IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III

IA-4695-2022 & IA-3987-2023
And
IB-445(ND)/2022

IN THE MATTER OF IB-445(ND)/2022:

WG. CDR. (Retd.) Jagannath Bhandari	…. Financial Creditor
Vs.	
M/s. Gardenia India Ltd.	…. Corporate Debtor

IN THE MATTER OF IA-4695-2022:

M/s. Gardenia India Ltd.	…. Applicant
Vs.	
WG. CDR. (Retd.) Jagannath Bhandari	…. Respondent

IN THE MATTER OF IA-3987-2023:

WG. CDR. (Retd.) Jagannath Bhandari	…. Applicant
Vs.	
M/s. Gardenia India Ltd.	…. Respondent

Order delivered On: 11.01.2024

CORAM:
SHRI BACHU VENKAT BALARAM DAS
HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For Applicant	:	Mr. Avneesh Arpatham, Mr. Ankit Sharma, Advs.
For Respondent	:	Mr. Rakesh Kumar, Adv.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. IB-445(ND)/2022

The present application has been filed by one Mr. Jagannath Bhandari 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 against M/s. Gardenia India Ltd., the Corporate Debtor herein.

2. The Applicant/Financial Creditor, aged 95 years old, is a retired Wing Commander of the Indian Air Force. Mr. Arun Kumar Ojha, who had developed friendly relations with the Financial Creditor by assisting him with various mutual funds etc., introduced the Financial Creditor to Mr. Manoj Kumar Ray, Mr. Sanjeev Kumar and some other persons who were in-charge and responsible for the affairs of the Corporate Debtor. They enticed the Financial Creditor with lucrative interest rates and assured returns on investment by giving commitment towards an assured return of 30% annually, payment of late fees and post-dated cheques. Pursuant to the same, agreements were entered into and some payments were received by the Financial Creditor and he re-invested the amount in their real estate projects.

3. Subsequently, the payments and dues were not paid regularly as per the scheduled timeline and therefore, upon mutual understanding, the Applicant/Financial Creditor (Second Party) and the Corporate Debtor i.e. M/s. Gardenia India Ltd. (First Party) entered into an agreement dated 03.12.2011 towards reconciliation of the outstanding liabilities. As per the agreement dated 03.12.2011, Rs. 1,00,00,000/- (Rupees One Crore Only) was invested by the Financial Creditor at the rate of 30% return p.a. in M/s. Gardenia India Ltd. Further, a post-dated Cheque bearing No. 103675 for Rs.1,15,00,000/- (Rupees One Crore and Fifteen Lakh Only) dated 03.06.2012 was handed over to the Financial Creditor upon execution of the agreement.

4. As per clause 1 of the agreement, upon expiry of the minimum lock in period of six months, the First Party was to make payment of Rs.1,15,00,000/-. If clause 1 of the agreement is not fulfilled by the First Party, then as per clause 2 of the agreement, the First Party was to have an obligation to pay interest at the rate of 30% per annum on the original investment of Rs.1,00,00,000/- till such time, the principal amount is returned together with the accrued interest by the First Party. Moreover, there was also a penalty of 5% towards delayed payment.

5. On 03.06.2012, the Corporate Debtor did not make payment of the buyback guarantee as stipulated in the agreement and the Financial Creditor did not encash the cheque upon the request of the Directors of the Corporate Debtor and Gardenia group of companies, namely, Mr. Sanjeev Kumar, Mr. Arun Kumar Ojha and Mr. Manoj Kumar Ray, who had personally visited the

Financial Creditor at his residence and pleaded before the Financial Creditor to give some additional time to make payment. The Financial Creditor further accepted their guarantee that M/s. Gardenia India Ltd. shall make payment of interest on investment of Rs.1,00,00,000/- at the rate of 30% p.a., which is continuous in nature until the principal along with interest is paid to the Financial Creditor herein.

6. The Financial Creditor had been pursuing the Corporate Debtor for his return on investment/the financial debt. However, the Director and Associates of the Corporate Debtor made promises of prompt payment and excuses that the economy is slow, liquidity crunch, etc. Similar tactics were repeatedly adopted each time the payment fell due and renewals/extensions were sought. The Director and Associates of the Corporate Debtor, especially Mr. Sanjeev Kumar, Mr. Arun Kumar Ojha and Mr. Manoj Kumar Ray even visited the Financial Creditor at his house repeatedly assuring the hapless Financial Creditor that his investment with the Corporate Debtor namely, M/s. Gardenia India Ltd. was safe and growing and would be credited soon.

7. Pursuant to the repeated demand of the Financial Creditor for payment of the financial debt, the Corporate Debtor paid Rs. 30,00,000/- (Rupees Thirty Lakh Only) by Cheque bearing No. 109498 on 02.09.2014 as payment towards the pending interest arising out of the agreement dated 03.12.2011. It is relevant to mention that at the time of the said payment of dues, the Financial Creditor was guaranteed that the remaining dues shall also be cleared at the earliest. However, no further payment has been received till date.

