

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

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

**SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER**

IA No. 338/JPR/2023
CP No. (IB)- 431(PB)/2018

(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:

SHRI ASHISH GOYAL

...Financial Creditor

Versus

M/S SNG REAL ESTATE PVT. LTD.

...Corporate Debtor

MEMO OF PARTIES

Sh. Ashish Goyal S/o Shri Suresh Kumar Goyal

Telluride DR, Piscataway,
New Jersey, USA-68854-1483
(Residential Address)

Through Shri Suresh Kumar Goyal

(Power of Attorney Holder)
A1-604, Palm Grove Heights,
Ardee City, Sector-52,
Gurgaon-122003

...Financial Creditor/Applicant

IA No. 338/JPR/2023
CP No. (IB)- 431(PB)/2018



VERSUS

M/s SNG Real Estate Private Limited

CIN: U45201RJ2008PTC027756

707, Paris Point Bani Park,

Jaipur, Rajasthan-302016.

...Corporate Debtor/Respondent

For the Applicant	:	Anurag Bhatt, Adv. Lokesh Pathak, Adv. Harsh Arora, Adv. Vaibhav Vijayvargiya, Adv.
For the Respondent	:	Naresh Kumar Sejvani, Adv. Susshil Daga, Adv.

Order Pronounced On: - 19.09.2023

ORDER


Per: Shri Deep Chandra Joshi, Judicial Member

1. This application is filed by Sh. Ashish Goyal ('Applicant'/'Financial Creditor') against the Corporate Debtor namely M/s SNG Real Estate Private Limited('Respondent'/'Corporate Debtor') under section 7 of Insolvency and Bankruptcy Code, 2016 (the 'IBC'/'Code') read with Rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of the Corporate Insolvency Resolution Process ('CIRP'), pursuant to default in delivering the possession of the said unit by the Corporate Debtor the Applicant.
2. The Applicant is an NRI, living in the United State of America ('USA'). The residential address of the Financial Creditor is Telluride DR, Piscataway, New Jersey, USA-68854-1483. The power of Attorney Holder



of the Financial Creditor is Shri Suresh Kumar Goyal and his residential address is A1-604, Palm Grove Heights, Ardee City, Sector-52, Gurgaon-122003.

3. The Corporate Debtor is a Private Limited Company, incorporated under the Companies Act, 1956 on 17.11.2008 and duly registered with the Registrar of Companies, Jaipur, having CIN: U45201RJ2008PTC027756. The registered office of the Company is situated at 707, Paris Point, Bani Park, Jaipur Rajasthan- 302016. The authorized share capital of the company is Rs. 10,00,00,000/- (Rupees Ten Crores Only) and the paid-up share capital of Rs. 4,99,00,000/- (Rupees Four Crores Ninety-Nine Lacs Only).
4. The details of the transactions leading to the filing of this Application averred by the Applicant are as follows:
 - a) The Financial Creditor approached the Corporate Debtor for the purchase of two flats in the project namely 'Sunrisers' for flat no. 1002, 10th floor admeasuring 2217 Sq. Ft. for a sale amount of 2,06,19,208/- (Rupees Two Crore Six Lakh Nineteen Thousand Two Hundred Eight Only) and flat no. 401, 4th floor admeasuring 2243.50 Sq. Ft. sale amount 2,08,65,671/- (Rupees Two Crore Eight Lakh Sixty-Five Thousand Six Hundred and Seventy-One Only). In accordance with the same, the parties herein entered into a



Memorandum of Understanding ('MOU') dated 08.03.2016. Copy of MOUs annexed as Annexure A-I(Colly) of the Application.

