

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 315/7/JPR/2019

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

MR. PAWAN KUMAR BANG

...Financial Creditor

Versus

M/S STAR VALLEY HEIGHTS LLP

...Corporate Debtor

MEMO OF PARTIES

Mr. Pawan Kumar Bang

S/o Shri Jugal Kishore Bang
Plot No. C-8, Netaji Subhash Nagar-II,
Hari Marg, Tonk Road, Jaipur

...Financial Creditor

VERSUS

M/s Star Valley Heights LLP

108, First Floor, Soni Paris Point Complex,
A-26-A, Sawai Jaisingh Highway,
Banipark, Jaipur- 302016 (Rajasthan)

CP No. (IB)- 315/7/JPR/2019

...Corporate Debtor**And****Union of India Through Ministry of Corporate Affairs**

A Wing, Shastri Bhawan Garage, No. 14,
Dr. Rajendra Prasad Road, New Delhi- 110001

...Proforma Respondent**Counsel for Financial Creditor** : Saurabh Jain, Adv.**Counsel for Corporate Debtor** : Prashant Daga, Adv.**Order Pronouncement On: 12.10.2023****ORDER****Per: Shri Atul Chaturvedi, Technical Member**

1. This Application is filed by Mr. Pawan Kumar Bang ('Applicant' / 'Financial Creditor'), against the Corporate Debtor namely M/s Star Valley Heights LLP ('Respondent' / 'Corporate Debtor') under Section 7 of Insolvency and Bankruptcy Code, 2016 (the 'IBC' / 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of the Corporate Insolvency Resolution Process ('CIRP'), pursuant to default in repayment of Rs. 36,80,000/- (Rupees Thirty-Six Lakhs Eighty Thousand Only).
2. The Corporate Debtor is a Limited Liability Partnership, incorporated on 30.03.2015 and duly registered with the Registrar of Companies, Jaipur having Identification No. AAD-6787. The registered office of the




Corporate Debtor is situated at 108, First Floor, Soni Paris Point Complex, A-26-A, Sawai Jaisingh Highway, Banipark, Jaipur- 302016 (Rajasthan). The authorised share capital of the company is Rs. 1,00,000 (Rupees One Lakh Only) and the paid-up share capital is also Rs. 1,00,000 (Rupees One Lakh Only).

3. The details of the transactions leading to the filing of this Application averred by the Applicant are as follows:

a) The Applicant entered into an agreement of sale with the Corporate Debtor on 30.04.2015 for purchasing an Elite Residential Flat, to be constructed at Khasra No. 284/1, 287/1 and 287/2, near Gurukul School, Nindar Mode, Sikar Road, Jaipur which was subsequently notarized and attested on 05.05.2016. The Applicant paid Rs. 5,00,000/- (Rupees Five Lakh Only) on 30.04.2015 and Rs. 15,00,000/- (Rupees Fifteen Lakh Only) through Cheque No. 627843 dated 30.04.2015 drawn on IDBI Bank as token money for the flat.

b) On 28.10.2015, a letter was written and addressed to the Corporate Debtor for seeking details of flats as agreed *vide* Agreement dated 30.04.2015. The Corporate Debtor neither replied to the said letter nor provided any details with respect to the said flat. on 18.05.2016 & 21.10.2016, the Applicant wrote a letter to the Corporate Debtor with reference to the letter dated 28.10.2015. However, no heed was paid to



the same. The Applicant also visited the office of the Corporate Debtor and enquired about the factual position of the flat, but the Corporate Debtor along with its representatives didn't provide any concrete reply, except oral assurances.

