



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-III

Item No.10
IB-867(ND)/2022

IN THE MATTER OF:

M/s. Kisten Realtech Pvt Ltd.

..... **APPLICANT**

Vs.

M/s. Aerens Jai Realty Pvt Ltd.

..... **RESPONDENT**

SECTION

U/s 9 IBC code 2016

Order pronounced on 30.05.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open court vide separate sheets. IB-867(ND)/2022
is **admitted.**

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**



**THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT III
IB-867(ND)/2022**

Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. Kisten Realtech Pvt Ltd. ... Applicant/Operational Creditor
Versus

M/s. Aerens Jai Realty Pvt Ltd. ... Respondent/Corporate Debtor

Order Delivered on: 30.05.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Siddharth Bhatli, Advocate.
For the Respondent : *Ex parte.*

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present petition has been filed under Section 9 of the IBC, 2016 with the prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor viz, *M/s. Aerens Jai Realty Pvt Ltd.*, declare Moratorium and appoint Interim Resolution Professional ("IRP").
2. The Operational Creditor namely *M/s. Kisten Realtech Pvt. Ltd.* is a Company registered under the Companies Act, 1956 on 13.02.2012, having its registered office at H-16/A/947, Sangam Vihar, New Delhi 110062.
3. The Corporate Debtor namely *M/s. Aerens Jai Realty Pvt. Ltd.* is a Company incorporated under the Companies Act, 1956 having its registered office at RZ-80-A-13, G/F Tugalkabad Extension, New Delhi-110019.



4. It is submitted that the Corporate Debtor approached the Operational Creditor to buy 5,400 equity shares out of 33,063 equity shares owned by the Operational Creditor. Thereafter, a Memorandum of Understanding (MoU) was executed on 15-10-2020 between the Operational Creditor and the Corporate Debtor wherein both the parties agreed for the sale and purchase of 5,400 equity shares. The Corporate Debtor agreed to purchase 5,400 shares @ 30,000.30 per share for a total consideration of Rs. 16,20,01,620/- . As per clause 2 of the MoU, the Corporate Debtor agreed to pay of 2/3rd of the total sale consideration (i.e., min Rs. 10,80,01,080/-) on or before 31.03.2021, to the Operational Creditor.
5. It is further submitted that the Operational Creditor sought an extension of 2 months by way of letter dated 17.05.2021 for the transfer of shares on or before 31.07.2021. Thereafter, the Operational Creditor transferred 5,400 shares in favour of the Corporate Debtor having distinctive numbers from 933634 to 939033 through 18 share certificates bearing numbers 118 to 135 of 300 shares each.
6. As per clause 2 of the MoU, the Corporate Debtor was to pay the full amount within two months from the date of the transfer of shares i.e., 30.09.2021. The Operational Creditor intimated the Corporate Debtor about the letter dated 02.08.2021 in respect of shares and requested him to make payment of the balance amount of Rs.5,30,51,620/- within the agreed period of 2 months i.e., 30.09.2021 to avoid payment of interest. Thereafter, the Corporate Debtor sought for extension of 15 days by way of a letter dated 28.09.2021 for making the payment and requested a waiver of interest for extended period.
7. It is further submitted that the Operational Creditor again requested the Corporate Debtor by way of letter dated 19.10.2021 to make a payment of Rs.5,30,51,620/- with up-to-date interest for the delayed period from 16.10.2021 till the date of payment.
8. The Corporate Debtor sold, its cars and made a payment of Rs.12,10,000/- on 02.11.2021 to the Operational Creditor and



requested the Operational Creditor to adjust the said amount and pay the balance amount within 10 days. After adjustment of the said amount, the Corporate Debtor was liable to pay an amount of Rs.5,18,41,620/- with 15% interest w.e.f. 03.11.2021.

