

**NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH  
COURT NO.1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
BENGALURU BENCH, BENGALURU, HELD ON 13.02.2020

**PRIORITY CAUSE LIST – 1**

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala  
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB) No. 331/BB/2019	For pronouncement of order	Sec 7 of I&B Code 2016	Mr. R V S Rao & Mrs. Lakshmi Rao	Sanjay Nair, Advocate	B And B Infrastructure Ltd	Shyam Sundar Advocate

ADVOCATE FOR PETITIONER/s:

ADVOCATE FOR RESPONDENT/s:

*Shri A J*  
*(SHRIKAR A. J.)*

ORDER

*CP(IB) No. 331/2019 B rejected by separate order.*

*Shri*  
*Member (T)*

*Shri*  
*member (J)*

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No.331/BB/2019  
U/s 7 of IBC, 2016  
R/w Rule 4 of I&B (AAA) Rules, 2016

**In the matter of:**

1. Mr. R.V.S Rao  
No.332/6, 14<sup>th</sup> Main,  
RMV Extension,  
Sadashivnagar,  
Bengaluru -560080

2.Mrs. Lakshmi Rao  
No.332/6, 14<sup>th</sup> Main,  
RMV Extension,  
Sadashivanagar  
Bengaluru – 560 080

- Petitioners /Financial Creditor

**Versus**

**B and B Infrastructure Limited,**  
4<sup>th</sup> Floor, “Orbis”, PID No. 76-15-61,  
2<sup>nd</sup> Cross, Residency Road,  
Bengaluru – 560 025

- Respondent/Corporate Debtor

**Date of Order: 13<sup>th</sup> February, 2020**

**Coram:** 1.Hon’ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon’ble Shri Ashutosh Chandra, Member (Technical)

**Parties/Counsels Present:**

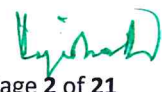
For the Petitioners : Mr. Sanjay Nair  
Mr. Pratham.N

For the Respondent : Mr. ShyamSundar  
WithShrikar A.J

**ORDER**

**Per:** Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.331/BB/2019 is filed by Mr. R.V.S Rao and Mrs. Lakshmi Rao (hereinafter referred to as 'Petitioners /Financial Creditor') U/s 7 of the IBC, 2016 R/w Rule 4 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of M/s. B and B Infrastructure Limited(hereinafter referred to as 'Respondent/Corporate Debtor'), on the ground, that it has committed default for total outstanding amount of Rs.8,25,37,700/-(Rupees Eight Crore Twenty Five Lakh Thirty Seven Thousand and Seven Hundred Only) which includes interest for a sum of Rs.12,19,768/- (Rupees Twelve Lakh Nineteen Thousand Seven Hundred and Sixty Eight 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) Mr. R.V.S Rao and Mrs. Lakshmi Rao, the Petitioners here in, are Financial Creditors, who have invested to finance the project for development of Project of Corporate Debtor with Buy back promises and arrangements.
  - (2) M/s. B and B Infrastructure Limited (hereinafter referred to as ('Respondent/Corporate Debtor/Company') was incorporated on 14.07.1987 under the provisions of Companies Act, 1956 with CIN: U85110KA1987PLC008488 having its registered office 4<sup>th</sup> Floor, 'Orbis', PID No. 76-15-61, 2<sup>nd</sup> Cross, Residency Road, Bengaluru - 560 025. Its Authorised Share Capital is Rs. 5,00,00,000/- (Rupees Five Crores Only) and Paid-up Share Capital is Rs.2,35,32,250/- (Rupees Two Crores Thirty Five Lakh Thirty Two Thousand Two Hundred and Fifty Only).
  - (3) It is stated that one Smt. Munna Bai and others, the owners of the immovable property bearing Survey Nos. 47/1A, 47/2A, Corporation No. 47/48-4 and presently bearing New



Municipal No.4 with Unique property ID No. 64-139-4 measuring 1 Acre 27 guntas under the jurisdiction of BBMP, situated at 64<sup>th</sup> Ward, Madiwala Range, 9<sup>th</sup> Block, Jayanagar, Bannerghatta Road, Bangalore conferred the development rights of the aforesaid property to the Respondent vide and Agreement for Development and Marketing dated 15.05.2003 registered in the office of the Sub-Registrar, Bangalore (Urban) District.

