IN THE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Petition (IB) No. 485(PB)/2017

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

MEENU CHOPRA
H. No. E-331
Greater Kailash
New Delhi-110048

.... Financial Creditor

Vs.

INNOVATIVE INFRA DEVELOPERS PVT. LTD.
C-7/85, FF, Sector-08
Rohini, Delhi, West-110085

.... Corporate Debtor

ORDER DELIVERED ON: 02.06.2022

CORAM:

JUSTICE RAMALINGAM SUDHAKAR, HON'BLE PRESIDENT
SH. AVINASH K. SRIVASTAVA, HON'BLE MEMBER (T)

Appearance

For the Petitioner : Mr.Sumesh Dhawan, Ms. Vatsala Kak, Ms. Charu Sharma, Mr. Tannya Baranwal, Mr. Jasvin Dhama, Advocates.

For the Respondent: Mr. Ankur Bansal, Advocate.

AKS

ORDER

Per: AVINASH K. SRIVASTAVA, HON'BLE MEMBER (TECHNICAL)

1. This is an application, filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (Adjudicating Authority Rules), for initiating the Corporate Insolvency Resolution Process (CIRP), declaring moratorium and for appointment of Interim Resolution Professional (IRP), against the company viz., M/s. Innovative Infradevelopers Pvt. Ltd. (Corporate Debtor), for default in repayment of Rs. 27,75,000 (Rupees Twenty Seven Lakhs Seventy Five Thousand Only).

Submissions of the Petitioner:

2. It is stated that the Agreement to sell (Agreement) dated 05.01.2015 (at pg. 20-39 of the Petition; Annexure A-4), was executed between the Petitioner and the Corporate Debtor, with regard to the unit bearing no. GF-46, admeasuring around 100 sq.ft., located at ground Floor, Hotel Towerant, Innovative Legend Heights (Unit). The Corporate Debtor in terms of the Agreement agreed to complete the construction of the Unit within fourteen (14) months from the date of the execution of the said Agreement.

3. The Corporate Debtor had agreed to pay a sum of Rs 25,000 (Rupees Twenty Five Thousand Only) per month less TDS at

source, to the Petitioner, during the period of construction, till the offer of the possession is made as Assured Return. The Petitioner, made the entire payment to the Corporate Debtor towards the sale consideration of the unit in the following manner:

Sl. No.	Cheque No/ Bank	Date	Amount (Rs.)
1	000077 drawn on Standard Chartered Bank	06.10.2014	2,50,000
2	000081 drawn on Standard Chartered Bank	10.12.2014	22,50,000
Total			**25,00,000**

4. The Corporate Debtor failed to hand over the possession of the Unit within the agreed time and also defaulted in paying the Assured Return for the period from December 2016 to October 2017. The Corporate Debtor issued a letter 13.07.2017, stating that the Order of the Hon'ble High Court of Punjab and Haryana dated 09.01.2015, to which the Corporate Debtor is not a party, however it affects the project as the construction activities have been stopped and therefore, the Corporate Debtor is not in a position to give any Assured Returns, till the stay Order is vacated.

5. Vide Order dated 05.04.2021, this Adjudicating Authority directed the Petitioner to file an affidavit with respect to non-applicability of the Ordinance dated 28.12.2019. The petitioner filed an affidavit dated 15.07.2021, in compliance of the Order dated 05.04.2021,stating that the IBC (Amendment) Ordinance dated 28.12.2019, is not applicable in the present case as the Petitioner is invoking its rights in terms of Section 5(7) of the IBC and the debt payable by the Corporate Debtor does not fall in the ambit of

Section 5 (8)(f) of the IBC as the committed returns/assured returns are not pure real estate transaction but also are in the nature of fund mobilization activity and has been recognized as financial debt under Section 5(8) (a) of the IBC.

6. The amounts given as Assured Returns ought to be dealt with a different approach as huge amounts of money are mobilized by developers to ensure the development of the projects, without any collateral or security. In this regard reliance is place on the judgment passed by the Hon'ble NCLAT in the matter of ***Nikhil Mehta & Sons Vs. AMR Infrastructure Ltd.*** Company Appeal No-7/2017, dated 21.07.2017, wherein the committed returns/assured returns have been recognized as a Financial Debt under Section 5 (8) of the IBC.

Reply by the Corporate Debtor:

7. The Corporate Debtor has filed its reply to the Petition dated 19.12.2017 and has stated that the petition filed is not maintainable as the clause 'M' of the agreement dated 05.01.2015, inter-alia covenants that in case of dispute between the parties, the same shall be adjudicated by invoking Arbitration proceedings under the Arbitration and Conciliation Act, 1996, therefore, all other remedies are expressly barred including recourse to present insolvency proceedings under IBC. The Petitioner has suppressed material information about the stay on the construction by the

Hon'ble Supreme Court vide Order dated 24.04.2015 in the matter of Rameshwar & Ors. Vs. State of Haryana & Ors. SLP (c) No. 5725/2015 and the delay in completing the construction is on account of Force Majeure. The Order dated 24.4.2015 is reproduced as under:

> *"....There shall be no further construction on the land in question in the meantime."*

8. The Corporate Debtor is although not a party to the litigation, however, the District Town Planner, Enforcement, Gurgaon (DTP), issued a letter dated 27.04.2015, directing to stop all construction activities in the light of the Order of the Hon'ble Supreme Court. The Corporate Debtor sent a representation dated 10.08.2015, to the DTP clarifying the stand and requested to vacate the stay of construction as the same is beyond the scope of the stay order passed by the Hon'ble Supreme Court. The Corporate Debtor also requested for permission to carry on the construction activities in accordance with the approved building plans.

