

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-V

COMPANY PETITION NO. (IB)-730/ND/2022

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF:

1. SUNIL MUDGAL

S/o J. R. Mudgal

...Petitioner No. 1 (Financial Creditor)

2. POOJA RANJAN

D/o Lt. Col M.R. Prasad

...Petitioner No. 2 (Financial Creditor)

Both residing at: V-07, .
Pearl Marjorie, 141/1-2,
Varthur Main Road, C V
Raman Nagar, Bengaluru –
560 093

VERSUS

**M/s S AND N LIFESTYLE INFRAVENTURES
PVT. LTD.,**

Having its registered office at: G-40, Ground Floor,
Gaurav Apartments, Saket,
New Delhi – 110 017.

...Respondent/Corporate Debtor

Order Pronounced on: 22.03.2024

CORAM

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT

For the Applicant : Ms. Neha Mathen, Adv

For the Respondent : Mr. Arun Saxena, Ms. Nalini, Adv.

ORDER

PER: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

1. The instant application is filed by Mr. Sunil Mudgal S/o J. R. Mudgal and Mrs. Pooja Ranjan D/o Lt. Col M.R. Prasad (hereinafter referred as 'Petitioners/Financial Creditors/Applicants') both residing at V-07, Pearl Marjorie, 141/1-2, Varthur Main Road, C V Raman Nagar, Bengaluru – 560093 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code/IBC') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process against M/s S and N Lifestyle Infraventures Pvt. Ltd, (for brevity "Corporate Debtor/Respondent").
2. The Respondent Company M/s. S and N Lifestyle Infraventures Pvt. Ltd, (CIN No. U45200DL2008PTC182273) was incorporated on 21.08.2008 under the provisions of the erstwhile Companies Act, 1956 having its registered office situated at G-40, Ground Floor, Gaurav Apartment, SFS DDA Flats, Saket, New Delhi 110017. Since the registered office of the

respondent corporate debtor is in New Delhi, this Tribunal which has territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

3. The details of transactions leading to the filing of this petition as averred are as follows: -

a) Applicants submitted that the Petitioners herein became aware that the Respondent was contemplating the development of Group Housing Project at The Highlands – “Aures Valley” at village Challang, Rajpur Road, Dehradun, Uttarakhand (for brevity ‘Project’). Pursuant to the representations of the Respondent and its reputation as an accomplished construction company, the Petitioners and the Respondent entered into a Memorandum of Understanding (‘MoU’) dated 1 November 2014, whereunder the Petitioners invested a total sum of INR 1,00,00,000/- (Rupees One Crore only) in the Project as consideration for the time value of their money.

b) Applicants further submitted that as per Clause 6 of the MoU, the investment made by the Petitioners was to remain ‘locked-in’ for a

period of four years (i.e., upto 1 November 2018). Thereafter, upon completion of the lock-in period, as per Clause 7 of the MoU, the Petitioners were unconditionally guaranteed payment of a minimum amount of INR 2,00,00,000/- (Rupees Two Crores only) as a return for the time value of money advanced by the Petitioners to the Respondent. Further, Clause 8 of the MoU provided that in the event that the Respondent was not able to pay the guaranteed amount of INR 2,00,00,000/- (Rupees Two Crores only) to the Petitioners, the Respondent would transfer a parcel of land of 800 sq. meters bearing khasra number 744 Kha in Village Challang, owned by it and its Director to the Petitioners.

c) Further the Applicant submitted that on 18 April 2017, the Petitioners received an email from the Respondent, updating them on the progress made in the Project. It was stated that due to various reasons, the real estate market was negatively affected and that consequently, the Project would be delayed indefinitely. Further, the Respondent specifically noted that the date of expiry of the lock-in period under the MoU was fast approaching. Accordingly, the Petitioners were offered the following three options to recoup their investment:

