

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP (IB) No.1170/MB-IV/2021**

Under Section 7 of the I&B Code, 2016

In the matter of:

**LIV Smart Welfare Association**

...Financial Creditor/Petitioner

V/s

**M/s D.K. Realty (India) Private Limited**

[CIN: U70102MH2012PTC2]

...Corporate Debtor/Respondent

Order pronounced on : 15.11.2022

*Coram:*

Mr. Manoj Kumar Dubey  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner(s) : Mr. Pulkit Sharma a/w Ms. Muskan Sharma,  
Advocates

**ORDER**

***Per: Kishore Vemulapalli, Member (Judicial)***

1. This is a Company Petition being C.P. (IB) No. 1170/NCLT/MB/C-IV/2021 filed on 22.10.2021 by LIV Smart Welfare Association, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against D.K. Realty (India) Private

Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Petition is filed by Mr. Marshal Verma, authorized by the Financial Creditor vide Board Resolution dated 24.09.2021, claiming default amount of Rs.81,45,67,305.50 (Rupees Eighty-One Crore Forty-Five Lakhs Sixty Seven Thousand Three Hundred Five and Five Paise Only) as on 31.08.2021.
3. The default clause in the Agreement of Sale of the Home buyers mentions the date of completion of said project. The date of completion of said project varies in each Agreement of Sale of the Home Buyers, based on the date of which the same was executed. The Developer executed a different Agreement of Sale with each home buyer mentioning a different date of possession commencing from 31<sup>st</sup> December 2019. If these Agreements of Sale are taken into consideration, the last date of completion of the said project is 31<sup>st</sup> December, 2019. Thus, the date of default on the part of Corporate Debtor to complete the said project is 31<sup>st</sup> December 2019 and the default continues till date.
4. The case of the Financial Creditor is as under:
  - a) It is submitted that the Financial Creditor/Petitioner is a Society Registered with the Assistant Registrar of Societies Greater Mumbai Region, Mumbai consisting of 217 flat purchasers/homebuyers who had individually booked separate flats with the Corporate Debtor and the Corporate Debtor is the Builder of project titled as "LIV Smart".
  - b) The Petitioner/Financial Creditor submits that the project comprised of 28 wings with each of the 28 wings having 3 basements, ground plus 14 upper floors and with commercial/shop premises/

units proposed on a portion of the ground and first floor in wing nos. 21, 25, 26, 27 & 28 to be constructed on a portion of the free sale land admeasuring 18,364 sq. mtrs or thereabout bearing CTS. Nos. 637772 (part) 637/33 (part), 637/54 (part), 637/55, 637/56, 637/58A (part), 637/60 (part), 637/61. 637/62 (part) of sub urban Scheme No. 1, Kurla of Village Kurla 11, within the Registration and Sub District of Mumbai City and Suburban situated at Premier Road, Off Lal Bahadur Shastri Marg, Kurla, in Greater Mumbai.

- c) The slum Rehabilitation Authority granted the commencement certificate bearing no. SRA/DDTP/525/L/PL/AP dated 05<sup>th</sup> August 2010 in respect of the said building. The project is to be developed in accordance with the building rules and regulations and bye-laws of the MCGM and the provisions of the Development Control Regulations, 1993 and such other laws, rules and regulations as may be in force from time to time and further subject to terms and conditions as may be imposed by the State Government and competent authorities.
- d) Some of the home buyers forming part of the Applicant Association/Petitioner entered into Tripartite Agreement with the Corporate Debtor and Dewan Housing Finance Corporation Limited ("DHFL") for availing Special Interest Scheme. The Corporate Debtor offered various Schemes/payment plans i.e. Construction Linked Plan/Scheme, Down Payment Plan/Scheme, Subvention Scheme/Pre-EMI sharing scheme, Special Interest Scheme etc. to the members.
- e) The Corporate Debtor approached DHFL with one of such schemes, wherein the Corporate Debtor has agreed to pay a part of the interest

