



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
ALLAHABAD BENCH, PRAYAGRAJ**

**CP (IB) NO.11/ALD/2024 with IA NO.250/2024**

*(An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016)*

**IN THE MATTER OF:**

**1. ASIT UPADHYAYA**

S/o Late Shri Laxmi Narain Upadhyaya  
R/o 23/164, Wazirpura Holy Crossing,  
Agra- 282002

**2. NANDINI GARG**

W/o Shri Naveen Garg  
R/o 95, Kaveri Kunj, Phase-2,  
Kamla Nagar, Agra- 282005

**3. VANDANA GARG**

W/o Shri Vikas Garg  
R/o 95, Kaveri Kunj, Phase-2,  
Kamla Nagar, Agra- 282005

**4. HARSH MITTAL**

S/o Late Shri Raghuvi Saran Mittal  
R/o A-12, Basant Vihar, Kamla Nagar,  
Agra- 282005

**5. RUCHI MITTAL**

W/o Late Shri Harsh Mittal  
R/o A-12, Basant Vihar, Kamla Nagar,  
Agra- 282005

**6. VIKAS GARG HUF**

Mr. Vikas Garg (Karta)  
S/o Late Shri Mahendra Kumar Garg  
R/o 95, Kaveri Kunj, Phase-2,  
Kamla Nagar, Agra- 282005

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**7. RAVI MAHESHWARI**

S/o Late Shri Rajeshwar Nath Maheshwari  
R/o C-7, Manglam Estate, Dayal Bagh,  
Agra-282005

**8. MEETA JAIN**

W/o Shri Mukesh Jain  
R/o 1/12, Sahitya Kunj, M.G.Road,  
Near SBI, Agra-282002

**9. POONAM MATHUR**

W/o Shri Ashish Mathur  
R/o M-15, Lawyer's Colony,  
Agra-282005

**10. SONBALA MEHROTRA**

W/o Shri Praveen Mehrotra  
R/o 18/155, Maithan,  
Agra-282003

**11. RAJESH GOYAL**

S/o Late Shri Rajeshwar Dayal Goyal  
R/o Flat No.604, Anant Desire, Samshabad Road,  
Rajpur Chungi, Agra-282001

**12. NITIN AGARWAL**

S/o Late Shri Purushottam Agarwal  
R/o D-571, Kamla Nagar,  
Agra-282005

**13. NITIN MAHESHWARI**

S/o Shri Ram Avtar Maheshwari  
R/o Flat No.G-25, Shubham Apartment,  
Halwai ki Bagichi, Mathura Road,  
Agra-282002

**14. SHALENDRA GUPTA**

S/o Shri Nand Kumar Gupta  
R/o Flat No.A-404, Manglam Estate,  
100ft. Road, Dayal Bagh, Agra-282005

**15. VEENU GUPTA**

W/o Shri Shailendra Kumar Gupta  
R/o Flat No.A-404, Manglam Estate,  
100ft. Road, Dayal Bagh, Agra-282005

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**16. CHANDRA SHEKHAR GUPTA**

S/o Shri Ram Gupta  
R/o East Masi Street, 357, Madurai,  
Tamil Nadu 625001

**17. DEEPA ARORA**

W/o Shri Gagan Arora  
R/o H.No.555, Ward No.-12, Krishna Colony,  
Gurgaon, Haryana- 122001

**18. GAGAN BURMAN**

S/o Shri S K Burman  
R/o 26, Manglam Estate, Dayalbagh,  
Agra- 282005

**19. MUKESH GUPTA**

S/o Shri Sita Ram Gupta  
R/o C-2/62, Bye Pas Road, Kamla Nagar,  
Agra- 282004

**20. PRATEEK MEHTA**

S/o Shri K K Mehta  
R/o 6, Mahatma Gandhi Road,  
St. John's Crossing, Agra- 282002

**21. N.K. AGARWAL (NARESH KUMAR AGARWAL)**

S/o Shri M L Agarwal jointly with  
Mr. Himanshu Agarwal  
S/o Shri Naresh Kumar Agarwal  
R/o 34, Friends Enclave, Dayal Bagh,  
Agra- 282005

**22. PUNEET MEHTA**

S/o Shri K K Mehta  
R/o 6, Mahatma Gandhi Road,  
St. John's Crossing, Agra- 282002

**.....FINANCIAL CREDITORS**

***Versus***

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**M/S NHA INFRABUILD PRIVATE LTD**

CIN: U45201UP2022PTC168820

**HAVING ITS REGISTERED OFFICE AT:**

KH No.210, Mauja Chamrauli Taj Nagri,  
Phase-II, Ishamshabad, Fatehabad Road,  
Agra UP 282001 IN.

Email: [nikhilgarg29@hotmail.com](mailto:nikhilgarg29@hotmail.com)

**.....CORPORATE DEBTOR**

*(An application under Section 60(5) (a) & (c) read with Section 65(1) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of the NCLT Rules, 2016)*

**AND IN THE MATTER OF:**

M/S NHA INFRABUILD PRIVATE LTD

**..... APPLICANT/CORPORATE DEBTOR**

***Versus***

ASIT UPADHYAYA & ORS.

**.....RESPONDENTS/FINANCIAL CREDITORS**

**Order pronounced on 31.01.2025**

***Coram:***

Mr. Praveen Gupta : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

***Appearances:***

Ms. Babita Jain, Adv. : For Financial Creditor/  
Res. in IA No.250/2024

Sh. Ruchir Batra, Adv. : For Corporate Debtor/  
Applicant in IA No.250/2024

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## **ORDER**

1. This Application has been filed on 19.01.2024 by 22 Allottees (Home Buyers) as the Applicant Financial Creditors as mentioned in Memo of Parties above, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “**IBC/I&B Code/ the Code**”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 against M/s NHA Infrabuild Private Limited (hereinafter referred as “**Respondent Corporate Debtor**”) in Form 1 containing all the information as required in Part I, II, III, IV and V of the Form showing a default in respect of the total financial debt pertaining to 22 allottees/Financial Creditors to whom 34 units of flats have been allotted amounting to Rs. 14,57,41,930.00 (Rupees Fourteen Crores Fifty Seven Lakhs Forty One Thousand Nine Hundred Thirty Only) which includes a sum of Rs. 5,71,35,420.00 (Rupees Five Crores Seventy One Lakhs Thirty Five Thousand Four Hundred Twenty Only) towards interest at rate 8% payable by the Respondent Corporate Debtor to the Applicant Financial Creditors as on 31.03.2023.

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2. The Respondent Corporate Debtor i.e M/s INFRABUILD PRIVATE LIMITED with CIN No. U45201UP2022PTC168820 is having registered office at KH No. 210 Mauja Chamrauli Taj Nagri Phase-II Shamshabad, Fatehabad Road, Agra-U.P. 282001 and therefore, this tribunal has jurisdiction to decide this application.
3. The Respondent Corporate Debtor was incorporated by conversion of Firm M/s Nikhil Associates to M/s NHA Infrabuild Private Limited vide resolution dated 10.5.2022 and executed on 06.8.2022. The Respondent Corporate Debtor is engaged in development of Real Estate Projects and was developing a Project of Group-Housing- Residential Scheme by acquiring land in village Chamrauli, District Agra.
4. The Applicant Financial Creditors state that the Respondent Corporate Debtor has acquired the rights in said entire land through tripartite agreement executed amongst the NIKHIL HOME ASSOCIATES AGRA, MAA MANSA DEVI SHAHKARI AWAS SAMITI LTD Agra, a cooperative Society having registration No 3154 dated 20.08.2003 being the Legal owner of land measuring 2.0741 Hec Vd AGRI a/c no 07 Khasra No

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210 situated at village & Mauja Chamrauli, Near TV Tower Shamshabad Road Agra is constructing a multistoried building complex consisting of residential flats of various sizes on different floors as per the Plan approved by the Agra Development Authority on 28.07.2012.

5. Applicant Financial Creditors also state that the Respondent Corporate Debtor has acquired marketing, construction, and development rights from the landowners of the land on which the impugned project is being constructed. The Respondent Corporate Debtor was assigned to collect the sale price from the allottees including Applicant Financial Creditors as per the terms of the agreement to sell. Accordingly, all the 22 Applicant Financial Creditors for allotment of units in the impugned project, filed application forms and then subsequently made payments to the Respondent Corporate Debtor. Thereafter, allotment letters were issued by the Respondent Corporate Debtor to each one of the Applicant Financial Creditors for the allotment of various units on a later date with a Flat Sale Agreement.

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6. As further stated that as per the Flat Sale Agreement, the Respondent Corporate Debtor committed to handover the possession of the units within 3 years from the date of commencement of construction of the individual block with a grace period of 6 months. However, the Respondent Corporate Debtor failed to deliver the possession of the flats within the stipulated time period despite making full payments by the Applicant Financial Creditors. It is also alleged that till date the Project is not completed and is nowhere near completion as per the information available with the Applicant Financial Creditors and also, the Respondent Corporate Debtor has so far not given any information regarding the date of completion of the Project or of handing over of the Flats booked by the Applicant Financial Creditors.
7. The said impugned Project of the Respondent Corporate Debtor was Registered under UPRERA having RERA Registration No UPRERAPRJ14225. Applicant Finance Creditors further pointed out that as per the UPRERA website, construction commenced on 10.06.2012 and to be

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delivered within 3 years and further grace period of 6 months, hence the date by which flats have to be handed over was 10.12.2015 but as the flats were not handed over on the said date, the date of commencement of default is 10.12.2015.

8. Later, UPRERA revised the start date to be 12.07.2017 and date of completion was declared as 10.06.2019. UPRERA conducted inspection of the project and submitted report on 30.03.2022 which has been annexed as **Annexure-A-9** of the Application. The UPRERA vide public notice dated 24.12.2022 stated that the registration of Project of the Corporate Debtor namely, 'Nikhil Park Royal' has been cancelled due to non-completion of the project on time. Thus, default continued till 24.12.2022 due to non-handing over of the flats or in case of such failure, no refund of the amount deposited against these flats was made to Applicant Financial Creditor.
9. As regards the present Application being within limitation period, the Applicant Financial Creditor stated that the act of non-handing over of the possession on part of the Respondent Corporate Debtor has resulted in default on the part of the

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Respondent Corporate Debtor first time on 10.12.2015 and since, the possession of the units in the impugned project has not been handed over till date, it resulted in continuing default/recurring cause of action in terms of Section 22 of the Limitation Act , 1963, and therefore the instant Application has been filed within limitation period.

- 10.** As regards meeting the eligibility criteria for filing the instant Application by the allottees of the impugned project, the Applicant Financial Creditor stated by referring to the second proviso of sub-section (1) of Section 7 of the IBC that such allottees being eligible to file an Application u/s 7 should be not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less. In the instant case of impugned project, the total number of allottees as per the information of the Applicant Financial Creditor are 318, 10% of which comes to 32 and total number of allottees as given in a tabular form on pages nos. from 14 to 17 comes to 34, and therefore the eligibility criteria for filing of instant Application has also been met.

