**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**BENGALURU BENCH**
**(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)**

Item No.04
**CP (IB) No.86/BB/2021**
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

**IN THE MATTER OF:**

**M/s. Omkhush Infrastructure Pvt. Ltd.**
R/Off: No.810, 8th Floor, Aura Biplex,
Above Kalyan Jewellers, S.V. Road,
Borivali (West)
Mumbai – 400 092. ... Petitioner/ Operational Creditor

**VERSUS**

**M/s. Merushikhar Realty (LLP)**
R/Off: No.2, 11th Floor, 'SOLUS'
1st Cross, J C Road,
Bangalore – 560 027. ... Respondent/Corporate Debtor

**Order delivered on: 30th May, 2022**

**Coram:** Hon'ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)
Hon'ble Mr. Manoj Kumar Dubey, Member (Technical)

**PRESENT:**

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| For the Petitioner | : | Mr. Amogh CA, Adv. |
| For the Respondent | : | None |

**O R D E R (ORAL)**

**Per: Ajay Kumar Vatsavayi, Member (Judicial)**

1. The present Petition is filed, under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the I&B (Application to Adjudicating Authority) Rules 2016, by M/s. Omkhush Infrastructure Private Limited (for brevity 'Operational Creditor/Applicant/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of M/s. Merushikhar Realty (LLP) (hereinafter referred as 'Corporate Debtor/Respondent').



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2. The Corporate Debtor, namely, M/s. Merushikhar Realty LLP is a Company incorporated on 22.09.2014 under the provisions of the Companies Act, 2013 with LLPIN:AAC-7415 having its registered office at No.2, 11th Floor, 'SOLUS', 1st Cross, J C Road, Bangalore – 560027, which falls within the territorial jurisdiction of this Adjudicating Authority. The total obligation of contribution of the said LLP is Rs.200000/- as per the Company Master Data attached at page no.78 of this Petition.
3. The present application has been filed by the Operational Creditor against the Corporate Debtor in respect of the default amount of Rs.2,44,52,603/- (Rupees Two Crores, Forty Four Lakhs, Fifty Two Thousands, Six Hundred and Three only).
4. It is stated that the Petitioner is a private company and is in the business of dealing in real estate development and construction whereas the Respondent is a Limited Liability Partnership and is in the business of real estate development.
5. It is also stated that the Petitioner was planning to set up a warehousing project near Bengaluru, Karnataka and therefore approached the Corporate Debtor to avail services for the said project and executed the Memorandum of Understanding (MoU) on 13.05.2015 with regard to the development of warehouse project. As per the terms of MoU, the Respondent was to provide certain services such as land aggregation, title clearance of land, obtaining various regulatory permissions, etc and as per the terms of MoU, the Petitioner made a payment of Rs.1,00,00,000/- (Rs. One Crores only) to the Respondent through RTGS bearing Ref. No.GBCBH15134125975 drawn from "The Greater Bombay Co-operative Bank Limited", Dahisar (East), Mumbai Branch on 14.05.2015. The said payment made was also reflected into Schedule of "Unsecured Loans" in Annual Reports of the Respondent for the FY 2015-16.
6. Despite receipt of aforesaid payment, the Respondent failed to comply with the terms of MoU and its services obligations and kept giving false promises and providing excuses to the Petitioner for long time. Further, the Petitioner sent an email on 20.09.2019 to the Corporate Debtor

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showing his intention to terminate the MoU and requested the Respondent to refund the aforesaid amount paid by the Petitioner. The Respondent neither replied to the aforesaid email nor returned the amount to the Petitioner and therefore, the Petitioner issued a Notice of Default dated 06.11.2019 to the Respondent to comply with the terms of MoU and its obligations within 30 days or else return the amount to the Petitioner.

7. The said notice was duly received by the Respondent on 11.11.2019. Pursuant to the MoU, on failure to fulfil obligations within 30 days from the issuance of the said Notice i.e. on or before 11.12.2019, the Respondent was liable to repay the advance amount One Crore along with the interest @ 24% p.a. thereon. Further, the Petitioner states that the date on which the default occurred is as 12.12.2019 i.e. the Respondent failed to comply the terms of the said notice within 30 days of issuance of Notice dated 11.11.2019.
8. It is also stated that the outstanding principal amount of Rs.1 Crore along with the interest amounting to Rs.1,44,52,603/- up to 20.05.2021 @ 24% p.a which is as per the terms of MoU, aggregating to Rs.2,44,52,603/ that is in default till date.
9. Finally, after trying since quite long time now, the Petitioner issued Demand Notice under Section 8 of the Code in Form No.3 and 4 dated 25.05.2021 for the outstanding principal amount of Rs.1 Crore and interest Rs.1,44,52,603/-.
10. The Demand Notice sent to the registered office of the Respondent as well as to Mr. Kishor Jain (Designated Partner of the Respondent) was duly delivered as per the tracking report of registered post receipts extracted from the indiapost.gov.in and also served through email to the Respondent and Mr. Kishor Jain on email Id registered with MCA Portal vis, legal@devmantra.com and kishorjain@jainheights.com on 08.06.2021. Further the Corporate Debtor issued notice of dispute through its legal advisors on 23.06.2021.