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component to DHFL for and on behalf of the home buyers who are desirous of purchasing/acquiring flats/units in the said project by availing home loans from DHFL, interest on which was to be linked to the Retail Prime Lending Rate of DHFL ("the Special Interest Scheme"). The Corporate Debtor represented to DHFL that subsequent to the disbursement of Home Loans under the Special Interest Scheme as agreed in accordance with the Construction Linked Payment Plan, the Corporate Debtor's obligation to pay a part of the interest component to DHFL shall be a distinct and independent obligation, more particularly, independent of any issue/concern/dispute of whatsoever nature between the Flat purchaser, DHFL and the Corporate Debtor during the loan period and shall be governed as per the terms of the Tripartite Agreement. Clause 3 on the Tripartite Agreement is set out below: -

*"The Builder hereby agrees and undertakes to bear and pay on behalf of the Borrowers, at its cost and from its own pocket, the differential interest of 2.15% p.a. (i.e. Present Interest Rate chargeable to eligible home loan borrowers @ 9.65% p.a. Less Interest @ 7.5% p.a. (floating) to be charged under the Special Interest Scheme as stated herein) on the loan amount sanctioned by DHFL, as per the Construction Linked Payment Plan described in Schedule II hereunder and as agreed by the parties herein. Any increase in the rate of interest consequent upon change in the RPLR effected by DHFL, shall be borne and payable by the Borrowers. However, for the first 300 bookings/allotments made by the Builder, any change in the rate of interest made by DHFL consequent to change in the RPLR sharing the Pre-EMI period, shall be borne*

*and paid by the Builder and the Builder's liability for payment of interest in respect of such first 300 bookings/allotments may exceed 2.15% pa during the Pre-EMI period."*

- f) Conditions specific to Special Interest Scheme are set out below as mentioned in Letter of offer cum Acceptance:

*"You have booked a Flat in the project "Livesmart", being developed by M/s D.K. Realty Pvt Ltd ("the Developer"). The Developer has offered to you a Special Interest Scheme under the construction link payment plan and you have opted for the said Special Interest Scheme wherein, the Developer has agreed to pay to us on your behalf, a part of the interest component in respect of your Home Loan, subject to the following conditions:*

*a. Interest applicable on your Home Loan is at Floating Rate of Interest which is linked to the RPLR of DHFL Present effective interest rate applicable to your home loan is 9.65% p.a. as indicated above.*

*b. The Developer shall pay on your behalf, interest @ 2.15% p.a. for a maximum period of 18 years.*

*c. In case of revision in the rate of interest by DHFL consequent upon revision in the RPLR,*

*the Developer will pay on your behalf, interest @2.15% p.a. and any increase in the interest rate effected by DHFL shall be borne by you.*

*d. If you are amongst the first 300 buyers, who have booked Flats in the project Livsmart under the Special Interest Scheme, the Developer has agreed to pay on your behalf, any increase in the interest rate, during the Pre-EMI period of 36 months, so that the effective rate of interest payable by you during the Pre-EMI period remains constant @7.50% p.a. However, any increase in the interest rate effected by DHFL after the expiry of the Pre-EMI period of 36 months till the expiry of the loan tenure, shall be borne by you.”*

- g) The Corporate Debtor has abandoned the project and has failed to construct and complete the project, and consequently failed to handover the peaceful possession of the flats to the homebuyers as per the terms and conditions of the Agreement Of Sale.
- h) The Corporate Debtor has also availed a loan from DHFL of Rs.963,23,59,197/- and has defaulted on the repayment of the said loan amount and interest payments on such loan. DHFL has commenced proceedings against the Corporate Debtor before the Debt Recovery Tribunal.
- i) Since, there was a prolonged delay on the part of the Corporate Debtor, to complete the construction of the said project, despite specific deadlines being set to complete the same, as stated

hereinabove. The Applicant/Financial Creditor was constrained to address a letter on 10.08.2020 to the Corporate Debtor raising serious concerns over the delay in completion of project and also seek information with regard to fate of the project.

