(2020) 02 NCLT CK 0037

In the National Company Law Appellate Tribunal

Case No : Company Application No. 938, 956/C-V/ND Of 2019, (IB) No. 923 (ND) Of 2019

Global Credit Capital Limited And Ors APPELLANT

Vs

Venta Realtech Pvt. Ltd RESPONDENT

Date of Decision : 26-02-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 5(7), 5(8), 5(8)(a), 5(8)(b), 5(8)(c), 5(8)(d), 5(8)(e), 5(8)(f), 5(8)(g), 5(8)(h), 5(8)(i), 8(f), 60(5)
National Company Law Tribunal Rules, 2016 — Rule 11
Real Estate (Regulation And Development) Act, 2016 — Section 2, 2(d), 2(zn), 2(zk), 2(zk)(v), 2(zk)(vi)

Citation : (2020) 02 NCLT CK 0037

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : Ajay K. Jain, Atanu Mukherjee, Yash Karan Jain, Krishnendu Datta, Manan Batra, Shashwat Anand, Mallika Prabhakar, Sanjay Bajaj

Final Decision : Dismissed

Judgement

Abni Ranjan Kumar Sinha, J

1. The present applications, CA-938 and CA-956, have been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") readwith Rule 11 of the NCLT Rules, 2016 for orders/directions to treat the applicants as 'Financial Creditor'.

2. Both the applications have the same prayer, therefore, we would like to dispose of both the CA's together for the sake of convenience.

3. The facts mentioned in the CAs in short is the Corporate Debtor is company/ builder and applicants are allottees in the real estate project namely "Monde de Provence" to be developed by the Corporate Debtor/Respondent. The applicants being the Financial Creditor, who owes the financial debt within the meaning of

Section 8(f) of the Code, in response to public notice issued by the IRP, filed a statutory claim with the IRP for considering their claim as Financial Creditor. It was further submitted that applicants are the owner of agricultural lands vide registered sale deeds. Both the applicants entered into separate Supplementary Collaboration Agreements with the Corporate Debtor on 17.05.2011. On the basis of the agreement, the applicants and the Corporate Debtor agreed to share the project in a ratio of 45:55 respectively and the share of the parties are to be determined after the completion of construction and development work. Further, as per the Clause 20 of the agreement, the developer shall complete the construction and development work of the said group housing project within 42 months from the date of signing of this agreement. If the handing over of possession of owner's share is delayed beyond the expiry of the said period of 42 months, then the developer shall compensate the owner for the owner' share of 45 per cent at the rate of Rs. 30/- per sq. ft. per month to the applicant companies till the date of development work is completed and share of applicant of the said project is not completed. Further, the applicants again entered into the said agreement by supplementary agreement dated 18.03.2013 with the Corporate Debtor company/builder and as per clause 5 of the supplementary agreement, the development work was to be completed by the respondent company within a period of 36 months from the date of the execution of the supplementary agreement subject to a further grace period of 6 months. Further in clause 8 of the supplementary agreement, the sharing ratio in the built up area between the Applicants and the Corporate Debtor was revised to the ratio of 30:70. Further in terms of clause 9 of the supplementary agreement the builder are of 43,433 sq. ft. falling in the applicant's allocation was be rounded off against 8 flats admeasuring 5450 sq. ft. each alongwith 16 covered parking space club etc. in the residential project and in respect of the balance are of 2834 sq. ft. remaining in applicant's share, the corporate debtor agreed to pay an amount of Rs. 11,500/- per sq. ft. and the Corporate Debtor instead of paying the value/amount, allotted an additional flat admeasuring 5450 sq. ft. in lieu of 2834 sq. ft. Further in terms of Clause 4 of the Supplementary Agreement, the land shall remain with the applicants till completion of the residential project. Further the applicants were allotted 9 residential flats measuring 5450 sq. ft. each alongwith two car parking for each flat and the copy of the allotment is also annexed with the application. Further in terms of agreement the parties, the claimants were entitled to receive possession of the foregoing 9 flats alongwith 16 car parking by 17.09.2016 for the Applicant No. 1 and by 30.06.2019 for the Applicant No. 2. Therefore, in pursuance of that agreement and on non-completion of the residential project, the applicants filed an application before the IRP and the IRP vide e-mail dated 01.07.2019 informed the applicants as under:-

"Dear Sir,

This is to inform you that in reference to your claim. I have been advised by COC to take legal opinion before accepting or rejecting your claim.

