IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.30/BB/2020
U/s 7 of IBC, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

Between:

1. Mrs. Jagruti Govind Punjabi
702, Adinath Towers, Sudha Park,
Vallabh Baug Extensions,
Ghatkopar (East),
Mumbai – 400077. & 3 Others - Petitioners/Financial Creditors

And

M/s. Expat Projects and Development Pvt. Ltd.
Regd. Off: Carlton Towers, A-Wing,
3rdFloor, Unit No.301-314,
No.1 Old Airport Road,
Bengaluru – 560 008. - Respondent/Corporate Debtor

Order Pronounced on: 12th 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 Petitioners : Shri S.M. Algaus a/w Ms. Anagha Mhatre

For the Respondent : Shri Uday Shankar R.

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.30/BB/2020 is filed by Mrs. Jagruti Govind Punjabi and three others (hereinafter referred to as 'Petitioners/Applicants/ Financial Creditors') U/s 7 of the I&B Code, 2016, R/w Rule 4 of the I&B (AAA) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Expat Projects

& Development Pvt. Ltd., on the ground that it has committed default for a total amount of Rs.47,52,180/-.

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. Expat Projects and Development Pvt. Ltd. ('Respondent/ Corporate Debtor') was incorporated on 14.09.2007 under the Companies Act, 1956 bearing the CIN: U45202KA2007PTC043869 and having its Registered Office situated at Carlton Towers, A Wing, 3rd Floor, Unit No.301-314, No.1 Old Airport Road, Bengaluru-560008. Its Authorised Capital is Rs.20,0,00,000/- and Paid-up Capital is Rs.10,00,190/-. The Company is *inter alia* engaged in the business of land development.

(2) The Corporate Debtor approached the Petitioners with proposal of investing in the development scheduled property called 'Golden Greens'. Accordingly, the Petitioners individually decided to invest in the scheme and executed Token Receipt Agreement No.1,2 & 3 with Corporate Debtor individually, wherein, it acknowledged and accepted Rs.2,00,000/- paid by each Applicant Nos.1, 2 & 3 towards the initial booking amount. As per the terms and conditions of the said Agreements, the Applicants agreed to invest each Rs.9,25,000/- in the said Scheme. Further, the Corporate Debtor assured the Applicant No.4 that a formal agreement will be executed at the earliest and also requested the Applicant No.4 to initiate payments towards the said scheme from October 2012. Accordingly, the Applicant No.4 executed a Token Receipt Agreement No.4 with the Corporate Debtor, wherein it has acknowledged and accepted the payment of Rs.2,76,000/- by the Applicant No.4.

(3) After making the payment of 70% of the total sale consideration amount towards the said scheme, the Financial Creditors approached the Corporate Debtor and requested for executing the Agreement of Sale as per the terms and conditions of the

Agreements 1 to 4, but the Corporate Debtor sought more time for executing the Agreement of sale and assured that the same will be executed within few weeks. Further, even after waiting for few weeks the Corporate Debtor failed to execute the same. The Applicant No.1 still made the full payments of sale consideration amount aggregating to Rs.9,25,000/- till date, Applicant No.2 has made payments aggregating to Rs.7,60,500/- out of total sale consideration amount of Rs.9,25,000/- till date, Applicant No.3 made the payments aggregating to Rs.9,15,500/- out of total sale consideration amount of Rs. 9,25,000 till date and Applicant No.4 made the payments aggregating to Rs.7,60,500/- out of total sale consideration amount of Rs.9,25,000/- till date.

(4) As per the terms and conditions of the said Agreements the Corporate Debtor agreed to complete the development within 60 months from date of execution of said Agreement with a further reasonable extension for 6 months and if the Corporate Debtor fails to complete the development within stipulated time, the Corporate Debtor is liable to refund the entire amount paid by the Applicants 1 to 3 along with accrued interest at the existing bank rate. Similarly the Corporate Debtors is liable to refund the entire amount paid by the Applicant No.4 along with accrued interest at the existing bank rate of the principal amount plus an additional 2% surcharge of the principal amount to the Applicant No.4.

(5) Despite several reminders, the Corporate Debtor neither executed the Agreement of Sale nor completed the development within the prescribed time limit, therefore, each of the Applicant sent a legal notice to the Corporate Debtor demanding the full refund of paid amount along with the interest applicable as per the terms and conditions of respective Agreements aggregating to Rs.47,23,223/-. Further, till date the Corporate Debtor neither refused nor disputed the claims made by Applicants. Hence, the present petition is filed.

