

IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

CP(IB)/44(PB)/2022

IN THE MATTER OF:

M/s Realpro Realty Solutions Pvt. Ltd. Applicant

Registered Office at:

Versus

M/s Sanskar Projects and Housing Ltd.Respondent

Registered Office at:

Order Under Section 7 of Insolvency and Bankruptcy Code, 2016

Order delivered on: 14.02.2023

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant : Mr. Vivek Kohli, Sr. Adv, Mr. Jivas Rawal,
Adv., Mr. Lokesh Bhola, Adv.

For the Respondent : Mr. H.L. Tiku, Sr. Adv., Mr. Munish
Kochhar, Adv., Ms. Yasmeet Kaur, Adv.

ORDER

PER SH. AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

1. This application under Section 7 of the Insolvency and Bankruptcy Code 2016, in short "IBC" has been filed by **M/s Realpro Reality Solutions Pvt. Ltd.** "Applicant" herein for initiating Corporate Insolvency Resolution Process (CIRP) against **M/s Sanskar Projects and Housing Ltd** 'Respondent' herein.
2. The Applicant claims itself to be a financial creditor. The case of the Applicant is that one Dr. Chetan Prakash, owner of a property bearing no. 107, Jor Bagh, New Delhi had entered into an MOU dated **20.11.2020** with **the Respondent**, allegedly the Corporate Debtor, as buyer with regard to transfer of ownership right for the entire second floor and entire terrace / roof upon the second floor with right to construct and own the floors with 45% undivided, indivisible and impartible ownership right in the land in favour of the Respondent. Vide the same MOU dated 20.11.2020, Dr. Chetan Prakash appointed M/s Royal Insignia Premium Constructions LLP, a sister concern of the Respondent as developer to construct the said project.
3. The Respondent, thereafter, entered into an agreement dated **09.12.2020** with the Applicant, whereby, they decided to make joint acquisition of the entire second floor and entire terrace / roof upon the second floor with right to construct and own the floors with a common object of earning and sharing revenue or gain on their use or subsequent sale in near future. They agreed to invest a total sum of Rs. **35,00,00,000/-** (Rupees Thirty Five Crores only/-) in the following manner i.e. Rs. **26,25,00,000/-** (Rupees Twenty Six Crore and Twenty Five Lakh Only) by the Respondent and **Rs. 8,75,00,000/-** (Rupees Eight Crore and Seventy Five Lakh Only), by the Applicant. The two parties also agreed to share the profits including the investment in the proportion of 75:25. As per **clause 2**

(d) of the agreement, the Respondent was obliged to make payment of proportionate share of the revenue receipts to the Applicant upon receipt of any sale consideration or advance from any intending buyer.

4. In furtherance to the agreement dated **09.12.2020**, Dr. Chetan Prakash executed a GPA dated **15.12.2020** in favour of the Respondent giving the Respondent the right to sell and lease out the entire second floor and entire terrace / roof upon the second floor with right to construct thereon.
5. As a result of the above, a sale deed dated **15.07.2021** was entered into between the Respondent and a Buyer Ms. Seema Jindal in respect of the entire terrace (roof) over the entire 2nd floor of the property upto the limits of sky with right to construct and own the entire third floor and entire terrace over and above the entire 3rd floor for a consideration of **Rs. 21,00,00,000/-** (Rupees Twenty One Crore Only).
6. It is stated that as per the agreement dated 09.12.2020, the Applicant was entitled to 25% of Rs. 21,00,00,000/- (Rupees Twenty One Crore Only) i.e. **Rs. 5,25,00,000/-** (Rupees Five Crore and Twenty Five Lakh Only) towards revenue share from the sale of the roof rights over the entire 2nd floor of the property with right to construct and own the 3rd floor to Ms. Seema Jindal. A demand notice dated **23.11.2021** was sent by the Applicant to the Respondent, which the Respondent replied vide letter dated **06.12.2021**. On going through the Respondent's reply to the demand notice, the Applicant came to know that only a part amount of **Rs. 4,40,00,000/-** (Rupees Four Crore and Forty Lakh Only) was paid by the Respondent. Thus, with respect to the sale of the roof rights over the 2nd floor, an amount of **Rs. 85,00,000/-** (Rupees Eighty Five Lakh Only) was due by the Respondent and payable to the Applicant.
7. It is further stated that vide sale deed dated 14.10.2021, the entire second floor was transferred to the Respondent by Dr. Chetan