Once the legal opinion comes we will update you accordingly on the status of your claim.

Kindly bear with us for another few days.

Thanks & Regards"

Thereafter, the applicants on 08.07.2019 received an email from the IRP as under:-

"Dear Sir,

We have analyzed your claim with various clauses of your agreement with Corporate Debtor and taken into consideration various provisions of this IBC, 2016 and Regulations made thereunder and bases on legal opinion received as advised by the CoC in its first meeting dated 17th June 2019, alongwith provisions of several other allied acts but express our inability to treat you as Financial Creditor entitling you to be a part of CoC simply on the ground that you have been allotted flats in this project of Corporate Debtor. In view of the above, you claim as Financial Creditor stands rejected."

4. Further it is submitted by the Applicants that since the applicants are allottees under a real estate project, therefore, they come under the definition of under Section 8(f) read with Section 2(d) of the Real Estate (Regulation and Development) Act, 2016. Further, in the IBC, there are two types of creditors i.e. Financial and Operational and the applicants are covered under the definition of Financial Creditor. Therefore, the applicants are the Financial Creditors and on the basis of the facts the applicants relied upon the Section 8(f) read with Section 2(d) of the Real Estate (Regulation and Development) Act, 2016.

5. Although the Resolution Professional filed separate replies against the applications filed by each of the Applicants, but the grounds taken by the Resolution Professional are common, therefore, we would like to state the brief submissions of the Resolution Professional below:

a. The applicants in their applications have claimed to be a Financial Creditor as per Section 5(8) (f) of the Code and that they fall under the definition of allottee as per the Real Estate (Regulation and Development) Act, 2016, however, the applicants do not fall under the definition of allottee but fall under the definition of (promoter) as mentioned under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016. The relevant extracts of the Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 is being reproduced hereunder as:-

"Promoter means":-

(i) A person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) A person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) Any development authority or any other public body in respect or allottees of--

(a) Buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) Plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) An apex state level co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) Any other person who acts himself as a builder, colonizer, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power or attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) Such other person who constructs any building or apartment for sale to the general public.

Explanation:- For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder."

b. The Hon'ble Apex Court recently in the matter of Pioneer Urban Land Infrastructure Limited and Anr. Vs. Union of India & Ors. W.P. (Civil) No. 42 of 2019 has reiterated what it has already held in the matter of Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. W.P. (Civil) No. 99 of 2018 that real estate allottees are those who make payments to the corporate debtor in lieu of services rendered i.e. construction of an apartment, but in the present case no amount was disbursed to the corporate debtor in lieu of construction of an apartment or any other consideration was given, although the applicants in their applications have claimed that their land was given in consideration but in reality the applicants themselves are the owners of the land till date, and further, each of the applicants has taken a sum of amount of Rs. 8,00,000/- from the Corporate Debtor as non-refundable security deposit.

c. The Hon'ble Maharashtra Real Estate Regulatory Authority in the matter of Mahesh Pariani Vs. Monarch Solitaire LLP, Complaint No. CC 0060000000789 in its final order dated 16.10.2017 has held that land owners having profit sharing in the project cannot be termed as an allottee and were given the status of co-promoter.

