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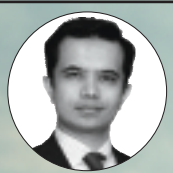

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Designation of Home Buyers as Financial Creditors: Relief or Pathway towards Tedious Litigation

Varsha Banerjee & Stuti Vatsa

Homebuyers have unvaryingly for protracted period, been at the receiving end on account of the unscrupulous acts committed by the large scale builders. Homebuyers are generally represented through an individual and /or association, which might fail to get the necessary relief when pitted against the large scale builders, who have considerable resources at their disposal. However, the Hon'ble Supreme Court, after taking into consideration the plight of the humongous home buyers and the wrath imposed on them by the unaccountable builders, have managed to provide considerable respite through its landmark judgments, passed in the matter of Chitra Sharma Versus Union of India, W.P.(C) No. 744/2017, Bikram Chatterjee Versus Union of India W.P.(C)No. 940/2017 and Pioneer Urban Land and Infrastructure Limited & Anr Versus Union of India & Ors, W.P. (C) 43/2019 (hereinafter referred to as the Pioneer Urban). The judgment in the matter of Pioneer Urban is the latest entrant, which recognizes and crystallizes the rights of the home buyers to initiate proceedings under the provisions of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as the Code).

The Hon'ble Supreme Court in the matter of Pioneer Urban, was adjudicating a batch of petitions, which challenged the constitutional validity of the amendments made to the Code, whereby in terms of an explanation inserted to Section 5(8)(f) of the Code, the allottees of the real estate projects were to be treated as financial creditors, so as to entitle them to trigger the provisions of the Code against the real estate builders. On 09.08.2019, the Hon'ble Court, pursuant to the perusal and deliberate consideration of the detailed arguments of the contesting parties, upheld the constitutional validity of the amendment. The Hon'ble Supreme Court, vide the said judgment held that the amendment was carried out in public interest and does nowhere intend to cause infraction of Article 14, 19 (1) g read with 19(6) of Article 300-A of the Constitution.

It also affirmed the position of the home-buyers as financial creditors under Section 5(8) (f) of the Code and further stated that the explanation, which was added in the amendment, was purely clarificatory in nature. Further, the Hon'ble Supreme Court held that Section 5(8) (f) of the Code is a residuary clause, wherein any amount, which, if not covered by any of the other clauses, would amount to financial debt, if it is in the nature of borrowing, having commercial effect. Since, the home buyers and the real estate developers have viable commercial

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interest under the real estate agreement, therefore, the amount raised from such an allottee, would subsume within Section 5(8) (f) of the Code, even without diverting towards explanation of the Code, which at any juncture has been held to be self-explanatory in nature. Therefore, the Hon'ble Supreme Court held that the home buyers were included in Section 5(8) (f) of the Code from the inception and the explanation was added with the sole purpose of clarification of doubts.

However, despite the fact that the home buyers are now recognized as financial creditors, who are entitled to initiate proceedings under the Code, the judgment of the Hon'ble Supreme Court also enlists certain parameters and/or defences, which the builders can now raise to oppose such applications preferred under the Code. It is submitted that though the Hon'ble Supreme Court successfully managed to uphold the status of the home buyers as financial creditors, the said judgment instead of providing adequate/immediate relief under Section 7 of the Code, relegated the home buyers towards quite a tedious/lengthy affair to establish default, which may eventually result in defeating the objective and purpose of the said Amendment.

It is stated that the home buyers, who are legally entitled to initiate proceedings under Section 7 of the Code, will be subjected to numerous obstacles, which could eventually derail the admission of the proceedings under the Code and thereby prevent the time-bound resolution, as envisaged. It is pertinent to state that the aim and the intent of the home buyers have always been to obtain their flat/apartment in a time-bound manner, in which they have duly invested their hard-earned amount. The provisions of RERA were introduced with an intent to ensure that the flats/apartments are constructed and delivered to the home buyers in time, barring which such buyers would be entitled to seek compensation along with interest or refund.

There exist various primary issues prior to initiation of proceedings under the Code, which would act as a deterrent for the home buyers in the light of the

judgment, passed by the Hon'ble Supreme Court, in the matter of Pioneer Urban. At the outset, it is noteworthy to state that as the Learned National Company Law Tribunal (NCLT) is already flooded with a large number of petitions preferred by the home buyers under the Code, such applications would have to be individually taken up and decided on merits, within a short span of 14 days. Further, to prove that there was a "default", reliance would initially be placed on the symmetry of information between the purchaser and the promoter, which could be obtained through the information submitted under RERA.

