

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No.201/BB/2020  
U/s 7 of IBC, 2016  
R/w Rule 4 of I&B (AAA) Rules, 2016  
R/w Section 60(5) of the IBC, 2016

**Between:**

**M/s. Skylark Ithaca  
Buyers Welfare Association**

No.202, Falcon Nest,  
01<sup>st</sup> Cross, Kaggaasandra,  
Bengaluru Zone 3,  
Mahadevapura Hoodi,  
Bengaluru- 560 093.

- Petitioner/Financial Creditor

**And**

**1. M/s. Ithaca Estates India Pvt. Ltd.**

Skylark Chambers, No.37/21,  
Yellappa Chetty Layout,  
Ulsoor Road,  
Bangalore-560 042.

- Respondent/Corporate Debtor

**2. M/s. Skylark Mansions Private Limited**

*Through it Resolution Professional*  
*Mrs. Ramanathan Bhuvaneshwari*  
C-006, Pioneer Paradise, 24<sup>th</sup>Main Road,  
7<sup>th</sup> Phase, JP Nagar,  
Bangalore - 560 042.

- Proforma Respondent

**Order Pronounced on: 31<sup>st</sup> March, 2021**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present (through Video Conference):**

For the Petitioner : Shri Jacob Alexander

For the Respondent No.1 : Ms. Amrita Jain

For the Proforma Respondent : Mrs. Ramanathan Bhuvaneshwari



**ORDER**

**Per:** Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.201/BB/2020 is filed by M/s. Skylark Ithaca Buyers Welfare Association U/s 7 of IBC, 2016 R/w Rule 4 of I&B (AAA) Rules, 2016 R/w Section 60(5) of the Code for initiation of group CIRP in respect of the Corporate Debtor Viz., M/s. Ithaca Estates India Private Limited along with M/s. Skylark Mansions Private Limited (SMPL) which was admitted initiating CIRP vide Order dated February 7, 2020 passed in C.P. (IB) No.389/BB/2019), on the ground that it has committed default for total amount of Rs. 4,32,76,03,097/- (Rupees Four Hundred Thirty Two Crore Seventy Six Lakh Three Thousand and Ninety Seven Only).
2. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are as follows:
  - (1) M/s. Skylark Ithaca Buyers Welfare Association (herein after referred to as 'Petitioner/Financial Creditor') is an Association, registered under the provisions of Karnataka Societies Registration Act, 1950 on 04.04.2019 having Identification No.DRB3/SOR/9/2019-2020. It comprises of more than 250 Members. Its registered office is at No.202, Falcon Nest, 01<sup>st</sup> Cross, Kaggaasandra, Bengaluru Zone 3, Mahadevapura Hoodi, Bengaluru-560093.
  - (2) M/s. Ithaca Estates India Private Limited ('Respondent/Corporate Debtor') was incorporated on 23.01.2013, having CIN: U45205KA2013PTC067632 and its Nominal/Authorized Share Capital is Rs. 5,00,000/- and Paid-Up Capital of Rs.1,00,000/-.
  - (3) The Corporate Debtor was incorporated as a wholly owned subsidiary of M/s. Skylark Mansions Private Limited (SMPL), and a special purpose vehicle and contractor of SMPL to execute the development of a project named 'Skylark Ithaca' situated at Sy. No.24/4, 24/5& 24/6 of Kodigehalli and Sy. No. 28, 29 and 30/1 of Kurudusonnenahalli Village, Bangalore East Taluk, Bengaluru,



Karnataka 560049 (the 'Project') SMPL had entered into Joint Development Agreements and Supplemental Agreements with various landowners of Kodigehalli village and Kurudu Sonnenahalli village, K.R. Puram, Bangalore, Karnataka, in relation to the land on which the Project was required to be developed, entitling SMPL to develop multi-storeyed residential buildings. Furthermore, the landowners had also executed a general power of attorney in favour of the SMPL authorising SMPL to execute and develop the Project and obtain various consents and approvals in relation thereto. Whilst, the said general power of attorney was executed in favour of SMPL, it was not executed in favour of the Corporate Debtor nor was it delegated to the Corporate Debtor by SMPL. Further, SMPL had also entered into allocation agreements with landowners for sharing of right, title and interests in the land provided for the Project. Subsequently, SMPL and the Corporate Debtor entered into an assignment deed dated March 12, 2013, authorising Corporate Debtor to construct the Project.

- (4) CP (IB) No.389/BB/2019 filed by the Petitioner respect of the SMPL was already admitted by initiating CIRP vide Order dated February 7, 2020 on an Application filed by the Financial Creditor herein due to the failure in completion of the project, namely, 'Skylark Ithaca'.
- (5) The Financial Creditor is an association registered under the provisions of Karnataka Societies Registration Act, 1950. It comprises of more than 250 members, and is a financial creditor in terms of section 5(8)(f) of the Code. SMPL had entered into Joint Development Agreements and Supplemental Agreements with various landowners of Kodigehalli village & Kurudu Sonnenahalli Village, K.R. Puram, Bangalore, Karnataka, in relation to the land on which the Project was required to be developed, entitling SMPL to develop multi-storeyed residential buildings. Furthermore, the landowners had also executed a general power of attorney in favour of the SMPL authorising SMPL to execute and develop the Project



and obtain various consents and approvals in relation thereto. Whilst, the said general power of attorney was executed in favour of SMPL, it was not executed in favour of the Corporate Debtor nor was it delegated to the Corporate Debtor by SMPL.

