

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 4148/MB/2018

*[Under Section 7 of the Insolvency and Bankruptcy Code, 2016
read with Rule 4 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

AKRITI INFRASTRUCTURE PRIVATE LIMITED

[CIN: U45400WB2007PTC114767]

Registered Office: 72/4

Shambhu Nath Pandit Street

Kolkata, West Bengal-700026.

...Financial Creditor

V/s

SHREEPATI BUILD INFRA INVESTMENT LIMITED

[CIN: U70109GA2012PLC007213]

Registered Office: Row House D, Castle Rock-Land Scape Town

Oxdel, Dona Paula Police Station

North Goa, Goa-403004.

...Corporate Debtor

Pronounced:13.03.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Financial Creditor: Adv. Ankit Lohia, Adv. Gautam Ankhad a/w Adv. Kritika Sethi i/b
Aquilaw

Corporate Debtor: Sr. Adv. Arun Kathpalia, Sr. Adv. Gaurav Joshi a/w Adv. Anuj Tiwari,
Adv. Ashwini Gawde and Adv. Kshitij Wadhwa i/b Adv. Lakshyaved
Odhekar

ORDER**[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. BACKGROUND**

- 1.1. This Company Petition bearing C.P. (IB) No. 4148/MB/2018 (Application) was filed on 10.08.2018 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Akriti Infrastructure Private Limited, the Financial Creditor (FC), through Mr. Bhaskarmoy Dey, representative of the FC, authorised *vide* Board Resolution dated 12.07.2018 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Shreepati Build Infra Investment Limited, the Corporate Debtor (CD).
- 1.2. The total amount of default involved in the matter is Rs. 11,68,58,087/- (Eleven Crores Sixty-Eight Lakhs Fifty-Eight Thousand Eighty-Seven Rupees) comprising of the principal amount of Rs. 3,30,00,000/- along with interest of Rs. 8,38,58,087/- calculated at the rate of 15% per annum compounded quarterly from 21.08.2009 till 30.06.2018, basis CD's letter dated 08.07.2016 to the FC regarding conversion of advance payments made towards booking of flats into a loan account.
- 1.3. The CD had promised *vide* letter dated 08.07.2016, to repay the amount paid by the FC from 11.08.2009 onwards along with mutually agreed interest/compensation on or before 30.06.2016. Hence, the date of default mentioned in the Part IV of the Application is 30.08.2016, which is the date of CD's promise to repay the amount.

2. CONTENTIONS OF FC

2.1. It is submitted that both the FC and the CD are engaged in the business of real estate construction. The FC has entered into an agreement dated 15.03.2011 with the CD for purchase of flats being Nos. 2001 and 2002 admeasuring built up areas 4325.15 sq. ft. and 4694.38 sq. ft. respectively, both flats on the 20th floor of a proposed building called "Shreepati Estates Wing A" to be constructed in Lower Parel, Mumbai.

2.2. The FC further submits that, prior to entering into the aforesaid agreement, the FC made payments to the CD in the following manner:

Sr. No.	Date	Mode	Amount (Rs.)
1.	21.08.2009	RTGS	80,00,000/-
2.	04.11.2009	RTGS	50,00,000/-
3.	04.12.2009	RTGS	50,00,000/-
4.	04.02.2010	RTGS	1,50,00,000/-
Total Amount			3,30,00,000/-

2.3. The FC submitted that on 01.04.2012, the CD issued a letter to the FC confirming receipt of Rs.3,30,00,000/- in its books of account. Subsequently, on 31.03.2015, a letter was issued by the CD to the FC that in the event of failure to obtain requisite permission from the appropriate authorities, the entire sum of Rs.3,30,00,000/- shall be repaid along with 12% cumulative interest per annum.

2.4. It is submitted that the CD, *vide* its letter dated 08.07.2016, confirmed the conversion of FC's advance payments for booking of aforesaid flats to a loan account and assured the FC about its repayment with a mutually agreed interest/compensation on or before 30.08.2016. According to the Ld. Counsel for

the FC, the CD admitted the amount due to the FC and sought time for repayment along with cumulative interest *vide* its letter dated 30.09.2017.