6. Further, the Financial Creditor/Applicant No. 1, Global Credit Capital Limited, vide Rejoinder submitted that:

a. It is denied that the applicant does not fall within the definition of allottee but falls under the definition of promoter as mentioned under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016. It is submitted that upon perusing clause (v) of Section 2(zk) mentioned above, would reveal that a promoter is the one who holds power of attorney from the owner of land on which building is being constructed or plot is being developed for sale, whereas in the present case the "Owner" of the land is the applicant, whereas the Corporate Debtor is the one who holds power of attorney. It is further submitted that it is not the case of the RP in the present application that the applicant was involved in the business/sale of plots or land to the general public, and thus the applicant does not fall within the terms of the promoter of clause (vi) Under Section 2(zk). That such an averment has not been made either by the applicant in its pleadings or by the Corporate Debtor in its reply. It is submitted that the judgment being relied upon by the Corporate Debtor by the name of Mahesh Pariani Vs. Monarch Solitaire LLP, passed by the Hon'ble Maharashtra RERA does not apply to the present case, since the applicant does not have a profit sharing arrangement with the Corporate Debtor, it has merely given land as consideration for the flats.

b. It is denied that the applicant has received a sum of Rs. 8 crores in as much as the same was subject to taxes. It is also submitted that the amount paid by the Corporate Debtor to the applicant under the said agreement is towards for security for fulfilment of the obligations and promises made by the Corporate Debtor qua the completion and development of the said project. The same is also clearly stated in the clause 17 of the supplementary agreement. It is further submitted that that in lieu to the amount paid by the Corporate Debtor to the applicant under the said supplementary agreement, the built up area to be allotted to the applicant was also reduced by the Corporate Debtor.

c. The applicant has also transferred absolute development rights in the said land of the applicant to the Corporate Debtor. It is further submitted that the transfer of the development rights, possession and execution of a power of attorney in the favor of the Corporate Debtor to deal with the land of the applicant and thereby, develop and construct the said project upon the land of the applicant and make profit from the same serves as "part consideration" given by the Applicant. It is submitted that it is only due to such aforementioned part considerations in the form of development rights, execution of power attorney/ license to deal with the said land of the applicant, transfer of possession of the said land and etc. It is submitted that it is due to said part consideration, to Corporate Debtor had managed to obtain the license from DTCP, Haryana and thus, create further rights in the buildup area constructed upon the said land of the applicant by allotting the flats/units to the public at large and make profit out of the same. It is submitted that it is not necessary that the consideration can be paid only in monetary terms.

7. Further, the Financial Creditor/Applicant No. 2 1ST Green Power Limited, vide Rejoinder, submitted that:

a. The RP is really a facilitator of the resolution process, whose administrative functions are overseen by the Adjudicating Authority. The controversy/dispute whether an 'allottee' in a residential project is a 'Financial Creditor' to whom a 'financial debt' is owed by the CD stands settled in favour of the 'allottee' by the Hon'ble Supreme Court in the case of: Pioneer Urban land and Infrastructure Limited & Anr. Vs. Union of India; Writ Petition No. 43 of 2019.

b. It is also submitted that the Applicant does not fall within the definition of "promoter" under the Real Estate (Regulation and Development) Act, 2016 since, the Applicant was:

i. not constructing the said project or developing the land into a project;

ii. never acted as a builder, colonizer, contractor, developer etc; and

iii. was sharing profit with the CD

c. The Applicant submits that the order dated 16.10.2017 passed by the Maharashtra Real Estate Regulatory Authority in case of an investor having profit sharing with the developer is out of context and cannot be relied upon by the RP to oust/reject the claim of the Applicant herein as 'financial creditor'.

8. We have heard the Ld. Counsel appearing for the Applicant No. 1, Applicant No. 2 and the RP and perused the averments made in the application, reply, rejoinder and written submissions. Since the claim of the applicants in CA No. 938 and 956 are common and the reply of the RP in respect of both the CAs is common, therefore, we would like to dispose of both the CAs with this common order.

