Real Estate Bytes

A Bankruptcy Judge Can Fix Your Balance Sheet, Not Your Company!

-Rhea S Verghese, Associate

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 included the allottees of real estate projects as financial creditors under the Code. Hereafter, the allottees could apply to initiate the CIRP against the Corporate Debtors ("real estate developer") like other financial creditors i.e., banks and financial institutions. The Supreme Court of India in Pioneer Urban Land and Infrastructure Ltd. v. Union of India[1]. upheld the constitutional validity of the inclusion of allottees as financial creditors. The Court also categorically refused reading into any limitation like pre-requisite minimum threshold in terms of numbers or otherwise on the right of allottees to approach the Tribunal and trigger the resolution process.

It is true that such a measure can be termed as an arm twist technique, but there do exist certain limitations to this mode of claim, whereby the financial creditors can approach the NCLT against a real estate company only by a joint application, in line with the Companies Act, where certain actions against a company can be activated only by members representing not less than 100 member or members holding not less than 10% of the share capital. [by the second proviso of section 7, via Section 3 of the amendment that took place on 13th March 2020 no 1 of 2020][2]

A writ petition was filed, *Manish Kumar v. Union of India*[3], where the provision of Section 7, stating the threshold limit of the financial creditor was alleged to be violative of Article 14 under Part III of our Constitution on the ground of being class legislation without any reasonable differentia and its retrospective application as manifestly arbitrary, the Court ordered status quo.
All this development led to resentment among the financial debtors as well, as such an amendment led to a surge of applications before tribunals, which were claimed by the builders and developers turned into corporate debtors, as malicious and the amendment only served as a debt recovery mechanism for many.

In contrast to the above said, the amendment has, however, impaired the right of the allottees who will now be not able to approach the Tribunal individually and independently or jointly, unlike other financial creditors and operational creditors, if the required minimum threshold is not met. The legislature has imposed minimum thresholds of 100 or 10% with retrospective applicability on the allottees who were included as financial creditors seeing their contribution in the projects and their condition of suffering for years.

Apart from the objections to constitutional validity, the amendment in Section 7 gives rise to several anomalies that will need redressal by the Court or legislature in future. The amendment also gives rise to several severe consequential hardships and inconveniences to the allottees, particularly due to its retrospective applicability.

SITUATION IN THE MIDST OF PANDEMIC

According to the Gazette notification on 24th of March 2020, S.O. 1205(E)

"The Code also allows the creditors of the company to initiate an insolvency resolution process, if the amount of default by the debtor company is at least one lakh rupees. The Ministry of Corporate Affairs has increased this threshold from one lakh rupees to one crore rupees."[4]

[1] (2019) 8 SCC 416
[2] https://www.ibbi.gov.in/uploads/legalframwork/d36301a7973451881e00492419012542.pdf
[3] 2020 SCC Online SC 384
[4] http://www.egazette.nic.in/WriteReadData/2020/218898.pdf

It is a great decision to temporarily increase the threshold from ₹1 lakh to ₹1 crore for real estate specifically in lieu of the drying market conditions. However, to ensure the industries, especially MSMEs, are protected, the levels may have to be decided on the merit of each sector. In the light of the present situation, it is surely advisable for the NCLT processes to be stalled for the next six months for any new defaults, given that an alarming rise of issues arising through NCLT itself.

RERA Act Does Not Bar Remedies Under The Consumer Protection Act

- Riya Jain, Associate

Recently, the Supreme Court (SC) in the case of M/s Imperia Structures Ltd. v. Anil Patni and Anr.[5] held that the choice or discretion is given to the allottee whether it wishes to initiate proceedings under the Consumer Protection Act (CP Act) or file an application under the Real Estate (Regulation and Development)Act, 2016 (RERA Act).

In the instant matter, a housing scheme was launched by M/s Imperia Structures in Gurugram in 2011. The complainants had booked their respective apartments and executed a Builder Buyer Agreement with the M/s Imperia Structures. The project was approved by RERA in November 2017. Over a while, the allottees had paid a significant amount however, even after four years there were no signs of the project getting completed.

Subsequently, allottees in 2017 approached the National Consumer Dispute Redressal Commission (NCDRC) seeking remedy against the inordinate delay. Imperia Structures challenged NCDRC's jurisdiction on the ground that the apartment having been booked for commercial purposes, the allottees would not come within the definition of "the consumer" as defined under Section 2(d) of the CP Act.