2.5. The Ld. Counsel for the FC further submitted that *vide* its letter dated 31.03.2018, the CD conveyed the FC its confirmation of receipt of Rs. 3,30,00,000/- during the period 2009-2010 as due and payable along with 15% cumulative interest, compounded quarterly from the date of investment till the date of repayment. However, the CD had not made any payment to the FC till date.

2.6. It is submitted that the default means a non-payment of debt in whole or in part and the term "financial debt" under Section 5(8) of the IBC does not expressly exclude interest free loan.

3. CONTENTIONS OF CD

3.1. In its reply dated 14.01.2019 and Additional Affidavits dated 14.12.2020 and 01.12.2022, the CD contested the maintainability of the Application on the following grounds:

a) Clause 7 of the said Agreement dated 15.03.2011 clearly stated that the CD shall not incur liability for delay in construction on account of reasons beyond its control. However, due to delay in obtaining approvals from various authorities including jail authorities, the CD was unable to commence the construction of the project. Hence, the CD, *vide* its letter dated 31.03.2015, informed the FC about temporarily transferring its advance amount to the loan account till the approval and commencement of the project. Moreover, there was no mention of any repayment schedule or any fixed rate of interest on the alleged outstanding amount in the CD's letter dated 30.09.2017.

b) The FC had admitted itself to be an allottee under Section 2(d) of Real Estate (Regulation and Development) Act, 2016 (RERA Act) in its rejoinder dated 05.02.2019. On account of the amended Section 7 of the IBC w.e.f. 28.12.2019, the application for initiating CIRP against a corporate debtor was required to be filed by not less than 100 of allottees under the same real estate project or not less than 10% of the total number of allottees of such real estate project, whichever is less. The third proviso to Section 7, as inserted by the amendment, allows the persons who had already filed applications for initiating CIRP, to comply with the said requirement within 30 days of the date of commencement of the amendment, i.e., 28.12.2019. Otherwise, the application would be deemed to be withdrawn before its admission. However, the FC failed to take any steps to comply with the amended provision of third proviso to Section 7(1) of the IBC and, is, therefore, the sole applicant in the present Application. The total number of allottees in the aforesaid project is 1864, while the present Application is filed solely by the FC. The FC being a single allottee does not meet the threshold criteria as provided under the amended third proviso to Section 7(1) of the IBC, and on this ground alone, the application is not maintainable, according to the Ld. Sr. Counsel for the CD.

c) The present Application is identical to CP(IB) No. 4149/2018, under Section 7 of the IBC, filed by the FC's sister concern, Abhiyan Developers Private Limited (Abhiyan Developers) against the same CD before another Bench of NCLT, Mumbai. Both CP(IB) No. 4149/2018 and the present Application are based on the same set of facts as evident from the Bench's order dated 11.07.2023. In fact, CP(IB) No. 4149/2018, was admitted by the Bench, which

was later set aside by Hon'ble NCLAT by order dated 07.03.2022 in CA (AT) (INS) 939/2021 holding that the FC's sister concern, Abhiyan Developers was an allottee. Relying upon the said order of the Hon'ble NCLAT, the NCLT Bench dismissed the said Section 7 Application on 28.07.2023, which decision was also upheld by Hon'ble NCLAT on 10.01.2024 in CA (AT) (Insolvency) No. 1694/2023. According to the Ld. Sr. Counsel for the CD, since the present Application is factually similar to that of CP(IB) No. 4149/2018, the FC's contention for seeking recovery of the alleged outstanding amount, based on conversion of advance payment for booking flats into a loan account, does not stand. He submitted that the legal challenge against Hon'ble NCLAT's order dated 07.03.2022 in CA (AT) (INS) 939/2021 before Hon'ble Supreme Court ended in withdrawal of Civil (A)No. 3184/2022, filed by FC's sister concern Abhiyan Developers on 05.09.2022.