- j) The Financial Creditor are valid allottees of the Project of the Corporate Debtor, however, the Corporate Debtor has abandoned the Project and has failed to construct and complete the Project, and hand over peaceful vacant possession of the flats to the home buyers as per the terms of the Agreements of Sale/allotment letters, executed by it with each of the home buyers/Applicants and the Corporate Debtor cannot give a clear title and vacant possession of the flat of the Applicants. The Corporate Debtor continues to be in default and is clearly not in position to give clear title and vacant possession of the flat to the Applicants even by 31<sup>st</sup> December 2021.
5. On 26.11.2021, when the matter was first come up on board, this Bench had issued Court Notice upon the Corporate Debtor, however, the same was returned with an endorsement "Door Locked". On 11.01.2022, the Bench directed the Financial Creditor/Petitioner to take out substituted service. The Financial Creditor/Petitioner complied the directions of the Bench and made newspaper publication in two newspapers one in English and another one in Vernacular Language and has filed proof of service on 21.01.2022. Despite sufficient service, the Corporate Debtor has neither appeared nor filed any reply to the petition in rebuttal. Therefore, the Corporate Debtor was set ex-parte on 03.03.2022.
6. On 03.03.2022, the matter was briefly heard and while arguing the case, the Ld. Counsel for the Financial Creditor submits that the rights of allottees arises from the document/agreement of sale as attached at Page

810 to 928 of the Petition. However, while going through the clauses of agreement of sale, it has been observed by this Bench that the rights of the allottees in a particular unit are subject to fulfilment of certain terms and conditions on the part of the purchaser as well as completion of the project by the developer. In compliance of the order dated 31.03.2022, the Financial Creditor/Petitioner filed additional affidavit providing the details regarding the payments that had fallen due for payment by the allottees concerned, under their respective agreements/allotment's letters, and whether the same have been paid, as demanded by the Developer/Respondent.

7. With respect to the rights and obligations of the flat purchasers and the developers in case of default, the Financial Creditor/Petitioner has *inter alia* culled out the relevant obligations and rights of flat and purchase from the Agreement for sale from clause 2, 5, 28, 29, 61, 62 and 63 annexed to the Petition.
8. With respect to the position of the Flat Purchasers, the same are Allottees, as per the Section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 ("Code") to be read along with Section 2(d) of The Real Estate (Regulation and Development) Act, 2016 ("RERA Act"). The said Flat Purchasers would fall under the definition of an "Allottee" irrespective of the amounts paid to the developer viz. the Respondent in the present case, so far as the Respondent has allotted the flat in a real estate project to the flat purchaser by entering into an agreement for sale and/or giving an allotment letter. A plain reading of the Explanation to Section 5(8)(f) provides that - "... (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing...". Nowhere in the definition of "Allottee", whether under Section 2(d) of the RERA Act or Section



5(8)(1) of the Code, is there a pre-condition that a flat purchaser has to pay 100% consideration for him to be an allottee in a real estate project. Even under the RERA Act, any purchaser of a flat/plot in a real estate project, can move an application as an Allottee under Section 18, inter alia seeking refund of amounts paid to the Developer irrespective of whether the full consideration of the flat has been paid or not. Once an Agreement of Sale is executed or an allotment letter or a flat has been allotted by a developer in a real estate project, against which the flat purchaser has paid the consideration, the flat purchaser becomes an "Allottee" in perpetuity, unless the agreement/allotment is terminated in accordance with its terms governing the relationship between the allottee and the developer.

9. It is further pertinent to mention, in the present case, the amounts to be paid to the Developer / Respondent, for most of the flat purchasers, was construction linked. As the Corporate Debtor has not completed the project, more so with respect to a few wings, the Developer/Corporate Debtor has not even constructed 3 RCC slabs (Refer Architects Certificate at Exhibit M at Pg. 799 of the Petition), the flat purchasers are under no obligation to pay the 100% consideration. The amounts demanded by the Corporate Debtor have been paid by majority of the flat purchasers, and in any event, by more than 100, which satisfies the criteria for admission of Petition.
10. Further, in case of a default in payment under the agreement, whether the Flat Purchaser would still be an allottee - In the present case, the flat purchasers would still be termed as "allottee" as no notice for curing the defects/termination has been issued by the Developer, which is a mandatory condition under the agreement (See Clause 61 and 62 of the sample agreement at Pg. 844 and 845 of the Petition). Without prejudice,

