IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.129/BB/2018
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

IN THE MATTER OF:

M/s. Lalitha Developers
A Partnership Firm
Leo Complex, 2nd Floor,
44-45, Residency Road Cross,
Bangalore – 560 025. - Petitioner/Operational Creditor

Versus

M/s. Ittina Properties Pvt. Ltd.
Regd. Off: #1054, III-Block,
7th Main Road, Koramangala,
Bangalore – 560 025. - Respondent/Corporate Debtor

Date of Order: 29th July, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Shri Sreevatsa with Shri Tahura Anzar

For the Respondent : Ms. Rashmi Subramanya

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.129/BB/2018 is filed by M/s. Lalitha Developers, (A Partnership Firm) under Section 9 of the IBC, 2016 read with Rule 6 of the I&B (Application to Adjudication Authority) Rules, 2016, by seeking to initiate the Corporate Insolvency Resolution Process (CIRP)

against M/s. Ittina Properties Private Limited ('Respondent/Corporate Debtor') on the ground that it has committed default for total outstanding amount of Rs.10,79,82,565/- (Rupees Ten Crores Seventy Nine Lakhs Eighty Two Thousand Five Hundred and Sixty Five 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.Lalitha Developers (hereinafter referred to as 'Petitioner/ Operational Creditor') is a Partnership Firm and has its office at Leo Complex, 2nd Floor, 44-45, Residency Road Cross, Bangalore-560025 and is engaged in the business of real estate development. The Petitioner firm is represented by its Partner Mr. Ranjit Kedia.

(2) M/s. Ittina Properties Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor') is a Private Limited Company incorporated under the Companies Act, 1956 on 19.09.1991 with Identification No. 08/12327, and has its registered office at No.1054, 3rd Block, 7th Main Road, Koramangala, Bangalore-560025. The Authorised Share Capital of the Company is Rs.15,00,00,000/- (Rupees Fifteen Crores Only) divided into 15,00,000 (Fifteen Lakhs) Equity Shares of Rs.100/- (Rupees One Hundred Only) each. The main objects of the Company, in brief, are to purchase, acquire, take on lease or in exchange or in any other lawful manner any area land, buildings, structures and to turn the same into account develop the same and dispose or maintain the same and to build townships, markets or other buildings residential and commercial, etc.

(3) The Petitioner is the absolute owner of the immovable properties bearing No.101 & 156/2 at Doddatoguru Village, Begur, Hobli,

Bangalore. The Petitioner and the Respondent entered into a registered Joint Development Agreement (JDA) dated 10.12.2003 for development of the above-mentioned property belonging to the Petitioner. The said agreement provided that the Respondent would construct on the property, apartment buildings as per sanction plan with internal and external services, amenities, fittings and facilities, passages, car parking etc. As per the JDA the Respondent paid a sum of Rs.80,00,000/- (Rupees Eighty Lakhs Only) to the Petitioner on 10.12.2003 through three cheques as per initial deposit. It was also agreed that the Respondent will be entitled for an undivided 78% share in the total built up area, whereas the Petitioner will be entitled for an undivided 22% of the total built up area subject to a minimum of 65000 sq. ft., per acre with proportionate car parking, terrace and constructed area. The Petitioner and Respondent also executed Indenture of Supplementary (IOS) to the JDA on 22.11.2004. As per this IOS and the JDA, the Petitioners share was determines as (148 apartments) equivalent to 1,70,867 sq. ft., with 17472 sq. ft. terrace area and 148 car parking spaces.

(4) The Petitioner and the Respondent entered into an Agreement of Sale dated 19.10.2005 wherein the Respondent agreed to purchase the share allotted to the Petitioner i.e., 1,93,956 sq. ft., saleable area for a total consideration of Rs.28,80,00,000/- (Rupees Twenty Eight Crore Eighty Lakhs Only) free from all encumbrances, accordingly a sum of Rs.3,00,00,000/- was paid and a balance of Rs.25,80,00,000/- was agreed to be paid through 37 post-dated cheques between 10.11.2005 and 25.07.2006. It was further agreed that a sum of Rs.80,00,000/-

paid as per the JDA would be appropriated in the final instalment, which was due on 25.07.2006. It was also agreed that in the event of dishonour of cheque, interest would be payable at 18% p.a.