d) The FC has concealed various material facts in the present matter. The Ld. Sr. Counsel for the CD submitted that the FC had initiated criminal proceedings in order to recover the alleged outstanding money by registering Complaint Case No. 19/2020 in Kalighat Police Station on 01.02.2020, which led to issuing search warrant to arrest the director of the CD and proceedings before the Chief Judicial Magistrate, Alipore in CGR Case No. 381/2020. However, the Hon'ble Calcutta High Court, by order dated 20.10.2022, in *Rajendra Rameshchandra & Anr. Vs. The State of West Bengal* (C.R.R. No. 3931 of 2022), stayed the search warrant and arrest of the directors of the CD subject to remittance of Rs. 3,30,00,000/- with the Registrar General of the High Court. The said order of Hon'ble Calcutta High Court was complied with by the directors of the CD on 21.10.2022 by depositing a cheque No.

303289 before the Registrar General, Calcutta High Court. Another fact concealed by the FC was that it had admitted that the interest component on the amount of Rs. 3,30,00,000/- had still not crystalized as the matter is sub-judice, as reflected in the FC's Balance Sheet for the Financial Year ended 31.03.2021.

4. REJOINDER BY FC

- 4.1. The FC submitted that the CD has made a misplaced reliance contending that the FC has admitted itself as an "allottee". Therefore, the FC does not require to meet the threshold as provided under the proviso to Section 7 of the IBC. According to the Ld. Counsel for the FC, even if the FC is seen as taking a contrary stand, it cannot be estopped from doing so as the earlier contentions were on wrong assumption of law. To substantiate it, the FC relied upon the decision of Hon'ble Supreme Court in *Union of India Vs. KS Subramanian*, [1989 Supp (1) SCC 331].
- 4.2. The FC further submitted that the CD's own conduct rendered the amount given as advance consideration for a flat as a "financial debt" under Section 5(8) and the FC and that it is a "financial creditor" under Section 5(7) of the IBC.
- 4.3. The FC submitted that the CD has failed to explain the admissions contained in the various letters issued to the FC. It is respectfully submitted that, upon such admission, there is no plausible defence that the CD can have.
- 4.4. The FC submitted that the nature of transaction between the FC and the CD had changed pursuant to the Admission Letters as well as transfer of debt amount to a loan account which shows that the debt amount is a financial debt due and payable to the FC by the CD.

4.5. The FC further submitted that since the aforesaid project is not registered under the RERA Act so it does not fall under the definition of 'real estate project' u/s 2(zn) of the RERA Act and due to absence of allotment, there is no question of application of Section 2(d) of the RERA Act.

5. ANALYSIS AND FINDINGS

5.1. We have perused all the documents and pleadings and heard both the Ld. Counsel for the FC and the CD.

5.2. The short question for our consideration and finding is whether the FC herein is to be treated as an "allottee" in a "real estate project", within the meanings assigned to them in clauses (d) and (zn) respectively of Section 2 of the RERA Act, as contained in the *Explanation* to Section 5(8)(f) of the IBC; and whether the FC has complied with the provisions of third proviso to Section 7 of the IBC, as amended, w.e.f. 28.12.2019.

5.3. The FC has made several payments totalling Rs. 3,30,00,000/- up to 04.02.2010. On that day itself, the CD put on record allotment of Flat Nos. 2001 and 2002 at Shreepati Estate on the 20th floor, N M Joshi Marg, Lower Parel, Mumbai to the FC for a consideration of Rs. 3,30,00,000/-. Subsequently, an agreement dated 15.03.2011 was executed between the parties for the purpose of allotment of flats. Clauses of the said agreement indicate that the transactions between the FC and the CD were in the nature of flat purchaser and builder. The payment of amount was acknowledged by the parties in Clause 1(a) of the said agreement saying that "*The Flat Purchaser has paid to the Developers on various dates on or before the execution of this Earmarking Agreement a sum of Rs. 3,30,00,000/-*". Part IV of the Application also indicates that the FC is a flat purchaser and the CD is a developer.