3. The Respondent have filed its statement of objections dated 17.02.20 to the Petition by *inter alia* contending as follows:

(1) The Respondent is a Company engaged in the business of Realty and has over years built a brand and goodwill for itself. It is solvent and is capable of repaying all the legal dues payable to any parties. However, the Respondent has a cash crunch due to market conditions which by itself is not sufficient to prove the insolvency. The Company has a strong net worth with ongoing projects. The Company has 116 direct employees and 500 employees, who are indirectly employed through contractors and further gives indirect employment to many who depend on the construction business from the Company. The Petitioners entered into Agreement with the Respondent, whereby the Respondent on account of its expertise would assist in the development of the property. The Recitals at Para 2 of the Token Receipts clearly stated that the Respondent is having the resources and knowledge in development of the land for residential and commercial purpose.

(2) As per Sec.7(3)(a) of the Code, the Financial Creditors has to furnish evidence to substantiate the default on part of the Respondent, which has not been done. Even if the Petitioner is considered to be a homebuyer, even in view of the amendment to Sec. 7 by way of the I&B Code (Amendment) Ordinance, 2019, an individual homebuyer alone cannot file an application before this NCLT seeking initiation of insolvency proceedings against a Developer. The first proviso to Sec.7(1) stipulates a minimum of 100 homebuyers or 10% of the total number of homebuyers in a project have to jointly file the preferred Petition together in order to initiate CIRP against a Developer. The Petitioners do not constitute 10% of the buyers. Hence, the Petition is liable to be dismissed on this ground alone. The Petitioners do not fall within ambit of Financial Creditor as defined U/s 5(7) of the Code, since the Petitioners are not covered within definition of Allottee under the Real Estate

Regulating Authority Act. A purchaser of an agricultural property does not fall into the ambit of Allottee and they cannot be termed as a financial creditor. Further, the amount that has been paid to the Corporate Debtor is for purchase of site which is a transfer of interest in immoveable property and the same cannot be termed as a financial debt since the money given did not have consideration for time value of money as defined u/s 5(8) of the Code.

(3) The property to be sold has not yet been demarcated and neither has it been converted since it remains an agricultural property. The Schedule given in the token receipt clearly stipulates that there is no exact plot that has been demarcated, no plot demarcated by way of boundaries for identification also on that account the Petitioners cannot be designated as Allottees and the project cannot be called as a Real Estate Project with the ambit of RERA as required to designate the Homebuyers as Financial Creditors. Money was advanced by the Petitioners for the purchase of immovable property which is of an agricultural nature and that there is no promise for the return of any time value of money. Hence, they do not fall within the category of Financial Creditors.

(4) The Petitioner No. 4 has explicitly in the Token Receipt Agreement has agreed to subject themselves to the Arbitration vide Clause 21 of the send Agreement. Hence, any grievance the recourse would be to have preferred an Arbitration. The Petitioners being aware of such Clause have approached this Hon'ble Tribunal with ulterior intention to coerce the Respondent herein. There is no legally enforceable Agreement between the Petitioners & Respondent. There is no concluded contract between the Petitioners and Respondent since the document that has been entered into is token receipt and is not sufficiently stamped.

(5) The sites in respect of which claims have been made fall within the jurisdiction of Raigad District of Maharashtra. Since the subject matter of the dispute is pertaining to Specific Performance in

respect of immoveable property situated in Raigad District in State of Maharashtra, the appropriate forum is the Civil Court within the territorial jurisdiction of Raigad, Maharashtra for specific performance i.e., either to hand over the site to the applicant or refund of the amount advanced. The motive of the Petitioners is not to initiate Insolvency Proceedings but to recover their money along with interest and put the Respondent in loses.

(6) Hence, the Petition deserves to be rejected at the outset.

4. Heard Shri S.M. Algaus, learned Counsel for the Petitioner and Shri Uday Shankar R., learned Counsel for the Respondent, **through Video Conference**. We have carefully perused the pleadings of both the Parties and extant provisions of the Code, the Rules made thereunder, and the Law on the issue.