(5) In view of certain amendments in the law governing to flats and apartment ownership, the Petitioners became entitled for an additional 22% share. The Petitioner executed a General Power of Attorney (GPA) on 19.05.2006 in favour of the Respondent Company to enter into Sale Agreements and to discharge other functions as stated in the GPA.

(6) It is alleged that the Respondent failed to make payment and consequently became due to pay the principal sum of Rs.4,70,00,000/- and interest of Rs.2,50,00,000/-. On 10.07.2008, the Petitioner got issued a legal notice to the Respondent calling upon the Respondent to pay Rs.7,20,00,000/-. The Petitioner further executed an Indenture of Supplementary to the Area Sharing Agreement on 30.04.2009, wherein the Petitioner herein were additionally allotted 14 flats equivalent to 14,900 sq. ft. with addition 14 car parking space. Thereupon, negotiations took place between the Petitioner and the Respondent. Based on those negotiations, on 22.05.2009 a Memorandum of Understanding (MOU) was entered into between the Petitioner and the Respondent wherein the Respondent has admitted that they were in due of Rs.6,21,00,000/- and that the Petitioner would have a first charge on the property for the said amount. It was further agreed that the Petitioner would be entitled for 30% of the sale price and the Respondent would be entitled for 70% of the sale price which would be deposited in a joint account and then

distributed. It was also agreed that all unsold flats will be sold and registered jointly. The Respondent without the knowledge of the Petitioner sold many flats directly and registered the same without remitting the Petitioner their legal share of 30%.

(7) It is stated that there was no positive response from the Respondent Company with regard to the balance payment. The Petitioner on 11.02.2013 issued a legal notice to the Respondent stating that out of Rs.6,21,00,000/- only a sum of Rs.1,67,63,435/- has been paid and the cheque for Rs.80,00,000/- was returned as 'funds insufficient'.

(8) It is further stated that several cheques were issued by the Respondent Company which have returned with 'insufficient funds' and the details are as follows:

Cheque No.	*Cheque Date*	*Drawn on*	*Amount (Rs.)*
007925	24.04.2012	Saraswat Bank	5,00,000/-
007924	24.04.2012	Saraswat Bank	5,00,000/-
251999	08.05.2012	Tamilnad Mercantile Bank	3,00,000/-
007923	23.04.2012	Saraswat Bank	5,00,000/-
001332	22.12.2012	Saraswat Bank	40,00,000/-
903844	03.06.2013	South Indian Bank	80,00,000/-
008231	26.07.2013	Saraswat Bank	10,00,000/-
556300	09.05.2014	Axis Bank	12,00,000/-
TOTAL			1,60,00,000/-

(9) On 10.03.2014, the Petitioner carried out paper publication and revoked the General Power of Attorney dated 19.05.2006 since the Respondent continued to sell apartments without remitting 30% share of the Petitioner as agreed under the MOU dated 22.05.2009. It is stated that the Respondent has been executing Sale Deeds even after GPA dated 19.05.2006 has been revoked. Immediately, thereupon, the Respondent filed an Arbitration

Application in A.A. No.6 of 2014 before the II Addl. District and Sessions Court, Bangalore Rural District.

(10) It is stated that as on the date of filing this Petition, the Respondent is due for a sum of Rs.10,79,82,565/- along with interest calculated at 18% p.a. The Petitioner has received only part payments from the Respondent out of Rs.6,21,00,000/-. Whenever Petitioner approached the Respondent making a demand, the Respondent was making false and frivolous reasons in order to escape the liability of making payments to the Petitioner. Since the Respondent Company failed and neglected to pay the amount due and payable by the Respondent to the Petitioner, the Respondent deemed to be unable to pay its debts.

(11) Since the Respondent failed to pay the balance amount despite repeated demands and follow-ups, was ultimately constrained to issue notice dated 10.10.2014 U/ss 433 and 434 of the Companies Act, 1956 and even after receiving notice, the Respondent failed to pay outstanding amount. On bare perusal of the financials of the Respondent Company, it is evident that the Respondent Company is not in a position to clear its debts and is not a solvent Company. The Petitioner has again sent a legal notice dated 04.02.2015 to the Respondent with Registered Office of the Respondent by RPAD and Speed Post and the same has been returned back with endorsement "Left Returned to Sender".

(12) Hence, filed the instant petition.

