IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 798/IBC/MB/2020

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

Devika Sharma & Ors.

Having registered office at: E/2, 103-106, 1st Floor, Bharat Nagar, Grant Road, Mumbai

……**Financial Creditor**

Vs

Kasata Hometech (India) Private Limited

5, Casa Blenche, Destination Architecture, Plot No. 45, Sector: 11, CBD Belapur, Navi Mumbai, Thane 400614

…….Corporate Debtor

Order delivered on: 11.08.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Shyam Babu Gautam, Member (Technical)

For the Applicant: Mr. Himanshu Chaubey, Advocate

For the Respondent: Mr. Sheelang Shah, Advocate

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company petition is filed by *Devika Sharma, acting for self and in the capacity as the authorized representative of*

petitioner nos. 2 to 16 (hereinafter called "Financial Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Kasata Hometech (India) Private Limited* (hereinafter called "Corporate Debtor") alleging that the Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 6,82,53,864/- to the Financial Creditor.

3. **The submissions of the Financial Creditor are as follows**:-

 i. The petitioners are Financial Creditors in terms of Section 5(7) of the Insolvency and Bankruptcy Code, 2016 and have preferred the instant petition under Section 7 of the Code for initiating Corporate Insolvency Resolution Process in the matter of Kasata Hometech (India) Pvt. Ltd., Corporate Debtor with respect to financial debts owed to the petitioners under different financial agreements.

 ii. In March 2016, the Financial Creditor, who is engaged in the business of Development of Housing Societies, issued a Product note inviting interested persons to invest in the Company vide subscription to Non-Convertible Debentures (hereinafter referred to as NCD). The purpose for issuance of the NCDs was to fund the completion of housing projects, as undertaken by the Respondent in Vadodara. As per the Term Sheet attached to the product note the total size of the

NCD issue was to be Rs. 25 Crores, that too in two traches. In the First Tranche NCDs worth Rs. 15 Crores were to be issued and in the Second Trache NCDs worth 10 Crores were to be issued. Furthermore, as per the product note each NCD was worth Rs. 1,00,000/- (Rs. One Lakh Only). Each debenture holder was entitled to payment of interest at the rate of 17.25% per annum, to be paid quarterly. The term of the NCD was to be months. The debenture holder was to be paid the principle amount in Eight equal monthly instalments starting from the end of the 5^{th} quarter.

iii. As per the said Product Note the Debenture Holder's Representative and Calculating Agent was to be M/s Karvy Realty (India) Ltd. Furthermore, the Debenture Trustee and Escrow Agent was to be one M/s Milestone Trusteeship Services Ltd. for the said purpose a Debenture Holders Representative Agreement was entered into between Respondent, M/s Karvy Realty (India) Ltd. and M/s Milestone Trusteeship Services Ltd. on 29.03.2016.

iv. M/s Karvy Realty is a Financial Management firm and was handling the investment portfolio of the Petitioners. Upon the advice of M/s Karvy Realty the petitioners, made investments in the Respondent Company, between April 2016 and June 2016. In furtherance of the payments as made, each of the petitioners were allotted NCDs commensurate to their investments.

v. The aforesaid holdings were accordingly reflected in the Demat account statements of the petitioners.

vi. As per the terms and conditions of the subscription of NCDs the petitioners herein were entitled to an interest on the Principal Amount, as invested, @17.25% per annum. The said payment was to be made to the petitioners herein on a quarterly basis. Furthermore, the petitioners were also entitled to repayment of Principal Amount in eight quarterly instalments starting from the end of the 5th quarter.

vii. Initially till May 2017, the payments were made as per schedule. However, post May 2017, the Respondent has been continuously defaulting in making the scheduled payment.

viii. After continuous follow up by the Debenture Holders, a letter came to be issued by the Respondent on 05.02.2019, whereby it admitted to the fact that no interest has been paid post the March 2018, quarter and that even with respect to the March 2018 quarter, only 80% of the payment has been made. The Respondent further admitted to the fact that in addition to the payment of interest, the repayment of the Principal amount is also due. It was stated in the letter that due to adverse Market Conditions in the Real Estate Sector, the sale of units has been negligible, leading to delay in repayment as per the terms of subscription.

ix. Even after the assurance by the Respondent, that the payment will be promptly made, till date the dues have not been cleared by the Respondent.

x. As on date the total payment outstanding in favour of the petitioners, from the respondent is Rs. 6,82,53,864/-. The said amount also includes the interest to be paid as per the terms of the Subscription. Even after repeated reminders, the petitioners have been denied the return on their investment, by the respondent.

xi. In the light of the foregoing the total outstanding amount of Rs. 6,82,523,864/- as per the terms of the NCD Subscription, is a financial debt under Section 5(8) of the Code. Hence this petition.

