IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI (COURT NO. IV)

Company Petition No. IB-1081/ND/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

M/S OLIVE GREEN REALTY

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

GENESIS INFRATECH PRIVATE LIMITED

...RESPONDENT/ CORPORATE DEBTOR

ORDER DELIVERED ON: 09.08.2021

CORAM:

DR. DEEPTI MUKESH

HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA

HON'BLE MEMBER (TECHNICAL)

For the Applicant : Mr. Bishikh Mohanty, Adv.

For the Respondent : Mr. Arvind Kumar, Adv.
Ms. Shashi Kiran, Adv.

MEMO OF PARTIES

M/S OLIVE GREEN REALTY

Registered office at:

117, Edmonton Mall

Bristol Hotel Gurgaon

Haryana 122001

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

M/S GENESIS PRIVATE LIMITED

Registered office at:

J-81 Ground Floor, Saket

New Delhi 110017

...RESPONDENT/ CORPORATE DEBTOR

ORDER

AS PER SUMITA PURKAYASTHA (MEMBER TECHNICAL)

1. The present application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by M/s Olive Green Realty (for brevity 'Applicant') through Capt. (Retd) Vipul Choudhary (Partner of Partnership firm) with a prayer to initiate the Corporate Insolvency

process against M/S Genesis Private Limited (for brevity 'Corporate Debtor').

2. The Applicant M/s Olive Green Realty is a partnership firm, with the PAN: AADFO7244F and GSTIN: 06AADFO7244FIZD. The Applicant is engaged in the business of is a Real Estate Investment Advisory and consultation having its registered office at 117, Edmonton Mall Bristol Hotel Gurgaon Haryana 122001.

3. The Respondent M/S Genesis Private Limited is a company incorporated on 05.12.2006 under the Companies Act, 1956 having its registered office at J-81 Ground floor Saket New Delhi 110017 and CIN U45200DL2006PTC156211. It is involved in the business of real estate Construction, sale purchase, broking etc of both residential and commercial projects at Bhiwadi, Rajastha (NCR).

4. As per the averments made in the application, the Applicant and the Corporate Debtor entered into a Memorandum of Understanding dated 01.06.2015. Consequent to this, a fresh MoU dated 03.02.2016 was executed. In pursuance of the MOU(s), services in the nature of Marketing, sales and brokering of residential housing units of Project Genesis Flora being developed by the Corporate Debtor were provided. That in terms of the agreement, the Applicant provided services on credit and duly raised various invoices dated 01.08.2015, 07.10.2015, 23.10.2015, 27.10.2015, 08.04.2016, 04.08.2016, 05.10.2016, 02.12.2016 aggregating to Rs. 53,35,266/-. The Corporate Debtor

failed to maintain financial discipline and made on account part payments on 21.10.2015, 13.11.2015, 25.04.2016, 04.08.2015, 08.05.2016 and 21.10.2016 aggregating to Rs. 29,42,857/- and Rs. 19,13,742/- were adjusted against services as requested by the Applicant time to time.

5. Further it is submitted by the applicant that in accordance with the terms and conditions of Memorandum of Understanding dated 03.02.2016 with the Applicant, the Corporate Debtor was required to discharge its liability towards services provided by the Applicant on credit within 07 days of the date of receiving 50% or above of the due payment as per the Builder Buyer Agreement for each buyer. It was represented by the Corporate Debtor that payment for the services provided on credit by the Corporate Debtor shall be made as per the terms and conditions of Memorandum of Understanding dated 03.02.2016 and shall be liable for penalty for delay in release of the consultancy charges/brokerage fees at the rate of 24% per annum. However, the Corporate Debtor has neither paid the debt nor has taken any steps to discharge the debt.

6. The Applicant issued demand notice dated 05.02.2019 under Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, calling upon the Corporate Debtor to pay an amount of Rs.7,37,147.7/- with respect to the outstanding invoices from 01.08.2015 to 02.12.2016 including interest @24% per annum as per the invoices claimed by the Applicant

from the Corporate Debtor. The notice was served upon the Corporate Debtor vide speed post and registered post and delivered on the address of the Corporate Debtor on 08.02.2019 as per the tracking Report. The Corporate Debtor filed its reply dated 16.02.2019 to the Section 8 demand notice. The said reply dated 16.02.2019 was sent to the Applicant vide speed post as on 21.02.2019 which is reflected on the tracking receipt filed by the Corporate Debtor.

7. The Applicant filed this application dated 15.04.2019 as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to pay their claim of Rs. 7,37,147.7/- towards unpaid invoices for the services provided by the Operational Creditor.

8. Notice with respect to the application was issued to the Corporate Debtor vide order dated 03.05.2019 of the Adjudicating Authority. The Applicant has complied with the provision of Section 9(3)(c).

9. The Corporate Debtor filed its reply dated 13.06.2019 and submitted that as per clause 1 of the MOU dated 01.06.2015 the Operational Creditor guaranteed to market as also sell 100 units of the project of the Corporate Debtor within a span of 12 months. In clause 3 it was further agreed that the Operational Creditor would have a pro-rata target of minimum 5 units per month for first 3 months and minimum 9 units per month for the next 9 months with a grace period of 1 month. The Corporate debtor placed emphasis on clause 4 of the MOU

in terms of which it was agreed that in case of failure of applicant to sell the agreed number of units per month, deficit number of units shall be sold first the next month and would attract penalty @1% of rate as per the agreement. The Operational Creditor failed to meet its targets as a result whereof penalty ought to have been levied however, considering the request of the Operational Creditor it was deferred from time to time.

