

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

IBA/1370/2019

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of **Oragadam City Developers Private Limited**

Sunitha Venkatesh,
No.1A, Serene Courtyard,
¾, Valliammal Street, Kilpauk,
Chennai – 600 010.

... Financial Creditor

-Vs-

Oragadam City Developers Private Limited,
CIN No.:U70101TN2009PTC7035,
New No.5, Old No.3, Giri Road,
T.Nagar,
Chennai – 600 017.

... Corporate Debtor

Along with

IBA/1371/2019

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of **Oragadam City Developers Private Limited**

Anitha Arun,
No.9, Chithramahal Apartments,
Canal Bank Road,
R.A.Puram,
Chennai – 600 028.

... Financial Creditor

-Vs-

Oragadam City Developers Private Limited,
CIN No.:U70101TN2009PTC7035,
New No.5, Old No.3, Giri Road,
T.Nagar,
Chennai – 600 017.

... Corporate Debtor

Order Pronounced on 11th February 2022

CORAM:

Justice (Retd) S. RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Financial Creditor: Karthick Seshadri, Advocate
For Corporate Debtor: A. V. Arumugam, Advocate

COMMON ORDER

Per: Justice (Retd) S. RAMATHILAGAM, MEMBER (JUDICIAL)

Under Adjudication are Applications **IBA/1370/2019** and **IBA/1371/2019** which is filed by one **Ms. Sunitha Venkatesh** (hereinafter referred to as '*Financial Creditor-I*') and **Mrs. Anitha Arun** (hereinafter referred to as '*Financial Creditor-II*') under Section 7 of the Insolvency & Bankruptcy Code 2016 (in short, 'IBC, 2016') r/w Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **Oragadam City Developers Private Limited** (hereinafter referred to as '*Corporate Debtor*'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. **IN RESPECT OF IBA/1370/2019**

a) Part-I of the Application sets out about the Financial Creditor from which, it is evident that the Financial Creditor Individual.



b) Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN: U70101TN2009PTC7035 which was incorporated on 06.01.2009 and the Registered Office of the Corporate Debtor as per the Application is stated to be situated at New No.5, Old No.3, Giri Road, T.Nagar, Chennai – 600 017. As per Part III of the application, the Financial Creditor has proposed the name of one Mr.Sangamithra, as the Interim Resolution Professional, who has also filed his consent in Form – 2.

c) From Part-IV of the Application, it is seen that a sum of Rs.45,02,170/- and the date of default is on 03.11.2019 is being claimed by the Financial Creditor as the Financial debt.

d) Part – V of the Application discloses the details of the documents which have been filed by the Financial Creditor in order to prove the 'Financial debt'.

3. The Learned Counsel for the Financial Creditor submitted that a claim was made before the Tamil Nadu Real Estate Regulatory Authority under Section 31 read with Section 71 of the Real Estate (Regulation and Development) Act, 2016, for refund of entire amount paid towards purchase and construction of row house, with interest, compensation and costs. The said claim came to be allowed by the Real Estate Authority on 03.10.2019, wherein the Hon'ble Authority has ordered refund of the amount Rs.28,44,827/- with interest at 10.15% per annum from the date

of payment till repayment and compensation at the rate of 9% on the amount of Rs.28,44,827/- towards mental agony and inconvenience and cost of Rs.25,000/- to be paid within 30 days from the date of issue of order. The Total amount due upon calculating interest is Rs.45,02,170/-.

4. **IN RESPECT OF IBA/1371/2019**

a) Part-I of the Application sets out details about the Financial Creditor from which, it is evident that the Financial Creditor is an Individual.

b) Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN: U70101TN2009PTC7035 which was incorporated on 06.01.2009 and the Registered Office of the Corporate Debtor as per the Application is stated to be situated at New No.5, Old No.3, Giri Road, T.Nagar, Chennai – 600 017. As per Part III of the application, the Financial Creditors has proposed the name of one Mr.Sangamithra, as the Interim Resolution Professional, who has also filed his consent in Form – 2.

c) From Part-IV of the Application, it is seen that a sum of Rs.45,10,989/- is the Principal and the date of default is 03.11.2019 which is being claimed by the Financial Creditor as the Financial debt.

d) Part – V of the Application discloses the details of the documents which have been filed by the Financial Creditor in order to prove the 'Financial debt'.