- c) On 26.06.2017, the Applicant wrote a letter to the Corporate Debtor, requesting therein to refund the amount deposited along with interest as the Corporate Debtor has failed to adhere to the terms and conditions of the contract dated 30.04.2015 and has failed to deliver possession as agreed. No heed was paid by the Corporate Debtor to the said request, neither the possession was handed over nor the amount deposited was refunded.
- d) Again on 25.05.2019 & 29.04.2019, a letter was written and addressed by the Applicant to the Corporate Debtor for refunding the amount deposited along with interest. The Corporate had not paid the same, instead, the representative of the Corporate Debtor refused to return the said amount. Thereafter the Applicant visited the site of construction and was shocked to see that no construction has been done till date.
- e) The Corporate Debtor neither paid the return of investment to the Applicant even after the repeated request nor handed over possession of the flats till date to the Applicant.



4. As a consequence of the aforementioned default, this Application has been filed seeking initiation of CIRP against the Corporate Debtor. The Applicant claims that the Corporate Debtor is liable to pay the aggregate amount of Rs. 36,80,000/- (Rupees Thirty-Six Lacs Eighty Thousand only) as of 29.04.2019, as reflected in Part IV of the Application.

Part IV

S. No.	Particulars of Financial Debt	
1.	Total amount of debt granted Date(s) of disbursement	Rs. 20,00,000/- (Rs. Twenty lakhs Only) Amount was disbursed on 30.04.2015.
2.	Amount claimed to be in default and the date on which the default occurred	<p><u>Amount Claimed:</u> Total amount of Debt: Rs. 36,80,000/- Principal Amount- Rs. 20,00,000/- Interest Amount- Rs. 16,80,000/-</p> <p>The Date of Default is as stated to be 29.04.2019.</p>

5. It is seen that earlier Mr. Naresh Kumar Sejvani, learned counsel appeared on behalf of the Corporate Debtor and sought time to file reply. Later on, no one appeared on behalf of the Corporate Debtor. On 09.06.2023, *ex-parte* proceedings were initiated against the Corporate Debtor. After that, Mr. Prerit Goyal, learned counsel appeared on behalf of the Corporate Debtor on 20.07.2023 and sought time to file a reply. On 17.08.2023, Mr.




Prashant Daga, learned counsel appeared on behalf of the Corporate Debtor, submitted that Vakalatnama had been filed online, and argued the matter.

6. The Corporate Debtor filed its reply *vide* Diary No. 2018/2023 dated 17.08.2023 stating as follows:


a) The very basis of the initiation of the CIRP i.e., the alleged agreement is not a valid document of allotment or an agreement of sale for the following reasons:

- I. The said alleged agreement has been executed with a non-existing entity. The alleged agreement has been executed between Star Valley Heights Pvt. Ltd. and Mr. Pawan Kumar Bang. Star Valley Heights Pvt. Ltd. has been dissolved and ceased to exist w.e.f. 30.03.2015 i.e., a month prior to the execution of the said alleged agreement.
- II. There is no specific detail of which flat is booked/ allotted under the said alleged agreement, nor there is any area identified along with a share in undivided portions of the Proposed residential scheme.
- III. The doubtfulness of execution of the said agreement is further substantiated by the fact that stamping of the agreement was done




by way of franking on 05.05.2015 i.e., after the alleged execution of the agreement.

- IV. The veracity and validity of the aforementioned agreement have been under investigation by the police investigating agencies who have also doubted the legal existence of such agreement. The FIR details have been annexed in the reply. The aforesaid facts despite the knowledge of the Applicant have not been brought on record and suppressed by the Applicant before this Adjudicating Authority.
- V. When the alleged agreement is under suspicion and has been executed with a non-existing entity, the Corporate Debtor is not bound by such agreement (i.e., agreement subsequent to the formation of the Corporate Debtor and not in his name or by its authorised/ designated director) therefore there cannot be said to exist any jural or legal relationship between the parties. There does not exist any financial creditor/debtor relations and sans thereof, the present application/petition is liable to be dismissed on this count alone. Pertinently, even at the time of filing of the present petition, the alleged financial creditor was aware of the fact that Star Valley Heights Pvt. Ltd. has ceased to exist despite filing a petition against a dead entity that was not maintainable in




the eyes of law. Subsequent amendment by the Applicant as allowed by this Adjudicating Authority cannot be construed to mean and have the effect that the alleged agreement was executed with the Corporate Debtor or Corporate Debtor is bound by the same as alleged or otherwise. The said amendment was only for continuing the proceedings and not to create any legal/jural relationship between Applicant/Corporate Debtor where none exists in law or otherwise.

