

Registration No. R.N. 42950/84 of the  
Registrar of News Papers of India  
Postal Registration No. : DL(DG-11)/8041/2021-23  
Printed By : Natraj Offset Printers  
B-15//1, Jhilmil Industrial Area,  
Delhi-110095

Annual Subscription : Rs. 4500.00  
Single Issue by personal delivery : Rs. 500.00  
Date of Publication : 20th & 21st of every Month  
Date of Posting : 23th - 29th of every month  
Weight of the RNP : 389 Grams  
Posted at Delhi-RMS-Delhi-110006

Pages 1 TO 276  
Are meant for postal authorities

# CURRENT CIVIL CASES

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JANUARY 2023  
PART-1

MODE OF CITATION 2023 (1) CCC

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# CURRENT CIVIL CASES

ISSN: 2582-1830

2023

Volume 1

Mode of Citation  
2023(1) CCC



**Vinod Publications (P) Ltd.**

Registered Office : 1561, Church Road, Kashmere Gate  
Delhi - 110036 (INDIA)  
Mob Nos: 997124394 & 9999374616  
Email : [vikas.nijhawan@vis-india.com](mailto:vikas.nijhawan@vis-india.com)  
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# A Law Journal

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2023—Issue No. 1—Vol. 38 (38th year of Publication)

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promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

*Explanation.*—For the purposes of this clause,—(a) the expression “commercial purpose” does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment; (b) the expressions “buys any goods” and “hires or avails any services” includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;<sup>1</sup>

➤ **In case of RERA, the aggrieved is called as the Allottee,**

“allottee” in relation to a real estate project, means the person to whom a plot, apart-

ment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;<sup>2</sup>

➤ **In case of IBC, 2016, the aggrieved is called as “Financial Creditor”.**

“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;<sup>3</sup>

A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. *Explanation.*—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed (3) The financial creditor shall, along with the application furnish— (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (b) the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board.<sup>4</sup>

➤ **The pertinent question is whether the remedies under all the three statutes can be sought parallelly?**

IBC, as it was originally enacted, did not contain an adequate recognition of the interests of homebuyers in real estate projects. Homebuyer

2. S.2(d) of the Real Estate (Regulation and Development) Act, 2016.
3. S.2(7) of Insolvency and Bankruptcy Code, 2016.
4. S.7 of Insolvency and Bankruptcy Code, 2016.

1. S.2(7) of The Consumer Protection Act, 2019.

are vital stakeholders. The process of corporate insolvency resolution directly impacts upon their rights and interests. Yet IBC, as initially crafted, did not protect them. The concerns of the homebuyers have been sought to be assuaged by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which came into force on 6-6-2018. As a result of the Ordinance, homebuyers are brought within the purview of financial creditors under IBC. Being financial creditors under IBC, allottees in real estate projects necessarily constitute a part of the CoC.<sup>5</sup> Even the fact that allottees may not be a homogeneous group, yet there are only two ways which they can vote on the Committee of editors—either to approve or to disapprove a proposed resolution plan. Sub-section (3) goes a long way to ironing out any creases that may have been felt in the working of Section 25-A in that the authorised representative casts his vote on behalf of all financial creditors that he represents. If a decision taken by a majority of more than 50% of the voting share of financial creditors that he represents is that particular plan be either accepted or rejected, clear that the minority of those who vote, all others, will now be bound by this decision. As has been stated by Supreme Court in *Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17, 2019 (Civ. 524)], the legislature must be given leeway in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later.<sup>6</sup> Thus, allottees/buyers were included in the main provisions. Section 5(8)(f) with effect from the coming into force of the Code, the Explanation being added in 2018 merely to clarify doubts that had

arisen. Supreme Court also held RERA is to be harmoniously with the Code, as amended by the Amendment Act. It is only in the event

<sup>5</sup> *Sharma v. Union of India*, (2018) 18 SCC 575; 2018 0 Supreme (SC) 797

<sup>6</sup> *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416 : (2019) 4 (Civ) 1: 2019 3 CurCC(SC) 243

of conflict that the Code will prevail over RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.<sup>7</sup>

Hence the Court concluded as follows:

- I. All the remedies under various statutes are concurrent.
- II. IBC will prevail over RERA.
- III. Section 5(8)(f) of the IBC, 2016 with effect from the inception of the Code, the Explanation being added in 2018 merely to clarify doubts that had arisen.