9. Now in the light of submissions raised on behalf of both the parties, we shall consider the case of the applicants. We have gone through the averments made in the application, reply & rejoinder as well as decisions filed by the parties and on the basis of that we find that it is an admitted fact of the parties that the applicants had entered into an agreement with the Corporate Debtor on 17.05.2011 and on the basis of that agreement the developer will get 55 per cent whereas the owner's share was 45 per cent and as per the agreement, the land shall be under the possession and control of the applicants but thereafter a subsequent agreement was executed on 18.03.2013 and according to the supplementary agreement in terms of Clauses 8, 9 & 10, new terms and conditions were fixed and the terms and conditions are stated below:

"8. That in terms of the said Collaboration Agreement the built up/saleable areas falling to the share of the Owner was 45 percent of the total built up/saleable area. However, the Developer has now assured and represented to the Owner that the proposed apartments in the said Group Housing Colony (in addition to having specifications as given in Annexure 'B' annexed hereto) would be furnished by Christopher Guy and the furnishing of each Apartment will tentatively cost over Rs. 3400/- per square foot. As such the parties have now agreed to revise their sharing in the built up/Saleable area constructed on the said land in the following manner:

Owner's Allocation: 30%

Developer's Allocation: 70%

9. In the light of the provisions of Clause above the parties have mutually agreed that now the Owner's Allocation in the residential apartments in the Residential Group Housing Colony to be constructed over the said land shall be a minimum of sanctioned area of 37520 square feet (equivalent to 46433 square feet super area) out of the total sanctioned area of 125065 square feet for the said land, along with proportionate, undivided, indivisible or impartible ownership rights in the land underneath as also the common areas and common facilities including but not limited to club; and minimum of 16 (Sixteen) number of covered car parking space i.e. 2 (two) covered car parking for each apartment etc. (herein referred to as "Owner's Allocation"). The remaining sanctioned area of 87545 square feet out of the total sanctioned area (FSI) of 125065 square feet for the said land together with proportionate undivided, indivisible or impartible ownership rights in the land underneath as also the common areas and common facilities including but not limited to club, covered car parking etc. shall fall to the Developer's Allocation in consideration of the obligations undertaken by it in terms of the said Collaboration Agreement and this Supplementary Agreement (herein referred to as the "Developer's Allocation")/The parties agree that as the built up saleable super area of 46433 square feet falling to the owner's allocation can be rounded off against 8 apartments in the Complex (See Annexure C). The residual built up saleable supre area of 2834 Sq. Feet will be transferred in favour of the Developer upon receipt of payment from the Developer calculated at the rate Rs. 11,500/- per Sq. Foot being the official printed 'Basic Sale Price' for the project 'Monde de Provence'. Such amount shall be paid by the developer to the owner within 21 days of execution of this Supplementary Agreement. That in the event for any reason whatsoever the Developer fails to make the payment (or the residual builtup area as mentioned in this paragraph, the Developer has agreed and undertaken toallot one more additional apartment in the said 'Monde De Provence' project without any further payment by the Owner which shall be allotted on the 22nd day from this date.

10. That simultaneously upon execution of this Agreement, the Developer undertakes to issue separate letter of allotment for each apartment failing to the share of Owner's Allocation as specified in Annexure-C. The allotment letter(s) so issued shall besides mentioning the Tower Number and the Floor Number shall

also specify the Apartment Number and area thereof. The ratio of Super Area to covered area for the Owner's Allocation shall be uniform for the entire Group Housing Colony."

10. From the perusal, it appears that by subsequent agreement, both the Applicants are allotted 9 flats each and as per terms and conditions, a separate letter of allotment is issued and on the basis of that the applicants claimed themselves to be the Financial Creditors. Before making any comments on the contention of the applicants, we would like to refer Section 5(7) and 5(8) of the Code and the same is quoted below:

Section 5(7)"financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes--

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;:

Explanation. -For the purposes of this sub-clause,-(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

11. Mere plain reading of the provisions shows that a Financial Creditor is a person to whom a financial debt is owned and includes a person to whom a debt is legally assigned or transferred. The applicants claimed themselves to be Financial Creditors because according to him a financial debt is owned by the Corporate Debtor. The plain reading of Section 5(8) shows that a financial debt means a debt along with interest which disbursed against the consideration of time value and money and includes any of the Clause (a to i) under Section 5(8) of IBC, 2016.

