lakhs Twelve Thousand One Hundred Thirty-Four Only) with respect to Unit No. B-804 till date. Without making complete payment towards consideration for the unit in question, the Financial Creditors cannot claim any debt owed by the answering Respondent and no default can be said to have been committed by the answering Respondent.

ii) The 'Financial Creditors' had also executed a Tripartite Loan Agreement dated 09.11.2015 for availing loan facility for purchase of the unit in question. By way of the said Tripartite Agreement executed between allottees, Answering Respondent and State Bank of Patiala (now State Bank of India), lien has been created over the said unit by the bank.

4.4. It is apparent that even in case of default/ cancellation, all rights to receive any payment of the Applicants have been subrogated to the Bank (SBI). Therefore, the Applicants cannot be termed as Financial Creditors as per Section 5(7) of the Code of 2016 and the Financial Creditor cannot claim any right with respect to the unit in question as the debt, if any, has been transferred in favour of the Bank.

4.5. It is further pertinent to submit that the said allottees have also defaulted in the loan, due to which the loan accounts have been declared as Non-Performing Assets on 08.11.2018 and 08.10.2018. Information regarding declaration of the loan accounts as NPA was provided by the bank to the respondent vide its letter

dated 29.06.2022. Also, proceedings under the Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 have been initiated by the Bank before the Debt Recovery Tribunal by way of OA No. 519/2019 and 513/2019. It is clear that as on date, the said allottees do not have any right over the units in question, and thus, have no right to maintain the present petition.

4.6. None of the Petitioners, including the newly impleaded petitioners, can be termed to be financial creditors of the Respondent. For ready reference, chart showing status of each of the petitioners is annexed and reproduced as below:

S.

No.

Petitioner No. (as per

Annex. A-9)

Unit No.

Status as Financial Creditor ("FC")

Reason(s)

1.

1-2

B-803

Not a FC

Complete payment not made.	Approx.	Rs.	10,40,000/-
outstanding out of principal amount.			

Debt not created.

2.

2-3

B-804

Not a FC

Complete payment not made.	Approx.	Rs.	20,00,000/-
outstanding out of principal amount.			

Debt not created.

3.

4-9

A-402

Not a FC

Complete payment not made. Approx. Rs. 16,00,000/-
outstanding out of principal amount.

Debt not created.

4.

10

B-503

Not a FC

Possession handed over on 27.03.2019. Sale Deed executed on
27.03.2019.

Debt satisfied.

5.

11

A-104

Not a FC

Possession handed over on 29.07.2019. Sale Deed executed on
29.07.2019.

Debt satisfied.

6.

12

B-907

Not a FC

Possession handed over on 28.03.2019. Sale Deed executed on
28.03.2019.

Debt satisfied.

7.

13

B- 1005

Not a FC

Possession handed over on 02.08.2019. Sale Deed executed on
02.08.2019.

Debt satisfied.

8.

14

A-603

Not a FC

Possession handed over on

30.12.2021. Sale Deed executed on 08.07.2021.

Debt satisfied.

9.

15

B-405

Not a FC

Possession handed over on 13.03.2020. Sale Deed executed on 13.03.2020.

Debt satisfied.

10.

16

B-704

Not a FC

Possession handed over on 10.06.2019. Sale Deed executed on 09.06.2019.

Debt satisfied.

11.

17

B-802

Not a FC

Possession handed over on 04.04.2019. Sale Deed executed on 04.04.2019.

Debt satisfied.

12.

18

B-801

Not a FC

Complete payment not made. Approx. Rs. 70,00,000/-
outstanding out of principal amount.

Debt not created.

13.

19

-

Not a FC

No unit allotted to Petitioner No. 19

14.

20

A-404

Not a FC

Unit not purchased from corporate debtor.

Possession handed over to original allottee on 10.01.2019.

Sale Deed executed in favour of original allottee on 10.01.2019.

Sale Deed executed in favour of subsequent purchaser by the original
allottee on 01.03.2021.

Debt satisfied.

15.

21

B-302

Not a FC

Possession handed over on 14.06.2019. Sale Deed executed on
14.06.2019.

Debt satisfied.

16.

22

B- 1006

Not a FC

Possession handed over on 15.03.2019. Sale Deed executed on 15.03.2019.