(6) Further, SMPL had also entered into allocation agreements with landowners for sharing of right, title and interests in the land provided for the Project. Subsequently, SMPL and the Corporate Debtor entered into an assignment deed dated March 12, 2013, authorising Corporate Debtor to construct the Project. The Project was required to be constructed and developed by Corporate Debtor, for and on behalf of, and under the directions of SMPL, as a contractor. Each of the Members of the Financial Creditor had entered into Sale Agreement and Construction Agreement with the Corporate Debtor and SMPL, for the purpose of purchase of flats / apartments, of varying sizes, to be constructed in the Project (the said Sale Agreement and Construction Agreement is hereinafter referred to as the "*Tripartite Buyer Agreement*").

(7) As per terms of the Tripartite Buyer Agreement, the Financial Creditors had paid consideration for the sale of flats in the project to Corporate Debtor and SMPL, jointly, as per the details provided in the calculation sheet attached as Annexure A5 herein aggregating to Rs. 127,44,38,369/- (Rupees One Hundred and Twenty-Seven Crores Forty-Four Lakhs Thirty-Eight Thousand Three Hundred and Sixty-Nine only). Thus, the rights, title and interests in relation to the land on which the Project is required to be constructed are with SMPL (under agreement with the original landowners) and the monies paid by the Financial Creditors in relation the Project have been utilised by SMPL and the Corporate Debtor, as a consortium. The Tripartite Buyer Agreement signed by various allottees in relation to the Project with SMPL and the Corporate Debtor for purchase of flats / apartments in the Project, were similar in nature except some variation with regard to the dates on which possession



of the apartments would be handed over to different allottees. The different dates on which these apartments were to be handed over as per the Tripartite Buyer Agreement were March 31, 2017, September 30, 2017, June 30, 2018 and December 31, 2018 as provided under clause 6.1 of the Tripartite Buyer Agreement. However, the Corporate Debtor and SMPL failed to provide possession of the apartments to the buyers in accordance with the timelines set out in the respective agreements.

- (8) Further, as per Clause 6.4 of the Tripartite Buyer Agreement, the respective allottees were entitled to receive damages amounting to a sum of Rs.4/- per square feet, per month for the delayed period in handing over possession of the flats / apartments. In relation to this, the Corporate Debtor and SMPL had convened meetings with the allottees on September 13, 2018 and September 22, 2018. In these meetings Mr. Saleem Sheriff, Chairman and Managing Director of both companies had promised to hand over the apartments to the allottees between March 2019 and June 2019. However, they failed to handover the possession of the apartments to respective allottees, as promised during the above-mentioned meetings. Consequently, the financial creditor, issued a demand notice dated July 22, 2019 asking for the refund of the amount paid by the allottees to the Corporate Debtor and SMPL. The Corporate Debtor, SMPL and their directors issued a vague and frivolous common reply on August 8, 2019, reneging on their commitments and obligations under the agreements and refusing to make repayment of the amount paid by the buyers.
- (9) Subsequently, the Financial Creditor filed an Application U/s 7 of the Code bearing number C.P. (IB) No.389/BB/2019 before Ld. NCLT Bengaluru, against SMPL, wherein it was stated that SMPL is liable to pay a sum of Rs. 220,90,27,614/- which was admitted by Tribunal on February 7, 2020 and the corporate insolvency resolution process was commenced in relation to SMPL. The



Financial Creditor herein seeks leave of the Hon'ble Tribunal to rely on the documents filed in C.P. (IB) No.389/BB/2019. Pursuant to the said order, Mrs. Ramanathan Bhuvaneshwari was appointed as IRP for CIRP in relation to SMPL. Accordingly, SMPL through its Resolution Professional has been arrayed as Proforma Respondent to this application. The IRP issued public notice inviting claims from various creditors on February 21, 2020. The Committee of Creditors ("CoC") for the CIRP was constituted on March 11, 2020 and the first CoC meeting was held on March 17, 2020.

(10) The documents shared by the insolvency resolution process in first meeting of the CoC, with respect to the accounts of the Corporate Debtor, *inter alia*, demonstrated that a sum of Rs. 113,01,51,436/- has been advanced by the Corporate Debtor to SMPL for the purpose of facilitating the acquisition of the land from landowners and obtaining approvals from various authorities. Further, in addition to the fact that SMPL has a development rights, title and interest over the land on which the Project is required to be constructed, and the right of construction of the Project is with the Corporate Debtor, the above-mentioned documents demonstrate that it is imperative that group corporate insolvency resolution process is initiated against the Corporate Debtor along with SMPL (already admitted to CIRP *vide* order dated February 7, 2020 in C.P. (IB) No. 389/BB/2019).