9. The Corporate Debtor is unable to apply for grant of Occupation Certificate, as the Hon'ble High Court of Punjab & Haryana, vide Order dated 09.01.2015, passed in the matter of Mukesh Sharma Vs. State of Haryana & Ors. Bearing CWP no. 23839/2014 directed the HUDA to not issue any Occupation Certificates with respect to the properties, where HUDA has not supplied water connection. The Corporate Debtor is unable to

complete the construction of the entire project in accordance with the timelines, on account of stay and the Clause F of the Agreement, which clearly states that in event when a stay order is in force on the construction activities of the company, the affected party is not obliged to perform the agreement as agreed. The amount being allegedly claimed by the Petitioner is not due and payable as the same is prevented on account of the Force Majeure conditions. The liability of the Corporate Debtor would not arise till the stay Order dated 27.04.2015 passed by the DTP is vacated.

10. The Agreement dated 05.01.2015 stands frustrated owing to the various Orders of the Hon'ble Supreme Court and the Hon'ble High Court and therefore, the Corporate Debtor is under no obligation to discharge any of its obligations. The petitioner has to satisfy that there is financial debt and the Corporate Debtor defaulted in repaying the alleged amount. The Corporate Debtor is commercially solvent and the Petitioner is seeking recovery of the amounts.

11. The Corporate Debtor has also filed reply in response to the affidavit filed by the Petitioner dated 15.07.2021, and stated that the purpose of the Petitioner while entering into the Builder Buyer Agreement was solely for the purpose of sale and purchase of a commercial property. The Corporate Debtor is engaged in the business of real estate development and is in no manner a financial institution or an NBFC, which lends money on interest or

otherwise, therefore, never intended to enter into a loan agreement to raise capital from the Petitioner. Even otherwise, the Petitioner has admitted the fact that she had approached the Corporate Debtor for purchase of a commercial property and the payment of assured return was not in the form of interest toward alleged loan rather the same was to be paid by the Corporate Debtor during the construction period in terms of the Agreement. The Petitioner in terms of the directions of the Hon'ble Supreme Court vide Order dated 12.03.2018, passed in the Rameshwar case (Supra), has already approached Haryana State Industrial and Infrastructure Development Corporation (HSIIDC) and claimed the amount as an allottee and not as a borrower. The Petitioner has also brought this fact to the knowledge of this Adjudicating Authority as is recorded in the Order dated 19.7.2018, which reads as under:

> *"...It has been stated by the Ld. Counsel for the non-applicant that in pursuance of the Order dated 07.06.2018 the claim has been filed before the HSIIDC in terms of the directions dated 12.03.2018 issued by the Hon'ble Supreme Court in the case of Rameshwar & Ors. V. State of Haryana ..."*

Thus, it is clear that no cause or purpose is served by the Petitioner to pursue this Company Petition, when the same claim is pending adjudication before HSIIDC.

12. We have heard the Ld. Counsels for both the sides and carefully perused the documents placed on records.

13. The first issue that needs to be answered is with regard to the maintainability of this petition as a single real estate allottee has filed this Company Petition. In this regard, reference can be made to the second and third provisos to Section 7 of the IBC, which reads as under:

"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 or 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 provisos*** *as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission."*

14. From a bare perusal of the provisos it is clear that the financial creditor who is an allottee under a real estate project becomes eligible to initiate CIRP proceedings against the Corporate Debtor when the prerequisite conditions are fulfilled i.e., when an application is filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent (10%) of the total number of such allottees under the same real estate project, whichever is less.

15. The position of law is settled by the Hon'ble Supreme Court in the matter ***Manish Kumar Vs. Union of India & Anr.*** WP (c) /2020, vide judgement dated 19.01.2021 as per which the constitutional validity of the Ordinance dated 28.12.2019 was upheld and the petitions which were not admitted by the Adjudicating Authority when the amendment came in force, were given liberty to withdraw within thirty days in case the new threshold/ prerequisites were not met.

16. In light of the judgment passed by the Hon'ble Supreme Court, the transaction between the parties in the case at hand is for the purchase of the commercial property by an individual and the clause for assured returns cannot be separated from the purpose of the Agreement i.e., purchase of commercial property for a said consideration. Thus, the Petitioner in terms of the provisions of IBC is an allottee of a real estate project.

17. The petitioner has failed to satisfy the requirement laid down in second proviso to Section 7(1) of IBC.

18. Accordingly, the Company Petition (IB) No. 485(PB)/2017, alongwith all the pending applications, if any, stands **dismissed.**

19. The documents be consigned to the record room.

-Sd/

RAMALINGAM SUDHAKAR
(President)

-Sd/

AVINASH K. SRIVASTAVA
(Member Technical)