5. The Learned Counsel for the Financial Creditor-II submitted that a claim was made before the Tamil Nadu Real Estate Regulatory Authority under Section 31 r/w Section 71 of the Real estate (Regulation and Development) Act, 2016 (RERA, 2016) for refund of entire amount paid towards purchase and construction of row house, with interest, compensation and costs. The said claim came to be allowed by Real Estate Regulatory Authority on 03.10.2019, wherein the Hon'ble Authority has ordered refund of the amount of Rs.27,86,890/- with interest at 10.15% per annum from the date of payment till repayment and compensation at the rate of 9% on the amount of Rs.27,26,890/- towards mental agony and inconvenience and cost of Rs.25,000/- to be paid within 30 days from the date of issue of order. The total amount upon calculating interest is Rs.44,10,989/-.

6. On hearing the averments, this Tribunal directed the Applicants vide daily order dated 28.09.2021 as follows:

"Counsel for the Respondent states that settlement proposal has been issued to the parties and the same is pending for final approval. Meanwhile, the question of maintainability ought to be satisfied by the Petitioner."



7. Pursuant to the same, the learned Counsel for the Financial Creditors filed the common notes of submission and argued that the order of an Adjudication Officer of the RERA has been given force of a 'decree' by the statute as contemplated under Section 40 of the (RERA, 2016) and Rule 27 of Real Estate (Regulation and Development) Rules, 2017 (RERA Rules, 2017).

8. It was further argued by the Learned Counsel for the Financial Creditor that the Applicant is a Decree Holder and he is entitled to enforce the said decree in a manner provided under the law. Further, it was submitted that "Decree Holder" is a Financial Creditor as contemplated under Section 3(10) of IBC, 2016 and he is entitled to file application to initiate CIRP against the Corporate Debtor.

9. It was further argued that the Adjudication Authority was not required to question the reasons for not taking steps for executing the decree in Civil Court. In support of the said argument the Applicant relied on Hon'ble Appellate Tribunal decision on **"Ugro Capital Limited Vs. Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd.** Further, the Learned Counsel for the Applicant relied on Hon'ble Apex Court decision in **Dena Bank Vs. C.Shivakumar Reddy and another** that the Decree Holder is entitled to file application under Section 7 of IBC, 2016.



10. *Per contra*, the Learned Counsel for the Corporate Debtor submitted that the claim made in the above application would not fall under the definition of 'financial debt' as per Section 5(8) of IBC, 2016. Further, it was argued that the order passed by Learned Adjudicating Officer under Section 31 r/w 71 of the Real Estate (Regulation and Development) Act, 2016 (RERA, 2016) cannot be termed as either judgment or decree, therefore, the applicant cannot be treated as "Decree holder" enumerated in the definition of "Creditor" as per section 3(10) of IBC, 2016 and this present application is not maintainable.

11. It was further submitted that the Adjudication Officer has the jurisdiction under Section 40 RERA, 2016 and Rule 27 of (RERA Rules, 2017) to treat the order as decree and enforce the same. In the present case no such application was filed by the Applicant before Adjudication Officer for enforcement and the said order cannot be treated as decree. Reliance was placed upon Section 2(3) of the Code of Civil Procedure, 1908, which reads as follows;

"Section 2(3): "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made;"



12. The order dated 03.10.2019, by the Adjudication Officer of the RERA is capable of execution and a person on whose favour such order was made would fall under the definition of "decree-holder". Further, Section 3(10) of IBC, 2016 reads as follows,

"Section 3(10): "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"

From the above, it was submitted that the "decree-holder" is undoubtedly covered by the definition of "Creditor" under Section 3(10) of the 'I&B Code'.

13. We have heard the submissions made by the Learned Counsel for both the parties. At this instance, the question which is required to be decided is whether the Applicant is entitled to maintain the Application filed under Section 7 of IBC, 2016 on the ground that he is a 'decree holder'.

14. In order to answer the said issue, it is essential to extract the definitions clause from IBC, 2016 which are necessary for the present case;

"Sec. 3(6) "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

3(10) "**creditor**" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

3(11) "**debt**" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Sec. 3(12) "**default**" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

15. The definition under Section 3 of IBC, 2016 would apply to the entire code of IBC, 2016, however the definition clause under Section 5 of IBC, 2016 would apply only to Part – II of IBC, 2016 which deals with the Insolvency Resolution Process for Corporate Persons. In order to file an Application under Section 7 of IBC, 2016, the Applicant should qualify to be a 'Financial Creditor' in respect of the Corporate Debtor. The terms 'Financial Creditor' and the term 'financial debt' are extracted hereunder;