(11) Therefore, the present application has been filed for initiating group CIRP against the Corporate Debtor along with SMPL for the following reasons:

- (a) SMPL and the Corporate Debtor are a consortium of companies in relation to construction and development of the Project.
- (b) The monies paid by the Financial Creditors to SMPL and the Corporate Debtor has been jointly utilised by SMPL and the Corporate Debtor in terms of the Tripartite Buyer Agreement, as a consortium. This aspect is corroborated by financial statement



- of the Corporate Debtor for the financial year 2018-19.
- (c) There intertwined transactions between SMPL and the Corporate Debtor, in relation to the Project, including the fact that the development rights, title and interest in relation to the land on which the Project is required to be constructed, is with SMPL, whilst, the right to construct is with the Corporate Debtor.
  - (d) Further, SMPL has provided a corporate guarantee, *inter alia*, on behalf of the Corporate Debtor in favour of other Financial Creditors.
  - (e) The entire marketing, solicitation of money, representations, selling of units has been done by SMPL.
  - (f) SMPL has obtained approval and a no objection certificate from Bangalore Development Authority and Hindustan Aeronautics Limited in relation to the Project.
  - (g) Further, it was SMPL that had recognised the formation of association of Financial Creditor.
  - (h) The Corporate Debtor and SMPL have common management as the directors of both the companies are same.
  - (i) The Corporate Debtor is wholly owned subsidiary of SMPL, and accordingly, owned and controlled by SMPL. It was incorporated only for constructing Skylark Ithaca project and was acting as contractor of SMPL.
  - (j) The development rights for the land belonging to the project are in favour of SMPL, whilst, the Corporate Debtor is constructing the Project as a contractor. Therefore, both SMPL and the Corporate Debtor jointly constructing and developing the Project as a consortium.
  - (k) The representatives of SMPL were regularly interacting with the Financial Creditors for addressing various issues related to the completion of the Project. SMPL along with the Financial Creditors had held multiple meetings and further communications between them took place vide emails dated



November 25, 2017 and April 9, 2019.

- (1) Therefore, it is a fit case for initiating a group insolvency against the Corporate Debtor along with SMPL Section 10A of the Code is not attracted in the present petition/ application as the default by the Corporate Debtor and SMPL had taken place in 2017 and 2018, when it was required to hand over the flats to the buyers.
- (12) SMPL has filed an appeal bearing number Comp. App. (AT) (Ins.) No. 647 of 2020 for setting aside the Order dated February 7, 2020, which is pending adjudication.
- (13) As per terms of the Tripartite Buyer Agreement, the Financial Creditor had paid consideration for the sale of flats in the project to Corporate Debtor and SMPL, jointly, as per the details provided in the calculation sheet aggregating to Rs.127,44,38,369/- Tripartite Buyer Agreement signed by various allottees in relation to the Project with SMPL and the Corporate Debtor for purchase of flats / apartments in the Project, were similar in nature except some variation with regard to the dates on which possession of the apartments would be handed over to different allottees. The different dates on which these apartments were to be handed over as per the Tripartite Buyer Agreement were March 31, 2017, September 30, 2017, June 30, 2018 and December 31, 2018 as provided under clause 6.1 of the Tripartite Buyer Agreement.
- (14) Subsequently, the Financial Creditor filed C.P. (IB) No.389/BB/2019, U/s 7 of Code before this Adjudicating Authority, against SMPL, wherein it was stated that SMPL is liable to pay a sum of Rs.220,90,27,614, which was on February 7, 2020 by initiating CIRP with consequential directions.
- 3.** The Company Petition is opposed by the Respondent No. 1 by filing Objections dated 14.01.2021 by *inter alia* contending as follows:
- (1) The instant Petition is not maintainable as same being infructuous as the Corporate Insolvency Resolution Process as against the

Proforma Respondent had already been admitted *vide* order of this Hon'ble Tribunal dated February 7, 2020 in CP (IB) No. 389/BB/2019, post which the Proforma Respondent has challenged the said admission before the Hon'ble National Company Law Appellate Tribunal, Delhi ("NCLAT") wherein the NCLAT *vide* its order dated 10.08.2020 directed the 'Interim Resolution Professional' Mrs. Ramanathan Bhuvaneshwari to ensure that the company remains a going concern. The Hon'ble NCLAT made it clear that its direction is only in respect to project 'Skylark ITHACA' and the said issue is to be finally adjudicated before the NCLAT. The financial creditors realized in hindsight that they erred in proceeding against the Proforma Respondent and now in order further browbeat and arm-twist the answering Respondent and in order to improvise their case the financial creditors have once again made Skylark Mansion Private Limited, a Proforma Respondent. Since the alleged debt and default in question is pertaining to Project Ithaca, then also the present Application is not maintainable either in law or in facts.

- (2) The answering Respondent and the Proforma Respondent are two separate companies, having distinct legal personalities. The assertion by the Petitioner that IEPL was incorporated as a contractor of SMPL is baseless and without any proof and is a disputed fact, which itself makes the application of the financial creditors non-maintainable. Further, the averment that the Respondent Company IEPL is a group company of Skylark Mansions Pvt. Ltd., hereinafter referred to as "SMPL" against which the order dated 07.02.2020 directing initiation of CIRP was passed in CP (IB) No.389/BB/2019 and the same being under challenge and pending adjudication before the NCLAT thus now the same issue cannot be adjudicated by this forum also. Further, it is relevant to mention that the answering Respondent herein was not made a party to the said proceedings despite the fact that it is independently handling

the project "Skylark Ithaca" in its own rights rather it was wrongly filed against SMPL with which the Applicant association has no privity of contract and the answering deponent has already raised this averment before the NCLAT where the matter is pending adjudication.