- b) It is also submitted that as per MOU an advance of Rs. 1,00,000/- (Rupees One Lakh Only) was to be paid as a token amount for Flat No. 1002 and Rs. 1,17,30,000/- (Rupees One Crore Seventeen Lakh Thirty Thousand Only) was to be paid after taking a loan from State Bank of India ('SBI/Bank'). Similarly, for Flat No. 401 also an advance of Rs. 1,00,000/- (Rupees One Lakh Only) was to be paid as a token amount, and Rs. 1,14,75,000/- (Rupees One Crore Fourteen Lakh Seventy-Five Thousand Only) was to be paid after taking a loan from SBI.
- c) The MOU also states that the first party i.e., the Corporate Debtor to this MOU will pay a Return on Investment ('ROI') to the Applicant @22% p.a. on the total invested amount Rs. 1,18,30,000/- (Rupees One Crore Eighteen Lakh Thirty Thousand Only) and 1,15,75,000/- (Rupees One Crore Fifteen Lakh Seventy-Five Thousand Only) on the residential flats namely flat no. 1002 and flat no. 401 respectively.
- d) It is also submitted that for availing the loan facility from SBI, the Financial Creditor, Corporate Debtor, and SBI entered into a Tripartite Agreement dated 05.02.2016. Thereafter entering into a

Tripartite Agreement, the Financial Creditor paid the advance token money to the Corporate Debtor *vide* cheque no. 6339 and 6340. It is submitted that the loan amount of respective flats was also paid to the Corporate Debtor on 07.03.2016. The cheque was encashed by the Corporate Debtor on 18.04.2016.

- e) Further it is submitted that the Corporate Debtor had also issued various cheques to the Applicant for the purpose of ROI as well as for bank EMIs however the said cheques were dishonoured due to insufficient funds.
- f) It is humbly submitted that despite repeated requests from the Financial Creditor, the Corporate Debtor has been delaying payment of both the bank EMIs and the return on investment under various pretexts. It is claimed that the Financial Creditor also issued a letter to the Corporate Debtor on 05.04.2018, reminding them to pay all outstanding debts, but no response has been received till date from the Corporate Debtor.
- g) The Applicant has stated the details of the amount due in Part IV of the Application which is as follows:


<u>PART IV</u>		
<u>PARTICULARS OF FINANCIAL DEBT</u>		
1.	Total Amount of Debt Granted	Rs. 2,34,05,000/- (Rupees Two Crore Thirty-Four Lakh Five Thousand Only)



	Date(s) Of Disbursement	07.03.2016
2.	Amount Claimed to be in Default and The date on which the default occurred (attach the workings for computation of amount and days of default in tabular form)	Rs. 2,79,31,958/- (Rupees Two Crore Seventy-Nine Lakh Thirty-One Thousand Nine Hundred Fifty-Eight Only) along with interest @24% p.a. and pro rata Interest over Return on Investment and interest levied by the Bank on default of EMIs till realization of the amount. (A Copy of the Commutation Sheet is annexed as Annexure- XII of the Application The default occurred on 08.03.2017 and 08.03.2018 for both flats bearing no. 401 and 1002 as no Return on Investment as provided in the MOU was paid by the Corporate Debtor.

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Diary No. 431/2018 dated 04.10.2018 stating as follows:

- a) The Corporate Debtor states that Financial Creditor is suppressing the material facts of subrogation of rights by way of the Tripartite Agreement executed between the parties herein, the Applicant provided a token amount of Rs. 1,00,000/- (Rupees One Lakh Only) by way of cheque and amount of Rs. 1,14,75,000/- (Rupees One Crore Fourteen Lakh Seventy-Five Only) by way of loan from the SBI for the Flat No. 401, at the 4th Floor, measuring of 2243.50 Sq. Ft., in order to give effect to the above transaction parties entered