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**11.** After narrating the above facts and circumstances of the case, the Applicant Financial Creditors submitted that the Respondent Corporate Debtor has failed to deliver the flats to respective Applicant allottees and also failed to refund the legitimate dues, therefore under such circumstances, it is just and equitable that the Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) may be initiated against it as per the provision of the Section 7 of the IBC.

**REPLY ON BEHALF OF THE RESPONDENT/CORPORATE DEBTOR**

**12.** In response to the aforesaid Application, the Respondent Corporate Debtor has filed a Reply on 01.06.2024 providing details of the impugned Project and countering all the allegations of the default raised by the Applicant Financial Creditors in this regard for initiating the proceeding under section 7 of the IBC. The details and the arguments taken by the Respondent Corporate Debtor in the Reply are briefly discussed here as under:-

**13. Details of the Impugned Project**

(a) In the year 2012, the Corporate Debtor launched a housing project namely '**Nikhil Park Royale**' consisting



of 5 towers (Tower A to E) at Shamsabad, Fatehabad Road, Agra for providing affordable housing facility with all advanced amenities.

- (b) The said project is duly approved by the Agra Development Authority ("ADA" in short) as per the applicable norms and Regulations vide its letter dated 28.07.2012.
- (c) The said project is duly registered with the Uttar Pradesh Real Estate Regulatory Authority (UPRERA in short) in compliance of provisions of the RERA Act, 2016 vide a Certificate dated 31.10.2017 issued by the UPRERA.
- (d) In the said project, 247 units/flats out of the total 372 units are allotted to the various homebuyers as given in Annexure D (from pages 47 to 51) of the Reply giving the list of the all Allotees and their respective units in the Project.

**14. Counter Arguments taken Against the Instant Application:-**

- i) The Respondent Corporate Debtor countered the Applicants for their claim to be Financial Creditors as per the second proviso of section 7(1) of IBC stating that



Applicants maliciously did not disclose the several true and material facts that 18 out of the 22 Applicants have falsely and fraudulently claimed to be allottees under the real estate project as prior to filing of the present Application, they have withdrawn from the Project and some of them received full refund and some of them received substantial/part refund. They even approached UPRERA for seeking repayment of their money without disclosing the fact that they have already withdrawn from the Project.

- (ii) It is further alleged that 21 (being the 33 Unit holders) Applicants out of total 22 (being the 34 Unit Holders) Applicants who have initiated the present Section 7 Application are RC Holders and guilty of the suppression, misleading of facts, forum shopping, an abuse of process of law as the Applicant Financial Creditors who have been paid in full and part, invoked multiple remedies simultaneously.
- (iii) Further, details of amounts refunded to each of Applicants and also litigations carried out by them at various forums have been provided in the Reply (from pg



nos. 7 to 27) showing that out of total amounts of Rs. 8,11,02,144.00 received from them, Rs. 4,71,64,982.00 have been refunded and four allottees i.e. Ms Vandana Garg, Mr. Vikash Garg, Mr Ravi Maheshwari and Mr. Rajesh Goyal have been refunded in full and others are paid substantially/partly and balance amounts are under the process of being refunded.

- (iv) After providing details of amounts refunded to the Applicants who have filed the present Section 7 Application, the Respondent Corporate Debtor contended that 18 out of 22 Applicants, who have initiated Section 7 Application, had already settled by receiving full and substantial repayments made to them against their respective flats on cancellations and in compliance of the orders of various forums as per the details given in para 11 of the instant Reply.
- (v) Now, as per the Respondent Corporate Debtor, there are only 4 Applicants (allotted one unit to each) out of 22 Applicants, who had not settled and not received any repayment from the Corporate Debtor but have chosen to approach other forums by filing various complaints. They



are namely Mr. Gagan Burman, Mr. Mukesh Gupta, Mr. Prateek Mehta and Mr. Punit Mehta, having made total payment of Rs. 75,04,336/- which at present is outstanding.

- (vi) With the above details presented by the Respondent Corporate Debtor in the Reply, it has been contended that the captioned Petition/Application does not meet the mandatory requirement of the second proviso to Section 7(1) of IBC, 2016, as 18 (30 Unit holders) Applicants out of 22 Applicants (34 Unit holders), had already settled by receiving full/substantial repayments from the Corporate Debtor against their respective flats, therefore, neither the criteria of 100 or 10% of the total allottees whichever is less in a Real Estate Project for filing of Section 7 Application by homebuyers is fulfilled nor the mandatory requirement of the minimum default amount being one crore rupees for filing of Section 7 Application is fulfilled.
- (vii) With respect to Ms. Vandana Garg (Applicant No.3) and Mr. Vikas Garg (Applicant No.6), Respondent contends that Ms. Vandana Garg and Vikash Garg (Husband & Wife) suppressed the fact that they advanced the term



loan of Rs. 95,00,000/- (Ninety-Five Lacks Only) to the Respondent Corporate Debtor on interest and later the Corporate Debtor repaid the entire amount along with the Interest amounting to Rs. 1,19,19,807.00/- (One Crore Nineteen Lakhs Nineteen Thousand Eight Hundred and Seven Only). Therefore, in view of the Respondent Corporate Debtor, the Applicant Nos. 3 & 6 cannot be treated as flat buyers.

(viii) With respect to the limitation, Respondent Corporate Debtor contends that this application is barred by period of limitation. the Serial No. 2 of Part -IV of the present application states the date of default as 10.12.2015 as per which, the present application is filed after a period of eight years. However, the last refund to the applicants was made in the year of 2016 against the cancellation of their respective flats immediately after 3-4 weeks from the date of allotment, which is evident from the bank statement. The present application has been filed after 8 years from the date when the Applicants ceased to be the allottees.





- (ix) Reliance has been placed on the judgement passed by the Hon'ble National Company Law Appellate Tribunal in ***Sushil Ansal versus Ashok Tripathi & Ors., 2020 SCC OnLine NCLAT 680***: holding that the Adjudicating Authority cannot be used as Recovery Forum and barred from filing Section 7 Application as reproduced herein below;

*"23. We accordingly summarize our finding as under: (i) Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate dated 10<sup>th</sup> August, 2019 by 'UP RERA' directing recovery of Rs. 73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the 'I & B Code'. Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees. "*

- (x) The judgment relied upon by the Applicant i.e *Pioneer Urban (Supra)* clearly states that the IBC is not supposed to be a debt recovery mechanism. Therefore, Home Buyers by concealing the fact that UPRERA has issued Recovery Certificate and passed orders on the same issue clearly establishes that Applicants are engaged in



recovery of their monies through various forums, which is not permissible as per the above order of the Hon'ble High Court.

- (xi) In a very recent Judgement, the Hon'ble National Company Law Tribunal, New Delhi in the matter of ***Neeraj Kumar Dubey & Ors, vs Rudra Buildwell Projects Pvt. Ltd. in CP (IB) -888/PB/2022*** dated 11.03.2024 made a detailed observation as follows;

*“21. The recovery under the RC can be made (or the allottee till am1 time before the Developer (Corporate Debtor) is admitted into CIRP and moratorium under Section 14 sets in. Therefore, as and when the Collector/Tehsildar recovers the amount due to the allottee (from the Developer the allottee will no longer remain a creditor or for that matter a home buyer and therefore, not eligible to file a Section 7 petition along with other home buyers in respect of whom 110 RCs have been issued. It can be therefore safely be said that it is the promptness of action on that part of a third party i.e. the Collector/Tehsildar which will determine the status of the allottees as Creditors/Financial Creditors/Home Buyers and not by either of the two parties concerned i.e. the Allottees and the Developer. Therefore, if allottees in respect of whom RCs have been issued are accepted as Financial Creditors/Home Buyers at the pre admission stage (when no moratorium is in force) highly anomalous and unsustainable situations can arise. One such scenario could be*



*that if all the homebuyers (Financial Creditors in a class) above the threshold level are those in respect of whom RCs have been issued and they file a Section 7 petition against the Developer (Corporate Debtor) and all their dues are recovered through coercive process by the Collector/Tehsildar before admission of the petition, for such allottees to pursue and sustain that petition would be an abuse of the process of law, since they would have become rank outsiders to the project with no stake at all in the project. It is important to note that this situation is quite distinct from the one in which after filing of Section 7 Petition, the Developer voluntarily refunds the amount of some of the allottees in order to defeat their threshold requirement to file a section 7 petition, since the former is action by a third party (Collector/Tehsildar) and the latter by the party who would be prejudicially affected by the Section 7 Petition. It is perhaps for this reason that Hon'ble NCLAT in judgment is Sushil Ansal Vs. Ashok Tripathi has emphatically denied status of allottees in respect of whom RCs have been issued to be eligible for triggering CIRP against the Developer at the admission stage.*

- 2 2. In the light of the above it is clear that in terms of adjudicated orders of UPRERA referred above and under Section 18 (1) of RERA that 4 of the allottees on their own volition and after confirmation by RERA have withdrawn from the project much before they filed the section 7 Petition and that RCs issued in favor of 4 allottees makes their status as Home. Buyers indeterminate on their own action or the action of the Developer, rather determined by action of a third party i.e. the Collector/Tehsil. Therefore, their contention of being home buyers along with other home buyers in respect of whom RCs have not been issued at the pre admission*



*stage is neither tenable nor sustainable. In the present case, the total number of allottees in the Project is 1002. Therefore, in order to fall within the mandate of the second Proviso of Section 7(1) of the Code, the captioned Application ought to have been filed by not less than 100 allottee. With the exclusion of these 4 allottees, the number of homebuyers in this petition falls below the threshold of 100, hence the main Petition is liable to fail at the threshold itself.”*

- (xii) The Financial Creditors have invoked multiple remedies simultaneously which is against the doctrine of election as discussed in the judgement of Hon 'ble Supreme Court in the matter of **A.P. State Financial Corporation v. M/s GAR Rerolling Corporation.** as follows;

*“15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results.”*

- (xiii) In compliance with the UPRERA Orders, the District Magistrate has ceased the bank accounts of the Respondent Corporate Debtor and recovered the sum of Rs. 56, 00,000/- (Fifty Six Lakhs) and repaid to the Applicants in addition to the payment that the Applicants



had already received from the Respondent Corporate Debtor on withdrawal from the Project. Copy of the Letter dated 22.12.2021 issued by the District Magistrate to the Punjab & National Bank and Agra District Cooperative Bank, Agra have been annexed as **ANNEXURE- W (COLLY)** with the Reply.

(xiv) Therefore, the Respondent Corporate Debtor finally prayed that the present application is liable to be dismissed for not meeting the mandatory requirement of the minimum number of allottees under the second proviso to Section 7(1) IBC and also not meeting the mandatory requirement of the minimum default amount which is one crore rupees for filing Section 7 Application and barred by limitation.