- (3) That this Respondent was incorporated as a separate body corporate on 23.01.2013 having Corporate Identity No. U45205KA2013PTC067632. That prior to incorporation of the answering Respondent, SMPL (Proforma Respondent) had entered into Joint Development Agreements with the landowners of land in respect of Sy. Nos. 24/4, 24/5, 24/6 of Kodigehalli Village and Sy. Nos. 28, 29, 30/1, 32/1 of Kurudu Sonnenahalli Village, K.R. Puram, Bangalore admeasuring 19 Acres 27 guntas along with certain Supplemental agreements for development of project in question i.e., "Skylark Ithaca". After the incorporation of the answering Respondent, a deed of assignment dated 12.03.2013 was executed by SMPL in favour of "*Ithaca Estates Private Limited*" (IEPL) assigning all its rights and obligations with regard to project "Skylark Ithaca" in favour of this answering Respondent. That in pursuant to deed of assignment dated 12.03.2013, large number of homebuyers including Members of Applicant Association during the period 2013- 2019, entered into agreement of sale and construction with Respondent Company on different dates. SMPL is the confirming party in the said agreements for the reason that it is the GPA holder of the landowners. That the answering Respondent entered into Contract for Civil Work with L&T dated 21.07.2014. Thereafter, the project was registered with RERA Karnataka, holder of landowners.
- (4) That the answering Respondent had replied to a notice dated 22.07.2019 which was sent to the Corporate Debtor as well as the Proforma Respondent, where it had reiterated the Proforma Respondent had assigned all its rights and obligations to the



Corporate Debtor who is developing the Project and Proforma Respondent has no role to play with respect to the development of the Project.

- (5) That when the Respondent Company was in the process of completing the project, some of the homebuyers formed the Applicant associations and filed C.P. (IB) No.389/BB/2019 which was admitted by initiating CIRP against Group Company SMPL. The Applicant association as well as its Members were fully aware about the deed of assignment dated 12.03.2013 by virtue of which the project was assigned in favour of the Respondent Company. Despite the said fact, with ulterior motives and *malafide* intentions, the proceedings were filed against SMPL and the answering Respondent herein was not even made a party to the said proceedings. The project in question belongs to the answering Respondent herein, the entire consideration has been paid by the buyers to this Respondent, the obligation to complete the project and the delivery of the flats is upon the Respondent. RERA registration also shows that the project belongs to the Respondents.
- (6) That the Respondent Company is fully solvent company and has the capability to execute and deliver the project. The information memorandum circulated by the RP in the 2<sup>nd</sup> CoC of SMPL clearly shows that the project 'Skylark Ithaca' has a surplus cash flow of 296.93 Crores after completion of the project and it can be completed if little time is given to the Respondent Company. In *Vodafone International Case (2012) 6 SCC 613*, it was held that despite exercise of control by the holding company, the subsidiary company has a separate legal existence. In *Bacha F Guzdar case* reported in AIR 1955 SC 74, the Hon'ble Supreme Court held that the shareholder of a company does not acquire interest in the assets of a company and he only has a right to participate in the profits of the company, whenever declared.

- (7) The allottees of the answering Respondent are not financial creditors qua the Proforma Respondent. The Project was constructed and developed by the answering Respondent in its individual capacity and without any involvement of the Proforma Respondent. The Financial Creditors had paid consideration for the sale of flats in the project to the answering Respondent. The Proforma Respondent did not receive any amount from the financial creditors, and did not make any assurances/representations to them. The contract to deliver the apartment for the consideration amount was finalized between Financial Creditors and the answering Respondent. As such, there exists no privity of contract between the financial creditors and the Proforma Respondent.
- (8) All the projects of the group cannot be forced to stop for its failure to execute and complete one project. The assets of IEPL cannot be clubbed together with assets of SMPL and maximised for IEPL's failure to execute one project within the timeline. In *Flat Buyers Association Winter Hills-77, Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP and Ors.*, it was held that if the same Real Estate Company has other project in another town, they cannot be clubbed together nor the asset of the Corporate Debtor for such projects can be maximised.
- (9) The answering Respondent that it is a solvent company. As such, initiation of CIRP is impermissible as against the answering Respondent. The answering Respondent satisfies Cash-Flow Test as well as Balance Sheet Test. The cash flow test is to ascertain whether the company is currently or in future able to pay its debts. The Balance Sheet test is to ascertain whether the value of the company's assets is more than the number of its liabilities after taking into account as-yet uncertain and future liabilities. It has satisfied both the Cash Flow Test as well as the Balance Sheet Test. The balance amount receivable by the answering Respondent from flat owners for Ithaca Phase 1 and Ithaca Phase 2 amounts to

Rs.204.95 crores. However, the same is omitted from the Summary of Receivables/Payables as on 31/3/2019 as well as the cash flow summary to fraudulently depict that the answering Respondent is running into losses and that it is unable to complete the construction of the Project. Keeping in mind the balance payment to be received from the Flat Owners, suffice it to say that the answering Respondent has surplus funds available to complete the construction of the Project. During the 2<sup>nd</sup> CoC Meeting of the Proforma Respondent, Information Memorandum for Project Skylark Ithaca of Ithaca Estates Private Limited was circulated which corroborates that the amount outstanding from the home buyers is 204.95 crores. It further provides that further estimated project cost is Rs. 370.12 crores whereas the total Funds available in the project to complete the construction is Rs.667.05 crores. As such, surplus available from sale of flats amounts to Rs. 296.93 Crores. Therefore, without an iota of doubt, that the Corporate Debtor is in a position to complete the construction of the project at the earliest.