Prakash through his GPA who holds the position of a Director at M/s Sanskar projects and Housing Limited, on a consideration of Rs. 15,00,00,000/- (Rupees Fifteen Crores Only/-). It is stated that the sale deed executed in respect of the 2nd Floor was significantly lower in consideration and value for a sum of Rs. 15,00,00,000/- (Rupees Fifteen Crore Only), although, the basement and the ground floor were sold for a sale consideration of Rs. 27,50,00,000/- (Rupees Twenty Seven Crore and Fifty Lakh Only) vide sale deed dated 28.10.2021 and Rs. 21,00,00,000/- (Rupees Twenty One Crore Only) vide agreement to sell dated 28.10.2021 respectively. It is stated that in terms of the agreement dated 09.12.2020, the Applicant was entitled to 25% of Rs. 15,00,00,000/- (Rupees Fifteen Crore Only) i.e. **Rs. 3,75,00,000/-** (Rupees Three Crore and Seventy Five Lakh Only) from the sale consideration of the 2nd floor as per revenue distribution provided in Clause 2 (d) of the agreement.

8. It is stated that the Respondent through its sister concern i.e. M/s Royal Insignia Premium Constructions LLP also entered into a construction agreement with Ms. Seema Jindal and received **Rs. 3,00,00,000/-** (Rupees Three Crore Only) towards the construction cost. In terms of clause 2 (d) of the agreement, it is entitled to a proportionate share of 25% on Rs. 3,00,00,000/- (Rupees Three Crore Only) i.e. **Rs. 75,00,000/-** (Rupees Seventy Five Lakh Only). It is stated that the Respondent defrauded the Applicant by entering into the agreement with its sister concern by not providing any information to the Applicant regarding involvement of its sister concern in the said transaction.
9. It is stated that in terms of the calculation chart at Page 28 table IV of the application, total outstanding due from the Respondent as on date is **Rs. 5,35,00,000/-** (Rupees Five Crore and Thirty Five Lakh Only). It is stated that the Respondent in its reply has made purely unsubstantiated and baseless allegation, which made the Applicant send a fresh demand notice dated 24.12.2021. It is stated that as per clause 2 (d) of the agreement, the Applicant was entitled to

receive its share within 7 days from receipt of the sale consideration. The Applicant has furnished a tabulated chart at para 20 in respect of the interest amounting to Rs. **24,28,357/-** (Rupees Twenty Four Lakh Twenty Eight Thousand and Three Hundred Fifty Seven Only), stating that the total outstanding amount will be Rs. **5,59,28,357/-** (Rupees Five Crores Fifty Nine Lakh Twenty Eight Thousand and Three Fifty Seven Only). It is stated that since no payment towards the outstanding dues was made, it is constrained to file the application under IBC as there is clear case of debt & default and it is a financial debt.

- 10.** On getting notice of the application, the Respondent filed its reply alleging that the reliefs sought in the application are beyond the scope of Section 5 (7), 5 (8) and 7 of IBC and the application deserves to be dismissed. It is alleged that the Applicant does not satisfy the test of being a “Financial Creditor” under IBC as it has no direct engagement in the functioning of the Respondent. It is further alleged that the Applicant had no interest in the functioning of the Respondent, and it was only interested in profit sharing. It is pleaded that the Applicant, without paying the agreed share of investment and the expense incurred / yet to be incurred, is claiming the money. It is stated that nature of agreement is one of investment in the ratio of 75:25 and sharing of profit / loss in the same ratio after completion of the project. It is not the financial debt as defined under the code.
- 11.** In the interim, it is stated that though, no payment is due or payable to the Applicant as the Applicant has not invested its entire investment as agreed, yet the Respondent paid a sum of Rs. 4,40,00,000/- (Rupees Four Crore and Forty Lakh Only). It is stated that there has been no default under the agreement dated 09.12.2020. The Applicant with malafides and with a view to unjustly enrich itself has claimed 25% of the sale consideration. It is stated that there is neither any debt nor default, nor any amount is due and payable under the agreement as of now for the alleged