The NCDRC rejected the contention raised by Imperia Structures and granted relief of refund of the amounts deposited by each of the complainants with simple interest @ 9% per annum from the respective dates of deposits along with Rs.50,000/- towards costs. Imperia Structures challenged NCDRCs ruling before the SC.

The SC was to decide whether the remedy so provided under the RERA Act to an allottee is the only and exclusive modality to raise a grievance and whether the provisions of the RERA Act bars an allottee from approaching other fora to have his grievance addressed.

SC observed that the availability of an alternate remedy is no bar in entertaining a complaint under the CP Act. The remedies available under the provisions of the CP Act are additional remedies over and above the other remedies including those made available under any special statutes.

Pertinently, Section 79 of the RERA Act bars the jurisdiction of a Civil Court to entertain any suit or proceeding in respect of any matter which the authority or the adjudicating officer or the Appellate Tribunal is empowered under the RERA Act to determine. Further, Section 88 specifies that the provisions of the RERA Act would be in addition to and not in derogation of the provisions of any other law, while in terms of Section 89, the provisions of the RERA Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

As regards the allottees who can be called "consumers" within the meaning of the CP Act, two questions would arise; a) whether the bar specified under Section 79 of the RERA Act would apply to proceedings initiated under the provisions of the CP Act; and b) whether there is anything inconsistency in the provisions of the CP Act with respect to that of the RERA Act.

Relying on the dictum of Malay Kumar Ganguli vs. Dr. Sukumar Mukherjee[6], SC held that the proceedings before the NCDRC are although judicial proceedings but at the same time, it is not a civil court within the meaning of the provisions of the Code of Civil Procedure. Therefore, Section 79 of the RERA Act does not in any way bar NCDRC under the provisions of the CP Act to entertain any complaint.

The absence of bar under Section 79 to the initiation of proceedings before a forum which cannot be called a civil court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is without prejudice to any other remedy available. Thus, there is nothing in the RERA Act which bars the initiation of proceedings under the CP Act after the provisions of the RERA Act came into force.

Money Received From Tenants As Part Of Compensation, Damages Or 'Mesne' Profits, Should Be Taxable: Delhi High Court

[5] Civil Appeal No. 3581-3590 of 2020

[6] (2009) 9 SCC 221

-Ujjal Chattopadhyay, Senior Consultant

While filing the Income Tax Returns for the relevant year, the property owner[7] claimed that the amount received from the tenant was not an income in his pocket and should not be subjected to tax, therefore. The property owner claimed that this was the capital receipt.

THE REASONED FINDINGS OF THE AUTHORITY:

The money accepted by the property owner from the tenant after the termination of a lease agreement either as part of compensation, damages or 'mesne' profits should be treated as his revenue receipt or income and therefore, should be subjected to tax as ruled by Delhi HC.

As per the details of the case,[8] a property owner had entered into an agreement with a tenant and fixed the annual increase on the decided rent amount. The tenant did not abide by the agreement and so the property owner filed a suit. The court ruled in the favour of the property owner and awarded him mesne profits and damages with interest.

The Income Tax department argued that the amount received under the heads of either compensation, damages or mesne profits were akin to income and hence, should be subjected to Income Tax. The Income Tax Department further argued that the money received only after the lease contract was terminated and was not as part of the rent.

The Delhi High Court observed that it was in lieu of the rent which the taxpayer would have otherwise derived from the tenant, that the mesne profits and interest thereon were awarded. Had it been a case where the capital asset would have been subjected to physical damage, or of diminution of the title to the capital asset, and damages would have been awarded under the head, there would have been merit in the taxpayer's claim that damages received for harm and injury to the capital asset, or on account of its diminution, would be a capital receipt.

This ruling lays down that mesne profits received on account of unauthorised occupation of immovable property by a tenant constitute revenue receipt resulting in accruing "taxable" status under the Income Tax Regulations and guidelines.