- (10) Ithaca Estates Private Limited inherited the right to develop and sell the Project Ithaca, independent of any involvement of Skylark Mansion Private Limited, its holding company. Ithaca Estates Private Limited advertised to the Homebuyers sans any involvement of its holding company. The consideration amount was received by the Ithaca Estates Private Limited and not its Holding Company. Skylark Mansion Private Limited had no involvement in the construction and the development of Project Ithaca, Ithaca Estates Private Limited acted as an independent entity and not for and on behalf of Skylark Mansion Private Limited. Ithaca Estates Private Limited entered into Sale Agreement and Construction Agreement with each of the financial creditors, where Skylark Mansion Private Limited merely stood as a “confirming party” to the agreements of



sale and constructions with the flat buyers, in the capacity of GPA holder of landowners. It has no obligation under the agreements.

- (11) The Financial creditors had paid the consideration amount only to Ithaca Estates Private Limited and no amount whatsoever was paid to its holding company. As such, the rights, title and interests in relation to the land on which the project is being constructed are solely vesting in Ithaca Estates Private Limited. Ithaca Estate Private Limited, despite its unwavering and committed efforts to complete the construction of the Project on time, failed to meet the timeline as originally stipulated as multiple homebuyers failed to pay their installments on time. There was a delay in payment of installments by the financial creditors of an approximate sum of Rs.65 Crores. Further, the Project faced more challenges on account of the gloomy market situation. Thereafter, due to the *malafide* and illegal proceedings initiated against SMPL, the project belonging to answering Respondent namely 'Skylark Ithaca' is held up and the Respondent Company is not able to execute the said project, due to which large number of buyers who want delivery of flats are suffering. However, since there is requisite cash flow in the company, respondent is solvent enough to complete the project. The project *Skylark Ithaca* consists of total 19 towers, out of which 11 towers are to be developed in Phase-I and 8 towers are to be developed in Phase-II. The 8 number of towers out 11 towers are already in the finishing stage, the lift in 6 towers is already supplied out of which in 4 towers lift is already installed, firefighting work is completed in 8 towers, all the finishing material like CP fittings, sanitary fitting and tiles, etc., for the remaining towers are already procured. The structure of club house which is about 40,000 sq. ft. along with Swimming pool is completed. In Phase-II of the project, the Respondent Company has completed all the footings, lower basement, and major portion of upper basement. 2 of the 8 towers have reached Ground and First floor.

- (12) The Apex Court in the case of *Swiss Ribbons Pvt. Ltd., Vs. Union of India*, (2019) SCC Online SC-73, has held that the object of the IBC, 2016 is to save the Company and not to drive the Company towards liquidation. Merely because there exists a default which has been occasioned on account of delay in payment by the financial creditors themselves, the Corporate Debtor should not be shoved into CIRP. The instant Application is an abuse of the process of law.
4. The Proforma Respondent has filed Reply on 22.02.2021, by *inter alia* contending as follows:
- (1) Ithaca Estates Pvt. Ltd. (IEPL) is a 100% subsidiary of the holding Company Skylark Mansions Pvt. Ltd. (SMPL) and the Directors of SMPL and IEPL are the very same individuals and are also the promoter Directors of both the Companies. SMPL is the deemed owner of the land, by virtue of power of Attorney Holder with respect to the project land on which the project Skylark Ithaca is constructed by its subsidiary Company IEPL. SMPL has also entered into Joint Development Agreement with the land owners for construction of the flats in the project Skylark Ithaca undertaken by its subsidiary Company IEPL. All the approvals for the project are obtained in the name of holding Company SMPL with respect to the project Skylark Ithaca.
- (2) As per the books of IEPL, there is no other project accounted except the project Skylark Ithaca and also no land is owned by IEPL as per the books of accounts and no JDA is entered into by IEPL for the project Skylark Ithaca. With the free flow of money of home buyers/bank loan of Rs.200 plus crores from IEPL to SMPL for various purposes, assets are created in the holding Company with respect to the funds transferred from the subsidiary Company, IEPL, creating common assets and liabilities between both the entities.