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11. The Corporate Debtor did not dispute the receipt of amount and execution of MoU in its reply to the demand notice. However, it raised other issues which are sufficiently addressed by the Petitioner in its rejoinder notice dated 16.07.2021 sent to the Corporate Debtor through post on 20.07.2021. The issues raised by the Corporate Debtor does not stand against the facts and position of law.
12. Since no repayment was made by the Corporate Debtor, the Petitioner is left with no option but to proceed further under the IBC, 2016. Accordingly, it has filed the Petition under the IBC, 2016 against the Respondent.
13. Heard Mr. Amogh CA, learned Counsel for the Petitioner and none for the Respondent/Corporate Debtor.
14. In spite of availing substantial time and number of opportunities, no counter has been filed by the Respondent/Corporate Debtor.
15. On 19.04.2022 and again today, even on revised call, there is no representation for the Respondent/Corporate Debtor.
16. It is submitted by the learned Counsel for the Petitioner that the Petitioner had entered into a Memorandum of Understanding (MoU) with the Respondent/Corporate Debtor on 13.05.2015 for procuring and developing certain land for warehouse and related infrastructure. As per the terms of the MoU, the Petitioner has given Rs.1 Crore as advance to the Respondent/Corporate Debtor and the same was evidenced by the bank statement filed by the Petitioner at Page No.118 of the CP. It is further submitted that in spite of lapse of time, the Respondent/Corporate Debtor failed to comply with their part of the obligations made under the MoU and accordingly the Petitioner terminated the MoU vide notice dated 06.11.2019 and demanded repayment of the advance amount along with the interest. Since, the Respondent/Corporate Debtor failed to do so, the Petitioner issued a demand notice under Section 8 of the IBC, 2016 on 25.05.2021. The Respondent/Corporate Debtor belatedly sent a reply on 23.06.2021 with unteneable grounds. Hence the CP.

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17. It is seen that the Petitioner entered into an MoU on 13.05.2015 and also paid an amount of Rs.1 Crore to the Respondent/Corporate Debtor. The balance sheet as on 13.01.2016 of the Corporate Debtor confirms the said fact of taking the said amount from the Petitioner. Further, the statement of account of the Corporate Debtor as on 13.03.2019 also confirms the debt.
18. The Respondent Corporate Debtor in his reply given to the demand notice issued on behalf of the Petitioner stated that the claim of the Petitioner is barred by limitation and that in terms of the MoU, the remedy lies before the competent Civil Court by filing a suit for Specific Performance and hence the proposed CP is not maintainable. It was further stated by the Respondent/Corporate Debtor's Director that they had never received any notice of termination and hence the claim of interest would not survive.
19. It is to be seen that the MoU is dated 13.05.2015. The Petitioner terminated the said MoU and recalled the advance amount vide notice dated 06.11.2019. In between, the Respondent acknowledged the debt in his balance sheet as on 13.03.2016 and also in his statement of account as on 13.03.2019. The instant CP was filed on 31.08.2021. Since the Petitioner terminated the MoU vide notice dated 06.11.2019 and issued the demand notice on 25.05.2021 and filed the instant CP on 31.08.2021, we are of the view that the CP is within the period of limitation, and accordingly, we reject the contention of the Respondent/Corporate Debtor made in his reply to the demand notice.
20. With regard to the contention that in terms of Clause-4 of the MoU, the Petitioner can only file suit for Specific Performance before the competent Civil Court but cannot maintain the instant CP, it is to be seen that this issue has already been settled by various decisions to the effect that invoking of any alternative remedy or availability of alternative remedy is not a bar for initiating CP under the IBC, 2016, provided that the Petitioner is able to establish the debt and default in terms of the provisions of the IBC, 2016. Hence this contention raised by the

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Respondent/Corporate Debtor through his reply to the demand notice is also rejected.

21. So far as the contention of the Respondent/Corporate Debtor raised in his reply to the demand notice, with regard to non-receipt of termination notice dated 06.11.2019, the Petitioner drawn our attention to the postal receipts and the corresponding tracking reports at page nos.134-137 of the CP. Hence, the said objection raised by the Respondent/Corporate Debtor is also rejected.

22. In the circumstances and for the aforesaid reasons and since the CP is complete and satisfies the requirements of Section 9 of IBC, 2016, the same is **admitted** and moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

    (a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in
    (b) any court of law, tribunal, arbitration panel or other authority;
    (c) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
    (d) 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;
    (e) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor;
    (f) It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
    (g) The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
    (h) The order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of

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Section 31 or passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;

23. In Part III of Form No.1 no name of any Resolution Professional is proposed by the Petitioner. Hence Mr. Nataraja Nanjundaiah, Registration No.IBBI/IPA-003/IP-N00304/2020-2021/13296 address at: 3108, First Cross, Mariyappana Palya, Near Hombegowda College, Bengalore, Karnataka, 560021, email id- nnataraja491@gmail.com, Mob - +91-8600034332 is appointed as Interim Resolution Professional (IRP). He shall file the registration certificate and written consent within one week from the receipt of this order.
24. The Law Research Associate of this Adjudicating Authority has checked the credentials of Mr. Nataraja nanjundaiah and there is nothing adverse against him. The IRP is directed to take the steps as mandated under Sections 15, 17, 18, 20 and 21 of IBC, 2016.
25. The Interim Resolution Professional shall after collation of all the claims received against Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Adjudicating Authority on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Adjudicating Authority every fortnight.
26. A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

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**(MANOJ KUMAR DUBEY)**
**MEMBER (TECHNICAL)**

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**(AJAY KUMAR VATSAVAYI)**
**MEMBER (JUDICIAL)**