IN THE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

C.P. No. IB-354 (PB)/2021

IN THE MATTER OF

Manish Kumar & Anr.

.... Applicant/Financial Creditor

VERSUS

M/s. Drishti India Limited

.... Respondent/Corporate Debtor

SECTION: 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 (for brevity 'the Rules')

Order Pronounced on: 01.11.2021

CORAM:

SHRI BHASKARA PANTULA MOHAN
HON'BLE ACTG. PRESIDENT
SHRI HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Financial Creditor: Mr. Manish Kumar & Harish Sethi, Advocates.

For the Corporate Debtor: Mr. Anurag Ojha, Mr. Gautam Barnwal with Mr. Shivam Malhotra, Advocates.

MEMO OF PARTIES

Manish Kumar
Resident of 10/536,
Kaveri Path, Madhyam Marg,
Mansarovar, Jaipur.

Renu Meena,
Wife of Manish Kumar,
Resident of 10/536,
Kaveri Path, Madhyam Marg,
Mansarovar Jaipur.

.... **Applicant/Financial Creditor**

Versus

Drishti India Limited
Registered Office at:
C-161, East of Kailash, New Delhi.
Bhikaji Cama Place.
New Delhi-110066.

.... **Respondent/Corporate Debtor**

ORDER

PER- BHASKARA PANTULA MOHAN, ACTNG PRESIDENT

1. The Present Application is filed under section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Mr. Manish Kumar and his wife Ms. Renu Meena, (for brevity 'Applicants') with a prayer to initiate the Corporate Insolvency process against M/s. Drishti India Limited (for brevity 'Corporate Debtor').

2. The Corporate Debtor is a limited company incorporated under the provisions of Companies Act, 1956 on 27.07.1994 having U74899DL1994PLC060496, having its registered office at C-161, East of Kailash, New Delhi-110065.

3. The applicant had averred in its application that the applicant is a practicing advocate and a person namely Mr. Vijay Kumar came in contract with the applicant and offered him to invest in the respondent company in return of directorship in the company and returns of more than 24% per annum on the amount lended to the company.

4. However, it is further submitted by the applicant that, the applicant had applied for mortgage loan with PNB HFL and obtained loan of Rs. 2 crores on his house out of which Rs. 1.90 crores were transferred in the account of Ms. Renu Meena and from her account the amount of Rs. 1.90 crores (95 Lakh vide (UTR No. CNRBH11354739551) and 95 Lakh vide (UTR No. CNRBH11354739501) were transferred in the bank account of corporate debtor on dated 15.12.2011.

5. Further, the applicant has been paying EMI's on the amount of loan at Rs. 2 Lacs per month, which has culminated approx 3 crores till date over and above the amount that has been paid to the corporate debtors.

6. The applicant has been continuously asking the corporate debtor to refund the amount, but no repayment was made by the corporate debtor till date. Therefore, the applicant filed the present application under section 7 of the Code.

7. The Corporate debtor filed its reply and raised following contentions, objecting the admission of the application as follows:

   a) The corporate debtor stated that the municipal corporation of Faridabad vide allotment letter dated 28.10.1994 allotted a land of 10 acres at Village Lakkarpur, Tehsil and District

Faridabad, Haryana to the Respondent M/s. Drishti India Limited. Further, the possession of the land was handed over to the Respondent on 23.04.2009. However, the copy of the allotment letter dated 28.10.1994 is placed on record.

b) That the respondent had entered into a Development Agreement dated 29.05.2012 with Saj Housing Private Limited (hereinafter referred as "Developer") at Developers instance, for setting up a project for residential colony at the allotted land. It is further submitted that the mutual understanding was there between the Developer and the Respondent that the Developer would bear the cost of the construction and the statutory/legal sanctions. The area of the project was shared as per the allocated ratio between the respondent i.e. 44% and the Developer i.e. 56%. additionally, the agreement had executed for a non-refundable consideration amount of Rs. 16,15,00,000/- paid to the respondent by the Developer in lieu of the purchase/acquisition of irrevocable development rights.