10. Further it is submitted by the Corporate Debtor that the MOU dated 01.06.2015 was repudiated and a fresh MOU dated 03.02.2016 was executed between the Corporate Debtor on one hand with M/S Axiom land base Pvt ltd and its consortium consisting of M/s Olive Green Realty and M/S Secure Homes on the other hand. Be that as it may, the spirit of the earlier agreement remained intact and contents of the same were also incorporated in the fresh agreement. However, it is a matter of regret that the Operational Creditor, namely M/s. Olive Green Realty not only failed to comply with its obligations under earlier agreement dated 01.06.2015, but its consortium also failed to adhere to the fresh agreement, in as much as the Operational Creditor under the earlier agreement sold only 38 flats of the respondent despite its commitment/assurance to sell 100 as. It is stated that there exists a bonafide financial dispute between the parties inasmuch as the applicant/its consortium has failed to honor its part of the commitment under any of the agreements. Without prejudice, it is

submitted that alleged financial debt even otherwise is fictitious in view of the default clause envisaged in the agreement.

11. Further it is submitted by the Corporate Debtor that the statement of accounts filed by the Operational Creditor doesn't record true, correct & complete entries between the parties. As aforesaid, the amount against invoice OG/Genesis/Fiora/08 dated 07.10.2015 has been wrongly recorded as against the bill amount of Rs. 4,92,200/- an amount of Rs. 5,17,200/- is recorded. Thus, there is an inflation of an amount of Rs. 25,000/-. Similarly, in the statement of account an amount of Rs. 3,60,929/- which has been duly adjusted on the request of the Operational Creditor himself in terms of letter dated 06.02.2016 is not reflected. Thus, as per statement of account of the applicant is inflated by an amount of Rs. 3,85,929/- (25,000/- + 3,60,929/-). In case the said entries are corrected, as per the statement of account of applicant himself, an amount of Rs. 92,738/- (4,78,667.7/- less 3,85,929/-) is due and payable by the Corporate Debtor as per the applicant. The Corporate Debtor has denied that the amount of Rs. 92,738/- is due & payable by Corporate Debtor to the applicant. The Corporate Debtor has annexed the invoice OG/Genesis/Fiora/08 dated 07.10.2015 and the statement of account.

12. The Corporate Debtor submits that reply to the Demand notice dated 16.02.2019 was sent, denying the false & frivolous allegations made by the applicant as also putting forth the true & correct picture. In the

said reply, the Corporate Debtor made it categorically clear that since the Operational Creditor failed to honour its contractual obligation of selling 100 units and kept on repeating the said default month by month, it was liable to pay penalty to the respondent in terms of the said agreement. The Corporate Debtor has also mentioned in the reply to the demand notice that the Operational Creditor has already instituted a criminal complaint being CC No. 86/18 in the court of Chief Judicial Magistrate, Gurugram; apart from the same, applicant has also filed complaint RAJ-RERA-C-2018-2155 with Real Estate Regulatory Authority (RERA), Rajasthan, against the Corporate Debtor. The copy of the complaint: RAJ-RERA-C-2018-2155 before RERA and a daily order dated 06.04.2019 of Chief Judicial Magistrate, Gurugram has been annexed.

13. The date of default is 21.10.2016 which is the date of the last invoice issued which was unpaid, and the present application is filed on 15.04.2019. Hence the application is not time barred and filed within the period of limitation.

14. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

15. The issue before this Adjudicating Authority is that the proceedings pending before the RERA Jaipur and the Criminal Complaint before Judicial magistrate Gurugram District court are ongoing since 2018.

This issue has been raised by the Corporate Debtor as pre existing dispute. This Adjudicating Authority while perusing the documents placed on record observed that the said documents do not clearly state the reason/issue as to why the proceedings are pending before the RERA Jaipur and Gurugram District court. Hence, this Adjudicating Authority vide order dated 06.07.2021 sought clarification from the Applicant. The order has been reproduced as:

"Learned Counsel for the applicant undertakes to file summary of the cases filed before RERA along with copies of 2 final orders passed in RERA and one final order passed in Gurugram District Court, Gurugram within ten days. Order is already reserved."

16. The Applicant, despite of being given an opportunity and enough time, has failed to produce any document before this Adjudicating Authority to clarify that the pending proceedings before the RERA Jaipur and Gurugram District Court are not in relation to the unpaid operational debt. In order to deal with the issue in hand we would like to refer to the Judgment of the Hon`ble Supreme Court in "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353***", wherein the Hon'ble Supreme Court analysed the meaning of dispute with respect to Operational Creditors and observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of

a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). ***What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.*** *........"*

"34. ***Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: ......***

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

17. Since the Applicant has failed to produce any document before this Adjudicating Authority to clarify that the proceedings pending before the RERA Jaipur and Gurugram District Court are not in relation to the unpaid operational debt, We are of the view that the operational creditors cannot use the Insolvency Code as a substitute for debt enforcement procedures. Further it has been observed that the said proceedings were filed prior to issuance of demand notice and the Corporate Debtor has also raised this issue as pre-existence of dispute in its reply to the Demand Notice dated 05.02.2019. From the aforesaid decision of the Apex court "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353***", it is clear that the dispute must exist before the receipt of demand notice. Hence, a pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor.

18. In view of the above, We are of the view that the prayer for initiating Corporate Insolvency Resolution process against the Corporate Debtor is not sustainable.

19. Application is therefore rejected and disposed off in terms of above order.

SD/-	SD/-
Sumita Purkayastha	**Dr. Deepti Mukesh**
Member (T)	**Member (J)**