12. At this juncture, we would like to refer the decision of the Hon'ble Apex Court given in Pioneer Urban Land and Infrastructure Limited & Another V Union of India [Supreme Court of India in WP (Civil) 43/2019] and upon which the Ld. Counsel for the RP in course of his arguments placed reliance. The Hon'ble Apex Court in Para 61 of the Judgment defined the word disbursed, the relevant portion is quoted below:

61. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th ed.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the 'Dictionary of Banking Terms' (Second edition) by Thomas P. Fitch in which "time value for money" was defined thus: "present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis."

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

13. In the light of that decision, when we shall consider the case of the applicants then, we find that the Hon'ble Apex Court in the aforesaid decision held that disbursal must be money and must be against the consideration for the time value of money. In the light of that, when we shall consider the case in hand then we find that in the case in hand although by subsequent agreement both the applicants were given allotment letter in respect of allotment of 9 Flats each and that allotment is made because the developer/Corporate Debtor had entered into an agreement with the applicants in respect of land of both Applicants upon which the developer intended to construct the apartment and in terms of the agreement, the share of the developer as well as the land owner is defined. Earlier by the first agreement, the share of the parties was 55:45 percent and by subsequent agreement, the share of the parties was 30:70, and against that share it was agreed that 9 flats will be given to each of the applicants. It is also matter of fact that the developer has to construct the apartments on the land of the applicants and the said land is still under the possession and control of the applicants because as per the agreement after the completion of the project, the applicants were required to execute the sale deed in favour of the person who purchased the flat from the developer. As per the conditions of the subsequent agreement, nowhere in the agreement, it is mentioned that the title and possession of the land is given to the developer rather the same is retained by the applicants. We further find that in lieu of the agreement also the applicants has received Rs. 8 crores and that has also been admitted by the applicants. Of course, the contention of the applicants is that they have received the same as a security amount, therefore, on the basis of the aforesaid discussion, we find that although in view of the decision of the Hon'ble Apex Court given in Pioneer Urban Land and Infrastructure Limited & Another V Union of India [Supreme Court of India in WP (Civil) 43/2019], the disbursement is only for the money, which has been paid against the consideration of the time value of money but here in this case no amount has been paid by the applicants to the developer/Corporate Debtor rather they have been given flats in lieu of the land upon which the apartments were being constructed by the developer.

14. At this juncture, we would also like to refer the explanation of Section 5(8)(f). The explanation says that the amount received from an allottee under Real Estate project shall be deemed to be an amount having the commercial effect of the borrowing. When we shall consider this explanation along with the decision of the Hon'ble Apex Court in Pioneer Urban Land and Infrastructure Limited & Another V Union of India [Supreme Court of India in WP (Civil) 43/2019] as well as the case of the petitioner, then we are of the considered view that in view of the decisions, the amount must be in terms of money and therefore, we are of the view that the claim of the petitioners come under the definition of financial

debt only if, any amount is raised from them by the developer but in the case in hand, it is admitted that no amount has been raised from the applicants by the developer, rather the developer has paid Rs. 8 crore to each of the applicants in lieu of the land upon which the real estate project is being developed.

15. At this juncture, we would also like to refer the definition of allottee given in Section 2(d) of the Real Estate (Regulation and Development) Act, 2016 and the same is quoted below:

"2(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

16. If I shall read Section 2(d) of the Real Estate (Regulation and Development) Act, 2016 along with the Section 5(8) (f) explanation 1, then in the light of the decision given by the Hon'ble Apex Court in Pioneer Urban Land and Infrastructure Limited & Another V Union of India [Supreme Court of India in WP (Civil) 43/2019], we are of the considered view that an allottee come under the definition of Financial Creditor only when any money has been raised from him because Hon'ble Apex Court held that the disbursal must be in terms of money, therefore, when we shall read the definition of allottee given in the Real Estate (Regulation and Development) Act, 2016 then we are of the view that unless the money has been raised from the allottee by the developer under real estate project, the allottee cannot be treated as Financial Creditor. So we find, no force in the contention raised on behalf of the Ld. Counsel for the applicants that since the flats are allotted to them through different allotment letters therefore, they are the allottees and on the basis of that they are Financial Creditors.