3. The Company Petition is opposed by the Respondent by filing Statement of Objections dated 25.10.2018, by inter alia contending as follows:

(1) It is contended that the Petitioner is not an Operational Creditor of the Respondent and there were no goods supplied or services rendered by the Petitioner entitling the Petitioner to file or maintain the present Petition. The Petitioner is attempting to specifically enforce the Agreement for Sale dated 19.10.2005 and Memorandum of Understanding dated 22.05.2009 and is seeking to recover the balance sale consideration. In these Agreements, there is a remedy available for the parties in the event of any breach of the terms of these Agreements.

(2) It is stated that under the Agreement for Sale dated 19.10.2005, the only remedies available to the Petitioner in terms of Clauses 2.6 and 5 of the said Agreement was to either specifically enforce the agreement, if permissible in law, or to forfeit 10% of the amount paid till the date of default and adjust the balance payment to the account of the Respondent against allotment of proportionate built up area. The MOU also provides for various remedies.

(3) It is stated that the Respondent had filed A.A. No.6/2014 before the II Addl. District & Sessions Judge, Bangalore Rural, on 11.04.2014 against the Petitioner for interim measures of protection. However, A.A. No.6/2014 came to be dismissed on 05.11.2016 for non-prosecution and the Respondent filed A.A. No.1/2017 before the I Addl. District & Sessions Judge, Bangalore Rural District, seeking to restrain the Petitioner from interfering with the Respondent's rights to convey right, title,

interest and ownership pertaining to the apartment complex. And this application is pending consideration. Therefore, the Petitioner is well aware of above arbitration proceedings and in fact has participated in the proceedings. Even A.A. No.1/2017 was filed prior to the filing of this Petition. The Respondent has initiated arbitration proceedings against the Petitioner vide legal notice dated 23.10.2016 and requested the Petitioner to come forward to appoint an Arbitrator. On the Petitioner's failure to do so, the Respondent was constrained to file CMP No.18/2017 on 16.01.2017 before the Hon'ble High Court of Karnataka against the Petitioner U/s 11 of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator, which is also pending consideration and the Petitioner has been served with notice thereof and has entered appearance through its Counsel.

(4) It is stated that the present Petition is not maintainable as it is hopelessly barred by laches and limitation, as cause of action arose on 10.07.2008 and 22.05.2009 and on 10.10.2014, when the alleged statutory notice was issued and thus Petition is liable to be dismissed on this ground alone.

(5) The Petitioner was owner of certain lands in Sy. Nos.101 and 156/2 of Doddathoguru Village, Begur Hobli, Bangalore South Taluk (now Bangalore East Taluk). The Petitioner entered into a registered Joint Development and Construction Agreement dated 10.12.2003 (JDA) with the Respondent to construct apartment buildings and multiplexes on the above properties. The parties agreed that in consideration of the Petitioner agreeing to transfer 78% undivided share in the above property to the Respondent or its nominees, the Respondent shall construct and deliver 22% of the total built area to be

constructed with proportionate car parking spaces, terrace area for the use and ownership of the Petitioner. The Respondent was entitled to the remaining 78% of the total built area etc. In terms of the JDA, the Respondent paid the Petitioner Rs.80,00,000/- as interest free refundable deposit. Further, in terms of Clauses 3, 7.8 and 14, the Petitioner was required to execute powers of attorney in favour of the Respondent to enable them to carry out the construction activity, obtain plan sanctions for development of the property, to register their portion of the built-up area, to enter into agreements for sale, etc. It is pertinent to note that the JDA at Clause 20 provides for settlement of disputes by arbitration.

(6) In addition to the above agreements, the parties have also entered into other agreements and pursuant to the agreements, the Petitioner executed Power of Attorney in favour of the Respondent. Of these, the Petitioner executed a Power of Attorney dated 10.12.2003 registered as Document No.519/2003-04 authorising I.Mahabaleswarappa, the then MD of the Respondent to inter alia enter into Agreements for Sale with prospective buyers, receive advances, entire consideration, issue receipts, execute agreements, etc. Subsequently, the Petitioner executed another Power of Attorney dated 21.04.2005 registered as Document No. 64/2005-06 inter alia authorising the Respondent to execute Agreements for Sale with prospective buyers, receive consideration, issue receipts, execute Sale Deeds, etc.