**FILING OF INTERLOCUTORY APPLICATION BY THE CORPORATE DEBTOR AGAINST THE INSTANT APPLICATION U/S 7 OF IBC**

**15.** The Respondent Corporate Debtor before filing of the above Reply has also filed an Interlocutory Application on 06.05.2025 numbered as IA No. 250/2024 under Section 60 (5) (a) & (c) read with Section 65 (1) of the Insolvency and



Bankruptcy Code 2016, read with Rule 11 of the National Company Law Tribunal Rules 2016 for seeking dismissal of the captioned Petition/Application. The Respondent Corporate Debtor of the present Application being Applicant herein in the instant Interlocutory Application (herein referred as “**IA**”) has sought the following reliefs: -

- a) Allow the present application;*
- b) delete Respondents No. 3, 6, 7 and 11 (4 Respondents) from the Memo of Parties for not being a part of the class of "allottees under a real estate project" since they are fully refunded and already withdrawn from the Project by approaching UPRERA and other forums for cancellation of their allotments as the RC issued to them, and which relief was duly granted by UPRERA and other forums and being guilty of concealment and suppression and forum shopping;*
- c) delete Respondents No. 1, 2, 4, 5, 8 to 10, 12 to 17 and 21 (14 Respondents) from the Memo of Parties for not being a part of the class of "allottees under a real estate project" since they are substantially/party refunded and had already withdrawn from the Project by approaching UPRERA and other forums for cancellation of their allotments as the RC issued to them, and which relief was duly granted by UPRERA; and other forums and being guilty of concealment and suppression and forum shopping;*
- d) impose heavy cost on the Respondent No. 3 & 6 for placing on record the forged allotment letter and impose heavy cost for providing false information to this Hon'ble tribunal;*





*e) Consequently, dismiss the captioned Petition under Section 7 IBC, i.e., CP(IB) No. 11/ALD/2024 for not meeting the mandatory requirement of the minimum number of allottees under the second proviso to Section 7(1) IBC neither meet the mandatory requirement of the minimum default amount which is one crore for filing Section 7 Application;*

*f) Impose costs upon the Respondents in terms of Section 65 of the Insolvency & Bankruptcy Code, 2016 for fraudulently and maliciously instituting the proceedings;*

*g) Impose costs upon the Respondents in terms of Section 75 of the Insolvency & Bankruptcy Code, 2016 for furnishing false information and particulars; and*

*h) Pass such order(s) that this Hon'ble Tribunal may deem fit and necessary in the interest of justice.*

**16.** In this IA also, the Corporate Debtor has taken similar pleas as it has taken in the Reply to the present Section 7 Application, which have already been discussed in foregoing paras *inter alia* stating that the Applicants in the present Section 7 Application are not home buyers as they have withdrawn from the project and the money paid by them have been fully/partly refunded.

**17.** The Applicant/Corporate Debtor has also alleged that Home Buyers namely Ms. Vandana Garg and Mr. Vikash Garg are engaged in committing fraud by forging the signature of the Director on the fake Allotment letter. This is evident from the



report of the two Forensic Experts submitted on 15.8.2023. The Respondent has filed Criminal Complaint against the said alleged Home Buyers which is pending before the District Court, Agra. Copy of the Criminal Complaint has been annexed as **Annexure No. 5** with the Application.

**18.** It is further alleged by the Applicant Corporate Debtor that aforesaid Respondents No. 3 and 6 provided loans of Rs. 95,00,000/- (Rupees Ninety Five Lakhs) on Interest to the Corporate debtor. The said loan has been repaid along with interest constituting a sum of Rs. 1,19,19,807. Therefore, Applicant in the said I.A. and Respondent Corporate Debtor in Main Application has sought to file an Application of perjury under Section 75 of the IBC, 2016 against the Respondent No. 3 & 6 who are Applicants in Main Application.

**19.** Respondent Corporate Debtor as being Applicant in the instant IA has challenged fulfilling of the criteria of 10% or 100 allottees whichever is less as provided under the proviso of Section 7(1) of the Code, by contending that claim of the total 18 allottees have already been settled by repayment of full or substantial amount against their respective allotted flats.





Thus, the criteria as provided in the said proviso is not fulfilled, the details of which is summarized below:-

_Respondents to whom full amount has been refunded, including RC holder and those they had chosen to approach Other Forums	4 Respondents (5 Unit Holder) Respondent No. 3,6,7&11
Respondents to whom substantial/part amount has been refunded, including RC holder and those they had chosen to approach Other Forums	14 Respondents (25 Unit Holder) Respondents Nos. 1,2,4,5,8 to 10,12 to 17 & 21
<b>TOTAL</b>	<b>18 Respondents (30 Unit Holders) (Out of 22 Respondents (34 unit Holders settled with CD)</b>

**REPLY AFFIDAVIT FILED BY THE RESPONDENTS/ FINANCIAL CREDITORS IN I.A NO. 250/2024**

**20.** The Applicant Financial Creditors did not file any Rejoinder to the Reply filed by the Respondent Corporate Debtor. However, in response to the said IA , the Respondents herein and Applicant Financial Creditors in Main Application has filed reply wherein they contends that the Interlocutory Application filed by the Respondent Corporate Debtor ( in Main Application) under Section 60(5) (a) & (c) read with Section 65 (1) of the Insolvency and Bankruptcy Code, 2016 is not maintainable because the Corporate Debtor has failed to



establish that the initiation of the corporate insolvency resolution process is being done either fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation as envisaged in the said section.

**21.** In this Reply to instant IA, the Applicant Financial Creditors have covered all the points raised in the IA as well as in the Reply filed by the Respondent Corporate Debtor against the Main Application filed u/s 7 of IBC by the Applicant Financial Creditors. These points are discussed as under:-

- (i). Respondents (Financial Creditors) contends that the admission of Section 7 of IBC petition depends upon having financial debt of more than 1 crore, default of payment of such debt and no. of allottees being more than 10% of the allottees in the project. In the instant matter, the allottees being financial creditors and money paid by them to the Corporate Debtor is financial debt in accordance with Section 5(8) of the IBC. Further, till date, the Corporate Debtor has failed to handover the possession of the allotted units and thus, there is a default of payment of financial debt due which is continuing till date. Further, the 10% threshold is also



being fulfilled by the allottees. Thus, all the threshold for admission of the present Section 7 petition is completed for initiating corporate insolvency resolution process against the Corporate Debtor.

(ii). Furthermore, Respondents in IA (Financial Creditors in Main Application) contends that the documents brought on record in present IA by the Corporate Debtor are forged, distorted, and fabricated documents and are in absolute contradiction of their own Books of Accounts filed by the Corporate Debtor on MCA Portal as available on Page No 945 to 958 in **Annexure A10** of the Main Application wherein all the payments made by the Applicants are shown as outstanding under the Head **“DEPOSIT AGST. PROJECT”**.

(iii). Respondents (Financial Creditors) also contends that some of the allottees though are recovery certificate holder, that doesn't change their status of being allottees as Financial Creditor in the instant case. No amount has been received by the allottees/Financial Creditors from the Corporate Debtor after the recovery certificate/order passed by UPRERA in their matter



towards compliance of the said orders. As pointed out by the Respondents in the instant IA (Financial Creditors in Main Application), the said issue is no more *res integra* in view of the recent judgment of Hon'ble NCLAT in ***Rahul Gyanchandani and Ors. v. Parsvnath Landmark Developers Pvt. Ltd. 2024 SCC Online NCLAT 469*** passed after relying upon the judgment of Hon'ble Supreme Court in ***Vishal Chelani v. Debashis Nanda, 2023 SCC Online SC 1324***, wherein it has been held that merely because a recovery certificate has been issued in favor of an allottee, his status for filing Section 7 application shall not change and such allottees shall remain Financial Creditors in class for the purposes of filing Section 7 application. Further, any distinction between Financial Creditors being RC holder and other allottees without RC shall be artificial distinction which shall be hit by the Hon'ble Supreme Court judgment in ***Vishal Chelani (supra)***. The relevant observation of this decision of the Hon'ble NCLAT is reproduced as under: -



"19. The allottees in Vishal Chelani's case were Applicants, who had also got order in their favour from RERA, but it was held by the Hon'ble Supreme Court that their status as a 'Financial Creditor' does not change and they were entitled to file their claim in Form-CA as a 'Financial Creditor'. The above judgment of the Hon'ble Supreme Court, which was relied by the Adjudicating Authority, clearly supports the submission of learned Counsel for the Appellant. The Appellant cannot be said to go out of the definition of 'allottees' merely because they have an order in their favour by RERA and the Appellants' submission that they should be treated in a different category, i.e., category of 'Decree Holder' and are not required to comply with Section 7, sub-section (1), 2nd Proviso cannot be accepted. The Appellants even after order of the RERA, directing for refund by the

Corporate Debtor, continued to be allottees and they have filed Section 7 Application as Financial Creditor of the Corporate Debtor. They are mandatorily required to comply with Section 7, sub-section (1), 2nd Proviso. In paragraph 8 of the judgment of the Hon'ble Supreme Court, distinction sought to be made by the RP between the Decree Holder and Homebuyers, who do not have order of RERA, was held to be artificial. Thus, Homebuyers, whether they have an order or Decree from the RERA or who do not have any Decree or order from RERA, belong to same category of allottees and no distinction can be made on the said ground.

20. We, thus, are of the considered opinion that Appellants are 'allottees' within the meaning of the Code and as a Financial Creditor, when they have filed the Application under Section 7,....." **[Emphasis Supplied]**



- (iv) The Financial Creditor further countered the reliance placed by the Corporate Debtor on a judgment by the Hon'ble NCLT, Delhi in the matter of **Neeraj Kumar Dubey v. Rudra Buildwell Projects Pvt. Ltd. (para-8@ pg.12 of IA)** which ruled that when RC has been issued and certain payments have been made towards satisfaction of the said RC, in such scenario, the homebuyers could not be termed as Financial Creditor for the purposes of filing Section 7 Petition. In this regard, it is submitted that, even as per the case of the Corporate Debtor, no payment has been made after issue of the RC which was done in 2022-2023 (@ Annexure-1 of the IA @ page- 25-106 of IA). Thus, the said judgment is clearly distinguishable on facts. Without prejudice to the above, the said judgment cannot be termed as good law in view of the judgment of Hon'ble NCLAT in case of **Rahul Gyanchandani (supra)** which was passed subsequent to the said judgment of the Hon'ble NCLT following the judgment of Hon'ble Supreme Court in **Vishal Chelani v. Debashis**



**Nanda, 2023 SCC On-line SC 1324.** Para-6 of the said

judgment of the Hon'ble Supreme Court is as under: -

*"6. It is thus evident that with the introduction of the explanation home buyers and allottees of real estate projects were included in the class of "financial creditors" - because financial debt is owed to them. On a plain reading of Section 5 (8)(f) no distinction is per se made out between different classes of financial creditors for the purposes of drawing a resolution plan. Consequently, the reasoning of the Mumbai Bench of NCLT "Mr. Natwar Agrawal (HUF)" is correct in the opinion of this Court.*

...