5. Ms. Anagha Mhatre, Ld. Counsel for the Petitioner, while reiterating the averments made in the Petition, as briefly stated supra, has also filed her written arguments dated 02.03.2020, by *inter alia* stating as follows:

(1) The investment made by the Applicants fall within the ambit of Financial Debt, as defined u/s 5 (8) of the Code and it the time value of money. Further, according to Black's Law Dictionary, the word "Time Value" is defined as *'Price Associated with the length of time that an investor must wait until an investment matures or the related income is earned"*. Further the bare perusal of the Section 5(8) of the Code and the definition of "time value" would render a prima facie conclusion that the aforesaid transaction is a financial debt. The Applicants have incurred expenditure to acquire property to produce revenue.

(2) As per terms of Agreements, the Corporate Debtor will provide exact plot description after demarcation process. Further the Corporate Debtor has allotted a Plot No. 91, 92 and 89, which are supposed to be developed as per the said scheme to Applicants 1 to 3 respectively.

Upon bare perusal of the definition of the Allottee and Real Estate Project, it is prima facie evident that the Applicants are allottee as defined u/s 5(f) of the code. The Financial Creditors have relied on the case of *Nikhil Mehta and Sons vs. AMR Infrastructures Limited* of Hon'ble NCLAT. In the present transaction the Corporate Debtor undertaken the said scheme for their financial gains, and therefore it has a commercial effect of borrowing.

(3) The Corporate Debtor acknowledged the payments made by the Applicants No.1 to 3 vide email dated 11.07.2018, 28.06.2018 and 28.06.2018. They have relied upon the cases of Hon'ble Supreme Court in *Swiss Ribbons Private Ltd. and Anr. Vs. Union of India & Ors. and Innoventive Industries Ltd. Vs. ICICI Bank & Anr.* The Corporate Debtor had never informed the Applicants about the plot of land being agricultural land. The Applicants have approached this Tribunal with a sole purpose of initiating CIRP against the Corporate Debtor. It is well settled law that the presence of Arbitration Clause in an Agreement, would not cause any impediment with regards to initiation of CIRP.

(4) It is a well settled principle that as soon as the Adjudicating Authority is satisfied that there is a default on part of the Corporate Debtor, CIRP can be initiated against the Corporate Debtor. In the present case, the Corporate Debtor failed/neglected to reply to the Demand Notice dated 20.08.2019 issued by the Advocates of the Applicants 1 to 4 much less complying with the requisitions enlisted in the Demand Notice for making payment towards the investment or raising any dispute with regards to existence/correctness/ quantum of the claim raised by the Applicants 1 to 4. In light of the above, the Corporate Debtor has no money to repay the financial debt and must undergo CIRP.

6. Shri Uday Shankar, learned Counsel for the Respondent, while reiterating the averments made in the Petition, as briefly stated supra, has also filed his written arguments on 04.08.2020 by *inter alia* contending as follows:

(1) The Petition is liable to be dismissed at the outset by virtue of the amendment to Sec. 7(1) IBC notified in Official Gazette dated 13.03.2020. Amendment to Sec. 7(1) which stipulated 10% or 100 whichever is higher of homebuyers as the limit to approach this Court and also in the case of existing petitioners before the Court, the Petitioner would need to meet up within number as per proviso two and three within 30 days of the amendment. The four Petitioners do not constitute 10% or 100 whichever is higher of the Homebuyers and since 30 days have lapsed since the notification of amendment, the Petition is liable to be dismissed.

(2) The Petition is not maintainable as it doesn't fulfil criteria of minimum default amount of Rs One Crore by virtue of Notification 1076 by MCA published in the Gazette of India on 24.03.2020. The claim amount of the present case is Rs.47,52,180/-, which is towards four Petitioners. Further, the Petition is not maintainable by virtue of Ordinance No.34 by MCA published in the Gazette of India on 05.06.2020, which provides for suspension of IBC proceedings initiated under the Code for one year.

(3) The Petition is also not maintainable as it has not submitted default record from the information utility specified by the NCLT Order by virtue of File No.5/02/2020 dated 12.05.2020. Filing of record of the Default of information utility is a mandatory requirement under Sec.7(3) of the Code.