- b) The alleged agreement having been executed with a non-existing entity is void ab initio and does not bind the Corporate Debtor. The alleged agreement being *non-est* in the eyes of the law and does not require any separate challenge by the Corporate Debtor as the said document is a void document. On the contrary, it is upon the Applicant to prove the existence of the document and obtain necessary declaration with regard to the existence of the document from the competent forum.
- c) The Applicant is not an allottee nor has advanced any monies against consideration for the time value of money. In other words, there is no financial debt extended by the Applicant and therefore, the petition under Section 7 of the IBC is not maintainable. For an allottee, the pre-condition is a valid agreement to sell with earmarking of which



flat/plot/apartment. There does not exist any of these conditions which would demonstrate that the Applicant is an allottee as per law.

- d) Without prejudice to the aforesaid submission that the Applicant is not a Financial Creditor nor an allottee, the Corporate Debtor submitted that the Financial Creditor is not a genuine home buyer and the said alleged agreement was only executed as a speculative investor and not for the purchase of a flat. The same is evident from conditions nos. 12, 14 & 15 of the alleged agreement which is annexed with the reply.
- e) Additionally, there is no period prescribed under the alleged agreement for handing over the possession. The project is still ongoing and registered with RERA authorities. Thus, the condition regarding being unable to complete the project has not occurred yet which could give right to the Applicant to demand monies from the Corporate Debtor in accordance with the agreement/ law. Therefore, there is no cause of action as the amount has not become due/payable as alleged or otherwise. In other words, there is no default in repayment as the financial debt itself does not exist or become due in the eyes of the law.
- f) The Application has been filed after the concealment of material facts/documents solely with the intent to extort monies and not with the intent for resolution of insolvency. The *malafide* intent is evident from the facts that (a) no valid agreement to sell with the corporate debtor;



(b) an application was filed against a non-existing entity despite knowledge (c) the Applicant is not a genuine allottee rather alleged agreement was for speculative investment; (d) previous transactions of giving and receiving monies were concealed as recorded in the final report dated 21.09.2019 filed before Ld. Metropolitan Magistrate No. 5, Jaipur Metro II, Jaipur (e) The Applicant's actions are solely for recovery and not for resolution of insolvency (f) the alleged financial creditor has failed to aver that he has any genuine interest in the resolution process rather the petition has been filed to settle the other accounts. The present CIRP being invoked with *malafide* intention, the Applicant is liable to be prosecuted under Section 65 of the IBC.

7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, along with the documents enclosed with the Application.
8. The Applicant/Financial Creditor claimed that he is not an allottee but an investor in speculative investment in view of the terms of the terms of the Agreement for Sale dated 30.04.2015. The Corporate Debtor raised an issue that the Applicant is a 'speculative investor' and triggered the Code with malicious intentions. In the instant case, it is to be seen that the parties entered into an Agreement to Sale dated 30.04.2015 wherein the clauses of the agreement clearly stipulate that the Applicant intended to purchase a



residential flat in the building complex and paid an advance sum of Rs. 20,00,000/- (Rupees Twenty Lakh Only) by cash and *vide* cheque no. 627843 dated 30.04.2015 drawn on IDBI Bank. Despite several reminders, the Corporate Debtor did not return the amount that was paid towards part consideration of the said flat.