*8. The Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of an- other enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in Natwar Agarwal (HUF) (Supra) by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as*





*subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to "hyper- classification" and falls afoul of Article 14. Such an interpretation cannot therefore be countenanced.*

*9. In view of the foregoing reasons, the impugned order is hereby set aside; the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority."*

- (v) The Hon'ble Supreme Court in the aforementioned judgment clarified the definition of "Financial Creditor" at the stage of Resolution Plan. However, admittedly, there is only single definition of Financial Creditor provided under Section 5(8) of the Code. The Hon'ble Supreme Court made it clear in the above reproduced para-9 that the home buyers to whom decree/RC have been issued by RERA is declared as "financial creditor" within the meaning of Section 5(8)(f) (Explanation) of the Code. Once, the same has been done, the NCLT could not have gone into different interpretation of "Financial Creditor" having different meaning at the stage of admission and that at the stage of Resolution Plan.





- (vi) The Applicant Financial Creditor has further pointed out another decision of a coordinate bench NCLT Delhi in case of **Ashish Kumar and Ors. v. Dwarkadhis Projects Pvt. Ltd. CP (IB) No. 281 of 2023** wherein Hon'ble NCLT Delhi Bench observed as under: -

*“39. As far as the plea regarding disqualification of 12 of the Petitioners is concerned, since the Corporate Debtor has not refunded the amount paid by them, it cannot be contended that despite their dues being still payable by the CD, they cannot be treated as allottee/homebuyers. As could be ruled by Hon'ble Supreme Court in Vishal Chelani and Others vs. Debashis Nanda [Civil Appeal No. 3806 of 2023] passed on 06.10.2023, a Financial Creditor entitled to approach RERA stays as home buyer and his position cannot be disturbed. We may also be not oblivious of the fact that in terms of the provisions of Section 238 of IBC, 2016, the present proceedings have overriding effect over the proceedings before RERA.....”*

- (vii) Referring to above judgment of a coordinate bench of NCLT Delhi, it has been argued by the Applicant Financial Creditor that in view of the above subsequent judgment of NCLT New Delhi Bench, the earlier judgment of the Hon'ble NCLT New Delhi in case of **Neeraj Kumar Dubey (supra)** is not only



distinguishable but, it is contrary to the judgment of Hon'ble Supreme Court as well as Hon'ble NCLAT and overlooking the judgement of coordinate Bench of the Tribunal. Further, the Applicant ( the Corporate Debtor in the Main Application) has relied upon the earlier judgment of Hon'ble NCLAT in ***Sushil Ansal v. Ashok Tripathi and Ors. 2020 SCC Online NCLAT 680*** wherein it was held that once recovery certificate is issued by RERA, a decree holder cannot be termed as financial creditor. The Applicant with an attempt to mislead the Hon'ble Tribunal didn't reproduce the reason on which the summary was given by the Hon'ble NCLAT in the said judgment, the same is reproduced as under: -

*“20. A ‘decree-holder’ is undoubtedly covered by the definition of ‘Creditor’ under Section 3(10) of the ‘I&B Code’ but would not fall within the class of creditors classified as ‘Financial Creditor’ unless the debt was disbursed against the consideration for time value of money or falls within any of the clauses thereof as the definition of ‘financial debt’ is inclusive in character. ....”*

**[Emphasis Supplied]**



- (viii) Thus, the judgment of Hon'ble NCLAT in **Sushil Ansal (supra)** stands overruled by the judgment of Hon'ble Supreme Court in **Vishal Chellani (supra)** and as interpreted by Hon'ble NCLAT the judgment of **Rahul Gyanchandani(supra)**.
- (ix) Further, the status of decree holder as financial creditor stands fructified by the Hon'ble Supreme Court in **Kotak Mahindra Bank Ltd. V. A. Balakrishnan & Anr-(2022) 9 SCC 186**. Thus, the law laid down by Hon'ble NCLAT in **Sushil Ansal (supra)** is no more a good law in view of subsequent pronouncements. The relevant observation of Hon'ble Supreme Court in **Kotak Mahindra Bank (supra) Civil Appeal No. 689 of 2021, decided on 30.05.2022** is as under: -

*“51. Applying these principles to clause (8) of Section 5 of the IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes", the Legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a "claim" arising out of*



*a Recovery Certificate from the definition of the term “financial debt”, when such a liability in respect of a “claim” simpliciter would be included in the definition of the term “financial debt”*

*[Emphasis Supplied]*

*"84. To conclude, we hold that a liability in respect of a claim arising out of a Recovery Certificate would be a “financial debt” within the meaning of clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.*

*[Emphasis Supplied]*

- (x) On the next issue raised by the Applicant/ Corporate Debtor with regard to forum shopping and doctrine of election, the Respondent in the instant IA ( Financial Creditor in Main Application) stated that the said issue is no more res integra, in fact, the Corporate Debtor has relied upon the recent judgment of Hon'ble NCLT, Delhi in the matter of **Neeraj Kumar Dubey (supra)** wherein the issue of doctrine of election as well as forum shopping has been answered against the Corporate Debtor in their own relied upon judgment. Thus, this fact in itself demonstrates the attempt on



the part of the Corporate Debtor/Applicant herein to mislead this Hon'ble Tribunal wherein pleadings has been deliberately made in contradiction to their own relied upon judgment. In so far as doctrine of election is concerned, the NCLT in the case of **Neeraj Kumar Dubey (supra)** has observed as under in this regard:

*"8. The CD has relied on the doctrine of election. The doctrine of election was discussed in the judgement of Hon'ble Supreme Court in the matter of A.P. State Financial Corporation v. M/s GAR Re-rolling Corporation, 10 in the following words:-*

*15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results.*

*Since, IBC proceedings are independent proceedings and in Pioneer Urban land and Infrastructure Limited and Anr. Vs. Union of India and Ors, (2019) 8 SCC 416 it was clearly held that the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the Corporate Debtor. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. Relevant paras are reproduced below:*



29. As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the Corporate Debtor. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, or at least get back monies that they had advanced towards the project with interest. If, however, the allottee wants that the Corporate Debtor's management itself be removed and replaced, so that the Corporate Debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognized by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, being given the choice to withdraw such complaint and file an application before the Adjudicating Officer under RERA read with Section 88.

***It is therefore clear that the petitioner could have approached this Adjudicating Authority for seeking a different remedy even after approaching RERA provided, he was not otherwise ineligible to do so."***

*[Emphasis Supplied]*

- (xi) Further, the doctrine of election qua IBC has been considered and negated by the Hon'ble Supreme Court while relying upon its earlier judgement in Kotak



Mahindra Bank (Supra) recently in the matter of ***Tottempudi Salaith v. State Bank of India & Ors.*** ***Civil Appeal No.2348 OF 2021***, decided on 18.10.2023 wherein it was clearly held that the doctrine of election cannot be applied to prevent the financial creditors from approaching the NCLT for initiation of CIRP.

- (xii) As regards the details of repayments to the Applicants discussed in para 9 to 14 of the IA, the Financial Creditors have replied that the date of alleged repayment as shown by the Corporate Debtor is prior to the date of initiation of RERA proceedings. The RERA being an adjudicating body after considering the documents on record, passed an order wherein not a whisper of repayment has been made. As clear from the judgment of Hon'ble Supreme Court in Kotak Mahindra Bank (Supra), a decree arising out of an adjudication process is a financial debt and the same cannot be modified before the Hon'ble Adjudicating Authority, any modification in the amount paid as provided in the





decree/RC can only be modified by bringing an appropriate proceeding against the order of UPRERA under RERA Act, 2016. Till the said order is set aside, the amount as per the said RC/Decree is final.

- (xiii) The amount paid by the Financial Creditors matches with the amount shown to be deposited as appearing in balance sheet of Corporate Debtor as on dated 30.06.2022. (*@page-950-958 of the Petition*) filed on MCA Portal by Corporate Debtor itself. However, the Corporate Debtor now claims that the said amounts were repaid to the Applicants prior to the issue of balance sheet of 30.06.2022. Thus, in effect, the Corporate Debtor is making statements which is contrary to their own books of account filed before the MCA. Therefore, the instant application is liable to dismissed with cost.

**22.** The claim of the Corporate Debtor submitted in its Reply with regard to the repayment made to 18 Applicants have been considered in the hearing held on 03.09.2024 and the Ld. Counsel representing the Corporate Debtor has been asked to





file an affidavit in this regard giving the full details with supporting evidences as per the order passed by this bench as reproduced below:

1. *After arguing for some time, the Ld. Counsel representing the Corporate Debtor seeks three weeks' time to file an affidavit to demonstrate as to the number of allotments made to each of the applicants and the amount deposited by the applicants, as also the amount if any repaid by the Corporate Debtor to each of the applicants corresponding to the number of the units allotted to them along with the interest due in accordance with the provisions of the flat buyers agreement, which the Corporate Debtor has executed. This table will also give the precise date on which the repayment has been made.*

2. *Let the supplementary affidavit be filed within the aforesaid stipulated period of three weeks by serving an advance copy to the other side.*

**ADDITIONAL AFFIDAVIT ON BEHALF OF THE CORPORATE DEBTOR**

**23.** In compliance to above order, an Additional Affidavit has been filed by the Corporate Debtor on 02.10.2024 providing details of flats allotted to 22 Applicants and refunds made to 18 Applicants out of which four Applicants are shown to have been fully refunded and for balance 14 allottees, refund is shown to have been made partly. However, as regards to two



allottees i.e. Smt. Vandana Garg and Sri Vikas Garg, it has been contended that they provided loans of Rs. 75,00,000/- and Rs. 20,00,000/- respectively and the same have been repaid along with interest totaling to an amount of Rs. 1,19,19,807/- and the allotment letter filed by them has been contended to be forged one as no flats have been allotted to them. The details as provided by the Corporate Debtor are given in a tabular form from page nos. 4 to 7 of the said affidavit. Only for remaining 4 Applicants i.e. Shri Gagan Burman, Shri Mukesh Gupta, Shri Prateek Mehta and Shri Parul Mehta, it is submitted to be genuine allottees to whom no refund has been issued. In the said affidavit, it has also been submitted that the Directors of the Corporate Debtor were in jail for the period from September 2017 to September 2021. The Applicants taking advantage of the absence of the directors of the Corporate Debtor during this period started filing complaints to UPRERA to take their money refunded and obtained *ex parte* order issuing recovery certificate against the Corporate Debtor despite the fact that the substantial money was refunded to them. Now, UPRERA on application of the Corporate Debtor after its directors were released from jail, is



reviewing its earlier order after considering the refunds already made to the Applicants, to make revised calculations for issuing new recovery certificates. After presenting these facts in the said affidavit, it has been submitted that the present Application is based on false and misleading facts/statements, as well as concealment and suppression of material facts and documents, to meet the oblique and illegal design of the Applicant Financial Creditors of the present Application.