The consideration was paid in following manner:

Cheque/ Banker's	***Name and Address of the Bank***	***Amount (In Rs.)***	***Dated***

Cheque No.			
018851	*ICICI Bank*	*1,00,00,000*	*14.10.2011*
018853	*ICICI Bank*	*6,00,00,000*	*20.10.2011*
018855	*ICICI Bank*	*3,00,00,000*	*01.11.2011*
RTGS	*UTRIOBAH11313002968*	*90,00,000/-*	*09.11.2011*
RTGS	*UTRIOBAH11315000060*	*2,10,00,000/-*	*11.11.2011*
DD300377	*Punjab National Bank*	*65,00,000/-*	*17.12.2011*
RTGS	***CNRBH11354739501***	***95,00,000/-***	***20.12.2011***
RTGS	***CNRBH11354739551***	***95,00,000/-***	***20.12.2011***
RTGS	*KKBKH11358827987*	*60,00,000/-*	*24.12.2011*
	TOTAL:	*16,15,00,000/-*	

However, the aforesaid table shows that the applicant has allegedly paid the sum of Rs. 1,90,00,000/- on 20.12.2011 as the consideration amount as per the development agreement for the allotted land of the Respondent and not as credit at interest rate of 24 % as alleged by the Applicant No. 2 through a letter dated 26.03.2012 addressed to the Respondent Company stating that:

"These amounts have been paid under an agreement to develop your 10 acres land at Village Lakkarpur, Faridabad"

c) It is further denied by the counsel for the respondent that the amount was not an investment, and the applicants have no such document to show that the amount was given for investment. Neither directorship was offered nor was interest at 24% to be given to the applicants. However, the respondent was not aware of what happened between the applicants and Mr. Vijay Kumar. All the allegations of applicants are false and unfounded, no record has been placed in support of the allegations made by the applicants. Further, the applicant no. 1 himself claims to be an advocate authorised to practice law and still he has not insisted on written and duly executed agreements for their alleged understanding, furthermore, the learned applicant no.1 has slept over their rights for 10 years and all of sudden come up with the present proceedings.

d) Thereafter, it is further submitted by the counsel for the respondent that, in any case under the Development Agreement even the Developer cannot claim to be a creditor since the relation between them is purely of landowner and the Developer. Therefore, the applicants in the present case

do not fall under the definition of the "financial creditor" under section 5(7) of the IBC and the amount of Rs. 1,90,00,000/- paid as a consideration to the respondent does not fall under the definition of "Financial debt" under section 5(8) of the IBC. The development agreement dated 29.05.2012 is placed on record.

e) It is further argued by the respondents that as per the pleadings of the applicants the alleged sum has been advanced by the wife i.e., applicant no. 2, in such case the husband cannot file the petition claiming himself to be financial creditor for the alleged debt advanced by the wife. In the instant case there is no notification which notifies such status being conferred to husband only because the wife alleges or claims herself to be financial creditor. However, it is an application sought to be preferred jointly is impermissible in law, warranting the present application to be dismissed on this count alone.

f) It is further stated that in the present application, applicant no.2 has not signed the Form-1 under the Insolvency and Bankruptcy Rules, 2016. Therefore, the same is non-est and has no legal significance attached to it.

8. The rejoinder was filed by the applicants states as under:

i) All the contentions of the corporate debtor are denied. That it has come as a surprise to the applicant that the respondent have entered into a Development Agreement with some company named Saj Housing Pvt. Ltd, for development of allotted land. The petitioner has for the first time come to know about this fact that the respondents have used the money given by the applicants for entering into a development agreement with some company named Saj Housing Pvt. Ltd, for development of allotted land. The applicant has for the first time come to know about this fact that the respondents have used the money given by the applicants for entering into an agreement with a company to which neither the petitioner is a part nor having any connection whatsoever with SAJ Housing Pvt. Ltd. The action of using the money given by petitioner for entering into any such agreement is a criminal offence punishable under the Indian penal Code.

ii) That the amount of Rs. 1.90 crore is admitted by the respondent to have been paid on 20.12.2011. it is admitted by the respondent that the Development Agreement was executed between the SAJ Housing Private Limited and the respondent on 29.05.2012 by no stretch of imagination, the amount deposited with the respondent on 20.12.2011 can be accepted to have been paid to the respondent on behalf of SAJ Housing Private Limited. Both the applicants do not know anyone in the SAJ Housing Pvt. Ltd.