even in case of home buyers where there is a shortfall in payment, the same would not disentitle them to be an "Allottee" of their respective flats, as no notice of termination has been issued by the Developer. Thus, the flat purchasers would still hold the status of an Allottee. However, in any event, the total home buyers who have paid the amounts as demanded by the Developer are much more than 100, and thus, would satisfy the basic eligibility criteria for the said petition to be admitted under Section 7 of the Code.

11. The Applicant also relies upon the judgement of the Hon'ble National Company Law Appellate Tribunal, New Delhi, in the matter of Shri Amit Katyal vs. Mrs. Meera Ahuja & Ors. Based on above, it is clear that the Corporate Debtor had committed default in not completing the construction work of the flat in time and failed to deliver the possession on the stipulated date as per agreement. The Corporate Debtor himself has admitted that in its reply to the notice dated 15.11.2018, unlike most builders who have abandoned the project and stopped the work. It is also evident that flat was to be delivered by 2<sup>nd</sup> week of February 2016, but the Corporate Debtor failed to honour its promise and could not deliver the flat in time.

12. Thus, it is clear that as per linked payment plan, as mentioned in Annexure-D of the Agreement, it is mandatory to issue demand notice for instalments on commencement of respective stages of Construction by speed post or courier. In this case, there is no evidence to show that the demand notice at respective stages of Construction was ever sent to the Allottee. Clause 2.18 of the Agreement makes it mandatory to send the Notice to the Allottee under Construction linked plan. But in this case, compliance of conditions of Clause 2.17 and 2.18 have not been made. Therefore, in the present case, it is difficult to ascertain as to when Instalment became due, at the start of the respective stage of the

Construction. Annexure- D, which is part of the Agreement, deals with the payment plan under the Agreement.

13. The Financial Creditor had filed details of flat purchasers showing the amount demanded by the builder and the amount paid thereof along with Additional Affidavit as Exhibit-A at Page 23.

**Findings:**

14. We have heard and prudently gone through the pleadings available on record. It is evident from the records and facts of the case that the Petition is filed by the majority of flat purchasers and fulfilled the criteria as per the provisions of the code. However, after receiving the demanded consideration amount, the Corporate Debtor failed to complete the construction of the aforesaid project and also failed to allot/hand over the possession of flats to the flat purchasers as per Agreement to Sale/Allotment Letter.
15. The Corporate Debtor also defaulted in repayment of loan facilities availed by them from the DHFL. As a result of which the DHFL filed petition for recovery of outstanding dues before the Debt Recovery Tribunal. It is clear from the endeavours of the Corporate Debtor that, they have failed to fulfil the promise made under the Agreement.
16. Thus, it is crystal clear that there is a clear debt and default on the part of the Corporate Debtor and the debt claimed in the Petition is covered under Section 5(8) of the Code. The petition is filed on 22.10.2021 and the date of default is 31.12.2019. Thus, the Petition squarely falls within the period of limitation as prescribed under Section 18 of Limitation Act, 1963.

17. In view of the above observations, this Bench is of the considered view that this petition is deserves to be admitted.
18. The Financial Creditor has proposed the name of Mr. Nitin Jain, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P01562/2019-2020/12462] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him.

ORDER

- a) This Application being C.P. (IB) No. 1170/NCLT/MB/C-IV/2021 filed by LIV Smart Welfare Association, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against D.K. Realty (India) Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP) is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

- 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 possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
  - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VI. That this Bench appoints Mr. Nitin Jain, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P01562/2019-2020/12462] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

- e) The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- f) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.
- g) The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. Compliance report of the order by Joint Registrar is to be submitted within 3 days from the date of uploading of the order.

Sd/-  
Manoj Kumar Dubey  
Member (Technical)

Sd/-  
Kishore Vemulapalli  
Member (Judicial)

15/11/2022