9. The Operational Creditor issued a legal notice dated 17.11.2021 to the Corporate Debtor to pay the balance amount within 7 days. However, no amount was received. Further, the Operational Creditor sent a demand notice under Section 8 of IBC, 2016 to the Corporate Debtor on 15.10.2022. The Corporate Debtor served a reply to the demand notice on 31.10.2022 which was served to the operational creditor on 02.11.2022.
10. The Corporate Debtor has been set ex parte vide order dated 07.03.2023 passed by this Adjudicating Authority.
11. It is relevant to mention that the Operational Creditor out of bonafide intention moved an Application under Section 7 [(IB)-738(ND)2021] of the Code against the Corporate Debtor but the same was dismissed by this Adjudicating Authority vide order dated 27.05.2022 on the grounds that the debt cannot be categorized as a financial debt within the meaning of provisions of Section 5(8) of the Code. The Corporate Debtor in its reply dated 07.02.2022 to the Section 7 of the Code had acknowledged the existence of the debt and therefore the Corporate Debtor has also made a payment of Rs.25,00,000/- on 16-04-2022 in lieu of the existing debt thereby acknowledging it. The copy of the order dated 27.05.2022 passed by this Adjudicating Authority is filed along with the application.
12. We have heard the submissions made by the Learned Counsel appearing for the Operational Creditor and perused the records.
13. The scope of IBC is limited to see whether there is a debt due and if any default has occurred in the payment/re-payment, hence the application is filed. Further, for ready reference, the definition of the "Operational Creditor" as defined under Section 5(20) of the IBC, 2016 is as follows:

Section 5: Definitions

.....



5(20) “Operational Creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;”

14. It is relevant to quote the definition of the "Operational Debt" as defined under Section 5(21) of the IBC, 2016, is as follows:

5(21) “Operational Debt means a claim in respect of the provision of goods or services including employment 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;”

15. As the term goods is not defined in IBC, 2016, we would like to refer the definition of "Goods" as defined under Section 2(7) of the Sale of Goods Act, 1930.

“Goods means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;”

16. After a conjoint reading of the above-quoted definitions, we are satisfied that the "Shares" are within the ambit of "Goods" and "Goods" are covered under the definition of "Operational Debt".

17. Having regard to the facts of the case, we are of the considered view that the debt arises out of the MoU dated 15.10.2020, the said amount is a debt disbursed against the consideration for the purchase of equity shares owned by the Operational Creditor, hence it is covered under the definition of "Operational Debt and the Applicant will be treated as "Operational Creditor".

18. We may like to cite relevant judgment in the facts of the present case. In the matter of **Samakar Financial Services Private Limited vs. Votary Trading Private Limited**, CP (IB) 735/KB/2019 dated 29.09.2019 (MANU/NC/7549/2019), wherein the Kolkata Bench of National Company Law Tribunal held that:



“10. From the aforementioned section it is clear that the shares are goods therefore it is established that a claim in respect of the provision of goods or services is owed. 11. Being satisfied that the Operational debt is due to the Operational Creditor and the Corporate Debtor committed default in payment, an application of this nature is liable to be admitted, provided the Operational Creditor satisfy that all the requirement to be meted out is complied.”

Hence, we are inclined to **admit** this application.

19. In light of the above facts and circumstances, it is hereby ordered as follows:-

- a. The Application bearing **IB-867/ND/2022** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **admitted**.
- b. We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14(1)(a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:
 - i. *“The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
 - ii. *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
 - iii. *Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*



- iv. *The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.*

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]”

- c. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14(3)(b) of the Code.
- d. Since section 9(4) of the code does not make it mandatory for the Operational Creditor to propose the name of the Resolution Professional along with the application to act as Interim Resolution Professional for the Corporate Debtor, the Operational Creditor has not proposed any name of the Resolution Professional. Therefore, this Adjudicating Authority appoints Mr. Prabhakar Kumar, as the Insolvency Resolution Professional of the Corporate Debtor from the available list of panel of Resolution Professionals as maintained by IBBI. The



registration number of the IRP is IBBI/IPA-002/IP-N00774/2018-2019/12373, the address of the IRP is No.1 Shiva Enclave, 3rd Floor, Pitampura, New Delhi, National Capital Territory of Delhi, Delhi-110034 and the e-mail id of the IRP is prabhakar_acs@rediffmail.com.

Therefore, the IRP shall file a valid Authorization for Assignment along with Written Consent in Form-2 and Registration Certificate within 3 days of the pronouncement of this order.

Accordingly, Mr. Prabhakar Kumar is appointed as IRP.

- e. In pursuance of Section 13(2) of the Code, we direct the IRP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 9 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.
- g. The IRP is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- h. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- i. The Operational Creditor shall deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs only) with the IRP to meet the expenses



arising out of issuing public notice and inviting claims. These expenses are subject to the approval of the Committee of Creditors (“CoC”).

- j. In terms of the Code, the Registry is hereby directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.
- k. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- l. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-SD-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**