Debt satisfied.

17.

23

B-607

Not a FC

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18.

24

A-701

Not a FC

Possession handed over on 16.10.2019. Sale Deed executed on 16.10.2019.

Debt satisfied.

19.

25

B- 1002

Not a FC

Unit not purchased from corporate debtor.

Possession handed over to original allottee on 21.02.2019.

Sale Deed executed in favour of original allottee on 21.02.2019.

Sale Deed executed in favour of subsequent purchaser by the original allottee on 06.04.2021.

Debt satisfied.

20.

26

A-102

Not a FC

Unit not purchased from corporate debtor.

Possession handed over to original allottee on 14.09.2016.

Sale Deed executed in favour of original allottee on 08.01.2020.

Sale Deed executed in favour of subsequent purchaser by the original allottee on 06.01.2020.

Debt satisfied.

4.7. The Respondent has relied on the judgment of the Hon'ble Supreme Court, in Pioneer Urban Land and Infrastructure Ltd. & Anr. V. Union of India, Writ Petition (Civil no. 43/2019 decided on 09.08.2019), which has categorically observed that trigger-happy allottees who approach the Hon'ble Tribunal with malicious intent, should not be granted indulgence by the Hon'ble Tribunal.

5. The Petitioners have filed rejoinder vide Diary No. 3491/2022 dated 29.11.2022 to the counter affidavit stating the following:

5.1. It is submitted that vide order dated 18.05.2022, the aspect of financial debt has already been validated by the Hon'ble Supreme Court wherein the adjudication of the present petition was allowed subject to impleadment of 10% flat owners, in same residential apartment project. Hence, the Respondent raising question on validity of Debt is irrelevant. The Respondent had admitted that Applicants complied with the 10% threshold as per the Code. With owners of 19 flats in project, Shivgyan Casa Prime having total 120 flats, there ought to remain no doubt that the 10% threshold, eligibility criteria has been fulfilled. The provisions of Section 7 of the Code has already been met in line with the Hon'ble Supreme Court's Order.

5.2. It is submitted that project is neither completed nor compliant with the law. No Occupancy Certificate from Civic Authority has been issued. The possession offered by Respondent is illegal possession and building is being used illegally, without any Occupancy Certificate from Civic Authorities. The Architect Occupancy Certificate being produced by Respondent is a defective certificate and violation with Civic Authorities is being adjudicated in the High Court of Rajasthan.

5.3. The Jaipur Development Authority ('JDA') has not approved Architect Completion Certificate and Occupancy Certificate till date, due to various violations, non-compliances of building permissions and incompleteness. There are major non-compliances and violations related to Sewage Treatment Plant, Ground Water Harvesting, Pollutant Disposal, Solar Energy Usage, Waste Water Recirculation, Rain Water Harvesting, Safety and Security of Residential Building, violations of Building Plan and Bye Laws, including illegal construction, for which JDA and Pollution Control Board have already issued Show Cause Notice to the Respondent. Due to lack of compliance and forceful possession provided to the homebuyers, JDA issued a demolition notice dated 02.11.2021 to the Corporate Debtor. It is submitted that the Corporate Debtor has filed a Civil Writ Petition bearing CWP No. 13407/2021 before the Hon'ble High Court of Rajasthan and vide order dated 29.11.2021 the said issue is yet to be decided.

5.4. The debt in question arises from the Clause No. 19 of Pre-Printed Application Form of the project which says that "if for any reason the Promoters & Developers are not in a position to allot the flat applied for to the Intending Applicant, then the Promoters & Developers shall be responsible only to consider allotment of an alternate Flat subject to availability or refund the amount deposited by the intending Applicant with interest @ 9% p.a. from the date of registration. However, Promoter & Developer shall not be liable in any manner whatsoever for any other damage/compensation/interest loss etc. on this account to the applicant". It is submitted that since the project is facing demolition by JDA, in the eyes of law there is no valid possession. There cannot be valid possession without Occupancy Certificate. Further, illegal possession cannot be equated with valid possession. List of incomplete jobs for which allottees are still struggling is provided in the rejoinder.

