

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
KOLKATA BENCH,  
KOLKATA**

**C.P (IB)No.1831/KB/2019**

**In the matter of**

An application under 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

**In the matter of:**

**M/s Ashish Vincom Private Limited**, registered under the provisions of the Companies Act, 1956, bearing CIN: U51109WB2007PTC115199 and having its registered office at 64, Bentinck Street, Kolkata-700069, West Bengal.

*... Financial Creditor*

Versus

**In the matter of:**

**M/s Neelkamal Grih Nirman Private Limited**, registered under the provisions of the Companies Act, 1956 bearing CIN: U45400WB2007PTC116109 and having its registered office at Punwani Chambers, 3<sup>rd</sup> Floor,7-B, Kiran Sankar Roy Road, Kolkata-700001, West Bengal .

*...Corporate Debtor*

Date of hearing : 26/07/2021

Order Pronounced on :05/08/2021

**Coram:**

***Mr. Rajasekhar V.K., Member (Judicial)***

***Mr. Harish Chander Suri, Member (Technical)***

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**Counsels appeared through Video Conference**

1. Mr. Abhishek Sikdar, Advocate } For the Financial Creditor  
2. Mr. Akash Sharma, Advocate }

1. Ms. Aparajita Rao, Advocate } For the Corporate Debtor  
2. Mr. Sanwal Tibrewal, Advocate }

**ORDER**

**Per: Harish Chander Suri, Member (Technical)**

1. The Court is convened by video conference today.
2. This petition 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, has been filed by **M/s Ashish Vincom Private Limited**, a corporate entity, bearing CIN: U51109WB2007PTC115199 and having its registered office at 64, Bentinck Street, Kolkata-700069, West Bengal (hereinafter referred as Financial Creditor), through one of its Directors Mr. Ashok Kumar Agarwal, seeks initiation of Corporate Insolvency Resolution Process in respect of **M/s Neelkamal Grih Nirman Private Limited**, another corporate entity having CIN: U45400WB2007PTC116109 and having its registered office at Punwani Chambers, 3<sup>rd</sup> Floor, 7-B, Kiran Sankar Roy Road, Kolkata-700001, West Bengal (hereinafter referred as the Corporate Debtor).
3. It is submitted in the petition that the Financial Creditor was approached by the Corporate Debtor for sale of one flat of 1600 sq ft. @ Rs.3,000/- per sq.ft. and one covered car parking @ Rs.2,00,000/- (Rupees Two Lakhs only) amounting to Rs.50,00,000/- (Rupees Fifty

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Lakhs only) at its proposed project site at 28 & 29 Barik Para Road, P.S. Behala, Kolkata-700034 in the light of the terms of Development Agreement dated 12<sup>th</sup> May, 2013 entered into by the Corporate Debtor with Srijan Mondal and others. It is submitted that the Financial Creditor on being approached by the Corporate Debtor found the proposal viable, and thus accepted the same and decided to pay 10% advance of property value, i.e. Rs.5,00,000/- (Rupees Five Lakhs only) for purchase of the aforesaid property which the Corporate Debtor accepted on bank transfer of Rs. 5,00,000/- (Rupees Five Lakhs only) on 6<sup>th</sup> March, 2014. The Financial Creditor has annexed the Bank Statements of the Financial Creditor showing payment of Rs.5,00,000/- (Rupees Five Lakhs only) and Development Agreement dated 12<sup>th</sup> May,2013 entered into by the Corporate Debtor with owners of the property, as ( '**Annexure-B & C**' ) respectively. It is further submitted that the Financial Creditor was assured by the Corporate Debtor that the said Flat would be delivered to them before 30<sup>th</sup> September, 2016 and in case of any delay or default in handing over the property, the Corporate Debtor would refund the entire amount of Rs. 5,00,000/- with agreed interest @ 18% per annum to be calculated yearly. It is further mentioned in the petition that the Corporate Debtor who readily accepted the advanced amount of Rs.5,00,000/- although did not provide balance confirmation but the advance towards the purchase of property is always reflected in the Balance Sheets of Corporate Debtor under the head "Advance against Property", starting from Audited Accounts as on 31<sup>st</sup> March,2014 and lastly on 31<sup>st</sup> March, 2018. It is further submitted by the Financial Creditor that the reflection of the amount advanced to the Corporate Debtor in its audited accounts is enough evidence to prove that the said sum was advanced to the Corporate Debtor for purchase of property.

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4. The Financial Creditor has annexed with the application the audited accounts of the Corporate Debtor with balance sheets and annexures thereto as on 31<sup>st</sup> March,2014 till 31<sup>st</sup> March, 2018, as (**Annexure-D**).
  