- i. The payment of INR 3,00,00,000/- (Rupees Three Crores only) upon an additional 18 months from the maturity date, i.e., in May 2020;
 - ii. The payment of INR 2,00,00,000/- (Rupees Two Crores only), upon the original maturity date on 1 November 2018; or
 - iii. The payment of the principal amount of INR 1,00,00,000/- (Rupees One Crore only) only upon the original maturity date on 1 November 2018, and a payment of the return amount of INR 1,60,00,000 (Rupees One Crore and Sixty Lakhs only) on 1 November 2019.
- d) Applicants submitted that through email dated 27 December 2017, the Petitioners opted for payment of INR 2,00,00,000/- (Rupees Two Crores only) upon the date of maturity (1 November 2018) and requested the Respondent to change the maturity date to 1 April 2018 instead. However, the Respondent did not acknowledge or reply to the said email, despite multiple reminders being issued by the Petitioners vide their emails dated 4 January 2018 and 14 January 2018.
- e) Applicant submitted that since there was no communication from the Respondent regarding the payments due to the Petitioners under the MoU, the Petitioners were constrained to issue a legal

notice dated 14 December 2021 to the Respondent, calling upon it to comply with the following within 15 days from the date of receipt of the said notice:

- i. To pay the Petitioners a sum of INR 2,00,00,000/- (Rupees Two Crores only) within a period of 15 days from the date of receipt of the notice;
 - ii. To pay the Petitioners interest at the rate of 18% per annum for the amounts that have remained outstanding, from the date when the amounts became due until the date of repayment (As on the date of the issuance of the legal notice, this sum was quantified at INR 1,08,00,000/- (Rupees One Crore and Eight Lakh only)).
- f) Applicant submitted that no response has been received from the Respondent to the said legal notice. Till date, despite the Petitioners having invested the sums mentioned above, the Respondent has failed to pay the debt due to the Petitioners in terms of the MoU. In the circumstances, the Petitioners are filing the present application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('the Code'). The Petitioners are financial creditors of the Respondent, having paid consideration to the Respondent for the time value of

their money, and as such, are entitled to file the present application before this Adjudicating Authority.

g) Applicant submitted that the cause of action for the present application arose on 1 November 2018, when the payment of INR 2,00,00,000/- by the Respondent to the Petitioners (in terms of Clause 7 of the MoU) became due. The cause of action is a continuing one and continues for each day that the Respondent fails to make payment to the Petitioners. Further, by virtue of the order dated 08.03.2021 passed by the Hon'ble Supreme Court in *Suo Moto Writ Petition (Civil) No. 3 of 2020, In Re: Cognizance for Extension of Limitation*, the period from 15.03.2020 till 14.03.2021 stands excluded for the purpose of limitation. Therefore, the present application has been filed well within the period of limitation.

h) Further the Applicants submitted that no proceedings in respect of the same cause of action are pending before any other court or Tribunal.

4. The Corporate Debtor has filed its reply/written submissions and has raised objection against the petition as below: -

a) Respondent submitted that the Petitioners have filed the present application on the basis of alleged default by the Respondent of the

terms of the MOU dated 01.11.2014, which is at page No. 21-25 of the application entered between the Applicant and the Respondent. The subject matter of the agreement was the purchase of 5% share by the Applicant in the housing project at 'The Highlands, Aures Valley, Village Challang, Rajpur Road, Dehradun', which was to be developed by the Respondent herein within a period of 4 years from the date of the execution of the MoU.

- b) Further the Respondent submitted that as per clause 7 of the MoU, the said investment was to be capitalized with at least Rs. 2,00,00,000/- (Rupees Two Crores Only) as return on investment. Also, clause 9 of the MoU mentions that upon the completion of the project and capitalization of the 5% share investment in the project, the Respondent herein shall pay an amount of Rs. 3,50,00,000/- (Rupees Three Crores and Fifty Lakhs Only) comprising of amount of investment and 5% profit in project, pro-rated to share of the applicants herein.
- c) It is further submitted by the Respondent that as per the MoU, the investment of the Applicants herein shall subsist and the applicants shall be the shareholder in the project till capitalization of investment, by the Respondent.

- d) Further the Respondent submitted that as per the MoU, if the Respondent fails to complete the project within the period of 4 years as mentioned hereinabove; the applicant has the right to retain the 5% share in the Project so invested for additional period. Also if the project is not completed in the additional period, than as per clause 13 of the MoU, further period of 3 months may be granted to the Respondent to complete the project. However for the extension of 3 months, the Respondent had to pay an additional interest of 1.5% over and above amount payable in terms of clause 6 & 7.
- e) The Respondent submitted that as per clause 13 of the MoU, if after the expiry of the additional grace period, the Respondent fails to capitalize the investment of the Applicant, the Respondent shall have to transfer land equal to the total amount of capitalization, to the Applicant. The said clause 13 of the MoU, prima facie shows that since the applicant has invested 5% share in the Project which does not falls under the definition of financial debt u/s 5(8) of IBC as no amount was due as on date of filing of the Application. Therefore, the present application is not maintainable and is liable to be dismissed.

- f) Further the Respondent submitted that the amount has been invested by the applicants in the project on the premise that the return on investment will be given to the applicant post the development of the project. Further if the investment is not capitalized, then the Applicant is entitled for equal portion of land and the land will be transferred by the Respondent. Therefore, amount invested in the equity share in terms of the Agreement does not fall under the definition of term 'Financial Debt' given in Section 5 (8) of the IBC.
- g) Respondent submitted that the amount invested by the Applicant cannot be said to be due within the provisions of the IBC. The Respondent is therefore, not a Corporate Debtor in terms of section 5(7) of IBC. Hence claiming of any amount by the Applicant against the Respondent is not maintainable.
- h) Respondent submitted that the transaction in the agreement dated 01.11.2014 does not fall under the definition of financial debt u/s 5(8) of IBC, Therefore, the applicant is not a Financial Creditor. Therefore, it is respectfully prayed that the application is liable to be dismissed.
- i) Further, the Respondent submitted that the interest amount claimed by the Applicants is false and misrepresented. The

existence of such interest is vehemently denied by the Respondent as it is merely an unjust manner of recovery sought by the applicant. The interest amount is without any evidence and without the consent and knowledge of the Respondent, the amount of interest is not recoverable by the Applicant and eventually no liability is due on the part of Respondent. Therefore, the applicant is misleading this Hon'ble Tribunal by filing false and frivolous claim of interest.

5. The applicant submitted a rejoinder/written submission wherein averments made by the corporate debtor in the reply were denied and it was stated that –

a) Applicant submitted that the aforesaid sum was invested by the Petitioners as consideration for the time value of money. This is clear from Clause 7 of the MOU, by which the Respondent had guaranteed that it would capitalize the Petitioners' equity share in the Project and the Respondent had also given an unconditional guarantee to pay a minimum amount of INR 2,00,00,000/ to the Petitioners on the completion of the lock-in period (which was for a period of 4 years from the date of the MOU, i.e., 01.11.2018). It is evident that the guarantee extended by the Respondent regarding the capitalisation of the Project/payment of minimum amount of

INR 2,00,00,000/- was not contingent on the completion of the Project, but was linked to the completion of the lock-in period only.

- b) Applicant further submitted that the Petitioners were granted 5% equity share in the Project vide the MOU, the primary purpose of the Parties' contract was to provide assured returns to the Petitioners by capitalising their equity share in the Project (as specified in Clause 7 of the MOU), This is also supported by Clauses 8 and 9 of the MOU, which make it clear that capitalisation of the Petitioners 5% equity share investment in the Project, and in any event, the payment of the minimum guaranteed amount to the Petitioners was the default option under the MOU. In fact, Clause 10 of the MOU clearly provides that it was the sole responsibility of the Respondent to capitalize the equity share of the Petitioners in the Project and that the Respondent shall be liable to pay back the Petitioners as per Clauses 7 and 8 Of the MoU. Thus, the MoU was a transaction by which the amounts that were raised by the Respondent had the commercial effect of a borrowing. The Respondent was bound to pay the said sums to the Petitioners, along with interest (as per Clauses 7 and 8 of the MOU) upon the completion of the lock-in period, for the time value of money advanced by the Petitioners. It is submitted that the

Respondent did not have the right to indefinitely hold on to the Petitioners' investment in the Project without capitalizing the same.

c) Further the Respondent submitted that, as per Clauses 12 and 13 of the MOU, it was only in the event that the Respondent failed to implement the Project within the specified lock-in period that the Petitioners had the choice to retain their equity share in the Project for an additional period. If the Respondent nevertheless failed to capitalize the Petitioners' investment within the additional grace period, it was bound to transfer land to the Petitioners. Thus, the transfer of land to the Petitioners was not the default option under the MOU and instead, it was the capitalisation of the Petitioners' investment in terms of Clauses 7 and 8 of the MOU.

d) Further the Respondent submitted that the amount extended by the Petitioners to the Respondent squarely falls within the definition of Section 5(8) of the Code. The Respondent's reliance on certain provisions of the MOU to contend that the amounts had been invested by the Petitioners only on the premise that the return will be given after the development of the Project and that the Applicant was entitled to transfer of land by the Respondent under the MOU, thereby rendering the amounts beyond the scope of a

Financial Debt' under Section 5(8) of the Code, is entirely misplaced and incorrect.

e) Respondent submitted that the MOU envisaged that the Respondent would pay interest at the rate of 1.5% per month (i.e., 18% per annum) on the 'payments due to the Petitioners in the event that it failed to capitalize the Petitioners' equity share investment in the Project within the agreed lock-in period. Accordingly, interest has been claimed at the rate of 18% p.a. in the present application and it is denied that the interest is false and misrepresented or without evidence. In any event, even if the interest claimed by the Petitioners is excluded from consideration, the default on behalf of the Respondent is above the threshold of INR 1,00,00,000/- stipulated for the initiation of corporate insolvency resolution process under Section 7 of the Code. Thus, the Respondent's objection as to the interest claimed is entirely untenable and liable to be rejected.

Analysis and Findings

6. We have heard Ld. Counsel for both the parties and perused the contents in the application, reply and rejoinder and also written submissions filed by the parties. The relevant documents annexed with the submissions have also been examined.

7. We have to consider following issues:

- i. Whether the parties have entered into contingent or forward sale agreement?
- ii. Whether the amount claimed by the Applicants became due and as per Part IV of Application amounting to Rs. 3,38,00,000/- is a financial debt under section 5 (8) (f) of IBC?
- iii. Whether the Applicant falls in the category of Financial Creditor as per Section 5 (7) of I & B code?

Issue i : Whether the parties have entered into contingent or forward sale agreement?

8. The Applicants and Respondent entered into the MoU on 01.11.2014 which is an admitted document. According to applicants, a sum of Rs 1,00,00,000/- was paid to Respondent on condition that Respondent will give 5% equity in the Housing Project of Respondent in Dehradun. After four years (lock in period) from signing the agreement Respondent will capitalize or purchase the equity holding in project from applicant and will repay at least Rs 2,00,00,000 and total sum of Rs. 3,38,00,000 comprising of repayment and 5% profit in the Project as per equity holding on pro-rata basis. In case the respondent fails to repay, a grace period of 3 months will be given to Respondent by mutual agreement between the parties' subject to payment of interest @1.5% on remaining

amount payable by the end of 4 years. After the grace period if any dues are remaining or respondent fails to capitalize Applicant's equity, then Respondent will be bound to transfer land equivalent to the total payable amount as per market rate to the applicant, such land being fully paid-up and freely transferable.

- 9.** It is clearly stated in the Clause 1 of said MoU that the subject matter of the MoU was purchase of 5% equity share by the Applicant in the housing project of Respondent at The Highlands, Aures valley, Dehradun. The clause 5 of the said MoU states that the amount has been paid by the Applicants to the Respondent favouring M/s. S and N Lifestyle Infraventures Pvt. Ltd. towards 100% payment in respect of 5 percent equity share in the said Project. That, Respondent represents and the Applicant agrees that the estimated period required for execution, completion and handing over of Project is 4 years.
- 10.** Therefore, we are not convinced by Applicant's contention that Applicants advanced a loan to the Corporate Debtor to enable construction for commercial sale of their housing project at The Highland, Aures Valley, Village Challang, Rajpur Road, Dehradun for a consideration of Rs 1,00,00,000/-. We have examined the terms and conditions of the MoU to understand the intention of parties. On reading the MoU in entirety it was manifestly clear that the MoU is a sale

agreement with settled base return and profits amounting to contingencies with a maximum ceiling. The clause 7 of the MoU extracted as below:

7. That, the First Party and Second Party agree that on completion of the Lock-in period, the First Party gives a guarantee to capitalise the Second Party's equity share in the Project and pay the Second Party his investment and profit in the project pro-rated to his equity share. The First Party gives an unconditional guarantee to the Second Party that the minimum amount paid back as return of capital and profit shall in any condition, be not less than Rs. 2,00,00,000/- (Rupees Two Crores Only).

Issue ii : Whether the amount claimed by the applicant became due and as per Part IV of Application amount of Rs. 3,38,00,000 is a 'financial debt' under section 5 (8) (f) of I & B code?

Issue iii: Whether the Applicant falls in the category of Financial Creditor as per Section 5 (7) of I & B code?

11. While determining both Issue ii and Issue iii together, on bare perusal of Section 5 (7) of Insolvency and Bankruptcy code "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 ;

12. Section 5 (8) "financial debt" 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;

(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);]

13. We are of the view that the debt claimed by Applicant i.e against the investment of Rs 1 crore, claiming Rs 3.38,00,000 as principle and interest is a Lucrative Agreement Situation. Moreover, in event of Non-payment by Respondent, Applicant has secured his interests as per clause 12 of agreement, by way of transfer of land by respondent to applicant for amount payable as per the market value.

14. Here it would be pertinent to refer to the judgment of Hon’ble NCLAT in the case of **Ankit Goyal vs. Sunita Agarwal [Company Appeal (AT)(INS) No. 1020/2019]** wherein it was held that *“in a situation where the allottee seeks to benefit from a “lucrative agreement” when he is “securing” his money by way of the agreement which gives him a lien over the flat/s, he cannot be considered a financial creditor but is a speculative*

investor who cannot be given benefit as a financial creditor under section 5(8)(f) of the IBC.”

- 15.** We would like to refer to the judgement by Hon’ble Supreme Court of India in the matter of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. vs Axis Bank Ltd. & Ors [(2020) 8 SCC 401]** wherein it was held that:

“.....what is intended by the expression “financial creditor” is a person who has direct engagement in the functioning of the corporate debtor ; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganization of corporate debtor’s business when there is financial stress. Hence, a financial creditor is not only about in terrorem clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically interwoven with the well-being of the corporate debtor”

- 16.** Hon’ble NCLAT in **Sudha Sharma vs Mansi Brar and Anr. [Company Appeal (AT) (INS) No. 83 of 2020]** emphasized:

“that money deposited/invested for speculative purpose does not entitle a person to take advantage of clause (f) of section 5(8) and be considered a financial creditor by virtue of being an allottee of a housing unit/flat.”

- 17.** Also the subsequent order of Hon'ble Supreme Court in **Mansi Brar Fernandes versus Sudha Sharma and Anr. [Civil Appeal No. 3826/2020]** which affirms the order of appellate Tribunal in the matter of **Nidhi Rekhan vs M/s Samyak Projects Private Limited, Company Appeal (AT) (Ins) no 1035 of 2020** stating that: *“the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A-1201 and E-1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a “financial creditor” as defined under explanation of section 5(8)(f) of the IBC.”*
- 18.** After perusing clause 12 of the MoU between the parties, it is observed that the applicant is entitled to the transfer of land in their name if the Respondent fails to return the total amount equal to the capitalized investment amount as mentioned in the MoU. Therefore, it cannot be said that there is an amount due and payable by the respondent to the applicant. Hence, default as per the MoU, which entails transferring the land to the applicants, does not give rise to a claim under the IBC since there is no consideration for the time value of money, and therefore it does not fall within the ambit of any of the clauses enumerated under

section 5(7) and section 5(8) of the IBC. The clause 12 of the MoU extracted as below:

12. In case, the First Party fails to implement the project within the agreed lock-in period, then, the Second Party may choose to retain his/ her equity in the project for an additional project period and any additional profits generated by the project owing to the additional project period shall be shared with the Second Party prorated to his/her equity share.

- 19.** Further, we are of the view that the status of “Financial Creditor” cannot be accorded to a person who, in the garb of a lender comes in the project as a speculative investor and for mere recovery of monies files exorbitant claims. Therefore, the benefit of section 5(8)(f) of IBC will not enure in his favour and the amount claimed in Part IV of the application doesn’t amount to become Financial Debt as per code.
- 20.** Therefore, the present application filed under section 7 of the IB Code 2016 against the corporate debtor is not maintainable.
- 21.** In the light of the above, we are of the view that, this application cannot be admitted and is hereby dismissed.

Let copy of the order be served to the parties

Sd/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)