iii) That the allegations of the respondent regarding any acknowledgment on 26.03.2012 with respect to the Development Agreement with SAJ Housing Private Limited is specifically denied the letter dated 26.03.2012 specifically does not name or acknowledge the agreement between the applicant and the developer it is further pertinent to mention that on 26.03.2012 the alleged agreement was not in existence and therefore from their own averment it is clear that the plea taken by the respondent is nothing but a bundle

of lie on oath therefore the same deserves action by this Bench.

iv) That it is already replied in the earlier para that how the respondents have received the payment with promised to pay interest at the rate of 24% on the deposits given by the applicants rest of the para is vehemently denied.

v) Further, that the applicants are in no way connected with any agreement and its conditions which the respondent has with any Developer. This amount was paid as loan to the respondent and the same is still reflected in the financial statement for the year ended 31st March, 2020 as long term loan.

vi) That the respondent is using money of the applicants to his advantage and earning profits therefrom. The applicants are being deprived of their hard-earned money and the benefit which they could have earned by using this money in business or otherwise. The 24% interest claimed by the applicants in the circumstances is quite moderate and deserved to be awarded to claimant.

vii) The allegation in para 10 of the reply filed by the respondent is denied. The complainant no. 2 has authorized the applicant no. 1 to sign on her behalf, being the husband of complainant No.2

viii) Lastly, it is prayed that further a criminal proceeding may be initiated against the respondents for fraudulently entering into an agreement with third party, using the money of the applicants without their knowledge, it is further prayed that the accounts of respondents be referred to forensic audit to ascertain the manner in which fraud has been committed. It is also prayed that the DIN No. of the respondent to be freeze so that they may not commit such further illegal acts and the wrong doings of the company be referred to serious fraud investigation office so that the truth of the respondents can be unearthed.

9. The written submissions were filed by the applicants states as under:

a) The applicants submits that the taking over of the loan has not been and cannot be disputed since the same is reflected every year in the respondent's balance sheet at page 50 of

the paper book entry reads it as "long-term borrowing". As per the balance sheet, the book value of tangible assets is around Rs. 8.8 crores. As such it is only IRP that can save the company and make the company viable after paying the debt by resolution plans which may be submitted to this Hon'ble Tribunal for approval.

b) Thereafter, the respondent in their reply had submitted that the land has been handed over to the applicants and it is upto them to develop the same with SAJ India forgetting that there is no such document has been produced evidencing any agreement between SAJ India and the applicants, instead an agreement between respondents and SAJ India had been placed on record. However, which is enough evidence to prove the fraud perpetuated by the respondent and the Developer.

c) However, it is further submitted by the applicants that, much stress is being laid that this is not financial debt if such type of transaction which is not denied that the amount has been received by way of transfer and that duly reflected in the balance sheet as long-term borrowing can

ever be said that the same does not fall under the category of financial creditor.

10. It is averred by the respondent in its written submissions:

i. The counsel for the respondent has submitted the propositions in support of contention that the petition under section 7 at the instance of Manish Kumar is not maintainable:

(1)*"As a financial creditor either by itself or jointly with 2 other financial creditors or any other person on behalf of the financial creditor, as may be notified by the central government may file an application for initiating CIRP against a corporate debtor before the Adjudicating Authority when a default has occurred".*

However, without prejudice to the other contentions, Mr. Manish Kumar to be a party jointly with his wife, he will have to be a financial creditor to the respondent. It is admitted fact that he has not advanced any sum to respondent, nor his name finds placed in balance sheet. He cannot claim himself to be a financial creditor. Under amended provision, he can file on behalf of his wife as any other person on behalf of financial creditor provided such other person is notified by Central Government vide Notification -S.O 109(E) dated 27th February, 2019 reads as:

"...., the central government notified following persons who may file an application for initiating CIRP against a

corporate debtor before the Adjudicating Authority on behalf of the financial creditor.

i.A guardian:

ii.An executor or administrator of an estate of a financial creditor;

iii.A trustee (including a debenture trustee); and

iv.A person duly authorised by the Board of Directors of a Company.