5.4. In the rejoinder filed by the FC to the CD's reply, the FC in para 10 at page No. 8 maintained that it is an "*allottee within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016, and such sums raised from the applicant/financial creditor towards the allotment of flats has the commercial effect of borrowing.*". However, during the final arguments as well as in its Written Submissions, on page 3, under the heading 'II. SUBMISSIONS', in paragraph 8(c), the FC claimed that "*FC is not an allottee;*". The reason for such a changed stand of the FC is that the aforesaid project is not registered under the RERA Act and hence, the project cannot be regarded as "real estate project". The Ld. Counsel for the FC argued that the CD cannot take shelter on the amended provisions of Section 7 to wriggle out of its liability towards the FC. Further, according to him, no allotment of flat has actually been made by the CD in favour of the FC, although para 10 of the agreement dated 15.03.2011 states that allotment of the flats would be made in favour of the FC in future. However, Ld. Sr. Counsel for the CD brought to our notice the allotment letter dated 04.02.2010 issued by the CD allotting Flat Nos. 2001 & 2002 in favour of the FC.

5.5. On consideration of the definition of the term "allottee" under Section 2(d) of the RERA Act, it is seen that "allottee" in relation to a real estate project, means "*the person to whom a plot, apartment or building, as the case may be, has been allotted, sold...*" (Emphasis supplied). Further, "real estate project" is defined under Section 2(zn) as "*development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling...*" (Emphasis supplied). Section 3 of the RERA Act mandates compulsory registration of real estate projects by the promoter. The term

“promoter” is defined under Section 2(k), *inter alia*, “a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons...”

(Emphasis supplied). Thus, the documents such as allotment letter dated 04.02.2010; letter dated 01.04.2012 for confirmation of advance amount for flat booking; agreement dated 15.03.2011; letter dated 31.03.2015 transferring the advance amount temporarily to a loan account till approval and commencement of the project point to a real estate developer-allottee relationship between the parties, and the FC will remain an allottee within the meaning of Section 2(d) of the RERA Act. Therefore, we are of the considered view that consequence of non-registration of a real estate project under Section 3 of the RERA Act does not change the promoter-allottee relationship already entered into between the parties. Moreover, in a related matter, the Hon'ble NCLAT on identical facts has already held that Abhiyan Developers, sister concern of the FC herein was an allottee and the order of admission of the CD into CIRP was set aside in CP(IB) No. 4149/2018. Decision of the Hon'ble Supreme Court in *Union of India Vs. KS Subramanian* (Supra) is not applicable in the present matter as the consistent stand taken by the FC in Part IV of the Application and rejoinder was that it is an allottee in terms of the definition of allottee under Section 2(d) of the RERA Act. It has changed its stand only in the Written Submissions, and never by sworn affidavit. Hence, we hold that the position of FC as allottee in the real estate project is proved.

5.6. Having found that the FC is an allottee in the real estate project, the next issue to be answered is whether, the FC has complied with the provisions of Section 7(1)

of the IBC. So long as the FC remains to be an allottee under Section 2(d) of the RERA Act, the FC will remain a “financial creditor” within the meaning of Section 5(8)(f) of the IBC. However, as a result of the amendments to Sections 5(7) and 5(8)(f), which came into effect on 28.12.2019, the present Application was required to be amended by including 100 of allottees in number or 10% of the total number of allottees of the real estate project, whichever is less. The third proviso to Section 7 gave opportunity to the applicants who had already filed Section 7 applications against corporate debtors to comply with the said requirement within 30 days from 28.12.2019. Failure to adhere to the requirement has been deemed to be withdrawal of such applications before admission.

5.7. In view of the above discussions, it is seen that this Application filed by the FC was pending at the time when the aforesaid amendments came into force w.e.f 28.12.2019. Therefore, it was incumbent upon the FC to comply with the newly enforced statutory requirement. The FC having not complied with the said provision, the application is, therefore, deemed to be withdrawn before admission. In view of reasons discussed above, we are not inclined to initiate CIRP in respect of the CD.

ORDER

The petition bearing CP (IB) 4148/MB/2018 filed by Akriti Infrastructure Private Limited, the FC, under Section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating CIRP in respect of Shreepati Build Infra Investment Limited, the CD, is **rejected**.

We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the FC before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present Application.

Sd/-

**SANJIV DUTT
MEMBER (TECHNICAL)**

Sd/-

**K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

//Tanmay Jain//