9. In order to understand the nature of the transaction in depth that has taken place between the parties it is relevant to refer to the terms of the Agreement for Sale dated 30.04.2015 wherein it is stated that the Applicant has agreed to purchase a flat from the Corporate Debtor and for which advance payment has been made. Besides that, it is an undisputed fact that the Applicant himself unequivocally confirms that an Agreement to Sale with the Corporate Debtor on 30.04.2015 for purchasing an Elite Residential Flat at Khasra No. 284/1, 287/1 and 287/2 near Gurukul School, Nindar Mode, Sikar Road, Jaipur was executed on 30.04.2015 therefore by virtue of Section 2(d) of the RERA Act, 2016 the Applicant falls within the definition of the allottee. Section 2(d) of the RERA Act, 2016 in this regard reads as under:

“2(d) “allottee” in relation to a real estate project, means the person to whom a plot, apartment 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;”




10. From the above-noted paras, it is crystal clear that the Applicant is an allottee in the Real Estate Project. As per the IBC, 2016 an allottee is covered under the definition of Financial Creditor by section 5(8)(f) of the Act. At this juncture, it is pertinent to refer to the definition of 'Financial Creditor' as per section 5(7) of the Code and the definition of 'Financial Debt' as per section 5(8) of the Code. The same is being reproduced as under: -

" Section 5(7) of the Code defines "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;

Section 5(8) of the Code defines Financial Debt as 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 non-recourse 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, —


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- 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);*

11. Therefore, an allottee in a real estate project is a Financial Creditor.

However, under Section 7 of the Code, 2016 for the purposes of initiation of CIRP there is a threshold limit with regard to the number of allottees who can jointly file a petition to initiate CIRP against the Corporate Debtor. The Insolvency and Bankruptcy (Amendment) Act, 2020 ('Amendment'), added certain provisos to section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') whereby special conditions were added for real estate allottees to qualify as financial creditors under the Code. The amended Section 7 reads as under:

Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation 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 percent. 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 percent. 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.]”

12. Accordingly, an Application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the IBC Amended Act, 2020 failing which the application shall be deemed to be withdrawn before its admission. The present Application was filed on 28.11.2019 which is much prior to the *Insolvency and Bankruptcy Code (Amendment) Act, 2020*. The said amendment came into force with effect from 28.12.2019. Even then, the Applicant has not modified the Application as per the amended provisos of Section 7 of the Code.

13. In view of the above, there is no iota of doubt that the Applicant in this case who is an allottee and who has applied singly for commencement of CIRP against the Corporate Debtor does not meet the benchmark of jointly filling by 100 allottees or not less than 10% of number of allottees whichever is less. Therefore, this petition filed by the single homebuyer does not qualify as a fit Application as per Section 7 of IBC, 2016 as amended from time to time to be considered under CIRP.



14. Apart from that, in the matter of *Manish Kumar vs. Union of India [2021]*

123 taxmann.com 343 (SC), the Hon'ble Supreme Court has held that:

“135.in terms of the Explanation in sub-Section 7(1), a financial debt need not be owed to the applicant, and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under section 7, provided that they are financial creditors and there is a default in a sum of Rs. 1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants.”

15. Therefore, it is significant to mention that Section 7(1) of the Code, 2016

mandates for financial creditors who are allottees under a Real Estate Project, an Application for initiating CIRP against the Corporate Debtor shall be filed jointly by not less than 100 of such allottees under the same Real Estate Project or not less than 10% of the total number of such allottees under the same Real Estate Project whichever is less.

16. Keeping in view the ratio of the aforementioned Judgment and having regard to the terms and conditions of the Agreement for Sale entered into between



the parties, this Tribunal is of the considered view that the petition of a single allottee to commence the CIRP against the Corporate Debtor cannot be admitted.

17. The Order in the present matter is made in terms of Section 7 of IBC, 2016 based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority. This order shall not act as a bar to the Applicant in pursuing any other remedies available to it, under the prescribed provisions of law.

18. Accordingly, in the circumstances, CP No. (IB)- 315/7/JPR/2019 is dismissed as rejected.

-Sd-

**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

-Sd-

**ATUL CHATURVEDI,
TECHNICAL MEMBER**