Guidelines For Rights Issues Of Units By Unlisted Infrastructure Investment Trusts (InvIT)

-Aanchal Gujrani, Associate

The Securities and Exchange Board of India (**SEBI**) has issued a circular dated November 4, 2020, to introduce the framework for unlisted Infrastructure Investment Trusts, i.e. InvITs to enable them rights issues of units to raise funds. The circular has enlisted immensely detailed Guidelines that are expected to ease the fund-raising process for unlisted InvITs and supplement the increasing market interest in them.

Primary condition for issuance is that an Investment Manager has to be taken on board by way of resolution of the board of directors, approving the rights issue of the units and determining the record date. The circular states that the minimum allotment to any investor will be INR 1 crore.

Further, the circular states eligibility conditions that the promoters, partners or directors of the sponsor(s) or investment manager or trustee of the InvIT should not be declared a 'fugitive economic offender', or debarred from accessing the securities market by SEBI and be a promoter, director or person in control of any other company or a sponsor, investment manager or trustee of any other InvIT which is debarred from accessing the capital market. Further, the units proposed to be issued must be of the same class as those already issued by the InvIT.

The circular also states that the investment manager shall decide the issue price before determining the record date and the same shall be disclosed in the letter of offer.

The timeline set by the circular is that the rights issue shall open within three months from the record date and the subscription period shall be a minimum of three working days and maximum of 15 working days.

The letter of offer shall be filed by the investment manager with SEBI at least five days prior to the opening of the rights

[7] ***M/S Skyland Builders P. Ltd. vs Income Tax Officer***, ITA 106 of 2005

[8] https://www.google.com/url?sa=t&source=web&rct=j&url=https://indiankanoon.org/doc/48344623/&ved=2ahUKEwjnwdXzxbbtAhUwzjgGHaYNCawQFjALegQIBxAH&usg=AOvVaw1SNMMkPqU8ssThKaeIohyb&cshid=1607162247073

issue and the InvIT may also appoint underwriters to have the issue underwritten.

The units shall only be issued in dematerialised form. The rights entitlement shall be credited to the Demat account of the unitholders before the date of opening of the issue. The unitholders will also have the right to renounce the units offered in favour of any other person and no condition minimum subscription has been prescribed.

The circular states various disclosure requirements for the Letter of Offer. The financial statements being included in the Letter of Offer are required to be not more than 6 months old from the issue opening date. Additionally, the history of the distributions made in the last 3 years, and the manner of calculation are also required to be disclosed. The Letter of Offer ("LOF") may incorporate disclosures by including references to web links in cases where information is already available in the public domain.

The InvIT is also restricted from making any further issue of units from the date of filing of the Letter of Offer until the allotment of units pursuant to the rights issue.[9]

The introduction of rights issues for unlisted InvITs is a clear signal of SEBI's intent to assist in developing a market for unlisted InvITs in India and towards its commitment to facilitate ease of doing business in the country. This was an expected yet a very welcome move from the regulator.

Norms For Relief Under MAHARERA For Delayed Projects

-Namrata Shah, Associate

As per section 18 (1) (a) of Maharashtra Real Estate (Regulation and Development) Act, 2016, if a promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement of sale or, as the case may be, duly completed by the date specified therein; then he shall be liable on demand to the allottees. In case the allottee(s) wishes to withdraw from the project, without prejudice to any remedy available, the amount received by him in respect of that apartment, plot, building as the case may be must be returned to him as prescribed in the manner as provided under the Act. This amount should be inclusive of compensatory benefits as well.

In the case of Suresh Swamy V/s Larsen and Toubro Ltd[10] bearing Complaint No. CC006000000057676, it was held that in case of revision of date of completion, allottees are entitled to interest from the promoter until the project is ready.

Further, in the case of Ashley Serrao V/s Propel Developer Pvt. Ltd.[11] the authority held that provision of Section 18 (1) (a) applies till the time project is incomplete. Once the project is complete or possession is given, the provision ceases to operate.

Hence, flat buyers cannot seek relief for a delayed project after completion of the project or after having availed possession of the said property.

[9] https://www.sebi.gov.in/legal/circulars/nov-2020/guidelines-for-rights-issue-of-units-by-an-unlisted-infrastructure-investment-trust-invit-_48082.html; Circular no. SEBI/HO/DDHS/DDHS/CIR/P/2020/223 dated November 4, 2020.

[10] 2018(4)ADJ406

[11] Judgment date: November 12, 2020