**24.** In the hearing held on 15.10.2024, the above affidavit filed by the Corporate Debtor has been considered by this Tribunal in which the Ld. Counsel appearing for the Financial Creditor claimed that no refunds have been received by the Applicant nos. 3,6,7 and 11 and this regard, an affidavit is also ordered to be filed by the Financial Creditor. In this hearing, eligibility of the proposed IRP has also been questioned by the Ld. Counsel appearing for the Corporate Debtor. The relevant order passed by this tribunal in this hearing is reproduced as under:

*“1. In this case, the reply on behalf of the Corporate Debtor has already been filed. Ld. Counsel representing the Corporate Debtor also points out that*



*the AFA of the IRP proposed by the Financial Creditor/Petitioners in this case, is not valid and the same stands suspended.*

- 2. Ld. Counsel representing the Financial Creditor seeks three days' time to clarify this aspect or to file an affidavit proposing the name of another IRP having valid AFA.*
- 3. Ld. Counsel representing the Corporate Debtor also points out that the amount with respect to the Applicant Nos.3, 6, 7 & 11 has already been fully refunded to them. However, Ld. Counsel representing the Applicant/Financial Creditor states that as per the RC of RERA, the amount has not been refunded and is outstanding.*
- 4. Let the affidavit to this effect be filed by the Ld. Counsel representing the Financial Creditor to place on record the evidence/proof as to the payment of refund or otherwise.*
- 5. Let the needful be done within a period of two weeks with advance copy to be supplied to the other side."*

**ADDITIONAL AFFIDAVIT ON BEHALF OF THE FINANCIAL CREDITOR**

**25.** In compliance to the above order dated 15.10.2024 passed by this tribunal, the Financial Creditor has filed an Additional Affidavit on 23.11.2024 submitting that no refund of amounts deposited by the Applicant nos. 3,6,7 and 11 have been received and this fact is corroborated from the fact that that the amounts paid by all these Applicants matches with the



amount shown to be deposited as appearing in Balance Sheet of the Corporate Debtor as on 30.06.2022 ( *pages 950-958 of the Application*) filed on MCA Portal by the Corporate Debtor itself which is in contradiction to the claim of the Corporate Debtor that the said amounts were repaid to the Applicants prior to the issue of balance sheet of 30.06.2022. Details of the amounts paid by these four Applicants and the amounts claimed to have been refunded to them by the Corporate Debtor as not having been received and still appearing in its Balance Sheet for the period ending on 30.06.2022, are provided from page nos. 5 to 8 of the said affidavit filed by the Financial Creditor. As these amounts are not paid, they are ordered to be paid along with the interest in the Recovery Certificates issued by UPRERA in respect of Smt. Vandana Garg, Shri Vikash Garg and Shri Rajesh Goyal. In case of Shri Ravi Maheshwari, a copy of the order dated 17.07.2023 of Additional Magistrate has been produced wherein order dated 26.09.2022 passed by the Lok Adalat (*produced by the Corporate Debtor in support of its claim to have repaid to Ravi Maheshwari*) was recalled specifically recording that the factum of payment made in the said order is incorrect. In the



said affidavit, necessary letters from respective banks have also been attached in which bank informed of not clearing the cheques issued by the Corporate Debtor as payment was stopped by the drawer. After attaching all these documentary evidences in the said affidavit, the Financial Creditor submitted in its Additional Affidavit filed before us on 23.11.2024 that no amount was refunded to Applicant nos. 3,6,7 and 11 as alleged by the Corporate Debtor.

**26.** In the above affidavit, it has also been submitted that admittedly as per the submissions made by the Corporate Debtor in its reply, 247 flats in the impugned project have been allotted by the Corporate Debtor. Thus, for the purpose of threshold of 10%, minimum 25 flats allottees can move an application u/s 7 in case Builder Corporate Debtor commits default of not delivering the flats or not refunding the money. In the present case, allottees of 34 units have moved the present Section 7 petition and in case, even these 4 allottees are removed, the present Application would be still maintainable by considering it as filed by the Applicants of 30 units to whom neither any flat has been delivered nor amounts



deposited by them have been refunded. Therefore, it is emphasized by the Applicant Financial Creditor in its Additional Affidavit that the present Application u/s 7 of IBC is still maintainable.

- 27.** As regards to the objection raised against the proposed IRP not being eligible, it has been submitted that the proposed IRP, Mr Pramod Kumar Sharma having address at H. No.-16, Dashrath Kunj-B West Arjun Nagar, Agra, Uttar Pradesh, 282001 and IBBI Registration Number IBBI/IPA-002/IP-N00110/2017-18/10258 have valid AFA which is appearing on IBBI Portal.
- 28.** The Applicant Financial Creditors as well as the Respondent Corporate Debtors both have also filed written submissions and the same have also been considered by us.

**Written Submission By the Financial Creditor**

- (i) In its written submission , the Applicant Financial Creditor has dealt with the issues relating the present application showing as fulfilling all the ingredients for its being admitted u/s 7 of the Code, meeting all the requirements of being under limitation , eligibility of



RC/Decree Holder for filing of Application u/s 7 and any distinction between RC/Decree Holders and other real estate allottee is artificial as held the Hon'ble Supreme Court and NCLAT in its judicial pronouncements as has already been discussed earlier in this order, doctrine of election /forum shopping as not being applicable to IBC proceedings, no repayment having been received by the allottees as alleged by the Corporate Debtor and allegation made by the Corporate Debtor as regards the forgery qua 3 units being without any basis.

- (ii) As regards the issue of meeting the ingredients of Section 7 of the Code, it is submitted that the Applicants are the allottees of flats under the project Nikhil Royal Park undertaken by the Corporate Debtor. Failure in allotment of the flats to the Applicants as per the Flat Purchase Agreement resulted into debt and default as per Section 5(8)(f) of the Code. Some of the Applicants in the instant case approached UPRERA for recovery of their amount which led to issuance of Recovery Certificates in their favour as per the orders passed by the UPRERA. After the issuance of Recovery Certificate,





no payment has been made by the Corporate Debtor to the allottees. Default in the instant case is more than the threshold limit of Rs. 1 crore as stated in Part-IV of the Application. As per the Corporate Debtor's own case that the total allottees being 247, the 10% of which comes to 25 wherein the present Application has been filed by 34 allottees, and hence meeting the requirement of threshold as provided in second proviso to Section 7(1) of the Code.

- (iii) As regards the issue of limitation, it is submitted that the Corporate Debtor has failed to give possession of their flats as per the timeline mentioned in Flat Purchase Agreement which caused default on 10.12.2015 and is continuing till date. Reliance has been placed on the judgement passed by the Coordinating Bench New Delhi, in ***Company Petition No. IB- 67 (ND)/2022 titled as YADUBIR SINGH SAJWAN AND ORS versus SOM RESORTS PVT. LTD.*** with regard to continuing cause of action/default qua Real Estate Allotees wherein possession has not been



handed over. The relevant part of this decision is reproduced as under:

*"10. With regard to issue of the claim of the petitioners being barred by the law of limitation, we observe that the cause of action or default in the homebuyers arises only when the agreed promised date of possession as per the builder buyer agreement has lapsed and till date the possession is not handed over. Given the fact that the default is for date of possession only, the limitation for the said period doesn't end because the date of possession doesn't arrive, until and unless, the project is completed and the possession is handed over to the homebuyers petitioners, thereby, resulting in a continuing/recurring cause of action in the case before us. The settled proposition of law has been reiterated by Hon'ble Supreme Court in the matter of Samrudhi Co-operative Housing Society Ltd. v. Mumbai Mahalaxmi Construction Pvt. Ltd. (Civil Appeal No. 4000 of 2019), decided on 11.01.2022 wherein it was held that:-*

*"12. Section 22 of the Limitation Act, 1963 provides for the computation of limitation in case of continuing breach of contract or tort. It provides that in case of continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. "* *"15.A continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement. Section 3 of MOFA imposes certain general obligations on a promoter. These obligations inter alia include making disclosures on the nature of title of the land, encumbrances on the land, fixtures, fittings and amenities to be provided, and to not grant possession of a flat*



*until a completion certificate is given by the local authority."*

*11. We find that the present petition filed under Section 7 of the Code, 2016 qualifies the test of limitation since the possession of the unit in the project "Casa itallia" are not been handed over till date, which is in breach of Builder Buyer Agreement and therefore, amounts to continuing default committed by the Corporate Debtor."*

- (iv) As regards the issue of RC/Decree Holder in respect of the house/flat allottee being eligible for filing of Section 7 petition, the same has now been settled by the Judgment of Hon'ble Supreme Court in case **Vishal Chelani (supra)** and subsequent decision of Hon'ble NCLAT in case of **Rahul Gyanchandani (supra)** and the basis on which the judgment of coordinate Delhi Bench of NCLT in case of **Neeraj Kumar Dubey (supra)** was passed as relied upon by the Corporate Debtor in this regard, is overruled. These decisions have already been discussed in foregoing paras of this order and it has been found that there is no distinction between RC/Decree Holder and other real estate allottees and such RC/Decree Holder in its capacity as the allottee of flat can also file Section 7 Application.



- (iv) As regards the allegation of certain Applicants having shown forged allotment letters, it is submitted that allegation of forgery qua 3 Units raised by the Corporate Debtor is vague. The Corporate Debtor has not refuted the fact that the applicants paid a deposit for the real estate project, nor has it asserted that the aforementioned individuals have been given the apartment/flat. The debt of the aforementioned allottees is acknowledged in the Balance Sheet of the Corporate Debtor dated 30.6.2022. The timing of the criminal complaint is suspect, as it was filed shortly after UPRERA issued a recovery certificate in favour of the Allottees against the Corporate Debtor. After conducting an investigation, the Police produced a report stating unequivocally that the current complaint was made only for the purpose of harassing the allottees in whose favor an RC was given by UPRERA. The timing of the said criminal complaint is in itself suspicious as it has been filed just after the issue of recovery certificate by UPRERA pursuant to its order against the Corporate Debtor and in favour of the aforementioned



respondents/Financial Creditors. In fact, the Police after investigation submitted a report clearly observing that the instant complaint has been filed against Ms. Vandana Garg, Mr. Vikash Garg, Mr. Shailendra Paratp Singh and Mr. Umesh Garg before the Chief Judicial Magistrate is with the sole motive of harassing the allottees in whose favour RC has been issued by UPRERA (*Annexure-G Colly Page No. 187*). It is now a settled position of law that the Hon'ble NCLT has no jurisdiction to go into the dispute relating to forgery. The same has been held by the Hon'ble NCLAT in ***Shelendra Kumar Sharma v DSC Ltd (2019 SCC OnLine NCLAT 1274-judgment dated 16.12.2019*** that-

*"5..... So far as the question as to whether the documents are forged or not is concerned, it cannot be determined by the Adjudicating Authority (National Company Law Tribunal) or this Appellate Tribunal and therefore, the Act Adjudicating Authority rightly not deliberated on such issue."*

- (v) Submissions made on other issues are reiterations what we have already discussed in foregoing paras, and hence not discussed again.



