IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP (IB) 4149/MB/C-II/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

Abhigyan Developers Pvt. Ltd.

[CIN: U45400WB2007PTC114966]

Reg. Off: 72/4, Shambhu Nath Pandit Street, Kolkata, 700025

Through Authorized Officer:

Mr. Bhaskarmoy Dey

Correspondence Address: Abhigyan Developers Pvt. Ltd., 72/4, Shambhu Nath Pandit Street, Kolkata, 700025

... Financial Creditor/Applicant

Versus

Shreepati Build Infra Investment Ltd.

[CIN: U70109GA2012PLC007213]

Reg Off: Row House D, Castle Rock- Land Scape town, Odxel, Goa, Dona Paul Police Station, North Goa 403004.

...Corporate Debtor/Respondent

Order Delivered on 29.10.2021

Coram:

Hon'ble Member (Judicial)	:	Mr. Ashok Kumar Borah
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor	:	Mr. Ratnanko Banerji, Senior Counsel a/w Mr. Samik Kanti Advocate.
For the Corporate Debtor	:	Mr. Dinyar Mador, Advocate a/w Mr. Shrivalli Kajaria, Advocate.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This is a Company Petition filed under section 7 (“**the Petition”**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Abhigyan Developers Pvt. Ltd.** ("the Financial Creditors"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Shreepati Build Infra Investment Ltd.** ("the Corporate Debtor").

2. The Corporate Debtor was on 29.03.2012 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is

U70109GA2012PLC007213. Its registered office is at Row House D, Castle Rock- Land Scape town, Odxel, Goa, Dona Paul Police Station, North Goa 403004.

Brief Facts of the case:

3. The applicant has entered into an agreement with the Respondent for purchase of flat after the payment of a sum of Rs. 3,50,00,000/- (Three Crore Fifty Lakhs only) in on "Shreepati Estates". However, as all the permissions and/or approvals were not sort properly, the Corporate Debtor was unable to commence the construction for the same. Subsequently, the said amount was converted into a loan account by the Corporate Debtor and the same was to be repaid along with agreed interest.

4. The breakup of payments made by the Applicant (Abhigyan Developers Pvt. Ltd.) to the Respondent (Shreepati Build infra Investment Ltd.) through RTGS is as under:

Sr. No.	**Date**	**Particulars**
i.	21.08.2009	Payment of Rs. 1,00,00,000/- (One crore)
ii.	04.11.2009	Payment of Rs. 50,00,000/- (Fifty Lakhs)

iii.	04.12.2009	Payment of Rs. 50,00,000/- (Fifty Lakhs)
iv.	04.02.2010	Payment of Rs. 1,50,00,000/- (One crore Fifty Lakhs)
Total Sum		3,50,00,000/- (Three Crore Fifty Lakhs only)

5. After recording of the receipt of a sum of Rs. 3,50,00,000/-, the Applicant and the Respondent came under an agreement dated 15.02.2011 for purchase of flats being Flat No. 4201 admeasuring 4232.15 sq. ft. (Built up area) and Flat No. 4202 admeasuring 4694.38 sq. ft. (Built up area) both on 42nd flor of a proposed building named "Shreepati Estate".

6. On 01.04.2012, the Respondent issued a letter confirming the receipt of Rs.3,50,00,000/- in its books of account to the Applicant. Subsequently, on 31.03.2015, a letter was issued by Shreepati Build Infra Investment Ltd. to Abhigyan Developers Pvt. Ltd that in case if the Respondent is unable to obtain requisite permission from the appropriate authorities the entire sum of Rs.3,50,00,000/- (Three Crore Fifty Lakhs only) shall be repaid along with 12% cumulative interest per annum. A Copy of letter is annexed as **"Annexure – F"**.

7. By letter dated 8th July 2016, the Respondent confirmed conversion of payment made towards booking of flat to a loan account and assured the Applicant that the amount shall be repaid with a mutually agreed interest/compression before 30.08.2016. A Copy of letter is annexed as **"Annexure – H"**. However, no payment was received by the Applicant in this regard. On 30th September 2017, the Respondent again admitted the amount due to the Applicant along with the cumulative interest that also remained unpaid, seeking further time to repay the same along with interest. A Copy of letter is annexed as **"Annexure – I"**.

8. On 31.03.2018, the Respondent informed the Applicant through letter confirming that the sum of Rs 3,50,00,000/- received during the period of 2009-2010 is due and would be repaid back with 15% cumulative interest, compounded quarterly from the date of investment till the date of Payment. However, no payment was made till date. A Copy of letter is annexed as **"Annexure – J"**.