The above submission is in accordance with settled law that if a statute prescribes something to be done in particular manner, all other course stands barred. Reference to this proposition may be made to the judgement of the Hon'ble Apex Court in State of Uttar Pradesh vs. Singhara Singh & Ors., AIR 1964 SC 358:

> *"8. The rule adopted in Tylor v Taylor is well recognised and is founded on sound principle. Its result is that if a stature has conferred a power has to be exercised, it is necessarily prohibits the doing of the act in any other manner than that which has been prescribed..... ******"*

ii. It is further argued by the respondent that the letter dated 26.03.2012 by Ms. Renu Kumar under her signature at page 43 of the Reply clearly shows that the money advanced was for the development of 10 acres of land. This document was withheld by the applicants to cook up the story without any documentary basis. Even in the Rejoinder, the applicants have not denied the content of letter dated 26.03.2012, thus, the question of advancing loan to respondent pales

into insignificance. Irrespective of nature of jurisdiction, exercisable by this Tribunal. In such circumstances, the applicant's averment qua nature of transaction as loan, stands falsified.

iii. Import of balance sheet: Focus of Judgement in Asset reconstruction.

The respondent argued that, whether the entry in balance sheet under the head of "security deposit for development of land" can be said to establish a jural relationship of debtor and creditor or was there any intendment between the parties to create such relationship. The expression security deposit" as finds place in Balance sheet cannot be lost sight of. In any development of land, it is only the developer i.e. SAJ Housing is obliged in law to develop the same and revert back to respondent with agreed considerations. The amount paid at the initial stage were for permission to develop the land and the said sum, once handed over to Developer becomes non-refundable.

To support its argument the respondent have cited a judgement of the Supreme Court in ***Asset Reconstruction Co. (India) Ltd Vs. Bishal Jaiswal, (2021) 6 SCC 366 (para 15)*** is based on ***Shapoor Freedoom*** Mazda (1962)1 SCR 140:

> *"6. ******** words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the*

*intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission and need not be expressed in words. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered*******."*

iv. However, the counsel for the respondent has further argued that the debt amount even if stated in balance sheet, has not become "due". In absence of any agreement, it cannot be presumed for long term borrowings that the sum stated to be so in balance is "due" on the date of its mention in the balance sheet. To determine as to when it becomes "due", the agreement and surrounding circumstances be seen. The Hon'ble Supreme Court in **M/s Innovative Industries Ltd. Vs. ICICI Bank & Anr., 2018(1) SCC 407 has held that:**

*"28. ******* It is at the stage of section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. *****"*

v. Thereafter, it is submitted by the respondent that, in the present case, there is no time value of money involved. As it

is pure non-refundable security deposit. Reference in this connection may be made to the judgement of Hon'ble Appellate Tribunal in ***Nikhil Mehta and Sons v. AMR Infrastructure Ltd. 2017 SCC Online NCLAT 859:***

> *"The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payment in future. It is also a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black law dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. *****"*

vi. Thereafter, the respondent has submitted that, every borrowing does not necessarily have commercial effect of borrowing and for this reason alone, the Code consciously uses the expression in sub- clause (f) of clause (8) of Section 5 to describe such other transactions which are not dealt with in clauses (a) to (e). In the present case, it is established from the above that there is no disbursement against the consideration of time value of money, the issue of examining as to whether it could fall in any of the class from (a) to (i), however, *ex abundati catulae* it is submitted that the instant transaction cannot be described as one

which is commercial effect of borrowings. In this connection expression "commercial" and "effect of" are significant. For this reason alone, the Appellate Tribunal has clearly stated that in Development Agreement the One developer cannot trigger insolvency against others. Thus, the decisional law also enunciate that the Applicants have no locus to maintain this case. The Hon'ble Appellate Tribunal in ***Vipul Ltd. v. Solitaire Pvt. Ltd., 2020 SCC Online NCLAT 620***, concerning the status of parties in a Development Agreement, has held as under:

> *"23. In the light of this Principle, we observe that in such a kind of a joint Venture Project, both the parties, if they are a Corporate should be jointly treated to be one for the purpose of initiation of CIRP and hence this application under section 7 is not maintainable."*

Hence, the respondent has prayed to dismiss this application on aforesaid ground.