  5. It is further submitted in the petition that the Corporate Debtor is in default of a sum of Rs. 5,00,000/- alongwith interest having accrued thereunder @ 18%, amounting to Rs.7,47,103/- which is described in the computation sheet (**Annexure-E**) and the ledger statement of the creditor (**Annexure-F**) to the petition. It is further submitted by the Financial Creditor that the amount advanced on 6<sup>th</sup> March, 2014 is already admitted in the balance sheet of the Corporate Debtor from year to year with effect from 31<sup>st</sup> March, 2014 and continuing till date. The balance sheets will prove the said amount.
  
  6. The Financial Creditor has also proposed the name Mrs. Meena Sureka, an Insolvency Professional with Registration No. IBBI/IPA-001/IP-P01422/2018-2019/12163 in connection with the proposed CIRP of the Corporate Debtor. The said Insolvency Professional has submitted Form-2 vide its written communication dated 17<sup>th</sup> September,2019 to this Adjudicating Authority that she agrees to accept the appointment as Insolvency Resolution Professional if an order admitting the present application is passed, and that she is currently not serving as an Insolvency Professional in any other proceedings and no disciplinary proceedings pending against her with the Board or Indian Institute of Insolvency Professionals of ICAI.
  
  7. The Corporate Debtor in its reply affidavit dated 5<sup>th</sup> March, 2020 filed through one of its Directors Mr. Agam Kumar Chowdhary submitted that allegations made in the petition are denied and disputed and that the

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petition is an abuse of process of this Tribunal. It is submitted that the petition has been filed to settle a personal score by invoking the provisions of IBC. It is submitted that Mr. Ashok Kumar Agarwal was a business associate of the Directors of the Corporate Debtor and the said Mr. Ashok Kumar Agarwal is also a Director in various associate companies of the Corporate Debtor.

8. It is submitted that the debt arises out of advance of property and that no document has been produced or relied upon to show that the said sum was in respect of any immovable property either by way of Money Receipt or Agreement for Sale or any allotment letter. It is submitted that the such claim of the Financial Creditor is false, frivolous and mischievous and has been made to take shelter against the law of limitation. The Corporate Debtor has further submitted that the Financial Creditor has failed to supply any document which could show that the said advance was paid towards purchase of property or allotment thereof. It is submitted that the Financial Creditor has misled this Tribunal to circumvent the statute and limitation and on this ground only, the petition should be dismissed. It is submitted that the petition is barred by the laws of limitation and there is no acknowledgement by the Corporate Debtor of the said advance against property by the Financial Creditor at all. It is submitted that the acknowledgement being relied on by the Financial Creditor in the balance sheet for the year ending 2017 cannot be an acknowledgement in the eye of law and does not have the effect of extending limitation and no such amount towards advance against property is reflected in any of the balance sheet of the Financial Creditor as alleged, thereby making it evident that the claim of the said Rs.5,00,000/- does not exist. The Corporate Debtor denied that the Financial Creditor was ever assured by

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the Corporate Debtor that the said Flat would be delivered to them before 30<sup>th</sup> September, 2016 or any other date and that in case of any delay, the said amount would be refunded with interest.

9. It is submitted that the Financial Creditor is not a Home Buyers within the meaning of decisions rendered under the IBC and thus cannot maintain this petition. The amount of Rs. 5,00,000/- allegedly advanced by the Financial Creditor is not reflected in the balance sheet of the Corporate Debtor for the financial year 31<sup>st</sup> March, 2017 under the heading "Advance against Property" and thus the Corporate Debtor is not liable to pay any amount towards the advance and /or interest thereunder. It is stated that no date of default has been given by the Financial Creditor in order to avoid the point of limitation. It is stated that the petition is frivolous, vexatious, harassive, mala fide and bad in law.
10. The Financial Creditor herein M/s Ashish Vincom Private Limited, is stated to have given Rs.5,00,000/- for purchase of the property in question, which the Corporate Debtor accepted upon bank transfer on 6<sup>th</sup> March, 2014. It is stated that the Bank statements of Financial Creditor showing payment of Rs.5,00,000/- and Development Agreement dated 12<sup>th</sup> May, 2013 between the Corporate Debtor and the owners of the land but what is surprisingly is that there is no previty of contract between the Financial Creditor and the Corporate Debtor because the Development Agreement is between Srijan Mondal and others with the Corporate Debtor herein and not between the Financial Creditor herein. It is also not clear as to how and in what capacity and on what terms and conditions, the Financial Creditor gave that money to the Corporate Debtor. The only proof is that a sum of Rs. 5 lakhs has been transferred