8. A joint meeting of the Directors and Associates of the Corporate Debtor with the Financial Creditor and his only son residing in the UK (the General Power of Attorney Holder herein) who was visiting due to the surgery of the Financial Creditor was held on 17.01.2017 at the residence of the Financial Creditor requesting for payment of dues. Mr. Manoj Kumar Ray and Mr. Arun Kumar Ojha promised that they would prepare the details of the amounts due immediately and settle the accounts of the Financial Creditor.

9. However, there was no response to the same and thereafter, the requests of the Financial Creditor for repayment of the financial debt was met with deafening silence. Despite his old age, he even visited the office of the Corporate Debtor numerous times demanding payment of his outstanding dues but to no avail.

10. The Financial Creditor is an aged veteran, who was living alone and his failing health was limiting his ability to rigorously institute and pursue legal action against the defaulting Corporate Debtor. Therefore, the Financial Creditor gave a complaint dated 12.02.2018 to the office of the Prime Minister of India seeking assistance and intervention in the matter to secure his pending dues and even gave a Complaint under Section 156 CrPC pursuant to which FIR No. 0355 dated 23.03.2019 was filed wherein the Corporate Debtor was also included as an accused person.

11. The last instalment fell due on 03.12.2020 and since the Corporate Debtor defaulted in payment, the Financial Creditor terminated the agreement on 14.12.2020 demanding payment of the original investment, accrued interest and penalty totalling to Rs.12,22,07,891/- by 26.12.2020. It is relevant to mention that the Corporate Debtor neither replied nor denied the financial debt/pending dues. Moreover, no payment of the pending financial debt has been made by the Corporate Debtor.

12. The cause of action arose on 26.12.2020 by which date as per the termination notice dated 14.12.2020, the Corporate Debtor was required to make payment of the aforesaid amount i.e. the principal investment and accrued interest, but did not make payment of the financial debt. The cause of action is continuing in nature and continues till date as the Financial Creditor's dues amounting to over Rs. 16,36,65,373/- have not been paid till date. Further, the present application has been filed within the period of limitation as per the orders of the Hon'ble Supreme Court in SMW(C) No. 3/2020.

13. The Financial Creditor has not received any dues arising from the agreement despite the repeated false assurances given by the Corporate Debtor and a hapless senior citizen who had tirelessly served the Nation has been running from pillar to post for the same. The total dues as on the date of filing the present application amount to Rs 16,36,65,373/- (i.e. Rs. 1,00,00,000/- @ 30% compound interest for a period of 10 years compounded semi-annually). Therefore, the present veteran Financial Creditor is approaching this Adjudicating Authority for justice and speedy Redressal in securing his pending dues/financial debt in light of his failing health and old age.

14. The Applicant had filed an affidavit on 30.01.2023 in compliance with the order dated 27.07.2002 stating therein that the date of default in the present matter should be treated as 26.12.2020 on the ground that the debt become due and payable on such date and therefore, the present application filed under Section 7 is within the limitation period.

15. The Respondent filed an IA i.e., IA-4695/2022, seeking dismissal of the present Section 7 application, which has been treated as the reply affidavit vide order dated 09.11.2022.

16. The Respondent has raised 2 objections which are as follows:

a. First, the Present Section 7 Application is barred by limitation because the cause of action arose in the year 2014 and the instant application has been filed after more than 7 years thereof.

b. Second, the Applicant has not produced any documents or evidence to show that payment was made to the Corporate Debtor and the transactions between the parties do not classify as Financial Debt.

17. We have heard the submissions made by the Ld. Counsel appearing for the parties and perused the records.

18. It is contended by the Applicant that an agreement was entered between the Applicant and the Corporate Debtor and according to the said agreement, the Applicant/Financial Creditor invested money for the development of the Real Estate Project of the Corporate Debtor and in return the Financial Creditor was assured with the lucrative interest rates and returns on the investment.

19. The Applicant contended that the Applicant and the Corporate Debtor entered into an agreement on 03.12.2011 for the re-conciliation of outstanding liabilities.

20. As per the said agreement amount of Rs. 1,00,00,000/- (Rupees One Crore Only) was invested by the Applicant at the rate of 30% return p.a. and the post-dated cheque bearing no. 103675 for Rs. 1,15,00,000/- (Rupees One Crore Fifteen Lakh Only) dated 03.06.2012 was handed over to the Financial Creditor by the Corporate Debtor.

21. Although the Corporate Debtor did not make the payment and the amount stipulated in the agreement, the Financial Creditor did not encash the post-dated cheques at the request of the directors of the Corporate Debtor.

22. It is submitted that on 03.09.2014, the Corporate Debtor paid an amount of Rs. 30,00,000/- (Rupees Thirty Lakh Only) by Cheque No. 109498.