breach or claim. It is stated that as per clause 6 of the agreement, in case of infringement of any terms & conditions of the agreement, either party is entitled to get the transaction enforced through the Court of Law by specific performance of contract at the cost & expense of the defaulting party. Hence there is no case for plea of debt or default. The invocation of insolvency proceedings is nothing but a method to arm twist the respondent to pay amounts which Applicant is not entitled.

- 12.** It is further alleged that the Applicant failed to perform its obligation under the agreement. In the garb of this application, the Applicant is essentially seeking specific performance of the agreement. It is stated that the Respondent has performed its part of the agreement. The Respondent has always been ready and willing and is still ready and willing to perform its part of the agreement subject to the Applicant complying with its commitment as per the agreement and make the investment as per the agreed ratio. It is stated that after completion of the entire project, the parties will work out whether they have made profit or suffered loss, which will be borne in the ratio of 75:25. Thus, any claim to any amount as a share of alleged profit as on date is premature. It is stated that the sale deed in respect of 2nd floor in favour of the Respondent was only for the purposes of assessing the marketable title. It is stated that neither the Applicant nor the Respondent is party to the construction agreement entered into between Ms. Seema Jindal and M/s Royal Insignia Premium Constructions LLP.
- 13.** The Applicant filed the rejoinder denying the averments made in the reply alleging that amount of default as mentioned under Section 7 IBC falls under the definition of Section 5 (8) of IBC and the amount disbursed by the Applicant / financial creditor is in the nature of a financial debt. It is stated that the Applicant had agreed to invest an amount of Rs. 8,75,00,000/- (Rupees Eight Crore and Seventy Five Lakh Only) in terms of the agreement keeping a commercial objective in its mind considering the prime location and commercial value of

the property. This commercial objective was for getting a profitable share in the sale proceeds from the sale of the 2nd floor and the roof rights over the second floor and in exchange of the investment made by the Applicant towards development, re-construction and further sale. Reference is made of the case of **Mack Soft Tech Pvt. Ltd Vs. Quinn Logistics India Ltd. Company Appeal (AT) (Insolvency) No. 175 of 2017**, where an amount was disbursed by the Financial Creditor for construction and development of a real estate project. The Hon'ble NCLAT held: *"disbursal of such an amount would fall under the definition of "time value of money"*.

- 14.** The Applicant denied that it was not involved in the corporate viability of the project. It is stated that as per clause 1 (a) of the agreement, the amount disbursed by the Applicant to the Respondent was actually a profit sharing loan having a repayment schedule as enumerated under clause 2 (b) and clause 2 (c) of the agreement. In this case, the Respondent failed to fulfill its contractual obligation towards the Applicant, which made it file the application under Section 7 of the Act. Reference is made of the case of **Orator Marketing Pvt. Ltd Vs. Samtex Desinz Pvt. Ltd., (2021) 228 CompCas 102(SC)**, where the Hon'ble Supreme Court has held: *"interest free loans fall under the definition of "Financial Debt"*."Reference is also made of the case of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited versus Axis Bank Limited and Ors. (2020 8 SCC 401)**, where the Hon'ble Supreme Court has held: *"it is the financial creditor who lends finance on a term loan or for working capital that enables the corporate debtor to set up and/or operate its business; and who has specified repayment schedules with default consequences. The most important feature is that a financial creditor from the very beginning is involved in assessing the viability of the corporate debtor who can, and indeed, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress. In short, the financial creditor is the one whose stakes*

are intrinsically interwoven with the well-being of the corporate debtor."