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by cheque no. 163245 in favour of the Corporate Debtor as amount advanced for purchase of property. No details of the property have been mentioned anywhere in the petition against which the said amount was advanced to the Corporate Debtor. If the property had been booked by giving advance/part payment, where would the question of payment of interest arise. There is no such agreement on record to show that the parties had agreed to pay interest on the said amount. A unilateral calculation of interest on the amount of Rs. 5 Lakhs from year to year totaling it up to Rs. 12,47,103/- being outstanding balance till 2<sup>nd</sup> September, 2019 would not help the Financial Creditor in having CIRP initiated against the Corporate Debtor. A lot more is required to prove that the parties had agreed to treat the said amount either advance against property or interest bearing loan or advance. Since the Financial Creditor has failed to prove any document or letter the terms of which have been consented by the Corporate Debtor. The question of any default would not arise because even till date the Financial Creditor has not recalled the loan by way of any notice or letter.

11. During the course of arguments, the Learned Counsel for the Financial Creditor submitted that the Financial Creditor was approached by the Corporate Debtor for sale of one flat of 1600 sq.ft. @ Rs.3000 per sq.ft. with one covered care parking @ Rs. 2,00,000/- total amounting to Rs. 50,00,000/-. Consequently, the Financial Creditor found the proposal viable and accepted the same and paid 10% of the value amounting to Rs.5,00,000/- for purchase of the said flat. It was assured by the Corporate Debtor that the flat would be handed over by 30<sup>th</sup> September, 2016 and in the event of delay or default, the entire Rs.5,00,000/- will be refunded with an agreed rate of interest @18% per annum. It is further submitted by the Ld. Counsel for the Financial Creditor that balance sheets of the Corporate Debtor of Financial Year 2014-15, 2015-

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2016 and 2016-2017 clearly indicate under the heading 'Loans and Advances', the existing liabilities of the Corporate Debtor to the tune of Rs.5,00,000/- towards the Financial Creditor and that the amount in default has been considered by the Corporate Debtor as an 'investment in property' and 'advance against property'. The Ld. Counsel for the Financial Creditor further submits that the balance sheets of the Corporate Debtor contain admission of liability and the agents of the company who made and signed it intended to make those admissions. It was submitted that the inclusion of the debt in balance sheets duly prepared and authenticated would amount to admission of a liability of the Corporate Debtor admits their liability towards the Financial Creditor for the amount claimed, and no explanation and circumstances surrounding the entry and alter the fact of that liability.

12. Ld. Counsel referred and relied upon the judgments of the Hon'ble Supreme Court of India in the cases of ***Espn Software India (p) ltd. vs. Modi Entertainment Network Ltd. (2012) 173 comp cas 465 (Delhi) and Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal & Jaiswal & Anr. [Civil Appeal 323 of 2021 (Supreme Court)***. The Learned Counsel further argued that from the balance sheets of the Corporate Debtor, it is apparent that the Corporate Debtor treated the Financial Creditor as an 'investor' and borrowed the amount pursuant to forward sale purchase agreement for a commercial purpose i.e. sale of the flat and treating the same at par with 'loan' in their return. The amount invested by the applicants come within the meaning of 'Financial Debt' as defined in section 5(8)(f) of the IBC, 2016.
13. The Ld. Counsel further relied upon ***M/s Al-Amin Limited vs. K.P. Sethumadhavan, [2017 SCC 50 Online Ker 11337]*** and submitted

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that, wherein it was held that the inclusion of a debt in a balance sheet duly prepared and authenticated would amount to admission of a liability and therefore satisfies the requirements of law for a valid acknowledgement under section 18 of the Limitation Act, even though the Directors by authenticating the balance sheet merely discharged a statutory duty and may not have intended to make an acknowledgement. The Ld. Counsel further submitted that in the event of the failure on the part of the Corporate Debtor to adhere to the terms of the verbal agreement between the parties, the said consideration amount was to be repaid by the Corporate Debtor alongwith the interest in the event the transaction did not materialize. This establishes that the debt in the instant case satisfies threefold criterion-i) Disbursal ii) time value of money iii) commercial effect of borrowing and, therefore, the ratio laid down by the Hon'ble Supreme Court with respect to the financial debt *in 'Pioneer Urban Land and Infrastructure Ltd. & Anr. (2019 SCC Online SC 1005)* can be applicable to the facts of this case. It is submitted that the investment was made by the Financial Creditor to derive benefit of the property being developed by the Corporate Debtor at Barik Para, which is the consideration for time value of money. Thus, it is submitted that Ashish Vincom Private Limited comes within the meaning of Financial Creditor and is eligible to file an application under section 7 of the IBC, and there being a debt in existence and default on the part of the Corporate Debtor, the present application of the Financial Creditor may be allowed.