9. The table mentioned herein beneath shows the outstanding loan amount along with interest:

Particulars	**Amount**
Principle Sum	3,50,00,000.00

Interest @ 15% per annum compounded quarterly	8,92,34,122
Total	**12,42,34,122/-**

Date of Default as submitted by the Applicants is on **30.08.2016.**

10. The Applicant in his Application has provided with the following documents as Annexures:
    i. Copy of agreement dated 15.03.2011 entered into between Applicant company and Corporate Debtor marked as **Annexure "D".**

    ii. 01.04.2012 Letter issued by Shreepati to Abhigyan confirming the balance lying as credit marked as **Annexure "E"**.

    iii. 31.03.2015 Letter issued by Respondent notifying transfer of advance amount to loan account till project starts marked as **Annexure "F".**

    iv. 08.07.2016 Letter issued by Respondent to Applicant assuring payment along with mutually agreed interest/compensation before 30 August 2016 marked as **Annexure "H"**.

v. 30.09.2017 Letter issued by Respondent admitting the claim amount is still due and further assuring that the sum of Rs. 3,50,00,000/- along with cumulative interest would be repaid along with the interest marked as **Annexure "I".**

vi. 31.03.2018 Letter issued by Respondent to Applicant confirming that the said sum would be repaid back with 15% cumulative interest compounded quarterly marked as **Annexure "J".**

11. The Applicant has relied on the judgement of the Hon'ble NCLAT in ***G. Sreevidhya v. M/s Karismaa Foundations Pvt. Ltd.*** [Company Appeal (AT) (Insolvency) No. 494 of 2018] ***(@paragraph 8 and 9***) to submit that an advance for a flat, if converted to a loan by the Corporate Debtor, is a financial debt and if the same is unpaid, the application is liable to be admitted.

12. Further, the Financial Creditor has also placed reliance on the judgement of the Hon'ble Supreme Court of India in ***Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd. (***2021 SCC Online 513***) (@paragraph 31)*** to demonstrate that default means a non-payment of debt in whole or in part. Further, the Hon'ble Supreme Court was pleased to hold that the "financial debt" in Section 5(8) of the IBC does not expressly exclude an interest free loan. In line to the above Judgement, the Financial creditor claims that the

Corporate Debtor has admitted that the sum of Rs. 3,50,00,000/- will be paid along with 15% cumulative interest compounded quarterly, and therefore the argument that the Financial Creditor has not booked any interest under such loan amount has no merit.

13. Relying on the aforesaid grounds, the Applicant all ingredients of Section 7 of the IBC stand satisfied namely:

   (i) by the admission letters, the Corporate Debtor has admitted that a debt is due and payable to the FC;
   (ii) specifically, in the letter dated 31st March 2018 the Corporate Debtor has admitted the sums along with interest is unpaid.

<u>Submissions on Behalf of the Corporate Debtor</u>:

14. In order to establish that the Corporate Debtor is entitled to file the Petition, the Corporate Debtor relies on the Applicant's submission in Paragraph 5b at Pg. 4 of Applicant's Affidavit in Rejoinder that it is "an allottee within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016 and therefore is a 'financial creditor' who is owed a 'financial debt' as per provisions of Section 5(7) read with Section 5(8)(f) of the IB Code 2016." This Affidavit was filed on 2nd December 2019. The Corporate Debtor submits that as a result of amendment which came into effect from 28th December 2019 into the Insolvency and Bankruptcy Code, 2016 as per provisions of Section 5(7) read with Section 5(8)(f), the application for initiating corporate insolvency resolution process

against the Corporate Debtor was required to be filed 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 of such real estate project, whichever is less. The third proviso gave an opportunity for persons who had already initiated corporate insolvency resolution process against a corporate debtor to comply with the said requirement within 30 days of the commencement of the said ordinance, failing which the application would be deemed to be withdrawn before its admission. In Paragraphs 7 to 9 of its Further Affidavit dated 6th February 2021, the corporate debtor has given the details of the number of units to be constructed. A total of 2699 units are to be constructed, of which 2139 units have been allotted. Even if one was to consider only the free sale units, out of 631 free sale units only 71 units have in all been allotted. Therefore, at least 8 allottees ought to have filed the application. The present application has been filed by a single allottee. The Applicant has not taken any steps to comply with the amended provision of S. 7 of the Code, and the application is therefore deemed to be withdrawn before admission.

15. The Corporate Debtor submits that the amendments to Section 7 of the Code were challenged in the Hon'ble Supreme Court of India, and by a judgment dated 19th January 2021, in the matter of ***Manish Kumar v. Union of India [(2021) 5 SCC 1]***, the Hon'ble Supreme Court of India upheld the amendments and gave a period of two

weeks from the date of the judgment for Applicants to comply with the amended provisions.