into the Tripartite Agreement & MOU. For the remaining amount, the Corporate Debtor Company complied with the petitioner's request and agreed to provide a receipt for the discounted amount of Rs. 73,65,671/- (Rupees Seventy-Three Lakh Sixty-Five Thousand Six Hundred Seventy-One Only) though the Applicant was actually supposed to make the payment of Rs. 92,90,671/- (Rupees Ninety-Two Lakh Ninety Thousand Six Hundred Seventy-One Only) however for the purpose of disbursing the Bank Loan in relation to the above residential flat for which the receipts were provided. *De facto*, the Corporate Debtor never received the said amount. Similarly, the Applicant provided a token amount of Rs. 1,00,000/- (Rupees One Lakh Only) and Rs. 1,18,30,000 (Rupees One Crore Eighteen Lakh Thirty Thousand Only) by way of a loan from the SBI for the payment of consideration for an amount of Rs. 2,06,19,208/- (Rupees Two Crore Six Lakh Nineteen Thousand Two Hundred Eight Only) against Flat No. 1002, at the 10th floor, measuring 2217 square feet. For the remaining amount, even the Corporate Debtor Company acceded to the requests and cooperated with the Applicant, and agreed to provide the receipt of a discounted amount of Rs. 71,19,208/- (Rupees Seventy-One Lakh Nineteen Thousand Two Hundred Eight Only) though the Applicant was




actually supposed to make the payment of Rs. 86,89,208/- (Rupees Eighty-Six Lakh Eighty-Nine Thousand Two Hundred Eight Only) however for the purpose of disbursing the Bank Loan in relation to the above residential flat for which the receipts were provided. *De facto*, the Corporate Debtor never received the said amount.

The brief particulars of the payments between the Applicant and the Corporate Debtor are as follows:


<i>Flat No.</i>	<i>Sale Consideration</i>	<i>Amount Received</i>	<i>Outstanding Amount</i>
401	Rs. 2,08,65,671/-	Rs. 1,14,75,000/-	Rs. 92,90,671/-
1002	Rs. 2,06,19,208/-	Rs. 1,19,30,000/-	Rs. 86,89,208/-
Total	Rs. 4,14,84,879/-	Rs. 2,34,05,000/-	Rs. 1,79,79,879/-

- b) Furthermore, it is also submitted that a Lock-in- Period of two (2) years was also agreed upon that the Corporate Debtor from 07.03.2018, till two (2) years cannot sell the said flats to any third party, apart from that it was also agreed between both the parties that after the completion of Lock-in-period the Corporate Debtor may himself Buy Back the said Flats.
- c) It is stated that the Applicant suppressed the material facts of the case and filed the present Application solely on the basis of the




Return-on-Investment clause. Further, it is submitted that the Applicant is unable to pay the Bank as well as the Corporate Debtor.

- d) It is pertinent to note that the Corporate Debtor has deposited an amount of Rs. 32,94,227/- (Rupees Thirty-Two Lakh Ninety-Four Thousand Two Hundred Twenty-Seven Only) on behalf of the Applicant in order to protect from rigor actions of the Bank. Copy of the Ledger Account of the Applicant in the books of the Corporate Debtor is annexed as Annexure-R/3 of the Reply.
- e) It is humbly submitted that from the Tripartite Agreement, the Applicant is not the actual Financial Creditor according to the definition provided under section 5(7) of the IBC, 2016. In accordance with the various clauses of the Tripartite Agreement, the Applicant assigned subrogated all its rights in favour of the SBI. Furthermore, it is stated that the Corporate Debtor has no liability to pay any dues, and in the above-said circumstances the Applicant cannot be treated as the Financial Creditor therefore the Application filed under Section 7 of the Code is not maintainable.
- f) The Corporate Debtor also relied on the Judgement of the Hon'ble Allahabad Bench in the matter of *Ajay Walia versus M/s Sunworld Residency Private Limited* wherein it was held that *as the applicant subrogated all its rights in favour of the HDFC Bank, therefore he*



cannot be treated as a financial creditor. Hence, Petition is rejected. However, liberty is granted to the Applicant to file its claim for the refund of due amount on exercise of the option of cancellation as per the supplementary agreement before the appropriate forum.