23. The entire case of the Applicant is based on the agreement dated 03.12.2011 executed between M/s. Gardenia India Ltd. and Mr. Jagannath Bhandari and we have perused the said agreement carefully.

24. The agreement is signed by both the parties. The contents of the agreement are reproduced below for ready reference:

"WHEREAS

A. *The Developer is developing a Group housing Project namely "Gardenia Glamour" at GH-2, Sector-3, Vasundhara, Ghaziabad, U.P. hereinafter referred to as the said "Project"*

B. *The second Party has approached the First Party for booking of 3 residential apartments having super area of approximate 5550 sq. ft. in the said project. Primarily with a view to make out profit out of the said booking and has booked a residential apartment in the said projects and has paid to the first party a sum of Rs. 1,00,00,000/- as booking amount.*

C. *They as the lockin period minimum 6 month if the first party fails to pay the amount after 6 month and honour the cheque then the first party shall pay a penalty of 5% if the same is not paid within 21 days from the cheque repayment date. However, if the first party fails to pay the amount even after lapse of 7 days from the cheque repayment date. However, if the first party fails to pay the amount even after lapse of 7 days the second party shall be at liberty to retain the flats.*

D. *It is further agreed that the Second Party shall surrender the said booking in favour of the first party and the First party has agreed to the said request on the terms and conditions appearing hereinafter.*

NOW THEREFORE THIS DEED WITNESSRTH AND IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOW:

1. *The Second party shall surrender his aforesaid booking, in favour of the first Party and shall receive a buyback guarantee of Rs. 1,15,00,000/- after an expiry of 6 months from the date of booking.*

2. *The First party shall pay to the Second Party, the aforesaid sum of Rs. 1,00,00,000/- after 6 months from the date of receipt of the booking amount/amounts with assured return of 30% per annum.*

3. *Subject to above payment, nothing is left payable by the First party to the Second Party under this agreement and against the aforesaid booking.*

4. *It is hereby expressly agreed and understood by the Second Party that, with the above said payment, the Second Party shall not be entitled at all for allotment/sale of the residential apartment booked by him, in his favour by the First Party, under any circumstances, and that he has left with no claim.*

5. *All disputes, whatsoever, relating to the subject matter of this agreement and any other matter connected therewith shall be referred for arbitration under the Arbitration Act, 1996. His decision will be binding on both the parties and shall be carried out by them as final adjudication of the said dispute. The Place of arbitration shall be New Delhi."*

25. The terms and conditions in the said agreement are ambiguous and it is not clear that whether this agreement is a Builder-Buyer Agreement (BBA) or a Financial Agreement. Even assuming that the agreement is a Home Buyers agreement the Applicant has to prove the threshold as required under Section 7 Second Proviso of Insolvency and Bankruptcy Code, 2016 however, the present application has been filed by a single home buyers holding 3 units therefore, it cannot be said that the Applicant has fulfilled the eligibility criteria as prescribed under Section 7 Second Proviso of Insolvency and Bankruptcy Code, 2016.

26. Further, the language used in the agreement does not suggest that it is a Financial Agreement. The agreement in question can at best be termed as an arrangement between the parties.

27. We are therefore unable to accept the contention raised by the Applicant that the amount involved in this application is a Financial Debt and the Corporate Debtor is in default and liable to pay the same.

28. We are of the opinion that the Applicant is not a Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor. We therefore hold that the present application is not maintainable and devoid of merits.

29. In view of the findings arrived at as stated above, we do not feel it appropriate to pass any order on the affidavit dated 30.01.2023 filed by the Applicant seeking a change of date of default as well as in the IA-3987-2023 seeking condonation of delay in filing the present application.

30. In light of the above facts and circumstances, we are satisfied that the present Applicant fails to fulfill the criteria under Section 7 of the Code. It is accordingly ordered as follows:

i. The Application bearing **(IB)–445(ND)/2022** filed by the Applicant under Section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **dismissed.**

ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

No order as to costs.

31. **<u>IA-4695-2022:</u>**

i. This Instant Application has been filed by M/s. Gardenia India Ltd., the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 for urgent rejection of the present Section 7 application on grounds of maintainability.

ii. In view of the Order passed in IB-445-ND-2022, we do not deem it appropriate to entertain this Instant Application. Accordingly, the **IA-4695-2022** stands **disposed of**.

32. <u>IA-3987-2023:</u>

i. This Instant Application has been filed by WG. CDR. (Retd.) Jagannath Bhandari, the Applicant under Rule 11 of the NCLT Rules read with Section 5 of the Limitation Act, 1963 for condonation of delay.

ii. In view of the Order passed in IB-445-ND-2022, we do not deem it appropriate to entertain this Instant Application. Accordingly, the **IA-3987-2023** stands **disposed of**.

Sd/-	Sd/-
(ATUL CHATURVEDI)	**(BACHU VENKAT BALARAM DAS)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**