16. The Corporate Debtor relies on the case of ***Nagindas Ramdas v. DalpatramIchharam [(1974) 1 SCC 242]***, where the Hon'ble Supreme Court of India held, at Paragraph 27:

> "*27. … Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties.*

Therefore, the Corporate Debtor submits that the Applicant is bound by the admission made in his Affidavit in Rejoinder and cannot put forth a contrary case.

17. The Corporate Debtor put reliance on an order date 16th July 2021 in the case of ***Mrs. Rajshree Vora & Anr Versus Makwana Properties Pvt. Ltd.***, the NCLT Mumbai Bench III dismissed a similar case holding that a Petition filed by a single allottee is not maintainable. In line to this, the Corporate debtor request for Dismissal of the Petition on grounds that the same is deemed to be withdrawn before admission.

18. Coming on the issue of **Claim of the Applicant that a Debt is due and owing to him is not correct, the Corporate Debtor** relies on first letter dated 31st March 2015 which according to him makes it very clear that the money would be transferred to a loan account only for a temporary basis till the project is approved and starts. The Respondent submitted that the letter in turn gave the Applicant an opportunity to exit from the project during the period of 3 months after the project had started. In such case, the earnest money would have to be repaid with interest. further, the Corporate Debtor Submitted that the letter clearly states *"it has also been decided that, as soon as the project starts within 3 months the investments would be realized by giving an exit incase to be decided by the investor. Incase he decides to retain, it will be his choice. The Developer will not charge transfer fee or any sort of transfer charges would be taken by the Investor incase he decides to exit from the above project and transfer his rights to the purchaser or any 3rd Party."* Moreover, "*The above arrangement does not relinquish the right of the Investor from the Permanent Allotment of the Flat on the day the project if approved and commenced at the agreed rate*". The Corporate Debtor also enclosed a letter of loan confirmation was for the Applicant's confirmation.

19. The Corporate Debtor was of a view that in order to exit from the project, the Applicant would necessarily have to cancel the agreement for purchase or transfer the same to a 3rd Party who would then be liable to pay the balance consideration. It is only if

the Applicant had exercised such option in writing and had cancelled the agreement dated 15th March 2011 that could he seek repayment.

20. Relying on the aforesaid submissions, the Corporate Debtor submits that the Agreement for Sale continues to hold the field **and the Applicant is bound and liable to pay the balance consideration as per the terms of the Agreement.** The project is underway, and as stated at Paragraph 26 / Pg. 12 of the Affidavit in Reply dated 4th November 2019, the flats will be constructed and delivered to the Applicant on the terms agreed by the parties.

21. Relying on paragraph 26 at page 13 of the Affidavit in Reply the Applicant, the Applicant has not treated the said amount as a debt but as a long-term capital advance and the same is not due. The Applicant has not shown any interest income towards the same in its Profit and Loss Account. Thus, The Corporate Debtor contends that neither the Applicant nor the Corporate Debtor have treated the said sum of Rs. 3.5 crores as a loan in their books of accounts.

22. The Corporate Debtor submits that the Applicant has wrongly claimed cumulative interest at 15%. The interest component was never expressly crystalised by & between the parties.

23. The Corporate Debtor submits that the reason for delay are **not on account of the him and that** if any orders are passed in the present Petition, great prejudice will be caused not only to the tenants and free sale purchasers, but also to the MCGM, MHADA and slum dwellers. The Corporate Debtor relies on the Hon'ble Supreme

Court of India in ***Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors. [(2019) 8 SCC 416]*** which held in Paragraph 50 that "*under S. 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat / apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA but wants to jump ship and really get back by way of this coercive measure monies already by it.*"

24. The Corporate Debtor submits that by this Petition, the Applicant is attempting to wriggle out of its obligation to pay the sum of Rs.9.57 crores against possession by seeking to recover a sum of Rs. 12,42,34,122 as on 30th June 2018 against the earnest money paid by it of only Rs. 3,50,00,000 in terms of clause 16(1)(b) of the agreement. And submits that even if the application is not deemed to have been withdrawn, the same ought to be dismissed on account of the fact that it is filed for oblique purposes.

<u>Rebuttal by the Corporate Debtor to the Authorities relied upon by the Applicant</u>:

25. The first is that of the NCLAT in the case of ***G. Sreevidya v. M/s Karismaa Foundations Ltd. [Order dated 19th March 2019 in Company Appeal (AT) (Insolvency) No. 494 of 2018]***. The Corporate Debtor submits that the facts of that case are totally different from the present facts. In that case, the real estate developer could not complete the project and agreed to repay the earnest money deposit with interest. Some amount of interest was actually repaid. A cheque dated 30th June 2015 for the balance loan amount of Rs. 1.35 crores was issued but was dishonored. It was in view of the dishonor of the cheque on the grounds of "*insufficient funds*" that it was held that the applicant therein was a financial creditor. See paragraph 3 of the judgement.

