

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – II**

IA/739/2022 In C.P.(IB)-4149(MB)/2018

*(Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the
NCLT, Rules 2016)*

In the matter of

Shreepati Build Infra Investment Limited

Registered Address: Row House D, Castle
Rock- Land Scape Town Odxel, Goa, Dona
Paul Police Station, North Goa- 403004.

.....Applicant

Vs

Abhiyan Developers Private Limited

Registered Address: 72/4, Shambhu Nath
Pandit Street, Kolkata- 700025.

.....Respondent

C.P.(IB)-4149(MB)/2018

*(Under Section 7 of the Insolvency and Bankruptcy
Code, 2016 read with Rule 4 of the Insolvency and
Bankruptcy (Application to Adjudication Authority)
Rule 2016)*

In the matter of

Abhiyan Developers Private Limited

Registered Address: 72/4, Shambhu Nath
Pandit Street, Kolkata- 700025.

.....Financial Creditor

Vs

Shreepati Build Infra Investment Limited

Registered Address: Row House D, Castle
Rock- Land Scape Town Odxel, Goa, Dona
Paul Police Station, North Goa- 403004.

.....Corporate Debtor

Order delivered on: 28.07.2023

CORAM:

SHRI SHYAM BABU GAUTAM

HON'BLE MEMBER (T)

SHRI KULDIP KUMAR KAREER

HON'BLE MEMBER (J)

Appearances:

For the Financial Creditor : Adv. Rohit Gupta a/w Adv. Kritika Sethi

For the Corporate Debtor : Adv. Mr. Cyrus Ardeshir

a/w Adv. Anuj Tiwari & Adv. Ashwini Gawde

ORDER

Per- Kuldip Kumar Kareer, Member Judicial

1. The Present IA is filed under section 60(5) of Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of National Company Law Tribunal Rules, 2016 by Shreepati Build Infra Investment Limited (for brevity 'Applicant') being the Respondent in the main company petition **C.P.(IB) 4149/MB/2018**, bringing on record an order passed by Hon'ble National Company Law Appellate Tribunal in Company Appeal (AT) (INS) 939 of 2021, wherein, Hon'ble NCLAT has set aside the order of admission dated 29.10.2021 passed by this Tribunal and remanded back the case to this Adjudicating Authority to consider the objection of maintainability as required under third proviso of Section 7(1).

2. Looking at the present IA and the main Company Petition, it reveals that **C.P.(IB) 4149/MB/2018** was filed under section 7 of the IBC, 2016 by Abhigyan Developers Private Limited, seeking to initiate CIRP against Shreepati Build Infra Investment Limited. It further reveals that the Financial Creditor entered into an agreement with the Corporate Debtor for purchase of flat after the payment of a sum of Rs. 3,50,00,000/- (Three Crore fifty Lakhs only). However, as all the permissions and/or approvals were not sought 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 the agreed interest.

3. After recording of the receipt of a sum of Rs. 3,50,00,000/-, the Financial Creditor and the Corporate Debtor 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 situated on 42nd floor of a proposed building named “Shreepati Estate”. Further, on 01.04.2012, the Corporate Debtor issued a letter confirming the receipt of Rs. 3,50,00,000/- in its books of account to the Financial Creditor. Subsequently, on 31.03.2015, a letter was issued by Shreepati Build Infra Investment Ltd. to Abhigyan Developers Private Limited that in case if it 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.

Further, by letter dated 08.07.2016, 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. However, no payment was received by the Applicant in this regard. 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.

4. In such circumstances, the Financial Creditor filed the main Company petition on 10.08.2018 and the same was admitted by this Tribunal vide order dated 29.10.2021. Against the said order, the Corporate Debtor filed an appeal (*Company Appeal (AT) (INS) 939 of 2021*) before Hon'ble National Company Law Appellate Tribunal, wherein, Hon'ble NCLAT has held-

19.....“Thus, it is quite clear to us that the amount of Rs. 3.50 Crore was not a loan given by Respondent No.1 to the Corporate Debtor which would have earned a pre-decided rate of interest, but was a deposit amount against booking of two flats which had been transferred on temporary basis in a loan account for saving the Corporate Debtor from falling foul of any law or accounting standards, and the same amount would have been transferred back as booking amount for flats upon completion and handing over possession of the flats.”

The Hon'ble NCLAT has further held that-

*“24., we are of the clear opinion that third proviso to Section 7(1) of IBC which lays down that if the applicant does not modify his application to comply with the requirements of the first or second proviso within 30 days of the commencement of the said Amendment Act of IBC, which came into effect on 28.12.2019, the application shall be deemed to be withdrawn before its admission. This statutory provision is quite clear and makes it obligatory on the part of their real estate allottee to modify his application in accordance with the first and second proviso of Section 7(1). **As facts of the case, and the arguments advanced by the parties, show that it was not done by the real***

estate allottee/applicant. In our view, this is a basic infirmity which strikes at the very root of the maintainability of Section 7 application.”

“25. In view of our inference that issue of non-satisfaction of statutory provision of third proviso to section 7(1) was not considered adequately and dealt with in the Impugned Order, we set it aside and remand the case to the Adjudicating Authority to consider the objection about maintainability as required under third proviso of Section 7(1) and any other objection/issues raised by the parties and pass a speaking order regarding admission/rejection of the Section 7 application. Needless to add, it shall be open to the parties to enter into any settlement in case they so desire.”

5. After hearing the parties and on perusal of the main company petition (CP(IB)4149(MB)/2018) including other material on record and the order dated 07.03.2022, passed by Hon’ble NCLAT in *Company Appeal (AT) (INS) 939 of 2021*, we are of the opinion that the actual nature of transaction between the parties was in the capacity of builder and allottee, based on the agreement dated 15.02.2011. Further any agreement cannot change the basic nature of transaction and the Financial Creditor over here will remain an allottee within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016. Therefore, it will also remain as 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. However, as a result of

amendment in Section 5(7) read with Section 5(8)(f) of the IBC, 2016 which came into effect on 28.12.2019, 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. The main Company Petition in the instant case was filed by a single allottee. The Applicant has not taken any steps to comply with the amended provisions of Section 7 of the Code, and the application is, therefore, deemed to be withdrawn before admission or the petition could have been filed jointly by not less than one hundred allottees or not less than 10% of the total number of allottees under the same real estate project. So, in view of the above, **CP(IB)/4149/2018** is ***dismissed as non-maintainable.***

Accordingly, **IA/739/2022** is **allowed as disposed of** in aforesaid terms.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)