14. On behalf of the Corporate Debtor, it is submitted by the Ld. Counsel that the argument of the Financial Creditor cannot stand to reason because there was no agreement for sale or letter of allotment which could poof on record to suggest that the amount was disbursed against the consideration for the time value of money in any manner whatsoever.

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It is submitted that the Development Agreement filed on record by the Financial Creditor is between the Landowners and the Corporate Debtor, to which the Financial Creditor is not a party. It is submitted that even though, it is admitted that the advance was made against property, the same does not classify the applicant as Financial Creditor as has been held by the Hon'ble Supreme Court of India in **Manish Kumar Vs Union of India & Ors.**

15. It is submitted by the Ld. Counsel for the Corporate debtor that there is no pleading that the money was lent to the Corporate Debtor as loan and as on date, there is no pleading to show that the applicants is a Financial Creditor nor is there any proof that the provisions of the Companies Act,2013 have been complied with by the applicant. Ld. Counsel further submitted that it is an established law that all advances do not necessarily attract provision of IBC and the applicant knowing the same has spun a story without any evidential backing to misutilise the code to recover non-existent debts as defined in the Code. It is submitted that the applicant is trying to use this Forum as a tool of recovery of dues, which is not permissible under the Code. Ld. Counsel submitted that in a catena of cases, various Courts and Tribunals have observed that the IBC cannot be used to substitute for a recovery mechanism. It is submitted that the Code cannot be used to extract the sum of money owned to a particular person.
16. The next submission by the Ld. Counsel for the Corporate Debtor is that the application is barred by time because the application was filed on 14<sup>th</sup> October, 2019. It is submitted that the acknowledgement of debt as per section 18 of the Limitation Act, 1963 is mandated to be within 3 years of the application i.e. on or after 15.10.2016 because the

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Development Agreement relied upon by the Financial Creditor being dated 12<sup>th</sup> May 2013, the amount claimed by the Financial Creditor is time barred. It is submitted that no document evidencing the acknowledgement of debt has been placed on record by the Financial Creditor for the period 15.10.2016 upto the date of filing of the said application. None of the documents annexed for the said period records and /or discloses the name of applicant as a creditor. It is submitted that the Financial Creditor filed the petition with fraudulent and malicious intent for any purpose other than resolution of insolvency or liquidation and therefore it is covered under section 65 of the IBC and citation relied on **Manish Kumar vs Union of India & Ors (2021 SCC Online SC 30)**.

17. Ld. Counsel further relied upon **Vishwa Nath Singh Vs Visa Drugs & Pharmaceuticals Private Limited (Company Appeal (AT) (Insolvency) No. 234-235 of 2017)**, wherein the Hon'ble NCLAT in para 16 observed that-

*“ In the present case, the respondent has failed to show that the amount of loan treated to have been given to the Corporate Debtor were disbursed against the consideration for the time value of money. In absence of any such evidence on record to suggest that the amount was disbursed against the consideration for the time value of money and was borrowed by the Corporate Debtor against the payment of interest, we hold that the respondent- M/s Visa Drugs and Pharmaceuticals do not come within the meaning of ‘financial creditor’.*

18. Having seen the respective pleadings of the parties and after hearing the arguments on both sides, one thing is clear that amount of Rs.5,00,000/- had been paid by the Financial Creditor to the Corporate Debtor but the Financial Creditor has not produced anything on record

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that the amount had been paid to the Corporate Debtor as booking amount for a particular flat. The Development Agreement relied upon by the Financial Creditor is between the Landowners and the Corporate Debtor, and not between the Financial Creditor and the Corporate Debtor.

19. Once it is proved that the amount advanced did not relate to booking of any flat, particularly in the absence of any agreement between the Financial Creditor and the Corporate Debtor to that effect, the Financial Creditor cannot make out a case for initiating CIRP against the Corporate Debtor. The amount given by the Financial Creditor to the Corporate Debtor may have been given for any purpose. No terms of any agreement, specific period, or continued investment, have been proved by any documents placed on record. Even the date of default, if at all, is not clear nor has any letter recalling the alleged loan/advance has been served on the Corporate Debtor or placed on record.
20. The Financial Creditor may however, be free to seek its remedies elsewhere for recovery of the amount of Rs.5,00,000/- with or without interest as the case may be, as per the documents in its possession. But certainly, it is not a case for initiation of CIRP under section 7 of the IBC,2016. In these circumstances, we do not consider it to be a fit case for admission. The petition is thus rejected with no order as to costs.
21. Accordingly, the application being **CP(IB) No. 1831/KB/2019** is thus rejected.
22. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.

23. Urgent certified copies of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

**(Harish Chander Suri)**  
**Member (Technical)**

**(Rajasekhar V.K.)**  
**Member (Judicial)**

Order signed on, this 5<sup>th</sup> day of August, 2021

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