(4) The Exhibit A, F, K and P placed at the main Petition clearly stipulates that the Respondent have entered into an arrangement for providing expertise service for development of the said land. Nowhere does the Agreement Stipulate that there are any title over the said land. There is no Agreement of Sale executed between the Petitioner and the Corporate Debtor and the Petitioner right and interest over the immovable property cannot be created by virtue of the Token

Receipt. Therefore, there is no legally enforceable agreement between the Petitioner and the Respondent and Token receipt is only a receipt which cannot be regarded as a concluded contract. The claims of the Petitioner are in respect of agricultural land where the Civil Court having jurisdiction of Raigad Maharashtra would be an appropriate forum and such an application is outside the scope of NCLT. Further, the Petitioner No.4 has explicitly agreed to refer to Arbitration for any dispute and therefore the Petitioners should invoked arbitration clause and resolve the dispute.

(5) The purchase of agricultural land is by virtue of a Token Receipt and the same is impermissible under Maharashtra Land Reform Act. Thus, such transactions including the Token receipt are void-ab-initio so far as IBC is concerned. The Respondent is solvent and is capable of repaying all the legal dues payable to any parties. The Respondent has excess assets over liabilities as reflected in the financial statements. The admission of this petition based on frivolous claims would jeopardize many investors, employees, shareholders, land buyers etc. of the Respondent, and thus it shall be rejected in the interest of justice.

7. As narrated supra, cause of action arises basing on Token Receipt Agreement dated 28.09.2012 executed between the Petitioners and the Respondent. The object of the Agreement is for development of "GOLDEN GREENS", located at Pahel Village, Lonere Town, District Raigad, Maharashtra State. Therefore, the Respondent has proposed a Development Scheme named as "GOLDEN GREENS', for development of the Project by proposing a layout with Agriculture plot, having clear and marketable title, and as per a plan prepared by the First Party with Four Corner Stone Demarcation of the Plot area and an internal access Motorable Road leading to the said plot. The Development shall be completed within 60 months from the date of executing this Agreement; further the Developer shall be permitted a reasonable extension of 6 months to complete the said development. If the Respondent is unable to deliver the plot as mentioned above, due to governmental restrictions or circumstances beyond their control, the First Party agrees to refund the entire amount paid by the Second Party with accrued interest at the existing Bank Rate OR alternatively allot another plot to the Second Party in any of the Properties / Developments promoted or developed by the First Party or its nominees in India, with the prior consent of the Second Party.

8. In Pursuant to the negotiations between the parties, the First Party has offered to sell the below listed plot and the Second Party has agreed to purchase the said plot in the aforesaid project, on the terms and conditions mentioned therein. The exact plot description shall be provided to the Second Party after the demarcation process is completed within 60 months from execution.

Plot No.	92
Area ad measuring about	One Acre, 4040 Sq. mts. Approx. (inclusive of Road)
Total consideration "Rs"	9,25,000/-

The Respondent shall deliver one acre land, out of which approximately 3560 Sq. ft. shall be utilized for providing internal access Motorable road to the property.

In pursuant to the above Receipt Agreement dated 28.09.2012, the Petitioners have not produced any legally enforceable Agreement of Sale except correspondences with regard to the payments made and acknowledgement by the Respondent.

9. Subsequently, Mr. Ajoy S. Chomaal, Petitioner No.2, has addressed a letter dated 20.08.2019, to the Respondent, by calling upon the Respondent to pay him a sum of Rs.7,60,500/- towards the Principal amount paid by him along with Rs.3,10,130/- towards the interest accrued on the Principal amount. The letter reads as under:

"To,

M/s. Expat Projects and Development Pvt. Ltd.

Carlton Towers, A Wing,
3rd Floor, Unit No.301-314,
No.1 Old Airport Road,
Bangalore – 560 008.

Kind attention: Mr. Berlyn D'Souza/ Mr. Feroz Shah

Sir,

Sub: Token Receipt Agreement dated 28th September, 2012.

At the outset, I say that I have entered into a Token Receipt Agreement dated 28th September 2012 ("said agreement") with you. By the said agreement you had proposed a development scheme named as "GOLDEN GREENS" for development of the project ("said development"), having a layout with an agricultural plot as more particularly set out in the said agreement having clear and marketable title, as per a plan prepared by you with Four Corner Stone Demarcation of the plot area and an internal access motorable road leading to the said plot.

As a confirmation to the said understanding I had made a payment of Rs.7,60,500/- towards the sale consideration under the said agreement.

As per clause 3 of the said agreement you were required to complete the said development within 60 months from the date of the said agreement or with a further reasonable extension of 6 months from the date of the expiry of the aforementioned 60 months.