- (3) With respect to the bank loans received from ICICI Bank, SMPL is the Corporate Guarantor. An amount of around Rs.46 Crores of project funds of ICICI Bank was transferred to the holding Company, in addition to Rs.113 crores transferred for creation of land parcel in the holding Company. The Resolution Plan approved for the project Skylark Ithaca is to get additional contribution of Rs.1250/- per sq. ft. from each customer, in order to complete the construction, as the money is diverted from project as accounted in IEPL books. The RP is unable to recover the same from the Corporate Debtor holding Company, as the CIRP is restricted to project Skylark Ithaca only. The Directors refuse to provide relevant information about the project Skylark Ithaca, with respect to diversion of funds to group companies/related parties, making it difficult for the undersigned to conduct the CIRP of the project Skylark Ithaca and the very same promoters and Directors of both SMPL and IEPL are absolving their responsibility on this project, after diverting sizable money from the project which was meant for construction of the flats.
- (4) There are common Directors and common management, land and approvals in the holding Company and project accounting in another Company and the funds diverted from the subsidiary Company to the holding company for creation of assets in the holding Company, has resulted in intertwining assets and liabilities between the holding company SMPL and IEPL.
5. Heard Shri Jacob Alexander, learned Counsel for the Petitioner, Ms.Amrita Jain, learned Counsel for the Respondent No.1 and Mrs.Ramanathan Bhuvaneshwari, Resolution Professional for Proforma Respondent, **through Video Conference**. We have carefully perused the pleadings of the Parties and extant provisions of the Code and the Law.



6. Shri Jacob Alexander, learned Counsel for the Petitioner, after arguing the case, has also filed Written Submissions on 22.02.2021, by *inter alia* stating as follows:

- (1) The Financial Creditor herein is the association comprising of 455 homebuyers, who had purchased apartments under 'Skylark Ithaca' Project and cumulatively disbursed Rs.432,76,03,097/- for the purchase. The Corporate Debtor ('CD') & Proforma Respondent failed to provide possession of the apartments to the buyers as per the timelines set out in respective Agreements and therefore committed default under Section 3(12) of the Code and therefore, CIRP shall be initiated against both the Companies.
- (2) The CD has wrongly contended in its reply that the present application is not maintainable as CIRP has already been initiated against Proforma Respondent and the same is under challenge before Hon'ble NCLAT and the order being challenged before Hon'ble NCALT is the outcome of a separate Petition in CP (IB) No. 389/BB/2019, which shall not affect any orders to be passed by the Adjudicating Authority in this Petition. Further, a substantial portion of the amount which was paid by the Members of Financial Creditors to the CD, was transferred to Proforma Respondent as is clear from the financial statements of the CD.
- (3) The Homebuyers had entered into builder-buyer agreement with the CD and Proforma Respondent, which were together acting as consortium for the development of the Project. Even though, the nomenclature used for Proforma Respondent in the Agreement is 'confirming party' but as Proforma Respondent has obligations in the builder-buyer agreement, it cannot be considered as a confirming party. The homebuyers as per the above agreement had made payments to Corporate Debtor which were utilized by Proforma Respondent and the same is evident from the P&L A/c of the Corporate Debtor. CD was merely a contractor, who was appointed by Proforma Respondent to build and develop the Project.



The brochure for the Project was also issued by Proforma Respondent which shows that Proforma Respondent was responsible for development of the Project. The Proforma Respondent entered into a development agreement with homebuyers through third parties. Due to lack of assets, CD doesn't have enough funds to complete the Project and hence even if the homebuyers claim dues from CD, it will not be able to pay.

- (4) It is stated that the Corporate veil needs to be lifted in the present case as Proforma Respondent and CD are trying to evade the provisions of the Code, as held by Hon'ble Supreme Court in *Siwss Ribbons Pvt. Ltd. vs. Union of India (2019 SCC OnLine SC 73)*. Money paid by homebuyers to CD has been siphoned off by Proforma Respondent and CD is a wholly owned subsidiary of Proforma Respondent. Further, the principle laid down in *Flat Buyers Association Winter Hills – 77, Gurgaon Vs Umang Realtech Pvt. Ltd. through IRP & Ors. (Company Appeal (AT) (Insolvency) No.926 of 2019)* cannot be applied in the present proceedings. The monies paid by the homebuyers is fungible. Therefore, in the present case, the CIRP of one Project is not possible and it should be with respect to both the Companies.

7. Ms. Amrita Jain, learned Counsel for the Respondent No.1, after arguing the case, has also filed Written Submissions on 19/22.02.2021, by *inter alia* stating as follows:

- (1) The Hon'ble NCLAT *vide* its Order dated 10.08.2020 has confined the CIRP proceedings only to Project Skylark Ithaca. The Project Skylark Ithaca is being developed by Ithaca Estates Private Limited (IEPL), the Respondent in the instant case, and SMPL has no involvement in the said project, whatsoever. The Hon'ble NCLT has confined the CIRP process to Project Skylark Ithaca by way of an interim order being of *prima facie* opinion that the homebuyers, i.e., the Petitioners herein, are not financial creditors *qua* SMPL. As



such, the Petitioners are bereft of *locus* to approach this Hon'ble NCLT seeking initiation of group insolvency when similar issues are pending adjudication before the Hon'ble NCLAT.