6. Thereafter, the Corporate Debtor vide Diary No. 20/2023 dated 04.01.2023 has filed Sur-Rejoinder stating that the Financial Creditors have alleged that the Respondent has not complied with statutory requirements and therefore, the JDA has not approved Completion Certificate and Occupancy Certificate till date. In this regard, it is submitted that by way of Order dated 10.04.2017, JDA has empanelled and authorized certain architects to issue completion and occupancy certificates. The Respondent has duly obtained Completion Certificate dated 28.04.2017 from such empanelled Architect. It is submitted that the said notice issued by the JDA dated 02.11.2022 was based on false facts and the same was duly replied to by the Respondent vide letter dated 09.11.2021. By way of the said reply dated 09.11.2021, it was made clear to the JDA that the Respondent has not violated any rules and/or Byelaws and has duly obtained all necessary approvals/permissions for the Project in question. Due to the extreme high handedness of the JDA, the action of the JDA, in issuing notice dated 02.11.2021, has been challenged by the Respondent before the Hon'ble Rajasthan High Court by way of SB Civil Writ Petition No. 13407/2021 titled 'Shivgyan Developers Pvt. Ltd. v. Jaipur Development Authority', wherein after consideration of the complete facts on record, the Hon'ble High Court, vide order dated 29.11.2021, has restrained JDA from taking any coercive action against the present Respondent. In the present case, the Financial Creditors do not fulfil the requirement for initiating CIRP of the Corporate Debtor. The present proceedings are being used by the original Financial Creditors merely as an arm-twisting tactic solely because the Respondent is not willing to cater to the illegal demands of the original Financial Creditors. The Project in question is complete in all respects and the majority of residents of the Project in question, including majority of the proposed Financial Creditors, are completely satisfied with the construction of the Project and the services provided therein. The said Completion Certificate dated 28.04.2017 has also been held to be valid and binding by the Real Estate Regulatory Authority vide its order dated 03.07.2019 passed in complaints filed by few of the proposed Financial Creditors.

7. On 14.12.2023, this Adjudicating Authority directed the Respondent to file

reply to IA No. 285/JPR/2023. The Respondent has filed its reply vide Diary No. 88/2023 dated 11.01.2023 stating that the allottees proposed to be impleaded in the present proceedings are not competent to invoke the provision of the IBC, 2016. It is also submitted that out of the total number of 23 proposed Financial Creditors, possession has been handed over to all except the proposed Financial Creditor No. 1-6, 15 and 20 (3 allottees). Thus, any purported debt in relation to the remaining allottees stood satisfied on handing over of possession by the Respondent. In the present case, the Original Financial Creditor's Debt stood subrogated in favour of the State Bank of India in view of their Loan Account having been declared NPA.

8. An affidavit to bring on record Additional Documents has been filed vide Diary No. 398/2023 dated 14.02.2023 which includes Reply to the Writ Petition filed by the JDA; Stay Application filed by the JDA to vacate the order dated 29.11.2021; Impleadment Application filed by the Casa Prime Residents Welfare Society, Jaipur and the Original Financial Creditors; Minutes of Meeting dated 18.05.2018 issued by the JDA; Illegal Completion Certificate dated 28.04.2017 and Occupation Certificate dated 23.12.2019 issued by the empanelled architect; show cause Notice dated 08.07.2021 issued by the Regional Office, Jaipur (South) Rajasthan State Pollution Control Board and Legal Notice dated 20.07.2022 issued on behalf of the Casa Prime Welfare Resident Welfare Society. Certain other clarifications have also been filed by the Financial Creditors through this Additional Affidavit which are not being reiterated herein. The Counter-affidavit has been filed by the Corporate Debtor to this Affidavit vide Diary No. 587/2023 dated 03.03.2023.

9. A short note/ chart has been filed vide Diary No. 730/2023 dated 21.03.2023 by the Respondent/ Corporate Debtor which tabulates the status of flats in the Unit of the Corporate Debtor.

Total No. of units under dispute

19

Possession Handed Over

14

Possession not handed over

5

Total No. of Units in project

120

Threshold (10%)

2

10. We have heard the Ld. Counsels for the parties and perused the averments

made in the Application, Reply, Rejoinder, Affidavits and Counter-Affidavits along with the documents enclosed with the Application.