15. We have heard the Counsels for the parties.
16. Ld. Counsel for the Applicant in his brief synopsis of arguments submits that the Applicant/Financial Creditor had agreed to grant a profit sharing loan to the Respondent/Corporate Debtor vide an agreement dated 09.12.2020 whereby it was agreed upon that both the parties shall invest in the ratio of 75:25 for the construction of the second floor and third floor and terrace above the third floor of the property. The revenue arising out of the sale of the area would be distributed in the same ratio. Ld. Counsel stated that total amount to be disbursed by the two parties as per the agreement was Rs. 35,00,00,000/- (Rupees Thirty Five Crore Only). Ld. Counsel contended that the Applicant had served the notice in Form-C claiming the due amount from the Respondent to the tune of Rs. 2,49,66,541/- (Rupees Two Crore Forty Nine Lakh Sixty Six Thousand and Five Hundred Forty One Only. It was replied by the Respondent vide dated 06.12.2021 informing the payment of monies by the Respondent to the Applicant in addition to the repayment stated in the notice. The Applicant thereafter sent a fresh demand notice dated 24.12.2021 claiming an amount of Rs. 5,35,00,000/- (Rupees Five Crore and Thirty Five Lakh Only).
17. Ld. Counsel contended that the amount due to the Applicant/Financial Creditor is covered within the ambit of a "financial debt" as defined under Section 5(8) of IBC. He placed reliance on the case of ***Pioneer Urban Land and Infrastructure Ltd. (supra)*** to contend that the amount had a time value of money since it was disbursed with an intention to earn return on the same by way of revenue entitlement in the said ratio. Nature of debt is elaborated in clause 1(a) of the Agreement, which stipulates it to be a profit sharing loan. Ld. Counsel referred the case of ***Orator Marketing Pvt. Ltd. Vs Samtex Desinz Pvt. Ltd. [(2021) 228 CompCas 102 (SC)]*** where it was held that even an interest free loan

is covered under the definition of financial debt. He also placed reliance on the case ***Mack Soft Tech Pvt. Ltd Vs. Quinn Logistics India Ltd. [Company Appeal (AT) (Insolvency) No. 175 of 2017]*** where it was held that an amount disbursed by the Financial Creditor for construction and development of a real estate project would fall under the definition of “time value of money”.

- 18.** Ld. Counsel contended that the Applicant had disbursed profit sharing loan to the Respondent which was to be utilised as a working capital for the development and construction of the property. Thus, it was actively involved in the corporate viability of the Respondent and the development of the property. He placed reliance on the case of ***Anuj Jain (supra)***.
- 19.** Ld. Counsel for the Respondent per contra submits that the Applicant is neither a Financial Creditor nor there is any financial debt due and payable by the Respondent. The agreement does not have the commercial effect of borrowing which is apparent from the reading of recital, clause 2 and clause 6 of the Agreement. The construction cost etc. during the execution of work was to be incurred/shared by the parties in the same ratio. Further, cost of 15% of working profit was to be borne by the Applicant towards expenses etc. Ld. Counsel contended that the agreement is not an agreement for borrowing money from the Applicant. Present is a case of joint investment in the ratio of 75:25 for purchasing second floor and terrace floor and then selling it after reconstructing. Whether there is profit/loss, the same can be arrived at only after the project is complete and all the expenses have been met. Ld. Counsel contended that the Applicant had to invest 25% but it defaulted in the same. Ld. Counsel stated that no loan was disbursed and the entire transaction was for investment in the project on profit/loss sharing basis. Ld. Counsel stated that under the Agreement dated 12.12.2020, the Respondent had paid Rs. 31,62,90,737/- (Rupees Thirty One Crore Sixty Two Lakh Ninety Thousand and Seven Hundred Thirty Seven Only) to the owner and the balance amount