However, once the home buyers, on the basis of the information submitted successfully succumb in proving the existence of default, the onus completely shifts towards the promoter, who could thereafter establish that the allottee himself is a defaulter and is not legally entitled to claim compensation/refund, thereby seeking dismissal of the application at the threshold itself. Such an option available to the promoter will provide the promoter with the liberty to prefer an application under Section 65 of the Code, alleging that the petition as preferred by the home buyers has been invoked fraudulently, with malicious intent and purpose. Therefore, the large scale builders, with an intent to delay the triggering of the Code or with an aim to prolong the whole process, would resort to filing of such applications, even when the home buyers have approached the Learned NCLT with clean hands and without defaulting at any stage. Such a remedy, as provided to the builders, would result in protracted litigation and derailment of the purpose of timely resolution. Thus, it is likely to impede the applications preferred by the bona fide home buyer, who has lost complete faith in the management of the real estate developer and has approached the Learned NCLT, with the expectation that some other developer may complete the pending projects, though bearing in mind the additional risk which would also be existing.

The second issue, which may also arise is quite poignant, since, as per the provisions of the Code, the Adjudicating Authority is provided with a period of 14 days, in which it has been endowed with the responsibility of dwelling into the aspect of default. It is pertinent to note that such proceedings, as carried out by the Adjudicating Authority are comprehensive in nature. Therefore, it is not feasible for the authority to adjudicate within a short span of time, the question of "default" and admits the proceedings under the Code of such large scale builders which could cause severe repercussions. As per the Hon'ble Supreme Court, it is stated that the period of 14 days as given to the Learned NCLT is completely directory and not mandatory in nature.

Further, as stipulated under Section 64(1) of the Code, the President of the Learned NCLT, pursuant to taking into account the reasons for delay, can extend the period by another 10 days, which again is directory in nature. It is pertinent to state herein that the objective of the Code, which aims towards timely resolution is again at crossheads, as in the matter of adjudication of default of the real estate companies, it would constantly result in extension of time period, which would eventually result in defeating the whole purpose and object of the Code. It is submitted that it is quite a tedious task for the Adjudicating Authority to pass an admission order against such real estate companies, wherein, the proceedings are summary in nature. Therefore, as the proceedings are summary, it is not feasible for it to examine evidence, pleadings to adjudicate on the default of such companies.

Lastly, it is stated that at present, the Learned NCLT is already flooded with a batch of petitions against the large scale builders, which would have to be taken up individually in order to adjudicate on the question of default. The issues which arise herein is that in order to deal with such petitions, pertaining to the real estate sector, it is of foremost importance that the Learned NCLT and NCLAT be manned with expert members, pertaining to real estate sector. What is most important is that such petitions are bound to give rise to ongoing litigation, which indeed would require the adequate expertise of members in the real estate sector, who may have sufficient knowledge to understand the process of such a crucial sector. However, as the Adjudicating Authorities as of now is operating with limited resources, the same may result in pushing a fairly solvent company into insolvency.

That, without sufficient expertise, it is

extremely difficult to adjudicate on such matters within a short period of time. Further, even if an extension is granted, which would eventually be in all such matters pertaining to the real estate companies, it would amount to defeating the objective and the purpose of the Code. It is also important to understand the application under Section 7 of the Code can be preferred by only those allottees, who are willing to take the risk of his flat/apartment not being completed in the near future and are willing to forego the aspect of receiving the principal amount along with interest in the near future. It may also result in a huge gestation period for the home buyers, who might have to wait before getting the possession.

Therefore, from the reading of the judgment passed by the Hon'ble Supreme Court in Pioneer Urban, it appears that the promoters shall be entitled to raise a catena of defences such as not limited to, default by the allottees, allottee's right to refund/compensation, intent of allottee, i.e. whether the allottee is a speculative investment and not genuinely interested in purchasing a flat and whether in falling real estate market, the allottee does not want to go ahead among other factors. Such defences shall ultimately result in certain dispute being raised by the promoter, which is beyond the scope and purview of Section 7 of the Code. Further, in certain cases, the alleged delay may be on account of force majure conditions, such as not limited to governmental decision and environmental clearance, which may also be considered as a defence by the promoter of the real estate company.

In the above background, it is quite likely that the home buyers might resort to the provision under RERA, wherein it is more likely that the project would be completed by the persons, as mentioned in the form provided by the real estate developers or might seek full amount of refund and interest together with compensation, if it is established that default has taken place. Thus, it is stated that though the amendment was introduced with the purpose of safeguarding the rights of the homebuyers under the Code, due to their disadvantageous position, however, with the issues as introduced in terms of the judgment of the Hon'ble Supreme Court in the matter of Pioneer Urban, the triggering of the process under the Code will itself prove to be quite a tedious task for the home buyers. The objective of the Code, which provides for a timely resolution, completely stands at bay, as there is a huge gestation period for triggering the proceedings under the Code and initiation of proceedings after admission.

Accordingly, though the home buyers have been accorded recognition as financial creditors, the lengthy proceeding which lies ahead may result in tedious litigation instead of being a sigh of relief. The fate of such large scale builders is likely to be witnessed in the next few months when the Adjudicating authority proceed to deal with such applications as preferred under Section 7 of the Code. We need to await the judicial approach as being taken by the Learned NCLT to finally realize the fate of such proceedings.

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