11. The Hon'ble Supreme Court in *Manish Kumar Vs. Union of India* (2021) SCC Online SCC 13 while upholding the constitutionality of the Amendment also threw light on the rationality and the need for the introduction of such a threshold. The court observed that the consequence of empowering a lone allottee to initiate the CIRP at his discretion, could thwart the entire real estate project thereby endangering the interests of other allottees who were not in favour of the same and might have faith in the Developer.

12. Thus, an application under Section 7 of the IBC is to be filed jointly by 100 allottees or 1/10th of the total number of allottees in the same Real Estate Project, whichever is less. The threshold of Rs. 1 crore denotes the total default of the Corporate Debtor to any Financial Creditor and not necessarily only to the Applicant Allottees. Hence, the allottees can move against the promoter even without any amount being due to them, provided that they meet the numerical threshold requirement under Section 7 of the case. For calculating the total number of allottees, only the number of allotted units in a project shall be considered, irrespective of the number of units constructed. In cases of joint allotments, wherein a single unit is allotted to more than one person, the joint allottees of that unit shall be considered to mean a single allottee.

13. In the case in hand, originally an Application under Section 7 was preferred by Gajraj Jain and two other Applicants conjointly. In view of the amendment in Section 7 and insertion of second proviso by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (1) of 2020, the Hon'ble Supreme Court directed the Applicants to meet the threshold as provided in proviso second of Section 7 (1) of the IBC. In compliance of the order passed by the Hon'ble Supreme Court, an Application has been preferred impleading 25 applicants holding 17 flats, along with the original allottees (who hold two flats) which comes to 16% of the allotted unit i.e., 120. At the time of filing the Application the required minimum amount of default was Rs. 1 lakh. Hence, according to the Applicant, impleading 25 allottees who are holding 17 flats with the Original Applicants meets the requirement as envisaged under proviso second of the Section 7 (1). It is contended by the learned counsel for the Respondent/ Corporate Debtor that Applicants are holding total number of 19 units out of which possession has been given to the allottees of 14 flats; who have been finally handed over the possession of the units and sale deeds have been executed in their favour, therefore, the same cannot be included in the present application as there is no cause of action remaining in their favour. Thereby, the Application filed by the applicants is not maintainable.

14. In *Manish Kumar Vs. Union of India* (supra), the Hon'ble Supreme Court has held that the persons to whom the flats have already been sold after completing construction, thereof, would still be allottees and would be included for computation of threshold limit. The relevant excerpts of the judgment is

reiterated below for reference.

"120. Be that as it may, as we have noticed the question must be decided with reference to real nature of the real estate project in which the application is an allottee. If it is in the case of an apartment, then necessarily all persons to whom allotment had been made would be treated as allottees for calculating the figure mentioned in the impugned proviso. The word 'allotment' does mean allotment in the sense of documented booking as is mentioned in Section 11(1)(b) in regard to apartment or plot with which we are largely concerned. Such detail regarding the quarterly up-to date list of the number and the types of apartments are to be uploaded as provided in Section 11. It is this information incidentally, which is the reservoir of data which the legislature intends that the allottees can use even though it is not necessarily confirmed to them. The allottee would also include a person who acquires the allotment either through sale, transfer or otherwise."

15. A co-ordinate Bench of NCLT, New Delhi, Court V in IB- 762/ND/2020, in a similar situation while following the judgment of Hon'ble Supreme Court passed in Manish Kumar Vs. Union of India held that as on the date of filing of the present application there were 653 allottees, and as per second proviso to Section 7(1) of the Code, minimum 64 allottees are needed for filing maintainability of the present petition. Moreover, the issue arising out of the plea taken by the Financial Creditor that allottees of apartments of which construction is complete are not to be included for computation of the threshold limit for the allottees required for the present petition, was considered by the Hon'ble Supreme Court in Manish Kumar Vs. Union of India. Hence, the Financial Creditor does not fulfil the threshold limit as provided under Section 7 and due to this reason, application is not maintainable.

16. The present application has been filed by the Allottees of 19 allotted units who are more than 10% of the allottees out of total 120 allotted units in the same real estate project thereby fulfilling the requirement of proviso second of Section 7(1).

17. Hence, this application is allowed and amended memo of parties is taken on record. The Registry is directed to serve a copy of this order to the parties herein. List IB No. 36/7/JPR/2018 for final arguments on 11.10.2023