Please note that the 60 months period from the date of the said agreement has lapsed on September, 2017 and the extended period of 6 months has lapsed on March, 2018. Accordingly, 16 months have lapsed from March, 2018.

As provided in clause 4 to the said agreement, in the event you failed to complete the said development beyond the extended period, you are liable to refund the entire amount paid by me with the prevailing bank rate.

In these premises, I call upon you to pay to me a sum of Rs.7,60,500/- towards the principal amount paid by me along with Rs.3,10,130/- towards the interest accrued on the principal amount.

Also please treat this letter as formal termination of the said agreement.

Your Sincerely,

Mr. Ajoy S Chomaal"

As per this letter, the Petitioner wants to recover the amount paid by him but not threatened the Respondent to initiate CIRP. Therefore, the present Petition is filed for recovery of amount paid to the Respondent, which is against the object of Code.

10. Even if the Petitioners deemed to be Home buyers, they are not fulfilling the requisite conditions prescribed U/s.7 of the Code, wherein a minimum of 100 Homebuyers or 10% of the total number of homebuyers in a project have to jointly file the Petition together in order to initiate CIRP. The Petitioners admittedly do not meet the above criteria. Moreover, the Petitioners are purchaser of an agricultural property and that amount has been paid to the Corporate Debtor is for purchase of sites with development. The Petitioners have not controverted the contention of Respondent that Property in question is an Agricultural land with so many restrictions imposed on it, as per law, for their transfer. As stated supra, as per the said Agreements, there is an alternative choice for the Corporate Debtor to allot another plot to the Petitioners in any of the Properties/ Developments promoted or developed by the First Party or its nominees in India, with the prior consent of the Second Party. There is an arbitration clause available in the Agreement. However, by not choosing above two alternatives available, the Petitioners have chosen to invoke provisions of the Code, on misconception of facts and law. Though there is no bar to seek to initiate CIRP even arbitration clause is incorporated in Agreement, the issues raised in the instant case suits arbitration clause to be invoked. And the Respondent also agreed for such course of action. As per law, debt arise basing on legally enforceable right and thereafter default arise. In the instant case, as detailed supra, there is no enforceable concluded Agreement/contract executed in pursuance to Token Receipt

Agreement dated 28th September, 2012 so as to raise legally enforceable debt. In this regard, it is relevant to rely upon the decision rendered in the case *of Nikhil Mehta & Sons (HUF) v. AMR Infrastructure Ltd. (2017) 78 taxmann.com 302 (NCLT – New Delhi),* In the instant case, money was advanced by the Petitioners for the purchase of immovable property, which is of an agricultural land which cannot be transferred as per Law. As rightly pointed out by the Respondent that dispute in respect of transfer of immoveable property needs to be adjudicated by Civil Court having territorial jurisdiction over same. It is relevant to point out here the judgement of Hon'ble Supreme Court of India in *Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.,* wherein it is *inter alia* held that, *a person who is genuinely not interested in purchasing a flat/apartment shall not be entitled to any remedy under this Code.*

11. It is relevant to observe here that even though the Petitioners are not able to demonstrate that the case falls within purview of the extant provisions of the Code, the fact remains that Respondent admittedly is in receipt of the money in question paid by the Petitioners. As rightly contended by the Petitioners, the Respondent, by knowing well about the nature of property and law on transfer of such property, have falsely represented and duped them to enter into the Agreement in question. It is not the case of Respondent that they have apprised the Petitioners about the issue they have raised now to oppose their claim. Therefore, though the case is not fit to initiate CIRP, it is fit case for the Petitioners to initiate appropriate Civil and Criminal proceedings against the Respondent for their misrepresentation and claim appropriate reliefs in those proceedings.

12. For the aforesaid facts and circumstances of the case, we are of the considered opinion that the Petitioners have failed to make out any case so as to initiate CIRP in respect of the Corporate Debtor. However, the

Petitioners can be granted liberty to initiate appropriate Civil and Criminal proceedings before jurisdictional Courts.

13. In the result, C.P. (IB) No.30/BB/2020 is hereby rejected by reserving liberty to the Petitioners to take appropriate Civil and Criminal proceedings against the Respondent before appropriate jurisdictional Courts seeking appropriate reliefs. No order as to costs.

ASHUTOSH CHANDRA
MEMBER, TECHNICAL

RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL

Krishna