- (2) The concept of Group Insolvency is alien to the Code, as the same is not envisaged in it. The Code does not have any provision for initiation of group insolvency. As such, the Petition liable to be dismissed on this ground alone. The Petitioners are placing reliance on a misconceived sequence of events to argue that SMPL has represented to the homebuyers that SMPL is also a party to the transaction. The same is utterly false. SMPL had entered into a Joint Development Agreement and other supplemental agreements with the original landowners of the said project. However, *vide* an Assignment Deed dated 12.03.2013, SMPL had assigned all its rights and obligations with regard to Project Skylark Ithaca to IEPL, the Respondent herein. It is vehemently averred that IEPL did not act as a contractor of SMPL but substituted SMPL altogether. The assignment deed, at Para 7 thereof, bears witness to the fact that IEPL is entitled to deal independently without any reference to or consent or concurrence of or any consideration to SMPL.
- (3) Further, the assets of IEPL cannot be clubbed together with the assets of SMPL and maximized for IEPL's failure to execute one project within the timeline owing to the non-payment of the balance amount from the homebuyers. In *Flat Buyers Association Winter Hills-77, Gurgaon vs. Umang Realtech Pvt. Ltd through IRP and Ors.*, it was *inter alia* held that the asset of the company (Corporate Debtor – real estate) of that particular project is to be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project and the CIRP should be on a project basis as per the plan approved by the Competent Authority.
- (4) The Hon'ble Apex Court has held in the case of *Swiss Ribbons Pvt. Ltd. vs. Union of India*, (2019) SCC Online SC-73, that the object of



the Code is to save the Company and not to drive the Company towards liquidation. In tune with the same, when IEPL here is a solvent Company, in a position to complete the construction at the earliest, the delay for which was occasioned owing to delay in payment by the financial creditors of an approximate sum of Rs.65 Crores, frivolous litigations filed by them against SMPL and the gloomy market situation, the Company ought not to be thrust into CIRP.

8. In the light of rival contentions of the Parties, as briefly mentioned supra, the following main issues arise for consideration:

- (1) Whether the Petition is maintainable under the provisions of Code;
- (2) Whether the Petitioner has come to AA with clean hands;
- (3) Whether the Petitioner is estopped from invoking provisions of Code again when they have already invoked provisions of Code by filing Company Petition earlier against Proforma Respondent herein, viz., C.P. (IB) No.389/BB/2019, which was admitted by initiating CIRP against it.

9. As stated supra, M/s. Skylark Ithaca Buyers Welfare Association (the Petitioner herein) consisting 255 Home Buyers, have earlier filed C.P. (IB) No.389/BB/2019 U/s 7 of IBC, 2016, R/w Rule 4 of I&B (AAA) Rules, 2016 claiming default of more than Rs.220 Cr. by *inter alia* seeking to initiate CIRP in respect of Skyline Mansions Pvt. Ltd. (Proforma Respondent herein) which was admitted by AA by an Order dated 7<sup>th</sup> February, 2020. Now the present Petition is filed by the same Association, however claiming 452 Home buyers by claiming default for an amount of more than Rs. 432 Cr. and it is filed U/s 7 of Code R/w Section 60(5) of the Code for initiation of Group CIRP in respect of the Corporate Debtor along with said C.P.(IB) No. 389/BB/2019).

10. Since, the instant Petition is filed under Sections 7 and 60(5) of Code, it is more relevant to refer and extract Section 60(5) of the Code, which reads as under:

*“Section 60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of— (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”*

By reading of the above provision, it is clear that the above provision enables parties to file Misc. Application(s) or proceedings by or against Corporate Debtor or Corporate Persons. It does not entitle a party to file a fresh Company Petition to initiate Group Insolvency as sought for in the instant Petition. Moreover, the Association has already moved against main Corporate Debtor by inter alia contending that it is the responsibility of Holding Company to get constructed promised houses as per Agreements through its alleged Subsidiary namely M/s. Ithaca Estates India Pvt Ltd. (the CD herein). It is also relevant to point out here that the Association is also relying on all the averments and documents filed in the connected C.P. (IB) No.389/BB/2019, which is under Appeal before the Hon'ble NCLAT, wherein several issues raised including CIRP initiated covers entire CD as well as its alleged Subsidiary, wherein an interim order was passed restricting CIRP to the project in question. And the matter is sub judice. Therefore, the instant Petition is not maintainable, and it is filed on misconception of facts and law, and it is filed to cover lapses, which were committed in the earlier company Petition.

- 11.** It is not the case of Association that it not aware of the issues raised in the instant Petition. And the Parties are same except in respect of number of Home Buyers, defaulted amount, etc. After having taken all

pleas in the earlier Company Petition and not impleaded the Corporate Debtor herein, in the earlier Company Petition, the Applicant/Petitioner is estopped from filing the present Petition. Moreover, the matter is sub judice and appeals are pending before the Hon'ble NCLAT against the decision of this AA.