\*\*\*\*\*

### 2023(1) CCC 99 (Cal.)

#### CALCUTTA HIGH COURT

*Tapabrata Chakraborty and Raja Basu Chowdhury, JJ.*

Bhargav Chatterjee and Anr. —Appellants  
versus

Infinity & Associates and Anr. —Respondents  
FA 147 of 2018  
Decided on 8.12.2022

Indian Evidence Act, 1872—Section 116—Civil Procedure Code, 1908—Order XX, Rule 12—Suit for recovery of possession, *mesne profits*, injunction and other reliefs—*Estoppel of tenant*—Admission of a party in proceedings is the best evidence and same does not need any further corroboration—In spite of arriving at a finding that no positive evidence had been adduced on behalf of respondents to dislodge appellants' contention that respondents are actually licensees in respect of suit property, Court below dismissed suit as appellants had failed to prove title over suit property by producing documents as regards such ownership—Rule of

<sup>7</sup> *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416 : (2019) 4

estoppel would cease to operate only after such licensee or sub-tenant has been evicted—Respondents cannot be permitted to contend that property was not belonging to appellants—Judgment and decree passed by Court below set aside directing recovery of possession of suit flat.

(Paras 15, 17, 18 and 19)

**Result:** Appeal allowed.

*Counsel for the Parties:*

For the Appellants: Mr. Probal Kumar Mukherjee and Mr. S.N. Dutta, Advocates

#### IMPORTANT POINTS

(1) *Admission of a party in proceedings is the best evidence and same does not need any further corroboration.*

(2) *Rule of estoppel would cease to operate only after such licensee or sub-tenant has been evicted.*

#### JUDGMENT

**Tapabrata Chakraborty, J.**—The present appeal is directed against the judgment and decree dated 22nd December, 2017 passed by the learned Civil Judge (Senior Division), 10th Court, Alipore in Title Suit No.7 of 2012.

2. The plaintiffs, being the appellants herein, preferred a suit for recovery of possession, mesne profits, injunction and other reliefs against the defendants, being the respondents herein, stating, inter alia, that though the plaintiffs have their permanent residence in the suit property but ordinarily they used to reside at Bangalore and that in early January of 2010, defendant no.2, the sole proprietor of defendant no.1, approached the plaintiffs for taking the suit flat in Schedule 'A' on leave and license basis for a period of 11 months commencing from 1st March, 2010 along with fixtures and fittings and car parking space as detailed in Schedule 'B' for the purpose of establishing his business and for carrying on his business therefrom and the plaintiffs agreed to allow the defendants to occupy the suit flat temporarily for 11 months commencing from 1st March, 2011 on conditions that the defendants would pay Rs.30,000/-

only per month and an amount of Rs.1,20,000/-, as security deposit to be refunded on determination or termination of license and that the fittings and fixtures mentioned in Schedule 'B' would be used by the defendant no.2 with all reasonable care for a period of 11 months commencing from 1st day of March, 2010 and that the defendant no.2 would be allowed to use the car parking space between 8.00 a.m. to 8.00 p.m. and that defendant no.2 would pay a fixed sum of Rs.10,000/- only per month in advance within 7th of each month. Incorporating such conditions an agreement for leave and licence was entered into by the plaintiff no.1 with the defendant no.2 and an agreement of hire was entered into by the plaintiff no.2 with the defendant no.2. However, after expiry of the full term of the said agreements though defendant no.2 by his letter dated 31st December 2010 assured the plaintiffs to hand over vacant possession on surrendering the license, he neglected to hand over the possession of the suit flat and the possession of the fittings and fixtures together with the car parking space and furthermore, in breach of his obligation, defendant no.2 converted the suit flat in an 'Archies Gallery' and in such circumstances, the plaintiff no.1 by a letter dated 6th June, 2011 called upon the defendants and particularly the defendant no.2 to quit and vacate the suit properties within 15 days from the date of receipt of such letter but the defendants wilfully failed and deliberately neglected to vacate the suit flat and neglected to pay license fees and hiring charges and as such the suit.

3. The defendants initially entered appearance and filed a written statement stating that the plaintiffs have no right to file the suit. The defendants claimed themselves as lawful tenant under the plaintiffs stating that they had deposited a huge amount to the plaintiffs for taking the suit property for the purpose of running their business and as a result, the defendants started a business of food for commercial exploitation of the suit property and decorated the suit schedule property by spending Rs.60,00,000/- and