of Rs. 3,37,09,263/- (Rupees Three Crore Thirty Seven Lakh Nine Thousand and Two Hundred Sixty Three Only) is still payable to him. 25% comes to Rs. 7,90,72,684.25/- (Rupees Seven Crore Ninety Lakh Seventy Two Thousand Six Hundred Eighty Four and Twenty Five Paise Only), whereas the Applicant had paid only Rs. 6,50,00,000/- (Rupees Six Crore and Fifty Lakh Only). In support of his contentions, Ld. Counsel placed reliance on the case of ***Nidhi Rekhan Vs. Samyak Projects Pvt. Ltd. CAAT(I) 1035/2020 dated 31.01.2022, Ankit Goyat Vs. Sunita Agarwal & Anr. CAAT(I) 1020/2019 dated 12.08.2021 and Vipul Limited Vs. Solitare Buildmart Pvt. Ltd. CAAT(I) 550/2020 dated 18.08.2020.***

- 20.** We have given our thoughtful consideration to the rival contentions, perused the documents and gone through the case laws *supra*.
- 21.** It is not in dispute that Dr. Chetan Prakash, who was the owner of the aforesaid property had entered into MOU dated 20.11.2020 with the Respondent with regard to transfer of ownership right of the 2nd floor / terrace / roof with right to construct on the floors. The Respondent thereafter, entered into an agreement dated 09.12.2020 with the Applicant. It is relevant to reproduce some of the terms & conditions of the agreement dated 09.12.2020 which have bearing in the present case:-

Page 1 Para 4

Whereas the first party (Respondent) and second party (Applicant) has decided to make joint investment / acquisition of the entire 2nd floor and also the exclusive ownership and usage rights of the entire terrace over and above the entire 2nd floor of the property, with right to construct, own and to have and to hold any areas / floors on the 3rd floor and subsequent terraces thereupon..... for common objective to earn and share profits or gain on its use or subsequent sale in near future.

Page 2 Para 1

“And whereas the first party and second party has mutually agreed that the said property shall be registered in the name of the first party and therefore, the first party has entered into an agreement to sell dated 12.12.2020 in its own name with

the owner of the property Dr. Chetan Prakash to purchase..... with all rights, title and interest.... thereto provided therein for a total consideration of Rs. 35,00,00,000/- in its own name out of the funds contributed by the first party and the second party in the proportion of their profit sharing investment.”

Page 2 Para 2

“And whereas it is agreed that the first party has absolute right and authority to construct, develop, sell, dispose of and transfer the said property to the purchaser (s) in whole or in parts.”

Page 2 Para 3

“And whereas, the first party and the second party have invested or agreed to invest, to get entitlement for share of profits / losses, in entire 2nd floor and also exclusive ownership or usage rights of the entire terrace over & above the entire 2nd floor with right to construct in the proportion of 75% & 25% respectively as per the following table:

<i>Name</i>	<i>Share</i>	<i>Amount (Rs.)</i>
<i>Sanskar Projects and Housing Limited</i>	<i>75%</i>	<i>26,25,00,000/- (Rupees Twenty Six Crore Twenty Five Lakh Only)</i>
<i>Realpro Realty Solutions Private Limited</i>	<i>25%</i>	<i>8,75,00,000/- (Rupees Eight Crore Seventy Five Lakh Only)</i>
<i>Total (Rs)</i>	<i>100%</i>	<i>35,00,00,000/- (Rupees Thirty Five Crores Only)</i>

Further construction cost, fee, taxes etc during the execution of work and other incidental expenses etc shall be incurred / shared by the first party and second party in the agreed ratio of 75:25 respectively. Further, cost of 15% of the working profit shall be borne by second party towards expenses / fees.”

Page 3 Para 2

“And whereas, in terms of mutual understanding, the first party is entitled to receive sale consideration or advance for the intending customers and shall refund proportionate share to the second party within 7 days of receipt along with profits computed thereon, provided the second party has in principal

invested its respective share in full at the stage or if contribution sought received in principal than the proportionate to principal amount and proportionate profit shall be refunded to second party. Interest @ 15% per annum will be paid in case of delay in payment beyond 7 days by first party.”

Page 4 Undertaking

“(a) The second party is willing to provide to the first party with certain funds (25% shares) in the form of a profit sharing loan, such funds to be invested by the first party according to this agreement.