11. Considering, the submissions made, and documents placed on record we are convinced that, in the present case the date of default has occurred and with respect to trigger the Corporate Insolvency Resolution Process against the corporate debtor. The pre-requisites of section 7 must be satisfied (a) acknowledgement of "financial debt" (b) default of debt, (c) application shall be within time period. The present application is well versed and fall within the ambit of

section 7 and satisfied the conditions. The debt is due of Rs. 1.90 crores, the default has occurred on 13.07.2021 and the present application filed well in time as the date of default is being of continue in nature and still reflecting in the latest Balance Sheet. Therefore, we are supported by the Judgement of Hon'ble Supreme Court In ***Bank of Baroda v. C. Shivakumar Reddy, 2021 SCC OnLine SC 543 which clearly held that:*** *"The Court also held that an application under Section 7 for imitation of corporate insolvency resolution process against a corporate debtor is not be barred by limitation if there is an acknowledgement of the debt by the corporate debtor before expiry of the limitation period. Such acknowledgment can be by way of statement of accounts, balance sheets, financial statements and offer of one-time settlement."*

12. In the present case all the requirements are established. The copy of the passbook of Canera bank annexed by the applicant at page 35 of the paper book shows that the withdrawal of Rs. 1.90 crores i.e., disbursal of the debt amount was made on 20.12.2011. The applicants had considered this amount as the loan given to the respondent which is reflected in the Balance Sheet as on

31.03.2020 at note 3 page 50 under the head note of "Long term borrowing".

13. This Bench is not satisfied with the arguments of the respondent with respect to the security deposit paid by the applicant to the respondent under the heads of long-term borrowing for development of the Land Agreement reflected in the Balance Sheet. It is nowhere proven by the respondent in the absence of any document how it is considered as the security deposit which is non-refundable to the applicants.

14. Therefore, there is an acknowledgement of debt by way of entries passed in the balance sheets, financial statements. The respondent has defaulted in the repayment of the amount taken in the form of long-term borrowing even after duly acknowledging the same in the balance sheet prepared by it. The reference can be made to section 129 of the Companies Act, 2013 which explicitly provides as under:

> *"(1) ..... The financial statements shall give a true and fair view of the state of affairs of the company or companies, comply with the accounting standards notified under section133 and shall be in the form or forms as may be provided for different class or classes of companies in....."*

15. We, are further supported by the Judgement of the Hon'ble Supreme Court in the **Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (2018) 1 SC 407.** which clearly held that:

> *"The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which the case it may give notice to the application to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.*
> *30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility, or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so, long as the debt is "due" i.e., payable unless interdicted by some law, or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority may reject an application and not otherwise."*

16. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

17. The application is complete and is filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. This bench is satisfied that the default is of

continue in nature, and a default has "occurred" and the latest date of default is on 13.07.2021, and debt is "due" since the disbursement of the loan amount on dated 15.12.2011 by the financial creditor to the corporate debtor. Therefore, the application warrants admission as it is complete in all aspects and is **admitted** for initiating CIRP as prescribed under the Code.

18. The Applicant has proposed the name of Insolvency Resolution Professional, Ms. Priyanka Chouhan, having registration No. IBBI/IPA-001/IP-P02348/2020-21/13447, and the E-mail pc181awyer@gmail.com. A written communication sent by her in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record. There is a declaration made by her that no disciplinary proceedings are pending against her in the Insolvency and Bankruptcy Board of India or ICSI. In addition, further necessary disclosures have been made by Ms. Priyanka Chouhan as per the requirement of the IBBI Regulations. Accordingly, she satisfies the requirement of Section 7 (3) (b) of the Code. Hence, we appoint Ms. Priyanka Chouhan as the IRP of the Corporate Debtor.

19. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the Respondent prohibiting the respondent as per proviso (a) to (d) of section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come in force.

21. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional Ms. Priyanka Chouhan to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the applicant. The

amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the applicant.

22. The registry is directed to communicate a copy of the order to the Applicant, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

BHASKARA PANTULA MOHAN
ACTG. PRESIDENT

HEMANT KUMAR SARANGI
MEMBER (TECHNICAL)