4. Submissions of the Corporate Debtor are as follows:

i. The petitioners have no authority to file the captioned petition. Petitioners have failed to disclose the details of the Debenture Trust Deed. The Debenture Trustee has not filed the present petition. The petition is against the letter and spirit of the terms of the Debenture Trust cum Mortgage Deed dated 28.03.2016 in terms or which action in case of any default can only be intimated after a decision by the Majority Debenture Holders. The term "Majority Debenture Holders" has been defined as "such number of Debenture Holders holding 75% or the nominal value of the then outstanding Debentures". The Debenture Trustee on behalf of the Debenture Holders can initiate proceedings against the Corporate Debtor in accordance with the provisions of the Debenture Trust cum Mortgage Deed dated 28.03.2016 and not otherwise. Hence, in the absence of the debenture trustee being a petition nor any letter of authority in favour of the petitioners, this petition is filed without any authority and ought to be rejected and dismissed on this ground in *limine*.

ii. The Debenture Trustee is a liaison between the issuer company and the debenture holders, who hold the secured property on behalf of the issuer company, which is mortgaged in favour of Debenture Trustee for protecting the interest of debenture holders. Debenture Trustee is an entity that secures any issue of debentures of a body corporate for the benefit of investors.

iii. The key role of appointment of a debenture trustee, is that the trustee can simplify the administration of large numbers of individual debenture holders. The trust deed outlines the rights and obligations of each party.

iv. Further, even if the petitioners are claiming their statutory right, such a statutory right is not available to any person in vacuum. There has to be a fad situation and contractual basis conferring rights and imposing duties on the parties. The statutory right does not merely obliterate these rights and duties which are part of the contract. There has to be some consecration given, the written executed contract and agreement between the issuer company and the debenture trustee whose is acting for the benefit of the debenture holders.

v. Further, the action is pre-mature, the petitioner, ought to have approached the debenture trustee and till date has not done so, the petition is premature in as much as there is no majority decision by the Debenture Holders to initiate any proceedings.

vi. The remedy available to the debenture holders/ debenture trustee is an "secured" debenture holders, is to enforce the security provided under the agreement. However, invoking corporate insolvency is a drastic measure. Such a measure should be taken only in drastic circumstances when the creditor has no other measure to recover the amounts. In the present, case there is enough security to secure all the claims of the debenture holders. The Debenture trustee has unfettered powers over the security as per the agreement, i.e. the power to take possession of the assets and to be power to sell the assets without resorting to the court. Hence, the appropriate and most beneficial manner to recover the amounts would to sell the security in the open market. In the event of corporate insolvency, the debenture holders would be required to start in line as per the waterfall mechanism set out in section 53 of the IBC.

vii. Furthermore, it is pertinent to note that, on various occasions the Corporate Debtor made offers to settle the disputes with the petitioners amicably in view of the ongoing pandemic situation. However, unfortunately the applicants were not agreeable. In view of, this Tribunal passed an order dated 25.03.2021, wherein it as inter alia recorded that if the parties do not settle the dispute, the petition would be admitted without hearing. However, the corporate debtor ought to have been given an opportunity to put forth its case and be given an opportunity to argue and put forward its submissions before this Tribunal.

viii. In the premises above mentioned, it is submitted that, the company petition be dismissed with costs.

FINDINGS

1. Before going into the merits of the matter, it is important to mention here the order dated 25.03.2021 passed by this Tribunal when the Corporate Debtor is constantly taking adjournments from this Bench on the pretext of settlement.

Order dated 25.03.2021

> *"…Mr. Seelang Shah, counsel for the respondent and Mr. Himanshu Chaubey, counsel for the petitioner are present through virtual hearing. Counsel appearing for the respondent requested 4 weeks' time on the ground that the respondent is sincerely interested in settling the matter. Considering the request, the matter is listed on 03.05.2021 with a clear understanding and direction that in the event of failure of settlement the above company petition would be automatically admitted without any hearing..."*

2. After passing the above order, the matter was ordered to be listed on board on 03.05.2021, however, due to second wave of pandemic (Corona Virus) and also on account of taking up only urgent matters by NCLT, the matter could not be listed. Thereafter, the matter was listed on board on 05.07.2021 and was adjourned from 05.07.2021 to 27.07.2021.
3. The only contention raised by the Corporate Debtor all through in his reply affidavit as well as in the written submissions is that the remedy available to the petitioners being debenture holders is to enforce the security provided under the agreement and invoking the Corporate Insolvency is a drastic measure and such measure should be taken only in drastic circumstances when the creditor has no other measure to recover the amounts. He further contends that on various occasions the Corporate Debtor made offers to settle the dispute with the petitioners amicably in view of ongoing pandemic situation. However, unfortunately the petitioners were not agreeable.
4. Thus, it is very clear from the above reply as well as written submission of the Corporate Debtor that the Corporate Debtor is not disputing the debt and default in this Company Petition. The petitioners being the debenture holders, their claims squarely falls within the definition ‘Financial Debt’. When once the debt and default are established and the debt is shown to be within limitation, this Bench has no alternative except to admit the above Company Petition. All the above contentions raised by the Corporate Debtor are beyond the scope of this petition as per settled law.

5. As stated above, the Corporate Debtor having admitted before this Bench on 25.03.2021 for automatic admission of the Company Petition if he fails to settle the matter before 25.03.2021, has no legal or moral right to pray for dismissal of the above Company Petition.
6. Therefore, for the reason stated above, there are no valid grounds warranting the rejection of the above Company Petition as the debt and default are clearly established and the debt is also within limitation. The petitioner has also suggested the name of proposed Interim Resolution Professional in part-3 of the Petition along with his consent letter in Form-2. Thus, the present Company Petition satisfies all the necessary requirements for admission.
7. In view of the above observations, this Bench is of the considered view that the above Company Petition is liable to be admitted and accordingly the same is admitted by passing the following:

ORDER

a. The above Company Petition No. (IB) -798(MB)/2020 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Kasata Hometech (India) Private Limited.
b. This Bench hereby appoints **Mr. Jugraj Bedi** Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00731/2017-2018/11208 as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/- **Sd/-**

SHAM BABU GAUTAM
MEMBER (TECHNICAL)

H.V. SUBBA RAO
MEMBER (JUDICIAL)