- g) It is submitted that the Application filed by the Applicant under section 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the CIRP has not been filed in accordance with the prescribed format containing the complete and mandatory details which are the mandate of the statute such as lacking the due amount, record of default, particulars of security held, list of documents in order to prove the existence of financial debt and the exact figure of an amount which in default.
- h) The information about the Ld. IRP provided by the Applicant differs from the information on the "IBBI" web portal, the email address provided in the current petition is sandeep8mahajan@gmail.com, whereas the information on the IBBI web portal states that it is sandeep_mhjn@rediffmail.com, the aforementioned personnel contacts with the Ld. IRP clearly demonstrates the Applicant's partisan relationship with the Ld. that the consent given by the Ld. Interim Resolution Professional in accordance with sub-rule(1) of rule 9 of the Insolvency and Bankruptcy (Application to




Adjudicating Authority) Rules, 2016 is incomplete because it does not disclose the necessary information required by Clause 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, and thereby prima facie is incomplete.

- i) The present Application is filed by Mr. Suresh Kumar Goyal on behalf of his son, Mr. Ashish Goyal, on the sole basis of a power of attorney which was executed on 23.04.2018 it is subject to strict proof to explain its sanity as the same has been executed in USA and un-stamped, therefore, it cannot be relied upon, apart from that said power of attorney was executed in USA on 23.04.2018 whereas the present Applicant was filed by the Applicant on 03.05.2018, which indicates that the present power of attorney fake and a fabricated document. Besides that, there is no signature on the power of attorney which is not permitted in the eyes of law.
- j) That the Applicant's entire application in no way proves a default or the inability of the Corporate Debtor to pay its debts, and that this is the fit case to invoke the provisions provided under section 65 of the IBC, 2016, and exemplary cost to be imposed against the applicant.

6. Consequent to the reply filed by the Corporate Debtor the Applicant filed its rejoinder *vide* Diary No. 647/2018 dated 16.11.2018 stating that:




a) The Applicant submits that the Tripartite Agreement does not have any clause which could be tantamount to subrogation of right. It is claimed that the Applicant has never subrogated any rights to the SBI regarding the loan amount. Further, it is submitted that the subrogation of rights by the Financial Creditor has not been mentioned anywhere in the Tripartite Agreement, and the Tripartite Agreement is only with respect to default occurred by the Financial Creditor in terms of the loan agreement. Without limiting the claims and rights of the Applicant, it is asserted that the responsibilities of the Corporate Debtor would only take effect if SBI make a request. Since SBI has not made any request, the Tripartite Agreement does not have any effect. Additionally, it is claimed that the Applicant made an investment through MOUs reached between the Corporate Debtor and the Applicant in the project of the Corporate Debtor called "Sunrisers." It is pertinent to note that the Applicant was entitled to a return on its investment at @ of 22% p.a. on the entire invested amount under the terms and conditions of the MOU. It is important to emphasize that the total invested amount as per the MOUs consists of the advance payment made by the Applicant and the amount disbursed through loans. It is clear from the clauses of the MOUs', the Applicant invested in the aforementioned flats in




order to receive guaranteed returns, and the agreement was made with the commercial effect of borrowing money.

- b) The Corporate Debtor did not offer the Applicant any discounts. It is asserted that the Financial Creditor was only required to pay 55.47% of the price of the units, or Rs. 1,15,75,000/- (Rupees One Crore Fifteen Lakh Seventy-Five Thousand Only) in accordance with clause 2 of the payment mechanism of the MOU dated 08.03.2016. According to the MOU's terms and conditions, the Corporate Debtor was responsible for paying the remaining sum of Rs. 73,65,671/- (Rupees Seventy-Three Lakh Sixty-Five Thousand Six Hundred Seventy-One Only). It is claimed that the Applicant was exempted from responsibility for the payment of the specified sum.
- c) It is stated that as per the terms of MOUs, the Financial Creditor was simply required to transfer funds from the Loan Account and make an advance payment for an amount of Rs. 1,18,30,000/- (Rupees One Crore Eighteen Lakh Thirty Thousand Only), or 57.37%, of the value of the flats. It is claimed that the sum was transferred on 08.03.2016 and that the Respondent was required to furnish the Applicant a receipt for Rs. 71,19,208/- (Rupees Seventy-One Lakh Nineteen Thousand Two Hundred Eight Only). It is important to




note that the builder was supposed to pay the remaining sum specified in the MOU. According to the argument, neither of the MOUs, through which the Applicant invested in the project of the Corporate Debtor, resulted in the Financial Creditor making a flat acquisition. Only on the request of the Applicant in the event of default by the Corporate Debtor flats can be purchased.

- d) It is denied that the Rs. 92,90,671/- (Rupees Ninety-Two Lakh Ninety Thousand Six Hundred Seventy-One Only) and Rs. 86,89,208/- (Rupees Eighty-Six Lakh Eighty-Nine Thousand Two Hundred Eight Only) for flat numbers 401 and 1002 are owed in relation to the consideration. It is asserted that, in accordance with the terms and conditions of MOUs, neither a pending nor unpaid claim for the investment amount for flat numbers 401 nor 1002 exists. It is important to note that the Corporate Debtor was not required to pay the above-stated sums for Flat No. 401 and 1002. It is important to keep in mind that MOUs are similar to Buy Back Agreements, for which the Financial Creditor is given an Assured Return and Bank EMIs at the MOUs completion after three years. It is denied that the Corporate Debtor extended the deadline for settling any outstanding sum. On the other hand, the lock-in clause was included to give the Corporate Debtor a minimum of two years to



return the invested money to the Applicant along with promised returns.

- e) In lieu of the return on investment, the Respondent had sent a cheque of Rs. 11,13,916/- (Rupees Eleven Lakh Thirteen Thousand Nine Hundred Sixteen Only) to the Applicant. The said cheque was dishonoured at the time of presentation, and despite numerous requests, the said payment was not cleared by the Respondent.
- f) The Corporate Debtor has not made any payments to the Bank on behalf of the Financial Creditor in order to shield that Applicant from the severe consequences. It is underlined that the Corporate Debtor has failed to make payments toward the debt because the Financial Creditor has already paid the whole amount owed to it under the MOU. It is important to note that the Financial Creditor is covered by the Insolvency and Bankruptcy Code, 2016, read in with the judgment of the Hon'ble Nation Company Law Appellate Tribunal's ruling in the case of *Nikhil Mehta & Sons v. AMR Infrastructure Ltd. in Company Appeal (AT) (Insolvency) No. 07 of 2017*. The Corporate Debtor's argument is misconceived, flawed, and rejected. It is asserted that there has never been any subrogation of rights.

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- g) It is disputed that the Application filed by the applicant falls within the grab of Ravi Mahajan v. Sunrise 14 A/S Denmark. It is claimed that the Hon'ble NCLT in the aforementioned matter denied the Financial Creditor's appeal on the grounds that no documentation supporting the default had been provided. In contrast, in the current instance, the documentation supporting the default is readily available and has been recorded. It is argued that the consent given by the Ld. Interim Resolution Professional in accordance with sub-rule (1) of Rule 9 of the Insolvency and Bankruptcy Code, 2016, is complete and that it discloses the necessary information required by Clause 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulation, 2016, and is hereby prima facie is incomplete.
- h) It is important to note that the current power of attorney has been properly stamped and is not a fake or fabricated document. A notarized power of attorney is presumed to be valid under Section 85 of the Indian Evidence Act of 1872. In accordance with the legislation, the Power of Attorney Holder's signature is not required on the Power of Attorney, it is argued before this Adjudicating Authority.



7. The Respondent has filed an additional affidavit *vide* Diary No. 2836/2019 dated 04.12.2019 and states that the Applicant is a genuine home buyer. The Applicant recently purchased five (5) flats from the promoter of the Corporate Debtor in SNG Shree Enclave project at Niwaru Road, Jhotwara. The said flats belong to M/s Parth Infratech Private Limited which is a sister concern of the Corporate Debtor. It clearly establishes that the Applicant is a home buyer. The registered sale deeds of the said flats are also on record.
8. The Respondent further sought permission *vide* order dated 20.12.2021 from this Adjudicating Authority to file the order of Hon'ble Debt Recovery Tribunal in the matter of State Bank of India vs Union Bank of India, order of Hon'ble Real Estate Regulatory Authority in the matter of Home Buyers Vs SNG Real Estate Private Limited & Ors. and Hon'ble High Court of Rajasthan in the matter of Union Bank of India Vs RERA & Ors. The compilation of orders has been filed by Respondent *vide* Diary no. 417/2022 dated 15.02.2022.
9. The Respondent filed an IA(IBC) No. 338/JPR/2023 under Section 340 of the Criminal Procedure Code, 1973 read with Section 195 of the Indian Penal Code, 1860 to take cognizance against the accused for committing the offence of perjury by filing the forged, fabricated documents/power of attorney.