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

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

(a) money borrowed against the payment of interest;

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

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

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

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

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

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

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

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

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

16. The Learned Counsel for the Financial Creditor contended that he is a decree holder from RERA and hence he is entitled to maintain the present Application under Section 7 of IBC, 2016. The mere factum of holding a 'decree' against a Corporate Debtor would not entitle an Applicant to file an Application under Section 7 of IBC, 2016. A 'decree holder' as per the Section 3(10) of IBC, 2016 is only a 'creditor', however in order to maintain an Application under Section 7 of IBC, 2016 the said 'creditor' should qualify to be a 'financial creditor' as defined under Section 5(7) of IBC, 2016.

17. An award passed by the Arbitrator under the Arbitration and Conciliation Act, 1996 would also qualify to be a 'decree'. However, merely because a person has obtained a 'decree', the same would not change the nature of transaction over which the decree was passed. It is significant to note here that a 'decree' can be obtained both for an 'operational debt' and also for a 'financial debt'. A 'decree' of a court can be relied on as supporting document in order to prove that the amount is due and payable, however it cannot at any point of time relied on to show that a person is an 'Operational Creditor' or 'Financial Creditor'. Further, a 'decree' cannot change the essence and nature of a transaction. An identical issue fell for consideration before the Hon'ble NCLAT in the matter of **Sushil Ansal Vs. Ashok Tripathi and Others**

(2020 SCC OnLine NCLAT 680), wherein it has been held as follows:

22. It has already been noticed in this Judgment that the 'UP RERA', which ordered recovery of amount of Rs.73,35,686.43/- owed to Respondent Nos.1 and 2 in terms of its order dated 10th August, 2019 has forwarded the Recovery Certificate to the Competent Authority for effecting recovery in the manner and as an arrear of land revenue from the Corporate Debtor. In the backdrop of this factual situation, Respondent Nos. 1 and 2 can safely be held to have approached the Adjudicating Authority only with a view to execute the decree in the nature of Recovery Certificate and recover the amount due thereunder. No conclusion other than the one that Respondent Nos. 1 and 2 were seeking execution of the Recovery Certificate issued by RERA and did not file the application under Section 7 of the 'I&B Code' for purposes of Insolvency Resolution, would be available in the facts and circumstances noticed hereinabove. This conclusion is further reinforced by the fact that the Recovery Certificate issued by RERA had been forwarded to the Competent Authority for effecting recovery as arrears of land revenue and the process was underway when Respondent Nos.1 and 2 sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor. It is indisputable that the Recovery Certificate sought to be executed is the end product of an adjudicatory mechanism under the 'Real Estate (Regulation and Development) Act, 2016' and realisation of the amount due under the Recovery Certificate tantamounts to recovery effected under a money decree though mode of execution may be slightly different. In this view of the matter, we are of the considered opinion that the application of Respondent Nos.1 and 2 under Section 7 of 'I&B Code' was not maintainable. It is accordingly held that in their projected capacity as decree-holders Respondent Nos. 1 and 2 could not maintain an application under Section 7 as 'Financial Creditors'.

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'.

(emphasis supplied)

18. In the present case, from the order obtained from RERA it is evident that the Applicant herein is an 'allottee' of a Real estate project and the Applicant herein under the pretext that he is a 'decree' holder is trying to get away from the glitches of an 'allottee'. Further, an application for initiating Corporate Insolvency Resolution Process against the Corporate Debtor by allottees under a Real Estate Project is required to satisfy provisos of Section 7(1) of IBC, 2016 which reads as follows

"Section 7: Initiation of corporate insolvency resolution process by financial creditor.— (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission."

19. It is clear that a minimum threshold limit has been laid down for taking cognizance of application under Section 7 of IBC, 2016 for triggering Corporate Insolvency Resolution Process, when such application is relatable to a Real Estate Project. In the present applications it is seen from the records that no documents have been filed by the Applicant to satisfy that they have the minimum threshold limit as laid down in the second proviso to Section 7(1) of IBC, 2016.

20. In view of the above discussions, this Adjudicating Authority is of the view that the Applications filed under section 7 of the IBC,

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2016 is required to be rejected and accordingly, the Applications viz. IBA/1370/2019 and IBA/1371/2019 are hereby **dismissed**. No costs.

-Sd-
B. ANIL KUMAR
MEMBER (TECHNICAL)

-Sd-
Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)

Raymond