### **Written Submission By the Corporate Debtor**

- (i) The Corporate Debtor in its written submission has reiterated all those details which have already been submitted at the stage of pleadings and have already been discussed in foregoing paras, as regards claiming to have refunded the amounts fully to 4 applicants and partly to 14 Applicants providing the details in tabular form as has already been submitted in Additional Affidavit filed on 02.10.2024 and thus, claiming to the present Application as not being maintainable due to cancellation of allotment of flats by these allottees and receiving the refunds either in full or in part, and therefore an IA no. 250/2024 has been filed seeking dismissal the present Application, alleging some Applicants having forged allotment letters, the order passed by UPRERA being *ex parte*, and hence presently being reviewed by UPRERA for recalculation of refund amount on application filed by the Corporate Debtors after its directors were released from jail, the proposed IRP not being eligible for appointment due to various suspension orders passed against him, the Application



having been filed beyond limitation, and hence not maintainable, referring to the decision of coordinate Delhi Bench of NCLT in case of **Neeraj Kumar Deubey (supra)** as the RC/Decree Holder in respect of house/flat allottees not being eligible to file Section 7 Application in his capacity as home buyer and the affidavit on not receiving the refund by Applicant nos. 3,6,7 and 11 to be filed as per our order dated 15.10.2024 as not filed by the Applicant nos. 3,6,7 and 11 but filed by the Applicant No. 1, Shri Asit Upadhaya on their behalf being a false affidavit. All these details have already been discussed by us in foregoing paras, and hence have not been discussed again for the sake of brevity.

### **FINDINGS AND ORDER**

**29.** We have heard the Ld. Counsel for the Applicant and perused the records, exhibits/annexures and after considering arguments advanced by respective Learned Counsels and examining the documents on record, the main issues which



are before us to be decided in respect of the present Application u/s 7 are:

**i. Whether the Application is filed within the period of limitation.**

**ii. Whether RC/Decree Holders would fall within the definition of Section 5(8)(f) of the Code, 2016.**

**iii. Whether condition regarding debt and default applicable for home buyers as per second proviso of section 7 (1) has been fulfilled**

**iv Whether the Present Application has been filed for fraudulently and maliciously instituting the proceedings under section 7 against the Corporate Debtor**

**(i). Whether the application is filed within the period of limitation.**

**30.** With regard to the first issue, it is stated in Part-IV of the Application that the total outstanding debt is Rs.14,57,47,930.00/- with the date of default being 10.12.2015 as the Respondent Corporate Debtor failed to deliver the possession of the flats allotted in the Project “Nikhil Royal Park” as per the Flat Sale agreement after a period of three years and six months’ grace period.





**31.** After not getting the possession of flats booked, the Applicant Finance Creditors approached the UP RERA for the purpose of refund of their amounts paid towards the flats booked by them. UPRERA vide order dated 13.10.2020 directed to refund the amount through monthly installments to the complainants. Due to non-compliance of the said order, RERA issued recovery certificate directing the District Magistrate to recover the amount as “arrears of land revenue.” Though , the Corporate Debtor claimed to have refunded the substantial amount to 18 Applicants ( out of which 4 Applicants are claimed to have been paid fully) even before the said order of the RERA as these allottees cancelled their allotments , and hence on application made by the Corporate Debtor after its directors were released from the jail , the UP RERA vide order dated 18.06.2022 amended its earlier order by directing that amount should be calculated again after obtaining necessary documents from both the parties. The Applicants Finance Creditors refuted such claim of the Corporate Debtor of having refunded the full amount to any of the Applicants and in this regard, an Additional Affidavit has also been filed showing that all such cheques issued by the Corporate Debtor could not be



encashed due to payment of such cheques was stopped by the Corporate Debtor as informed by the bank after such cheques were presented to bank for payment. In this regard, the Balance Sheet of the Corporate Debtor as on 30.06.2022 has been referred, which was filed to MCA portal (*page nos. 945-956 of the Application*) showing the amounts deposited by the Applicants against the booking of flats as outstanding under the head “**DEPOSIT AGST. PROJECT**”. This balance sheet has neither been countered in the Reply filed by the Corporate Debtor nor any comment on the outstanding balances shown in the said balance sheet has been made in the written submission filed by the Corporate Debtor. Even during the hearing of the case, the Ld. Counsel for the Corporate Debtor did not offer any clarification on the outstanding balances shown against the Applicants in this balance sheet as on 30.06.2022 despite raising query in this regard. Therefore, we find that the amounts deposited by the Applicants Financial Creditors against the booking of flats were outstanding before filing of the present Application despite all claims of refunds made by the Corporate Debtor and it is also undisputed fact that the flats booked by the Applicants Financial Creditors



were not delivered before filing of the present Application as the construction of flats could not be completed even after UPRERA revised the start date for construction of flats to be 12.07.2017 and date of completion was declared as 10.06.2019. Thereafter, on the basis of the inspection report carried on 30.03.2022, the UPRERA vide public notice dated 24.12.2022 cancelled the registration of Project of the Corporate Debtor namely, 'Nikhil Park Royal' due to non-completion of project on time. Thus, default by the Respondent Corporate Debtor is continuing in nature and it is accepted to have continued till 30.06.2022 in its balance sheet due to non-handing over of the flats as well as after having failed to deliver the possession of the flats, not refunding the amounts deposited against these flats by the Applicant Financial Creditor. Such default continued up to the date of filing of the present Application and is still continuing. Thus, we find that default in this case is continuing in nature due to default of non-delivery of flats booked by the Applicant Financial Creditors even after the date of completion of construction of impugned project has been revised to 10.06.2019 and subsequently, the registration of the impugned project itself



got cancelled vide notice dated 24.12.2022 of UPRERA. Thus, the default being continuing in nature from the date of default i.e. 10.12.2015 as declared in Part IV of the Application till 24.12.2022 when UP RERA cancelled the registration of the said Project, the present Application filed on 19.01.2024 is found to have been filed within limitation period as per section 22 of the Limitation Act, 1961 in view of the continuing default. As the outstanding deposits from the Applicant Financial Creditors against the flats booked by them have been acknowledged by the Respondent Corporate Debtor in its Balance Sheet as recently as up to 30.06.2022, the present Application filed on 19.01.2024 is found to have been filed within limitation period even as per section 18 of the Limitation Act, 1961. In view of our above findings, we hold that the present Application has been filed within the limitation period.

**(ii) Whether RC/Decree Holders would fall within the definition of Section 5(8)(f) of the Code, 2016.**

**32.** As in the present case, many Applicants have also filed applications before RERA for getting refund of the amounts



deposited by them after not getting possession of flats allotted to them and obtained recovery certificate issued against the Corporate Debtor for making recovery, therefore, the Corporate Debtor raised a contention that after obtaining the orders from UP RERA and Recovery Certificates are also issued after such orders, these Applicants do not form part of 'class of allottees' for the purpose of Section 7 Application. In this regard, the Corporate Debtor relied on a judgement passed by the Hon'ble NCLAT in **Sushil Ansal v Tripathi & Ors 2020 SCC Online NCLAT 680**, holding as under:-

**"23.** *We accordingly summarise our finding as under:*

*(i) Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate dated 10th August, 2019 by 'UP RERA' directing recovery of Rs. 73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the 'I&B Code'. Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.*

*(ii) Decree-holder, though included in the definition of 'Creditor', does not fall within the definition of 'Financial Creditor' and cannot seek initiation of Corporate Insolvency Resolution Process as 'Financial Creditor'.*

*..."*



Based on above judgment of Hon'ble NCLAT, another judgment of a coordinate NCLT Delhi Bench passed in case of ***Neeraj Kumar Dubey & Ors versus Rudra Buildwell Projects Pvt. Ltd, ibn CP(IB) 888/PB/2022***, has also been referred wherein , it has been held that those allottees who for the purpose of getting their deposit amount to be refunded from the Corporate Debtor of a real estate project have obtained RC /Decree on the basis of the order of RERA on their own volition and after registration by RERA have withdrawn from the project, cannot be considered as home buyers under the second proviso of section 7(1) of IBC for the purpose of filing of Section 7 Application . Details of this decision has already been discussed in foregoing paras of this order while dealing with the Reply of the Corporate Debtor

- 33.** Per contra, the Applicants in their submissions have clarified the latest legal position with respect to those home buyers who have obtained RC/Decree on the basis of the order from RERA for getting refunds of their deposited amounts after failure of the builder in delivering them the allotted flats. In this regards, it is submitted that this issue is now settled by



the Hon'ble Supreme Court in ***Vishal Chelani v. Debashis Nanda, (2023) 10 SCC 395 : (2024) 242 Comp Cas 267 : 2023 SCC OnLine SC 1324 at page 399*** holding that an allottee in Real Estate Project , who subsequently becomes a Decree Holders under RERA Act , continues to be a creditor in the class of home buyers and shall be governed by the threshold limit prescribed under the second proviso to Section 7(1) of the IBC. As per the Hon'ble Supreme Court in this decision, home buyers who secure decree under RERA are not different from other financial creditors. Details of this decision, has already been discussed in foregoing paras of this order while dealing with the Reply of the Applicant Financial Creditors filed against the IA 250/2024 of the Corporate Debtor.

- 34.** The above decision of the Hon'ble Supreme Court in case of ***Vishal Chelani (supra)*** has been followed by the Hon'ble NCLAT in case of ***Rahul Gyanchandani and Ors. v. Parsvnath Landmark Developers Pvt. Ltd. 2024 SCC Online NCLAT 469*** holding that merely because a recovery certificate has been issued in favor of an allottee, his status



for filing Section 7 application shall not change and such allottees shall remain Financial Creditors in class for the purposes of filing Section 7 application.

- 35.** In view of above, it is argued before us by the Ld. Counsel for the Financial Creditors that the judgment of Hon'ble NCLAT in ***Sushil Ansal (supra)*** stands overruled by the judgment of Hon'ble Supreme Court in ***Vishal Chellani (supra)*** and as further interpreted by Hon'ble NCLAT in its subsequent judgment of ***Rahul Gyanchandani (supra)***. Therefore, reliance placed by the Corporate Debtor on the decision of the coordinate NCLT Delhi Bench in case of ***Neeraj Kumar Dubey(supra)*** is misplaced and not a good law. Accordingly, he argued for taking all the Applicants, whether they are decree holder under RERA Act or not, into consideration for determining the threshold for the purpose of deciding the admission of the present Section 7 Application.
- 36.** We have carefully considered the legal position as put up before us based on the above judicial pronouncements as regards to the home buyers who have secured recovery certificate/decreed under RERA Act, and we are of considered





opinion that this issue is no more *res integra* after the decision of the Hon'ble Supreme Court in case of **Vishal Chellani (supra)** and further interpreted by the Hon'ble NCLAT in case of **Rahul Gyanchandani(supra)**. Any Home Buyer who obtains a decree under RERA Act in capacity of allottee in a Real Estate Project is covered under the definition of Financial Debt contained in explanation to Section 5(8)(f) of the Code. Accordingly, a home buyer being holder of a decree in the capacity of an 'allottee' of a real estate project is a Financial Creditor in its capacity as being home buyer and there is no distinction between the home buyers who secure decree under RERA and other home buyers who have not obtained such decree on default of the Real Estate Corporate Debtor to deliver the allotted flats.