(7) He has also relied upon the following judgments:

a. *Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors & Cables Limited (2018) 98 taxmann.com 375 (SC).*

b. *Infrastructure Leasing and Financial Services Limited v. S.A. Builders Limited (2001) 103 CompCas 1089.*
c. *Munirabad Chemicals Co. v. B.C. Mody Exports Private Limited and Another (2008) 142 CompCas 589 (Bom.).*
d. *Rahul Sayal v. S.S. Conbuild Private Limited (2018) 96 taxmann.com 282 (NCLT-New Delhi).*
e. *Giridhar Rajgopal v. Skyline Construction and Housing Private Limited order dated 24.10.2018 in C.P. No.30/2016 passed by NCLT-Bangalore Bench.*
f. *K. Kishan v. Vijay Nirman Company Private Limited in Civil Appeal No.21824 of 2017.*

4. Heard Shri Sreevatsa, learned Senior Counsel for the Petitioner and Ms.Rashmi Subramanya, learned Counsel for the Respondent. We have carefully perused the pleadings of the parties and the extant provisions of the Code and the law

5. The instant Company Petition has been filed on 04.06.2018 under Section 9 of the IBC, 2016 read with Rule 6 of the I&B (Application to Adjudication Authority) Rules, 2016, by inter alia seeking to initiate the Corporate Insolvency Resolution Process against M/s. Ittina Properties Pvt. Ltd. ('Respondent/Corporate Debtor') basing on the Joint Development Agreement dated 10.12.2003, Indenture of Supplementary, Agreement of Sale dated 19.10.2005, Indenture of Supplementary to the Area Sharing Agreement dated 30.04.2009, Memorandum of Understanding dated 22.05.2009. As stated supra, the Respondent, after failing to convince the petitioner to agree for Arbitration as per the Covenants in question, has ultimately filed C.M.P. No.18/2017 before the Hon'ble High Court of Karnataka under Section 11(6) of the Arbitration and Conciliation Act, 1996 in respect of M/s. Lalitha Developers (Petitioner herein) by seeking to refer the

matter to the Arbitration Centre for adjudication of the dispute by appointing an Arbitrator on the ground that there is an Arbitration Clause in the Joint Development and Construction Agreement dated 10.12.2003. Basing on the joint submission of both the parties to refer the matter to sole Arbitrator, the said C.M.P. is disposed of by an order dated 15.02.2019 by appointing Hon'ble Mr. Justice (Retd.) Ashok B. Hinchigeri as the Sole Arbitrator to adjudicate the dispute between the parties. In pursuant to the said appointment, the Respondent received a letter bearing Disp. No.AC-K/452/2019 dated 20.03.2019 from the Arbitration & Conciliation Centre – Bengaluru and asking it to file settlement of claim with supporting documents. Accordingly, claim settlement has been filed and matter is pending before the Arbitrator. It is also on record that the Respondent herein has filed Arbitration Application No.6/2014 on 11.04.2014 before the District & Sessions Judge, Bangalore Rural at Bangalore under Order XXXIX Rule 1 & 2 of the CPC, and also another Arbitration Application No.1/2017 on 27.01.2017 before the District and Sessions Judge, Bengaluru Rural District at Bengaluru under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure. It is also not in dispute that in response to the Demand Notice dated 24.04.2018 issued by the Petitioner, the Respondent has given a reply dated 03.05.2018 by raising dispute and also pointed out all the cases filed including arbitration case. Therefore, the instant Company Petition is not maintainable as there is a pre-existing dispute between the parties. Therefore, the operational debt is in dispute.

6. In a recent judgement rendered in *Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd.,*[1] by Hon'ble Supreme

---

[1](CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)

Court of India, wherein it is inter alia, held that existence of undisputed debt is sine qua non of initiating CIRP. As per para 34 of judgment, it is stated that the Adjudicating Authority, while examining an application filed under Section 9 of Code, will have to determine:

i. Whether there is an 'operational debt' as defined exceeding Rs.1 Lakh?

ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of aforesaid conditions is lacking, the application would have to be rejected.

7. In view of the above facts and circumstances of the case, the Bench is of the considered opinion that the Petitioner failed to make out any case to admit the case.

8. In the result, C.P. (IB) No.129/BB/2018 is hereby dismissed. However, this order would not come in way of the parties to prosecute the pending Arbitration and to take further remedies available to it under any other law. No order as to costs.

(ASHOK KUMAR MISHRA)	**(RAJESWARA RAO VITTANALA)**
MEMBER, TECHNICAL	**MEMBER, JUDICIAL**

Krishna