10. The Respondent further filed an additional Affidavit *vide* Dairy No. 1613/2023 dated 30.06.2023 in order to place on record the complaint filed before the Hon'ble Real Estate Regulatory Authority wherein the Applicant is claiming himself an allottee of the Corporate Debtor. Copy of the Complaint No. 5621/2022 annexed as Annexure-1 of the additional Affidavit.

11. The Respondent has filed written submissions *vide* diary No. 1619/2023 dated 10.07.2023 that state the following:

a. The Respondent submitted that the Applicant is failed to satisfy the minimum threshold criteria provided under Section 7(1) of the Code, 2016 which states that Financial Creditors who are allottees under a real estate project shall be filed an Application for initiation of CIRP 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.

b. The Respondent further submits that there is subrogation of debt and there cannot be two creditors for the same set of debt. The Respondent also relied on the following Judgements:

I. Ajay Walia Vs Sunworld Residency NCLT Allahabad-order dated 30.07.2018



II. Nupur Archila Vs Mantri Developers NCLT Bangalore-order dated 24.03.2021

III. Surendra Sharma vs M/s Mantri Developers (P) Ltd. NCLT Bangalore-order dated 27.04.2021

- c. The Respondent states that there is no default on the date of filing the Application therefore there is no cause of action arises if the debt was not due and payable.

12. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the debt fell due in 2017, and the Application was filed before this Adjudicating Authority in 2018. Hence, the period of three years after the default occurred had not been exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.

13. The Applicant entered into two Memorandum of Undertakings with the Corporate Debtor on 08.03.2016 for the purchase of flat no. 1002, 10th floor admeasuring 2217 sq. feet, and Flat no. 401, 4th floor admeasuring 2243.50 sq. feet in the project of the Corporate Debtor namely 'Sunrisers' for a sale amount of Rs. 2,06,19,208/- (Rupees Two Crore Six Lakh Nineteen



Thousand Two Hundred Eight Only) for flat no. 1002 and Rs. 2,08,65,671/- (Rupees Two Crore Eight Lakh Sixty-Five Thousand Six Hundred Seventy-One Only) for flat no. 401 respectively. The Applicant/Financial Creditor mentions that in terms of MOUs signed between the parties, he is not a homebuyer but an investor/Financial Creditor. In order to support his argument, the Applicant draws the attention of the Bench to the Return-on-Investment Clause of the MOUs which reads as follows:

Relevant extract of Return-on-Investment clause in MOU of flat no. 1002 is reproduced herein below: -

“1. That the first party to this MOU will pay the return on investment on the above-mentioned residential flats @22% p.a. (Rs. 26,02,600/-) on yearly basis continuing till three years on the total invested amount of (Rs. 1,18,30,000/-) Payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly Bank EMI.

Calculation of yearly return on investment amount is as under: -

a) 22% on Invested Amount (Rs. 1,38,30,000) i.e., Rs. 26,02,600 Bank Instalment i.e., Rs. 14,64,324 p.a. + Net Return on investment amount i.e., Rs. 11,38,76/-

b) Bank instalment means:

*EMI of SBI Bank Rs. 1,22,027 X 12 Months + Rs. 14,64,324/- p.a.
(Bank Instalment) ”*

Relevant extract of Return-on-Investment clause in MOU of flat no. 401 is reproduced herein below: -

“1. That the first party to this MOU will pay the return on investment on the above-mentioned residential flats @22% p.a. (Rs. 25,46,500/-) on yearly basis continuing till three years on the total invested amount of (Rs. 1,15,75,000/-) Payable to the second party or as per the terms and conditions mentioned in this MOU. Above amount of return on investment is inclusive of monthly Bank EMI.