- 37.** In the present case, there are 22 Applicants who have been allotted 34 units of flats, which the Corporate Debtor has failed to deliver and also, the amounts deposited by them on booking of these flats are not refunded fully.
- 38.** As per the details provided by the Corporate Debtor, the Applicant No. 1 to 6 along with 8 to 12 and 21 had



approached UP RERA for the purpose of seeking refund of the amount deposited for purchasing flat from the Respondent/ Corporate Debtor in the Project “Nikhil Royal Park”. Consequently, Recovery Certificates in favour of the said applicants have been issued directing the District Magistrate to recover the amount as arrears of revenue.

Apart from the aforesaid applicants, Applicants Nos.7, 13, 14, 15, 16, 18, 20 & 22 approached the State Consumer Dispute Redressal Commission (SCDRC) for seeking refund of the deposit amount. The State Consumer Dispute Redressal Commission (SCDRC) vide order dated 15.03.2018 directed the promoter of Nikhil Home Associate to refund the amount along with 18% interest and litigation fee of Rs. 10,000 to the Complainant.

- 39.** Further, the Corporate Debtor in its reply to the main application and in I.A No. 250 of 2024 has categorically stated that 18 out of 22 applicants had already been settled by remitting their dues. Since the recovery certificates has already been issues by the UP RERA under section 40 of the RERA Act, directing a district Magistrate to recover the



amount as arrears of land revenue, therefore, it was contended by the Corporate Debtor that such applicants are not liable to claim the status of 'allottees' in the project namely 'Nikhil Royal Park'. However, such claim of the Corporate Debtor has not been found to be tenable after considering the decision of the Hon'ble Supreme Court in case of **Vishal Chelani (supra)** discussed above. Moreover, the refunds claimed to have been paid to the Applicants could not be fully established by the Corporate Debtor as the deposit amounts paid by them have been shown as outstanding in the balance sheet of the Corporate Debtor as on 30.06.2022 filed on MCA Portal.

- 40.** Therefore, we hold that in the present case, all the Applicants are Financial Creditors as per the provisions of section 5(8) and shall be considered home buyers for the purpose of determining the threshold as per second proviso to section 7(1) irrespective of any of them being RC/Decree holder or not, as none of them have got the delivery of flats allotted to them and also amounts paid by them have not been fully refunded to them



**(iii) Whether condition regarding debt and default applicable for home buyers as per second proviso of section 7 has been fulfilled**

- 41.** In the present case, there are 22 Applicants being the Homebuyer/Allottees who have booked 34 units in the project named “Nikhil Royal Park” developed by the Corporate Debtor. Earlier as per the flat sale agreement, the flats were to be delivered by 10.12.2015
- 42.** The Financial Creditors were allotted flat units in 2013 vide provisional allotments letters after depositing the booking amount in lieu of the flat units. The required deposit amounts have been paid by the Applicants in lieu of allotment of flats. The total amount as claimed to be outstanding as on 31.12.2023 is Rs. 14,57,41,930.00 (including interest of Rs. 5,71,35,420.00).
- 43.** It is argued by the Ld. Counsel for the Financial Creditors that as per the Flat Sale Agreement, the Corporate Debtor was required to handover the possession of the flat units within 3 years from the date of commencement of construction of the individual block with a grace period of 6



months. However, the said Project got delayed. Later, when the said Project was Registered under UPRERA under RERA Registration No UPRERAPRJ14225, the date of starting the project was revised to 12.07.2017 and date of completion of the Project was set on 10.06.2019. Later, on the basis of the inspection report carried on 30.03.2022, the UPRERA vide public notice dated 24.12.2022 cancelled the registration of Project of the Corporate Debtor namely, 'Nikhil Park Royal' due to non-completion of project on time.

- 44.** Thus, under the facts and circumstance as discussed above, the Corporate Debtor has committed default by not handing over the possession of the allotted flats to the Financial Creditors and the default continues till today as due to cancelation of registration of the said Project by RERA, the construction activities have also stopped and the said Project has still not been completed. As far as refunding the deposit amounts of the Applicants is concerned, it has already been discussed earlier that refunds have also not been made for full amounts which is corroborated by the outstanding amounts of deposits that are shown under the head



“DEPOSIT AGST. PROJECT” in the Balance Sheet as on 30.06.2022 totaling to Rs. 14,19,74,437/-. Thus, it is clear that there is a default committed by the Corporate Debtor because of neither delivering the possession of flats nor refunding the deposit amounts fully and outstanding unpaid deposit amounts is far in excess of the threshold limit of Rs. 1 core. As per the threshold of the Applicants being 100 or 10% of total number of allottees whichever is less as given in second proviso to section 7(1) is concerned, it has been found by us that there are total 247 allotted units as admitted by the Corporate Debtor in its Reply, 10% of which comes to 25. The 22 Applicants who have filed the Application are shown to have been allotted 34 units. However, in respect of 4 Applicants ( sl. 3,6,7 and 11) , it has been claimed that full amounts have been refunded but the same has been denied by the Financial Creditors in the Additional Affidavit filed on 15.10.2024 and necessary evidences were produced to show that the cheques issued by the Corporate Debtor could not be encashed due to the reason that payment of these cheques were stopped by the Corporate Debtor as informed by the Bank after these cheques were presented to Bank. Out of



these Applicants, it is also claimed by the Corporate Debtor that the allotment letters produced by the Applicant nos. 3 and 6 are forged as no such allotment of flats were made to them and the amounts shown as deposited by them was told to be taken as loan which according to the Corporate Debtor was refunded along with interest. Though any such forgery as alleged by the Corporate Debtor was denied by the Applicant Financial Creditor, however, even after reducing these four Applicants from the total number of 22 applicants, there would remain 18 applicants having 30 units of allotted flats and the same would still be within the threshold limit of 25 as calculated above . Therefore, the threshold condition as provided in second proviso of section 7 has been found to be met.

- 45.** As far as the forgery of allotment letters as alleged by the Corporate Debtor in respect of two Applicants is concerned, it is now a settled position of law that the Hon'ble NCLT has no jurisdiction to go into the dispute relating to forgery. The same has been held by Hon'ble NCLAT in ***Shelendra Kumar Sharma v DSC Ltd (2019 SCC OnLine NCLAT 1274-***



(judgment dated 16.12.2019) as we have already discussed in foregoing paras of this order while discussing the written submission of the Financial Creditors.

- 46.** In so far as forum shopping and the doctrine of election is concerned, the Corporate Debtor submitted in this regard alleging fraud and malicious intent of the Financial Creditor by filing of the present Application even after obtaining Recovery Certificate under the order of UPRERA, for which the Corporate Debtor relied upon the judgement of Hon'ble Supreme Court in the matter of A.P. State Financial Corporation v. M/s GAR Re-rolling Corporation wherein it was held as under:

*15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results.*

- 47.** In this regard, it is important to note that IBC proceedings are independent proceedings and in ***Pioneer Urban land and Infrastructure Limited and Anr. Vs. Union of India and***





**Ors, (2019) 8 SCC 416**, it was clearly held that the Code and RERA operate in completely different spheres.

**48.** The Code deals with a proceeding in rem in which the focus is the rehabilitation of the Corporate Debtor. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. Therefore, if the allottee wants that the Corporate Debtor's management itself be removed and replaced, so that the Corporate Debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy as available is recognized by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, being given the choice to withdraw such complaint and file an application before the Adjudicating Officer under RERA read with Section 88 as held by the Hon'ble Supreme Court in **Pioneer Urban (supra)**. Now, the Hon'ble Supreme Court in **Tottempudi Salaith v. State Bank of India & Ors. Civil Appeal No.2348 OF 2021**, **decided on 18.10.2023** has held that the doctrine of election



cannot be applied to prevent the financial creditors from approaching the NCLT for initiation of CIRP.

**49.** In view of the above findings and existing legal position as discussed above, we are of considered view that the doctrine of election or forum shopping would not be applicable in present case, and hence the allottees/Applicants could have filed the present Application for seeking a remedy under IBC as well even after approaching RERA, and if, however the allottees despite getting order from RERA for refund of their deposited amount, exercise any such option of filing of Section 7 Application for getting the management of the Corporate Debtor removed and replaced for getting it rehabilitated through CIRP, it cannot be termed as fraudulent action or malicious intent at the part of the allottees/Financial Creditors. Therefore, such plea taken by the Corporate Debtor is rejected.

**50.** Considering the details as discussed above, we find that all 22 Applicants being allottees of 34 units of flat under a real estate project named “Nikhil Park Royal” are Financial Creditors in class meeting the threshold criteria of 10% of total number of



247 allottees in this project and the present Application filed by them under Section 7 of IBC is fit to be admitted for initiating CIRP against the Corporate Debtor as there is a debt on account of deposits made by these Applicants against the flats allotted to them in excess of the threshold limit of Rs. 1 crore and a default has occurred because of the flats allotted to these Applicants have not been delivered and also on such failure, the deposit amounts have not been fully refunded by the Corporate Debtor, consequent thereupon an amount of Rs. 14,57,41,930.00 (including a sum of Rs. 5,71,35,420.00) is still outstanding to be refunded to these Applicants. Therefore, as per our above findings, conditions regarding debt and default applicable for home buyers as per second proviso of section 7 (1) has been fulfilled.

**(iv) Whether the Present Application has been filed for fraudulently and maliciously instituting the proceedings under section 7 against the Corporate Debtor**

**51.** The Respondent Corporate Debtor has also filed an interlocutory application I.A No. 250 of 2024 under section 60(5) (a) & (c) read with Section 65 of the Code and read with Rule 11 of National Company Law Tribunal Rules, 2016 *inter*



*alia* praying for deleting the Applicant nos. 3,6,7 and 11 from memos of parties as not being a part of the class of “ allottees under a real estate project” on account of their deposits being fully refunded and also deleting the Applicant nos.1,2,4,5,8 to 10,12 to 17 and 21 ( total 14 Applicants) from memos of parties as not being a part of the class of “*allotees under a real estate project*” on account of their deposits being substantially/partly refunded and all these 18 allottees have already withdrawn from the project and to impose penalty on the Applicants for initiating fraudulent and malicious proceedings against the Corporate Debtor and for furnishing false information and particulars.

**52.** Details of submissions made by the Corporate Debtor in the said IA in this regard and counter reply filed by the Applicant Financial Creditors against this IA have already discussed from para nos. 15 to 20 of this order.