(e) That in case any of the parties hereto infringes any of the terms and conditions of this agreement, then the other party shall be entitled to get this transaction enforced to the Court of law by specific performance of the contract, at the cost & expenses of the defaulting party.”

- 22.** Question arises, *whether the Applicant is the “financial creditor” as provided under IBC or whether the alleged transaction is covered within the ambit of “financial debt” as defined under IBC or there has been default on the part of the Respondent.* For understanding the same, few relevant provisions of the IBC are extracted below:

Section 5 (7) of IBC defines “Financial Creditor”:

“It means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to”

Section 3 (11) of IBC defines “debt”:

“It means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”

Section 5 (8) of IBC defines “Financial Debt”:

“It 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;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause”*

23. The scheme of IBC is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. “Default” as defined in Section 3 (12) means non payment of a debt once it becomes due and payable, which includes non payment of even part thereof or an installment amount. It was held in the case of **Swiss Ribbons Private Limited and Anr. Versus Union of India and Ors. (2019) 4 SCC 17:**

“23. A perusal of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in [Section 5\(8\)](#) or otherwise, as [Section 5\(8\)](#) is an inclusive definition. On the other hand, an “operational debt” would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

24. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a “default” occurs. The Explanation to [Section 7\(1\)](#) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear

that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under [Section 7\(4\)](#), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under [Section 7\(5\)](#), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under [Sections 8 and 9](#), an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.”

- 24.** A perusal of the agreement dated 09.12.2020 reveals that the Applicant had no direct engagement in the functioning of the Respondent. However, the nature of agreement is in the form of an investment in the ratio of 75% & 25% and sharing of profit / losses in the same proportion after completion of the project. They had to invest Rs. 35,00,00,000/- (Rupees Thirty Five Crore Only) together in the proportion of their profit sharing entitlement. It was the first party i.e. the Respondent who had absolute right and authority to construct and develop / sell etc. the property to the purchasers in whole or in part. As per the agreement, the Applicant besides investing 25% i.e. Rs. 8,75,00,000/- (Rupees Eight Crore and Seventy Five Lakh Only) towards purchase of rights from the owner had to incur expenses in the construction, taxes etc. in the agreed ratio of 75:25 respectively. Further cost of 15% of the working profit was to be borne by the Applicant towards the administration expenses / statutory charges / fee and other indirect expenses.
- 25.** From the plain reading of the agreement, it is clear that it was an agreement for joint investment entered into by the Applicant with the Respondent with an understanding to share the profit / losses in the same proportion together with sharing other charges.

- 26.** In the instant case, the Respondent had purchased the rights after making the payment to the owner Sh. Chetan Prakash. The Respondent sold the roof rights over the second floor to Ms. Seema Jindal vide sale deed dated 15.07.2021. It was Seema Jindal who had a construction agreement with its sister concern, M/s Royal Insignia Premium Constructions LLP for construction of the 3rd floor on the terrace of the 2nd floor for which its sister concern has taken Rs. 3,00,00,000/- (Rupees Three Crore Only) from Ms. Seema Jindal. The Respondent was not at all involved in the said construction agreement with Ms. Seema Jindal.
- 27.** It is not the case that the project was complete or the construction was over. The document shows and it is also not disputed, that though, the Applicant had to invest Rs. 8,75,00,000/- (Rupees Eight Crore and Seventy Five Lakh Only) in the said project as its share but it had only invested Rs 6,50,00,000/- (Rupees Six Crore and Fifty Lakh Only). There is no explanation for investing lesser amount than what was agreed in the agreement. The transaction also reveals that the Applicant has not disbursed the said amount against the consideration for time value of money. Present is a case of investment by the Applicant for sharing profit / losses from the said project in the agreed ratio and on the terms & conditions as mentioned in the agreement. In the instant case, there was no breach of the agreement by the Respondent, rather, the first default was committed by the Applicant, when it did not pay share of its investment under the agreement. The Respondent in its reply has specifically stated that it is ready / willing and still ready and willing to perform its part of the agreement. We find force in the contention of Ld. Counsel for the Respondent that in this case, the Applicant had invested the amounts and agreed to share 25% of the cost of the property, which is to be sold to the 3rd parties. Further, after the completion of project, the parties have to work out whether they gained profit or suffered losses, which will also be borne in the

proportion of 75:25. Therefore, it is a profit/loss sharing partnership.