26. The next judgment relied upon by the Applicant is in the case of ***Orator Marketing Pvt. Ltd. v. SamtexDesinzPvt. Ltd. [2021 SCC OnLine SC 513]***. Reliance was placed upon paragraph 31 thereof in support of the proposition that a 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body. It is submitted that the said judgment has no application to the present case as in the present case, the said sum of Rs. 3.5 crores was not taken by the corporate debtor in order to finance the project.

Submission by way of Rejoinder:

27. The Financial Creditor submits that Corporate Debtor has made a misplaced reliance to paragraph 5 (b) ***(@pg. 4 of rejoinder)*** of the rejoinder filed by the Financial Creditor to contend that the FC has purportedly admitted to be an "*allottee*". This submission as to the Financial Creditor is false and would appear from the records of the case.
28. Furthermore, reference is made to paragraphs 5(c) to 5(i) ***(@pg 4-6 of the rejoinder)*** 6(a) to 6(d) ***(@pg. 7-8 of rejoinder)*** of the Rejoinder by the Applicant to demonstrate that the Financial Creditor has consistently maintained that it is the Corporate Debtor's acts that rendered the amount given as advance consideration for a flat as a "financial debt" under Section 5 (8) of the IBC and the FC is a "Financial Creditor" under Section 5(7) of the IBC.
29. The Financial creditor submits that the Corporate Debtor has failed to explain the admissions contained in the aforesaid Admission Letters. Further, in the reply filed by the Corporate Debtor, the Corporate Debtor has admitted to the issuance of the Admission Letters. It is respectfully submitted that, upon such admission, there is no plausible defence that the Corporate Debtor can have.

30. During the course of arguments, the CD had relied on ***Nagindas Ramdas v. DalpatramIchharam [(1974) 1 SCC 242]*** at paragraph 24 to state that admissions, if true and clear, are by far the best proof of facts admitted. This judgement was ostensibly relied upon to falsely demonstrate that the Financial Creditor had purportedly

admitted to being an 'allottee'. As stated aforesaid, this submission of the Corporate Debtor is false, misplaced and contrary to the records. On the other hand the Financial Creditor relies on this judgment to state that in light of the pleadings of the Corporate Debtor, the Corporate Debtor has admitted that there has been a default of a financial debt due and payable to the Financial Creditor.

31. It is further submitted that the defence put forth by the Corporate Debtor that the Financial Creditor is an "allottee" in a real estate project is merely a red herring. The reference to ***Pioneer Urban Land and Infrastructure Limited v. Union of India*** is entirely misplaced since, these judgments deal with the rights and obligations of an 'allottee' in a real estate project. As stated above, the CD has admitted converting the advance amount into a loan payable and the CD has admitted that the flats will not be handed over and the allotment of flats in favour of the FC stands cancelled.

32. We have heard the arguments of Financial creditor and Corporate Debtor and perused the records.

33. From the face of all the arguments advanced by the Applicant, it is clear that there exist a Debt and Default. The documents relied upon namely letter dated 31.03.2015 annexed as **"Annexure F"** is a substantial proof that Debt is there when, the Applicants amount was transferred to loan account and subsequently Default is clearly

attributable from letter Dated 08.07.2016 Annexed as **“Annexure H”**.

34. We also consider the facts of the case in the lights of the Hon’ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a ‘dispute’ as far as Section 7 petition is concerned. As soon as a ‘debt’ and ‘default’ is proved, the adjudicating authority is bound to admit the petition.

35. The Financial Creditor has proposed the name of **Mr. Rakesh Kumar Tulsyan,** Registration No. IIBI/IPA-001/IP-P01144/2018-19/11970, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration.

36. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

37. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP (IB) 4149/MB/C-II/2018** filed by **Abhigyan Developers Private Limited** the Financial Creditors, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Shreepati Build Infra Investment Limited [CIN: U70109GA2012PLC007213],** the Corporate Debtor, is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(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 Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest (Sarfaesi) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium:-

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) **Mr. Rakesh Kumar Tulsyan,** Registration No. IIBI/IPA-001/IP-P01144/2018-19/11970, having address at B-4, Vinay Tower, Kranti Nagar, Lokhandwala, Kandivali (East), Mumbai – 400101, Mobile: +91 9969410171, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the 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 a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of Rs.2,00,000/- (Rupees Three Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Dated 29th October, 2021

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**ASHOK KUMAR BORAH**
Member (Technical)	**Member (Judicial)**

29.10.2021
SAM