**12.** While initiating CIRP, one of the criteria is solvency of CD apart from debt and default in question. It is settled position of law that the provisions of the Code cannot be invoked for recovery of outstanding amount, and it cannot be misused to drop curtain on healthy organisation. The Project Skylark Ithaca is being developed by Ithaca Estates Private Limited (IEPL). Even in CIRP initiated in respect of Skylark Mansions Pvt. Ltd., the Resolution Plan proposed by Resolution Applicant is subject to contribution of Rs.1250/- per sq. ft. only from each customer in order to complete Skylark Itchaca Project. Therefore, it shows, the Corporate Debtor is in a position to complete the project in question. The Respondent satisfies Cash-Flow Test as well as Balance Sheet Test. The Cash Flow test is to ascertain whether the Company is currently or in future able to pay its debts. The Balance Sheet test is to ascertain whether the value of the Company's assets is more than the number of its liabilities after taking into account as-yet uncertain and future liabilities. The balance amount receivable by the Respondent from flat owners for Ithaca Phase 1 and Ithaca Phase 2 stated to be tune of amount of Rs.204.95 Crores. However, since there is requisite cash flow in the Company, Respondent is solvent enough to complete the Project. Therefore, the Corporate Debtor, prima facie appears to be solvent Company, which cannot be subjected to insolvency proceedings and it should be given one more opportunity to fulfill its obligations to various Home Buyers, who have substantially contributed to get their flats.

It is also relevant to point out here , as detailed supra, the Project *Skylark Ithaca* consists of total 19 towers, out of which 11 towers are to be developed in Phase-I and 8 towers are to be developed in Phase-



II. The 8 number of towers out of 11 towers are already in the finishing stage, the lift in 6 towers is already supplied out of which in 4 towers lift is already installed, firefighting work is completed in 8 towers, all the finishing material like CP fittings, sanitary fitting and tiles, etc., for the remaining towers are already procured. The structure of club house which is about 40,000 sq. ft. along with Swimming Pool is completed. In Phase-II of the project, the Respondent Company has completed all the footings, lower basement, and major portion of upper basement. 2 of the 8 towers have reached Ground and First floor.

**13.** In terms of Assignment Deed dated 12.03.2013 in question, SMPL had assigned all its rights and obligations with regard to Project Skylark Ithaca to IEPL, the first Respondent herein. As per law, once CIRP is initiated in respect of CD, all the claimants of CD have to submit their claims to IRP/RP. Moreover, all the Home Buyers, admittedly are in respect of same Project Skylark Ithaca and they are stated to have made their claims to RP of earlier CP. The issues whether initiation of CIRP in respect of SMPL is justified or not; whether it is in respect of one CD (SMPL) or only in respect of IEPL (CD herein) etc., are issues to be decided in the pending Appeals by the Hon'ble NCLAT, and thus all issues are sub judice.

**14.** As per law, every incorporated Company has a separate legal entity and having statutory rights, whether it is holding or subsidiary Company. And initiating CIRP against holding Company would not automatically apply to its subsidiary unless Subsidiary has also become insolvent Company. And there are situations, where holding Company may not be solvent Company but its subsidiary may be prospering Companies depending on the nature of business, it has been established. In case , two independent insolvency proceedings have been initiated in respect of Holding as well as Subsidiary Companies, the Parties may seek to combine both the Proceedings subject to satisfying broad criteria for such combination, as judicial forums especially NCLT Mumbai, have enumerated.

- 15.** It is relevant to point out here that M/s. Skylark Ithaca Buyers Welfare Association, the Petitioner was incorporated on 04.04.2019 with the District Registrar of Societies Zone-3, Bangalore Urban District, under the Karnataka Societies Registration Act, 1960. The earlier Company Petition bearing CP (IB) No.389/BB/2019 is filed by M/s. Skylark Ithaca Buyers Welfare Association represented by its Members totalling to 255 (names of whose have been given in the Petition Cause Title itself) and this Company Petition is filed against M/s. Skylark Mansions Private Limited. However, the instant Company Petition bearing CP (IB) No.201/BB/2020 is filed by M/s. Skylark Ithaca Buyers Welfare Association and the list of Members are not furnished in the Cause Title of the Petition, but list was enclosed as Annexure-A5 to the Petition, wherein, names of 452 homebuyers have been given. By perusal of the names of the homebuyers furnished in both the lists, the names are common except some additional names were added in the instant Application. Therefore, the Petitioner failed to furnish its total Registered Number of Members and resorting to file the Applications by abusing the provisions of the Code. As per Law, an Application / Petition has to be filed comprehensively so as to take all available pleadings by impleading proper and necessary parties. For the reasons best known to the Petitioners/Financial Creditors, CP (IB) No.389/BB/2019 is filed by impleading only M/s. Skylark Mansions Private Limited, whereas, in the present CP, they impleaded both M/s.Ithaca Estates Private Limited and M/s. Skylark Mansions Private Limited. Therefore, the Petitioners are invoking the provisions of the Code in a casual manner.
- 16.** We are deciding the issues raised in the instant Company Petition, however, without prejudice to the rights of Parties, in the Pending Appeals in question. And this decision is also subject to outcome of decision of Hon'ble NCLAT in pending Appeals.
- 17.** For the aforesaid reasons and circumstances of the case, and the Law on the issue, we are of considered opinion that the Petitioner has failed



to make out even prima facie case so as to initiate CIRP as prayed for.  
Therefore, the instant Company Petition is liable to be dismissed.

**18.** In the result, C.P. (IB) No.201/BB/2020 is hereby dismissed. No order as to costs.



**ASHUTOSH CHANDRA  
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA  
MEMBER, JUDICIAL**

Krishna