- 28.** Reply of the Respondent finds mention that out of the total sum of Rs. 35,00,00,000/- (Rupees Thirty Five Crore Only), a sum of Rs. 31,62,90,737/- (Rupees Thirty One Crore Sixty Two Lakh Ninety Thousand and Seven Hundred Thirty Seven Only) alone was paid to Dr. Chetan Prakash. Balance of Rs. 3,37,09,263/- (Rupees Three Crore Thirty Seven Lakh Nine Thousand and Two Hundred Sixty Three Only) is still payable to him. The Applicant did not share its balance. The Respondent sold the roof rights over the second floor to Ms. Seema Jindal for a sale consideration of Rs. 21,00,00,000/- (Rupees Twenty One Crore Only) vide sale deed dated 15.07.2021. The Respondent had duly informed the Applicant about the said sale. The Respondent had also given the report of other expenditure incurred by it in Para 9 of the reply i.e. the expenses on stamp duty / registration, commission paid to the dealer, and the sum paid for the construction on the 2nd floor to Royal Insignia Premium Constructions LLP, total amounting to Rs. 4,13,00,000/- (Rupees Four Crore and Thirteen Lakh Only). Thus, the Applicant was obliged to invest Rs. 2,88,73,059/- (Rupees Two Crore Eighty Eight Lakh Seventy Three Thousand and Fifty Nine Only) i.e. balance of its share in the said investment towards the cost incurred as stipulated in Para 12 of the reply. It is relevant to mention that despite all these shortfall in the investment, Respondent paid Rs. 4,40,00,000/- (Rupees Four Crore and Forty Lakh Only) to Applicant out of Rs. 21,00,00,000/- (Rupees Twenty Crore Only), which it had received from Ms. Seema Jindal.
- 29.** In this case, the Respondent has denied having sold the 2nd floor vide sale deed dated 14.10.2021. It has submitted that the said agreement to sell was only for the purposes of assessing the marketable title of the property. We find force in this submission as from the document i.e. Sale deed dated 28.07.2022, it is seen that the 2nd floor was sold to Smt. Bibi Rani Nangia for Rupees

21,50,00,000/- (Rupees Twenty One Crore Fifty Lakh Only/-) and not at a lesser value as alleged.

- 30.** It is true that the said investment was made by the Applicant keeping a commercial objective in its mind specifically considering the prime location and commercial value of the property and with the commercial object to earn profit in the sale proceeds in exchange of the investment made by it towards development, reconstruction and further sale. The agreement also provides for sharing of losses in the same ratio. The said investment is no term can be said to be a loan to the Respondent against consideration for time value of money. In the case of **Mack Soft Tech Pvt Ltd** (*supra*), the amount was disbursed by the financial creditor for construction and development of a real estate project. It was held that this amount would fall under the definition of time value of money but in the present case, it was an investment made by the Applicant on profit / loss sharing basis. There is no default as there is no question of non-payment of debt in whole or in part. As per the agreement, there was sharing of both profit or loss after completion of the project. In the case of **Anuj Jain** (*supra*), the financial creditor from the very beginning was involved in assessing the viability of the corporate debtor. There was process of restructuring of the loan and reorganization of corporate debtors but in the present case, the investment was made by the Applicant for profit and loss sharing basis. In the case of **Orator Marketing Pvt. Ltd.** (*supra*), interest free loan was given but the present case relates to investment made by the Applicant in the project on profit / loss sharing basis and therefore, the said investment does not fall under the definition of “financial debt”.
- 31.** We may like to cite a judgement by this Adjudicating Authority on the similar facts wherein one Joint Development agreement was involved. This Adjudicating Authority in the matter of *Samyak Projects Private Limited Versus Ansal Housing and Constructions Limited in CP(IB)/259/2019* has held:

