

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV

CP (IB) No.3082/MB.IV/2019

*Under section 9 of the Insolvency &  
Bankruptcy Code, 2016*

*In the matter of*

Jenis Vora through duly constituted  
attorney, Viraj Vora

...Operational Creditor

Versus

HBS View Private Limited

[CIN: U70109MH2012PTC226906]

... Corporate Debtor

Order pronounced on : 23.09.2020

*Coram:*

Mr. Rajasekhar V.K. : Member (Judicial)

Mr. Ravikumar Duraisamy : Member (Technical)

*Appearances:*

For the Operational Creditor : Mr Mukesh J Pabari i/b Pabari  
Law Associates, Advocate

For the Corporate Debtor : Mr Laxman Kanal, Advocate

ORDER

*Per: Rajasekhar V.K., Member (Judicial)*

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Ms Jenis Vora, an individual, through her duly constituted attorney, Mr Viraj Vora (*Operational*

*Creditor*), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against HBS View Private Limited (*Corporate Debtor*).

2. The Corporate Debtor is a private company limited by shares and incorporated on 14.02.2012 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its CIN is U70109MH2012PTC226906. Its registered office is at No.505, Ceejay House, Dr Annie Besant Road, Worli, Mumbai 400 018, in the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 16.08.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹2,16,00,000.00 (Rupees two crore sixteen lakh only) as principal and ₹67,42,750.00 (Rupees sixty-seven lakh forty-two thousand seven hundred and fifty only) as interest as on 30.10.2017, which is stated to be the date of default.
4. The case of the Operational Creditor is as follows: -
  - (a) The respondent had approached the petitioner herein for purchase of flat bearing No.59, 'C' Wing, Vellard View Premises Cooperative Society Limited [Society Share Certificate No.46], located at Tardeo Main Road, Haji Ali Circle, Mumbai 400034. M/s Prakash & Co, solicitors, agreed to act as escrow holders in respect of the said transaction. The total sale consideration was fixed at ₹2.40 crore, which was to be paid on or before 30.10.2017 to the petitioner.
  - (b) In discharge of the liability towards the transfer deed, the respondent issued cheque No.003517 dated 25.10.2017 for a sum of ₹2,13,84,000/-. On the due date, the respondent requested the petitioner not to deposit the cheque due to some financial

constraints, and assured the petitioner that the cheque would be replaced. In furtherance of the same, the respondents issued a fresh cheque No.004074 dated 20.12.2017 for an amount of ₹1,14,84,000/- and another cheque No.004075 dated 15.01.2018 for an amount of ₹99,00,000/-. Like before, on the due dates, the respondent once again requested the petitioner not to deposit the cheque as the respondents would arrange for the necessary funds in two to three weeks.

- (c) The petitioner, after waiting for the said period, deposited cheque No.004074 dated 20.12.2017 on 08.03.2018 in his bank, viz., Saraswat Cooperative Bank Limited, Carnac Bunder Branch, which was dishonoured by the respondent's bankers. Statutory Notice as required under section 138 of the Negotiable Instruments Act, 1881, was issued, which was neither replied to by the respondent, nor was the amount paid. Therefore, the petitioner lodged criminal complaint under section 138 of the Negotiable Instruments Act, 1881. The respondents duly entered appearance before the court. Thereafter, a settlement was arrived at mutually and consent terms were filed into court, leading to withdrawal of the criminal complaint against the respondent.
- (d) The present petition has been filed citing breach of consent terms and not paying a sum of ₹2.16 crore plus interest calculated at 18% per annum.
5. The total debt due and payable to the petitioner is ₹2,83,42,750.00 (Rupees two crore eighty-three lakh forty-two thousand seven hundred and fifty only), as mentioned at page 12 of the Petition.
6. The petitioner had served a Demand Notice in Form 3 dated 25.07.2019 to the respondent (Exhibit '3', pp.14-18) in terms of section 8 of the IBC. The respondent has sent a reply dated 09.08.2019, wherein they have *inter alia* stated that there is no purported debt due

and payable. The reply has been annexed at Exhibit '15' at pp.109-115 of the Petition. Necessary affidavit of No Dispute in terms of section 9(3)(b) of the IBC has been annexed at Exhibit '20' at pp.143-146 of the petition. Bank statements are placed at Exhibit '18' at pp.122-129. The general power of attorney has been placed at Exhibit '17' at pp.117-121.

7. Mr Laxman Kanal, Learned Counsel appeared on behalf of the Corporate Debtor and made his submissions.
8. In its reply dated 18.12.2019, the Corporate Debtor has set up the following defence:-
  - (a) The Applicant is one of the members of Vellard View Premises Cooperative Society Limited, having ownership of Flat No.59, 'C' Wing, Vellard View, Tardeo, Mumbai. In 2011, the back portion of the compound wall collapsed, leading to concerns about the structural stability of the building. Therefore, all the occupants of the building, including the petitioner, vacated their respective flats. Ultimately, in 2016, the old building was demolished;
  - (b) Under an Agreement for Development dated 06.05.2012, the Society appointed the respondent/corporate debtor as developers for redevelopment of the property. Like other erstwhile occupants, the petitioner herein is also entitled to a new flat in the new building named as 'HBS View 360,' by way of permanent alternative accommodation;
  - (c) In March 2017, the petitioner approached the respondent herein and offered to sell the flat that she was entitled to in the new building, since she had already purchased a flat somewhere else by availing of a housing loan, and the petitioner was finding it difficult to pay the EMIs in the matter. Given the prevailing market conditions, the respondent initially refused to purchase the

new flat. However, on the insistence of the petitioner, and on condition that the respondent may pay ten percent of the total consideration as earnest deposit immediately and the balance of the purchase price in instalments, and purely with a view to helping out the petitioner, the respondent agreed to purchase the new flat at a consideration of ₹2.40 crore. The agreement and understanding were that in the event the respondent is unable to pay the balance consideration on the due date, the petitioner will refund the earnest deposit and the transaction will come to an end;

- (d) Accordingly, the respondent paid ₹24.00 lakh by way of earnest deposit, leaving a balance of ₹2.16 crore payable to the petitioner as balance of purchase price, on or before 25.10.2018. An Escrow Agent was also appointed. Title deeds of the property were given to the Escrow Agent. On the same day, the respondent handed over a post-dated cheque for the balance sale consideration, *i.e.*, ₹2,16,00,000/- less TDS of ₹2,40,000;
- (e) When the petitioner deposited the cheque, it got dishonoured and in view thereof, the respondent intimated to the petitioner its inability to purchase the new flat and terminated the MoU. It also requested the petitioner herein to refund the earnest deposit together with interest thereon, which the petitioner refused to do. The petitioner however offered to give some more time to the respondent to complete the transaction. It is the respondent's case that since the petitioner was not refunding the earnest money deposit, it had no alternative but to replace the previous cheque with two new post-dated cheques for ₹1,14,84,000/- and ₹99,00,000/-. These two cheques again got dishonoured, and therefore, the respondent requested the petitioner to terminate the transaction and refund the earnest money with interest, which the petitioner did not do. The petitioner instead chose to file two criminal complaints before the Learned Additional Chief Metropolitan Magistrate, Sewri, Mumbai, under section 138 of the Negotiable Instruments Act, 1881. In view of the above, the

respondent had no alternative but to settle both complaints by executing consent terms on 15.01.2019. However, for various reasons, the respondent could not adhere to the consent terms;

- (f) The respondent *vide* letter dated 26.07.2019, cancelled the MoU and informed the petitioner that it did not wish to purchase the new flat, and called upon the petitioner to refund the earnest money deposit of ₹24,00,000/-. Instead of doing so, the petitioner chose to send a demand notice under the IBC;
- (g) During the course of arguments, learned counsel for the respondent has submitted that balance of purchase price can never be termed as a '*debt*' within the meaning of section 3(11) of the IBC. The petitioner continues to have right, title and interest in the society, and also continues to receive rents from the respondent as part of the terms and conditions of redevelopment.

- 9. We have heard the arguments of both sides and perused the records.
- 10. We notice that the present petition has been filed by a power of attorney holder on behalf of the petitioner. In *Palogix Infrastructure Private Limited v ICICI Bank Limited*,<sup>1</sup> the Hon'ble NCLAT, after noting the judgment of the Hon'ble Supreme Court in *Innoventive Industries Limited v ICICI Bank*,<sup>2</sup> that the IBC was an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution, and that it is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself, exhaustive of the matters dealt with therein, went on to hold that a power of attorney holder is not competent to file an application on behalf of a

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<sup>1</sup> 2017 SCC OnLine NCLAT 266

<sup>2</sup> 2017 SCC OnLine SC 1025

financial creditor or operational creditor or corporate applicant (para 38 of the judgment).

11. This judgment holds the field at present, and we are bound by it. Therefore, the present petition filed by a power of attorney holder on behalf of the petitioner is not maintainable. Be that as it may, we have considered the petition even on merits.
12. We have considered the underlying nature of the transaction between the parties. The petitioner had offered her flat, which she was entitled to in the premises in question on account of redevelopment of the existing building, to the respondent. The respondent had paid what has been called “earnest money” to the petitioner. The present petition is for the remainder of the purchase price of the flat, apparently on the strength of an MoU dated March 2017 (we are unable to ascertain the exact date of the MoU from the petition). *Prima facie*, an MoU is a sort of agreement which will lead up to a formal agreement in due course. It is generally considered to be non-binding and legally non-enforceable, though exceptions would exist particularly in cases where a binding understanding can be inferred from its various clauses.
13. In the present case, even if it is considered to be in the nature of binding contract between the parties, the MoU has been cancelled by the respondent *vide* its letter 26.07.2019. This is as yet unchallenged.
14. In response to the question put by the Bench as to how this is an operational debt, the learned counsel for the petitioner invited our attention to section 3(11) and 3(12) of the IBC. These sections read as follows: -

*“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.”*

*“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 paid by the debtor or the corporate debtor, as the case may be.”*

15. Learned Counsel for the respondent submitted that the petitioner continues to have right, title and interest in the society, and also continues to receive rents from the respondents arising out of the agreement for redevelopment. He further pressed his point that every contractual debt would not be an operational debt as no goods or services have flowed from the petitioner to the respondent. Further, in the present case, the payment has been made by the respondent to the petitioner and not *vice versa*.
16. There is merit in the contention of the learned counsel for the respondent. Section 5(21) of the IBC defines an operational debt as *“a claim in respect of the provision of goods or services, or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”* In the present case, the underlying nature of the transaction is akin to that of a sale agreement. The present petition seeks to enforce the ‘sale agreement’ as an operational debt. There is no supply of goods or service from the respondent to the petitioner, as a result of which a debt could be said to have arisen. Rather, it is the petitioner who is required to supply the ‘good’ in the form of the new flat, to the respondent. Therefore, we hold that such a transaction is not covered within the meaning of section 5(21) of the IBC. This is more in the nature of specific performance of the transaction, which can, if necessary, be enforced in a civil court. This Adjudicating Authority

cannot take upon itself the role of a civil court in enforcing specific performance of such contracts.

17. For the reasons stated above, the present petition fails and therefore, the same is rejected.
18. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on grounds only of dismissal of the present petition by this Adjudicating Authority.
19. Let a copy of this order be communicated to the parties in terms of the provisions of section 9(5)(ii) of the IBC.

Sd/-  
Ravikumar Duraisamy  
Member (Technical)

Sd/-  
Rajasekhar V.K.  
Member (Judicial)

23.09.2020