**53.** In our findings so far discussed from para nos. 28 to 48 of this order, we have already held that all the Applicants as mentioned in the prayer of this IA and mentioned in previous para of this order are genuine allottees and their deposit



amounts are not fully refunded and outstanding amount of their deposits are far in excess of the threshold limit of Rs. 1 crore, and therefore it is held by us that present Application filed by these Applicants are admissible for initiating CIRP against the Corporate Debtor. Therefore, all the grounds raised by the Corporate Debtor in this respect are liable to be dismissed.

**54.** As regards for taking action u/s 65 against the Applicants, it is required to be proved by adducing substantial evidence that insolvency resolution process has been initiated fraudulently or with malicious intent for any purpose other than for the resolution of insolvency. The allegation of the Corporate Debtor is that 18 Applicants have withdrawn from the project and they have already obtained Recovery Certificates on account of the orders passed by UPRERA out of which four Applicants have been fully refunded and fourteen Applicants have been substantially/party refunded even before the order was passed by UPRERA. Therefore, as per the Corporate Debtor, these Applicants are not eligible for filing of Application u/s 7. By filing the present Application u/s 7,



these Applicants are only indulging in Forum Shopping to harass the Corporate Debtor with malicious intent. For showing any fraud or malicious intent at the part of these Applicants while filing the present Application, the Corporate Debtor is required to bring on record the cogent supporting evidence before this tribunal which prima facie establishes such intent. In the instant case, there is no documentary evidence placed on record by the Corporate Debtor/Respondent against the Applicants to prove that the insolvency process was initiated fraudulently with *malafide* intent. The only plea taken by the Corporate Debtor was that the RC/Decree Holders cannot be considered as home buyers under the provisions of the second proviso of section 7, and hence they are not eligible to initiate Section 7 proceeding and as the Applicants have already got the order of UPRERA for getting refunds, they are only indulging in forum shopping by filing application under section 7. Both the above pleas taken by the Corporate Debtor have not been found to be maintainable as we have already given our findings in this order. In our considered view, such pleas taken by the Corporate Debtor are not indicative of any fraud or malicious



intent at the part of the Applicants on initiation of Section 7 Application. Only in respect of two allottees , it was claimed that the allotment letters were forged and criminal cases are filed against them and full amounts were refunded to them along with two more allottees but even if these four allottees are removed from the list of the Applicants , the total remaining allotted units would be 30 in respect of balance 18 Applicants , which is still more than the threshold limit of 25 as discussed above , and hence the present petition would still remain maintainable, though these allegations have already been countered by the Financial Creditors as already have been discussed in this order.

**55.** At this point, it is also necessary to consider the legal position on this issue as propounded by the *NCLAT* in the matter of ***Monotrone Leasing Pvt. Ltd. vs. PM Cold Storage Private Ltd., 2020 SCC Online NCLAT 581***. The relevant part of this judgment are as follows:

*“34. Section 65 of the Code provides for penal action for initiating Insolvency Resolution Process with a fraudulent or malicious intent or for any purpose other than the resolution. However, the same cannot be construed to mean that if a petition is filed under Section 7, 9 or 10 of*



the Code without any malicious or fraudulent intent, then also such a petition can be rejected by the Adjudicating Authority on the ground that the intent of the Applicant/Petitioner was not resolution for Corporate Insolvency Resolution Process. **As the proceedings under IBC are summary in nature, it is difficult to determine the intent of the Applicant filing an application under Section 7, 9 or 10 of the Code unless shown explicitly by way of documentary evidence.** This situation may arise in specific instances where a petition is filed under IBC specifically with a fraudulent or malicious intent.”

.....

“7. The submissions which is sought to be pressed by the respondent in this appeal that entire amount is paid and the application is malicious application but there is no findings in the order of Adjudicating Authority that entire amount has been paid and nothing is due, hence, the application is malicious.

**8. Observations made in paragraph 26 is that Financial Creditor is trying to settle personal scores and put undue pressure on the Corporate Debtor. We are of the view that for proving the ingredient of Section 65 there has to be adequate pleadings and findings. Observations made in paragraph 26 does not fulfill the requirement of Section 65 so as to reject the Section 7 application.**

9. We, thus, are of the view that the order of the Adjudicating Authority impugned cannot be sustained and is hereby set aside. In result, we revive the Section 7 application before the Adjudicating Authority which may





*be decided afresh after hearing both the parties in accordance with law."*

**56.** Considering the above judgment of the NCLAT and taking into account our findings given in foregoing paras of this order as regards the present Application u/s 7 being admissible for initiating CIRP against the Corporate Debtor, the allegation of the Corporate Debtor of the present Application being fraudulent and filed with malicious intent cannot be sustained as no such documentary evidence could be produced to show such fraud and malicious intent.

**57.** Considering all the submissions made by both parties and our findings discussed in this order so far, we find that the insolvency proceeding initiated by the Applicant Financial Creditors against the Corporate Debtor does not fall under Section 65 of the Insolvency and Bankruptcy Code, 2016 as Corporate Debtor could not bring any material on record to establish that the present application filed u/s 7 by the Financial Creditor for the initiation of CIRP against the Corporate Debtor has been done fraudulently or with malicious intent for any purpose other than for the resolution of insolvency because we have already found that there is a



debt due to Financial Creditor and default has occurred in its repayment/delivery of possession of flats as held by us in para 48 of this order. Given that the existence of debt and default has been established and the requirements under Section 65 are not met, the Corporate Debtor's contention is unfounded, hence rejected. Accordingly, the IA 250/2024 filed by the Corporate Debtor is dismissed.

**58.** In view of our findings so far discussed in this order, we are satisfied that the Applicant Financial Creditor has proved that there is a 'debt' and 'default' on part of the Corporate Debtor, which is more than the threshold limit of Rs. 1 crore applicable at present and the Application u/s 7 has been filed within limitation period meeting all the conditions of second proviso to section 7(1) of the Code and complete in all respect and an interim resolution professional is also proposed as per section 7(3)(b). Accordingly, this Application has been found fit to be admitted as per Section 7(5) of the I & B Code, 2016 against the Corporate Debtor, M/s M/s NHA Infrabuild Private Limited.



**59.** The Financial Creditor initially proposed Mr. Pramod Kumar Sharma as Interim Resolution Professional (hereinafter referred as “**IRP**”) in Part-III of the Application, however during the proceedings it was submitted that the AFA of the said proposed RP had expired. Therefore, a supplementary affidavit has been filed vide Diary No.2445 dated 28.11.2025 in compliance of the order dated 15.10.2024, showing that the above proposed IRP is having valid AFA until 30.06.2025 on the IBBI Portal. Mr. Pramod Kumar Sharma is registered with Registration Number is IBBI/IPA-002/IP-N00110/2017-18/10258, R/o H.No-16, Dasharath Kunj-B West Arjun Nagar, Agra, Uttar Pradesh ,282001, Email: pksharmafcs@gmail.com. He has duly given the consent in Form No. 2 dated 08.01.2024 annexed as **Annexure- 6** with the application at Page No. 162. The Law Research Associate of this Tribunal, Miss Ankita Sharma, has checked the credentials of Mr. Pramod Kumar Sharma and found that Disciplinary Committee of IBBI vide order dated 20.9.2024 suspended the registration of Mr. Pramod Kumar Sharma for a period of three years as also pointed out by the Corporate Debtor objecting his appointment. However, the Applicant



Financial Creditors submitted before this tribunal an order dated 16.10.2024 passed by the Hon'ble High Court of Allahabad in ***Writ-C No. 33195 of 2024 titled as "Pramod Kumar Sharma versus IBBI & 02 Ors."*** wherein the impugned order dated September 20, 2024 is stayed till the next date of listing and this stay is still continuing. On checking the IBBI *website*, the AFA of Mr Pramod Sharma is still found valid till 30.06.2025 and the disciplinary proceeding against him is stayed by the Hon'ble High Court. Therefore, we appoint Mr. Pramod Kumar Sharma as IRP in this case.

**60.** We accordingly pass the following order

- I. In the given facts and circumstances of the case as per our above findings, the present application u/s 7 being complete in all respect and having established the default in payment of the Financial Debt for the default amount being above the threshold limit and an IRP also having been appointed as above in para 57, the instant Application is admitted in terms of Section 7(5) of the I & B Code, 2016 against the Corporate Debtor and



accordingly, moratorium is declared in terms of Section 14 of the Code.

II. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry: -

- a.** The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b.** Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c.** Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d.** The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.

III. Apart from above prohibitions in respect of the corporate debtor, it is further directed that the supply of essential



goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period.

- IV. The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.
- V. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33 as the case may be.
- VI. The IRP is directed to take steps as mandated under section 13 and 15 of the IBC for making public announcement about the commencement of CIRP against the Corporate Debtor and moratorium against it u/s 14, and also take necessary actions as per sections 17, 18, 20 and 21 of IBC, 2016.



- VII. The IRP shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor and to constitute a Committee of Creditors ( hereinafter referred as “**COC**”) and shall file a report certifying the constitution of the COC to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the COC within seven days of filing the report of the constitution of the COC.
- VIII. The COC in its first meeting shall appoint a Resolution Professional (hereinafter referred as “**RP**”) as per the provision of section 22(2) and file an application before this Tribunal for confirmation of the appointment of the RP.
- IX. The Suspended Board of Directors of the corporate debtor is directed to give to IRP/RP complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case, the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the IRP/RP all the



information regarding maintaining the Backup and regarding service provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the service provider and its location, and also address of the location of the Books of Accounts maintained in the cloud. In case, accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs.

- X. The Statutory Auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI.
- XI. The IRP/RP is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest.





- XII. In case of any non-cooperation by the Suspended Board of Directors or the Statutory Auditors, IRP/RP may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor.
- XIII. The IRP/RP may take the assistance of Digital Forensic Experts empaneled with this Bench/IBBI/MCA for this purpose.
- XIV. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances.
- XV. The IRP/RP is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.
- XVI. The IRP/RP is directed to approach the Government Departments, Banks, Corporate Bodies and other entities



with requests for information/documents available with those authorities/institutions/ others pertaining to the Corporate Debtor which would be relevant in the CIR proceedings.

- XVII. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the IRP/RP to enable him to conduct the CIR Proceedings as per law.
- XVIII. The IRP/RP is further directed to send regular progress reports to this Tribunal every month.
- XIX. We direct the Financial Creditor to deposit a sum of Rs.1,00,000/- with the Interim Resolution Professional, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.



**61.** A certified copy of the order shall be communicated to both the Applicant Financial Creditors and the Respondent Corporate Debtor. The learned counsel for the Applicant Financial Creditors shall deliver a certified copy of this order to the IRP forthwith. The Registry is also directed to send a certified copy of this order to the IRP at his e-mail address forthwith.

**62.** List the **CP (IB) No.11/ALD/2024** on 17.03.2025 for filing of the progress report/further proceeding.

**63. I.A No.250/2024** is dismissed accordingly.

*-Sd-*

**(Ashish Verma)**  
**Member (Technical)**

*-Sd-*

**(Praveen Gupta)**  
**Member (Judicial)**

**Date- 31.01.2025**