“17. On reading the various clauses of the JDA, which is almost identical in all the three JVAS, it appears to be a case of joint Development by proportionate participation of both the parties and sharing of the profits or the built-up area in the manner specified in the JVA. Nowhere, in the JVA, there is an indication to the effect that Respondent has to provide services to the Petitioner, if both are to share the project by putting the land and development works and sharing the land and technical support for development and share the profits, it can be only termed as a case of JV Project and not a case of service provider by one party or the other. It is also to be noticed that in case of dispute, it is a case for Arbitration between the parties in the JVA. We also find that there are clauses in the JVA which state even in respect of interest collected from customers for late payment, which should be shared between landowner and developer in a particular ratio. It therefore goes beyond mere construction and development, it goes further subsequent to the completion of the project, If the units are given to the intending purchaser and there is a delay in payment even that will be shared between parties. The revenue sharing concept which is the key to this JVA makes it very clear that it cannot be termed as a service owed by the Respondent to the petitioner; both will have to sail together or sink, because of the JVA. Furthermore, we also notice that at page 136 to 145, are the statements given by the respondent in the normal course of business, stating details of the property under development and the share of the petitioner under the JVA.

20. The reading of it makes it clear that in terms of the JVA a substantial amount of Rs. 23,44,53,000/- has been received by the petitioner from the respondent/corporate debtor and there is a balance of Rs. 03,92,18,660/-. This should at best be termed as an ongoing business liability which should be resolved between the parties in terms of the JVA. This makes it clear that it is not a

case of debt but is a case of liability as between one partner and the other partners in the JVA."

- 32.** This matter came in appeal before Hon'ble NCLAT in *Appeal (AT) (Ins) No. 384 of 2022* wherein Hon'ble NCLAT vide order dated **01.08.2022** dismissed the appeal and held :

"The Joint Development Agreement between the parties makes it clear that both the parties are to share profits according to the percentage and mechanism as provided therein. Present was the case of sharing revenue profit by both the parties. Present was not a case where any Operational Debt was owed by the Corporate Debtor to the Appellant so as to initiate Section 9 Application. Various clauses of the Joint Development Agreement have been noticed and Revenue, Sharing Concept is the key to the Joint Development Agreement and the Joint Development Agreement also contemplated arbitration between the parties in event of any dispute. It has been informed by the Learned Counsel for the Respondent that Arbitration Proceedings have already been initiated and are pending between the parties. We are of the view that no grounds have been made out to entertain this Appeal. The Appeal is dismissed."

- 33.** The project is at the stage of construction of the 3rd floor. The Respondent has stated in clear terms that as per the agreement, it is willing to share the revenue with the Applicant. That being the position, there is no default, which is a precondition for initiating the corporate insolvency resolution process as provided under Section 7 of the Act. Clause 6 of the agreement clearly provides that in case of infringement of any terms & conditions of the agreement, either party is entitled to get the transaction enforced through the Court of Law by specific performance of contract at the cost & expense of the defaulting party.
- 34.** Thus, in our clear opinion, the Applicant cannot claim status and benefits as financial creditor as defined under section 5(7) of IBC.

No cause of action has accrued in favour of the Applicant to initiate this action as the Applicant neither falls in the category of the “*financial creditor*” as defined under Section 5 (7) of IBC nor the alleged transaction can be said to be covered within the ambit of “financial debt” as defined under Section 5 (8) of IBC. The application therefore is not maintainable and is required to be dismissed.

35. ORDER

In light of the above facts and circumstances, the Application bearing **CP(IB) – 44 (PB)/2022** filed by the Applicants/(FC), under section 7 of the Code read with rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against the Respondent/(CD), is **DISMISSED**.

No Order as to costs.

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**(RAMALINGAM SUDHAKAR)
PRESIDENT**

-sd-

**(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL**