

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI COURT III**

**IA-3326/2022  
In  
IB-224(ND)/2022**

**Under Section 7 of the Insolvency and Bankruptcy Code, 2016**

**In the matter of:**

M/s. Golden Heritage Promoters Pvt. Ltd. ...Financial Creditor

Vs.

M/s. ALM Infotech City Pvt. Ltd. ...Corporate Debtor

**Judgment delivered on: 01 .03.2023**

**Coram:**

**SHRI BACHU VENKAT BALARAM DAS  
Hon'ble MEMBER (JUDICIAL)**

**SHRI ATUL CHATURVEDI  
HON'BLE MEMBER (TECHNICAL)**

For the Applicant :


For the Respondent :

**ORDER**

**Per: BACHU VENKAT BALARAM DAS, MEMBER (J)**

**IA-3326/2022:-**

1. The Applicant in this IA is the Corporate Debtor in Company Petition 224/ND/2022, filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 by Golden Heritage Promoters Pvt. Ltd., (Financial Creditor). The Applicant is seeking dismissal of the Section 7 petition on the ground of maintainability.


- 
2. It is submitted that the Financial Creditor herein claimed an amount of Rs. 2,74,56,332/- (Rupee Two Crore Seventy-Four Lakhs Fifty-Six Thousand Three Hundred and Thirty Two only) including interest @ 21% compounded at monthly rate and payable quarterly under the captioned petition.
  3. That two Sale Agreements were executed between the Applicant/Corporate Debtor and Financial Creditor dated 30.01.2017 inter alia two units in the ILD Grand Complex were allotted to Financial Creditor, namely 10-B on the 10th Floor, area 1820 Sq. Ft. and 12-C on the 12th Floor, area 1790 Sq. Ft. as security interest.
  4. That two Buy Back Agreements, were also executed between the Applicant/Corporate Debtor and Financial Creditor dated 30.01.2017, whereby the Corporate Debtor were to buyback the allotted units and all rights thereunder for a sum of Rs. 49,50,000 (Rupees Forty Nine Lakh Fifty Thousand Only) per unit, total of Rs. 99,00,000 (Rupees Ninety Nine Lakh Only ).
  5. The Applicant has submitted that the Financial Creditor herein is a single home buyer and in view of the law laid down by the Hon'ble Supreme Court of India in the case of **“Manish Kumar vs. Union of India; (2021) 5 SCC1”** wherein it has been held that a single home-buyer is barred to approach this Hon'ble Tribunal under Section 9 of the Code. The Hon'ble Supreme Court has also held that the amendment to the Code passed by the Parliament in March 2020, is constitutionally valid, which requires no less than 100 or 10% home-buyer to initiate insolvency against a builder or a developer. Therefore, in view of the law laid down by the Hon'ble Supreme Court, the home-buyers are required to approach this Tribunal with a joint application of atleast 10% or 100% of the total home-buyers of a project and in case the number of home-buyers is less than that, the application should be dismissed.
  6. The relevant portion of the amended provision is reproduced below:

IA-3326/2022

In

IB-224(ND)/2022

Date of Order: 01.03.2023



**"7. (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.**

**Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating 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 per cent 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 per cent 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.]"***

7. The Ld. Counsel appearing for the Applicant has referred to Para III of the Buy Back Agreement dated 30.01.2017 entered into M/s ALM Infotech City Private Limited (Corporate Debtor) and M/s. Golden Heritage Promoters Private Limited (Financial Creditor) which reads as follows:

*The Developer has assured the Allottee that there will be steep rise in the price of said Units/Properties in near future. In order to give weight to its assurance, the Developer has entered into this buyback Agreement with the Allottee, whereby the Allottee may, after expiry of 12 months from the date of execution of this agreement, ask the Developer to buyback the said flat and buyback all the rights of the Allottee in the said flats. In such a situation the Developer shall, within 30 days of the receipt of the written notice from the Allottee, pay to the Allottee a sum of Rs 49,50,000/- (Rupees Forty Nine Lakh Fifty Thousand Only) towards repayment as full and final payment of all the rights, interests, claims of the Allottee in the "said Area". However, it is agreed that the Allottee shall exercise this buy back option within a period of one month after the expiry of the aforesaid period.*

8. According to the said clause, the allottee has the option to buy back the unit within a period of one month of giving a written notice but in this IA-3326/2022 the allottee has not exercised that option.

9. The Ld. Counsel for the Applicant has also referred to various clauses of the Sale Agreement dated 30.01.2017, entered into between the Corporate Debtor and the Financial Creditor which are as follows:-
- a) Clause 1 states that “the developer acknowledges the receipt of Rs. 49,50,000/- (Rupee Forty Nine Lakh Fifty Thousand Only) including service tax from the allottee as booking amount of the said units in the said complex/building.
  - b) In clause 2 of the said agreement, it is stated that “the developer hereby confirms the allotment of above said unit in the said complex for total sales consideration of Rs. 49,50,000/- (Rupees Forty Nine Lakh Fifty Thousand only) plus applicable service tax and agreed that balance consideration will be paid before possession.
  - c) In clause 3 of the agreement, it is stated that the allottee(s) will be entitled to the ownership rights of the said unit except the common areas of ILD Grand Gurgaon including common passages, entrance, corridors, staircase etc.
  - d) Clause 4 of the said agreement states that on obtaining possession of the units, the allottees shall be responsible for payment of electricity/water bills directly to the concerned department in respect of consumption of electricity/water.
10. The Ld. Counsel further submitted that the Applicant is a single home-buyer and therefore, the present petition filed by a single home-buyer is not maintainable and liable to be dismissed.
11. The Respondent (Financial Creditor) has filed a reply affidavit denying the allegations/averments made in the application. It is submitted that the Applicant is not a home-buyer. The status of the Respondent is that of a Financial Creditor since he has advanced interest bearing loan to the Corporate Debtor and the Corporate Debtor has defaulted in discharging his loan to pay the amount to the Financial Creditor. Therefore, the present petition under Section 7 is maintainable.

- 
12. The Corporate Debtor had executed an Agreement for repayment of loan amount and release of security along with the Agreement vide which finance facility was provided, and it is therefore, quite evident that the intention behind executing 2 (two) Sale Agreements was never to sell the Units to the Financial Creditor in the Property developed by the Corporate Debtor. The execution of Agreement to release the security at the time when the repayment of loan by the Corporate Debtor would take place to the Financial Creditor speaks volumes about the intention of the parties, which it always was to enter into a loan borrowing agreement.
13. It is pertinent to reiterate here that the Corporate Debtor had acknowledged its liability to pay an amount of Rs. 1,18,00,000 (Rupees One Crore Eighteen Lakh only) to the Financial Creditor in its second draft of settlement deed received by the Financial Creditor from the Corporate Debtor on 24.01.2019 vide email (annexed as Annexure Y at Page 101-106 in the FC's Petition) and there was also a proposal from the Corporate Debtor offering a settlement offer to the FC before the Hon'ble Metropolitan Magistrate, Patiala House Court, New Delhi, on 11.07.2022. The repeated proposals of settlement imply that there existed an explicit acknowledgement of liability by the Corporate Debtor of the loan borrowed by it from the Financial Creditor, and it cannot be the case of the Corporate Debtor now to take shelter under averments which were never existent and also never tenable.
14. The Respondent/Financial Creditor also submitted that the Corporate Debtor has acknowledged its liability towards the Applicant to the tune of Rs. 1,18,00,000 (Rupees One Crore Eighteen Lakh only) as per the second draft of settlement deed sent by the Corporate Debtor to the Financial Creditor on 24.01.2019. The Corporate Debtor also made a proposal for settlement on 11.07.2022 before the Hon'ble Metropolitan Magistrate, Patiala House Court, New Delhi which shows that the

Applicant is not a home-buyer and that the present Applicant is trying to mislead the Court by placing wrong facts.

15. We have heard Mr. Sanjeve Bhushan Deora, Ld. Counsel appearing for the Applicant and Mr. Shaunak Kashaya, Ld. Counsel appearing for the Corporate Debtor and perused the records.
16. From the records produced before us and considering the facts and circumstances peculiar to the present case, we observe that the Applicant herein sought benefit from a 'lucrative Agreement' as he is 'securing' his money by way of this Agreement whereby the corporate debtor were to buy back the allotted units and rights thereunder for a sum of Rs.49,50,000/- per unit in regard to two units for which sale agreements were executed between the Applicant herein and the Corporate Debtor. On a perusal of the Buy Back Agreements executed between the Applicant and the Corporate Debtor, we observe that the Applicant is given an assurance of the steep rise in the price of the units for which sale agreement is executed between the parties and Applicant is given an option to retain the apartment or to sell the earmarked units to the Developer after the expiry of period of 12 Months.
17. The relevant Clause 2 and Clause 3 of the Buy Back Agreement dated 30.01.2017 entered between the Financial Creditor and the Corporate Debtor are reproduced herein below:-

*"2. The Developer hereby confirms the allotment of above said unit in said Complex for total sales consideration of Rs 49,50,000/- plus applicable service tax. And agreed that balance consideration will be paid before possession.*

*3. The Developer has assured the Allottee that there will be steep rise in the price of said Units/Properties in near future. In order to give weight to its assurance, the Developer has entered into this buyback Agreement with the Allottee, whereby the Allottee may, after expiry of 12 months from the date of execution of this agreement, ask the Developer to buyback the said flat and buyback all the rights of the*

*Allottee in the said flats. In such a situation the Developer shall, within 30 days of the receipt of the written notice from the Allottee, pay to the Allottee a sum of Rs 49,50,000/- (Rupees Forty Nine Lakh Fifty Thousand Only) towards repayment as full and final payment of all the rights, interests, claims of the Allottee in the "said Area". However, it is agreed that the Allottee shall exercise this buy back option within a period of one month after the expiry of the aforesaid period."*

18. It is pertinent to note that, in a regular Builder Buyer Agreement, the Allottee does not have this option of exercising his choice of taking or not taking the possession of the subject unit. In a normal Builder Buyer Agreement if the Buyer does not accept the possession, the EMD is forfeited. In this case, the Applicant and the Home Buyer had executed two Buy Back Agreement for assured return. Hence, we hold that the Applicant is a Home Buyer who sought to benefit from this 'lucrative Agreement'.
19. The **Hon'ble NCLAT in 'Subha Sharma Suspended Board of Director Vs. MansiBrarFernandes [Company Appeal (AT)(Insolvency) No. 83 of 2020]**, examined the terms of the MoU and observed that at the end of 12 months period, the 'Corporate Debtor' would buy-back the apartments and refund the amount paid together with premium and held that it was a 'lucrative Agreement' for the investor and therefore the Allottee is a 'speculative investor' and set aside the Admission Order of the Adjudicating Authority.
20. We are further persuaded by the Judgement of the Hon'ble Supreme Court in **Manish Kumar (Supra)**, it is a settled preposition of law, that the minimum threshold requirement of allottees as envisaged in Second Proviso of Section 7(1) i.e., *not less than one hundred of such allottees under the same real estate project or not less than ten per cent* should be met at the time of filing the application.

21. In the present case, as observed hereinabove, the present application under Section 7 of the Code, 2016 has been filed on 28.02.2022 by only one alleged Home Buyer claiming to be a financial creditor of the Corporate Debtor who has advanced interest bearing loan to the Corporate Debtor and the Corporate Debtor has defaulted in discharging his loan to pay the amount to the Applicant on the strength of exercising of Buy Back Agreements without fulfilling the threshold criteria as envisaged under Section 7(1) second proviso of the Code, 2016.
22. Having regard to the conspectus of facts and circumstances, we are of the considered view that the applicant herein is a home buyer and therefore at the time of filing the present Application under Section 7 of the Code, 2016 have to meet the very first mandatory criteria of threshold limit as envisaged under Second Proviso of Section 7(1) of the Code, 2016, which is not met in the present Case.
23. Accordingly the Company Petition i.e., IB/224(ND)/2022 being **non-maintainable stands dismissed. The instant Interlocutory Application i.e., I.A./3326/2022 stands allowed.**

**Sd/-**  
**(SH. ATUL CHATURVEDI)**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**(SH. BACHU VENKAT BALRAM DAS)**  
**MEMBER (JUDICIAL)**