Calculation of yearly return on investment amount is as under: -

a) 22% on Invested Amount (Rs. 1,15,75,000) i.e., Rs. 25,46,500 Bank Instalment i.e., Rs. 14,32,584 p.a. + Net Return on investment amount i.e., Rs. 11,13,916/-

b) Bank instalment means:

*EMI of SBI Bank Rs. 1,19,382 X 12 Months + Rs. 14,32,584/- p.a.
(Bank Instalment) ”*

14. The Applicant/Financial Creditor claimed that he is not a homebuyer but an investor in view of the aforementioned Return on Investment clause of the MOUs. However, in addition to the MOUs a Tripartite Agreement has been executed between the Applicant, Corporate Debtor, and State Bank



of India/Bank which states that the party at the first part and the party at the second part Applicant and Corporate Debtor herein have requested the Bank to disburse the loan to the Applicant to purchase the flats in the project of the Corporate Debtor namely Sunrisers.

15. Additionally, the Applicant relied on the judgment of *Nikhil Mehta and*

Sons Vs AMR Infrastructure Ltd. (supra) wherein it was held that:

“20. From the aforesaid agreement/Memorandum of Understanding it is clear that appellants are "investors" and has chosen "committed return plan". The respondent in their turn agreed upon to pay monthly committed return to investors. Thus, the amount due to the appellants come within the meaning of 'debt' as defined in Section 3(11) of the I & B Code' which reads as follows: —

"(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;"

16. However, on the contrary in the present case the Applicant and the Corporate Debtor entered into MOU for the purchase of flat no. 1002, 10th Floor admeasuring 2217 sq. feet and flat no. 401, 4th Floor admeasuring 2243.50 sq. ft. in the project named Sunrisers for an aggregate sale amount of Rs. 2,06,19,208/- (Rupees Two Crore Six Lakh Nineteen Thousand Two Hundred Eight Only) and Rs. 2,08,65,671/- (Rupees Two Crore Eight Lakh Sixty-Five Thousand Six Hundred Seventy-One Only) respectively.

17. 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 MOUs



entered between the parties on 08.03.2016. It states that a sale agreement has been executed in favour of the Applicant for the purchase of the flats in the project of the Corporate Debtor for which advance payment has been made through a Bank Loan from the State Bank of India. Besides that, it is an undisputed fact that the Applicant himself unequivocally confirms that he had purchased and was allotted two flats in the project of the Corporate Debtor 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;”

18. Moreover, an agreement to the sale had been executed on 09.11.2015 between the Applicant and Corporate Debtor for the sale of the said flats in a project named Sunrisers wherein the Applicant referred to as Allottee.
19. Apart from that it is seen from the records that the Applicant has also filed a complaint *vide* complaint no. RAJ-RERA-C-N-2022-5621 before the Hon’ble Real Estate Regulatory Authority, Jaipur in the capacity of an allottee wherein the Applicant seeking possession of unit no. 1002 and 401 in the said project.



20. 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, —

- 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);*

21. 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.]”

22. 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 03.05.2018 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.

23. 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.

24. 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.”

25. 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.

26. Keeping in view the ratio of the aforementioned Judgment and having regard to the terms and conditions of the Memorandum of Understanding and the Tripartite Agreement 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.



27. 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.

28. Accordingly, in the circumstances, CP No. (IB) 431/(PB)/2018 is dismissed as rejected.

IA No. 338/JPR/2023

The Corporate Debtor filed this IA under Section 340 of the Criminal Procedure Code, 1973 read with Section 195 of the Indian Penal Code, 1860 to take cognizance against the accused for committing the offence of perjury by filing the forged and fabricated documents.

In light of the foregoing, this Interim Application is infructuous and is disposed of accordingly.

**-Sd-
DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

**-Sd-
ATUL CHATURVEDI,
TECHNICAL MEMBER**