17. At this juncture, we would also like to refer the decision of coordinate bench of NCLT given in Jagdish Kumar Sharma and Ors. V. RC Realcon Pvt. Ltd. CP (IB)-856/ND/2019 under the similar circumstances and the money paid for renewal of license cannot form Financial Debt under Section 5(8) (f) of the Code.

18. At this juncture, we would also like to refer the arguments raised on behalf of RP, who in course of his argument submitted that the applicants are a Promoter and not a Financial Creditor, therefore, we would like to discuss this point raised by the RP and before that we would like to refer the definition of Promoter given under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 and the same is quoted below:

"2(zk) "promoter" means,--(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of--

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public. Explanation.--For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the Junctions and responsibilities specified, under this Act or the rules and regulations made thereunder;"

19. At this juncture, we would also like to refer the arguments made by Ld. Counsel for the RP who in course of his arguments submitted that in the Supplementary Collaboration Agreement both the owners and developer shall execute and register the sale deed are the documents.

20. In light of those submissions, we would like to quote that Clause 21 of the agreement and that is quoted below:

"21. That the Owner and Developer shall also execute and register the sale deed(s) or such document(s) or instrument(s) including Apartment Buyer's Agreement in favor of the intending purchaser(s) of unit(s)/space(s) car parking etc. in respect of the units, floor space(s) etc. forming part of allocation of both Developer & Owner agreed to be sold to different intending purchaser(s), at the cost and expense of the said intending purchaser(s) and shall give the said intending purchaser(s) title and interest as may be permissible by present or future laws on the terms and conditions of this agreement of Owner's allocation to the Owner pursuant to completion of all the 4 Towers in the proposed Group

Housing Colony by the name 'Monde de Provence' and after obtaining the occupation certificate by the Developer."

21. Mere plain reading of the Clause 21 of the Supplementary Collaboration Agreement shows that both the applicants/owners and the developer/Corporate Debtor shall execute and register the sale deed and the other documents in respect of the flat, car parking etc. in favour of the intending purchaser therefore, when we shall read this Clause along with the definition of Promoter then we are of the considered view that the applicants are not the Financial Creditors rather they are the promoters along with developer hence, on the basis of allotment of flats in terms of the Supplementary Collaboration Agreement, in our view, the applicants cannot be treated as Financial Creditors and the allotment letter cannot come under the definition of financial debt.

22. Therefore, we find no force in the contention raised on behalf of the applicants that in view of the allotment letters issued in their favour regarding the allotment of 9 flats, they are entitled to claim before the RP as a Financial Creditor and they are also entitled to be included as a member of CoC as Financial Creditor.

23. For the reasons discussed above, we are of the considered view that the applicants are not liable to be considered as a Financial Creditor. Therefore, the prayer to declare them as Financial Creditors is hereby rejected.

24. So far, the second contention of the applicants, that if they are not considered as Financial Creditor then the RP may be directed to handover the possession of the apartments of the land is concerned, in our opinion, since the applicants have entered into a Supplementary Collaboration Agreement with the developer who has developed the real estate project on the land of the applicants and against whom the CIRP has been initiated, therefore, they are also the promoter of the said project hence, they are not entitled to get the land back. Therefore, this prayer of the applicants is also rejected. Accordingly, both the applications CA 938 and CA 956 are hereby dismissed.

25. We further find that vide order dated 25.09.2019, the direction was given to COC to not proceed till the next date of hearing and the interim order was continued till the next date of hearing. Therefore, the same order dated 25.09.2019 is hereby vacated. COC is directed to act as per provisions of the law.

