

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -II**

IA No. 1536/2021

In

C.P. (IB) No. 216/MB/2019

Under Section 60(5) of Insolvency and
Bankruptcy Code, 2016

Bhupendra Pancholi

Having address at- 604 & 605, 6th Floor, Arun
Chambers, Tardeo Road, Mumbai- 400034

.... Applicant

Versus

M/s Kavya Buildcon Pvt. Ltd.

Having address at – 2nd Floor, 99 C, Kavya
Aura, Sitaram Ghadigaonkar Marg,
Tulsiwadi, Tardeo, Mumbai- 400034

.... Respondent

In the matter of

Bhupendra Pancholi

...Original Petitioner/Financial Creditor

Versus

M/s Kavya Buildcon Pvt. Ltd.

...Corporate Debtor

Order Delivered on :- 22/02/2024

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Applicant : Adv. Vivek Kantawala a/w Shanay Bafna

For the Respondent : Adv. Rahul Sarda a/w Chirag Sarawagi

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. The present application has been filed by the Applicant seeking appointment of IRP in C.P (IB)/216(MB)/2019 which was filed by the Applicant under Section 7 of Insolvency and Bankruptcy Code, 2016.
2. The case of the Applicant, as set up in the application, is that the Applicant had purchased a flat from the Respondent/Corporate Debtor on payment of Rs. 65,68,664/-. The Respondent had issued a letter of allotment dated 14.01.2016 to the Applicant and, therefore, the Applicant is the Financial Creditor of the Respondent/Corporate Debtor. It is further the case of the Applicant that the Applicant had filed the present Petition i.e. C.P (IB)/216(MB)/2019 under Section 7 of Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor. During the pendency of the said

application, consent terms were executed and taken on record by the Tribunal and vide order dated 17.10.2019, the Petition was disposed of in the light of the consent terms. The Applicant is now seeking restoration of the Company Petition on account of breach of the consent terms. As per the consent terms, the Corporate Debtor was obliged to pay a sum of Rs. 80,68,664/- which included interest as well. As the Corporate Debtor has failed and neglected to comply with the consent terms, the Applicant issued notice dated 05.03.2021 to the Respondent but despite that the needful was not done by the Respondent. Hence the application.

Reply filed on behalf of the Respondent:-

3. It has been pointed out that the Financial Creditor has died and till date no application has been filed to bring on record the legal heirs. Even otherwise, the application is not maintainable, the Applicant cannot seek automatic initiation of CIRP against the Corporate Debtor for the alleged non-compliance of consent terms dated 16.10.2019.
4. It has also been stated in the reply that as per the amendment in Section 7 of Insolvency and Bankruptcy Code, 2016, the Financial Creditors, who are allottees under the real estate project, can file an application for initiation of CIRP jointly by not less than 100 of such allottees under the same real estate project or not less than 10 percent of the total number of allottees under the same real estate project whichever is less. Since the Company Petition has been filed by a single allottee, the same cannot be maintained as per the amended provisions of the IBC

5. The Respondent has prayed for dismissal of the application.

Analysis and Findings:-

6. We have heard the Counsel for the parties and gone through the record.
7. During the course of arguments, it has been contended by the Counsel for the Applicant that though the Applicant has died but the cause of action in this case survives and an application has already been filed by the widow of the late applicant for impleading herself in the capacity of legal heir of the deceased applicant. Therefore, the application ought not to be dismissed on this ground. Counsel for the Applicant has further referred to the consent terms, more particularly clause (3) of the consent terms, which clearly provides that in the event of failure of the Respondent to comply with the conditions, the Corporate Debtor will automatically enter into CIRP and IRP, Mr. Nagraj U. Hiregange Advocate, shall stand automatically appointed as IRP under the terms and conditions indicated by the IRP vide letter dated 19.12.2018. In the light of the fact that the consent terms have been violated by the Corporate Debtor and the payment has not been made, Counsel for the Applicant has urged that the Company Petition should stand restored automatically as per clause (3) of the consent terms.
8. On the other hand, Counsel for the Respondent has argued that in the light of the amendment made in Section 7 of the Code which clearly provides that no Petition by a home buyers can be filed singularly without complying with the requisite conditions i.e. either an application for initiation of CIRP can be filed jointly by not less than 100 of such allottees under the same projects or

not less than 10 percent of the total number of allottees under the same project whichever is less and on this ground itself, the application is liable to be dismissed as the said amendment is retrospective in nature and is applicable to all the applications which were pending at the time of amendment.

9. We have weighed the contentions raised by the Counsel for the parties and gone through the records carefully.
10. It is no doubt true that C.P (IB)/216(MB)/2019, which is sought to be revived by way of this application, was allowed to be withdrawn in the light of the consent terms executed between the parties vide order dated 17.10.2019. It also cannot be disputed that as per the consent terms, in the event of violation of the consent terms, the Corporate Debtor was to be admitted into CIRP. Though clause (3) stipulates that in the event of violation of the consent terms, the Corporate Debtor was to be automatically admitted into CIRP and IRP would also stand appointed automatically but practically and legally speaking, clause (3), as it is, cannot be enforced, the reason being that before ordering CIRP, this Authority has to record findings of facts with regard to existence of financial debt and its default etc. In any case, clause (3) of the consent terms can be interpreted at the most to mean that in the event of non-compliance of the consent terms, the Applicant could approach this Authority for revival of the Company Petition.
11. Now, the question arises as to under the facts and circumstances of the present case, whether the Company Petition can be revived or not. In this regard, Counsel for the Respondent has pointed out that in the light of the amendment carried out in Section 7 of Insolvency and Bankruptcy Code,

2016, so far as home buyers as applicants are concerned, the proviso to Section 7(1) says that in case of allottees under the real estate project, an application for initiating CIRP against the Corporate Debtor shall be filed jointly by not less than 100 of such allottees under the same real estate project or not less than 10 percent of the total number of allottees under the same real estate project, whichever is less. That amendment is retrospective in nature as it has been made applicable to the applications filed prior to the amendment on 28.12.2019 and it has been made mandatory that the application filed prior to amendment shall also be modified so as to comply with the requirements of the first and second proviso within a period of 30 days failing which, the same shall be deemed to have been withdrawn.

12. In the context of the amended provisions of Section 7 of IB Code, no doubt the Petition filed by the Applicant under Section 7 of IB Code is not maintainable as per law as it stands today. However, since the said Petition was filed prior to the amendment and the fact that the consent terms were violated by the Respondent giving a right to get the Company Petition revived, in our considered view, the Application for restoration cannot be dismissed at the very outset. On the restoration of the Petition, as per the amendment itself, in our considered view, an opportunity has to be afforded to the Petitioner to comply with the amended provisions of Section 7(1) of the IB Code and if the Petitioner would fail to comply with the said provisions, in that event the Petitioner would be non-suited on that ground.
13. As a result of the above discussion, we deem it appropriate to allow the application for revival of the Company Petition in the light of the violation of

the consent terms by the Corporate Debtor. However, the Respondent/Corporate Debtor shall be at liberty to press for dismissal of the application, if the amended provisions of Section 7 are not complied within the stipulated period of 30 days. **IA No. 1536/2021 is allowed and disposed of** accordingly to the extent indicated above.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)