- (4) When the Respondent was looking out for investors to fund/finance the project for the development of the aforesaid property, the Respondents after being convinced, decided to invest in the project with Buy Back promises and arrangements. Accordingly, the Petitioners and the Respondent entered into three separate buy back agreements even dated 27.06.2015; three separate Agreements of Sale even dated 27.06.2015, and Construction Agreements dated 27.06.2015 with respect to 3 apartments namely 6-C, 6-D and 7-C. That in pursuance of the three buy back agreements dated 27.06.2015, the Petitioners have advanced an amount of Rs. 4,13,34,068/- (Rupees Four Crore Thirteen Lakh Thirty Four Thousand and Sixty Eight only) towards the financial requirements of the Respondent, through various cheques, as enclosed to the buyback agreements dated 27.06.2015
- (5) It is stated that as per Clause VI of the said Buyback Agreements, the Agreement of sale and the Construction Agreements shall be treated as a part and parcel of the buyback agreement, and shall be read together for all intents and purpose. Clause V of the Buyback agreement entitles the Petitioners to exercise the following options irrespective of whether the project achieves completion or not:



- (a) Option to offer the respective Schedule B Property and the Schedule C Residential apartments to your Company, for a buyback after completion of three years from the date of commencement of the Project at a minimum buyback as agreed to therein, in which event, the Respondent Company shall be bound to accept the offer made by the Petitioners and effect as a onetime payment for the same within the period of 60 days from the date of offer made against which, the said agreements to sell and the construction Agreements will be cancelled or assigned infavour of persons identified by your Company.
- (b) It is further agreed between the parties that in case the Petitioners exercise the option to assign their rights under the Agreement of sale and Construction Agreement infavour of any person/s identified by the Petitioners, then in case the sale price and consideration agreed to be paid by such assignee or nominee is less than the minimum buyback price reserved and agreed to under that particular Buyback agreement then, in that event the Respondent Company shall be bound to pay to the Petitioners , the difference between the sale price and consideration agreed to be paid by assignee or nominee of the Petitioners and the minimum buyback fixed between the parties and agreed to by your company.
- (6) It is stated that the buyback price as agreed in the buyback agreements dated 27.06.2015 for each of the apartment is mentioned below:



Sl.No.	Apartment	Buyback Price
1	6C	Rs. 3,75,36,000
2	6D	Rs.4,81,92,000
3	7C	Rs. 3,69,24,000
	Total Amount	Rs. 12,26,52,000

(7) It is stated that the Petitioners, after completion of the 3 year waiting period stipulated under the buyback agreement dated 27.06.2015, have exercised the first option available to him under Clause V (a) of the buyback agreements in the first week of August 2018, and made an offer to the Respondent Company to buyback the said apartments and pay the minimum reserved price as agreed for the said apartments. Due to repeated requests made by the Petitioners, the Respondent made a payment of an amount of Rs. 3,00,00,000/- (Rupees Three Crores only) on 01.01.2019 by way of RTGS with transaction reference No. 000000003245 at HDFC Bank, Kasturba Raod, Branch in the Account of the Petitioners i.e., Mr. R.V. S Rao. Furthermore, the Petitioners made repeated requests to the Respondent vide emails dated 14.01.2019, 05.03.2019 and 20.05.2019 to pay the balance amounts with respect to all three apartments, The Respondent Company made a further amount of Rs. 1,13,34,068/- (Rupees One Crore Thirteen Lakhs Thirty Four Thousand and Sixty Eight only) on 20.06.2019 after prolonged delay and has no intention to pay the remaining amount due under the buyback agreement. The time period stipulated under Clause V of the buyback agreement has also expired. Owing to the long delay in the payment of the remaining amount of Rs. 8,13,17,932/- (Rupees Eight Crores Thirteen Lakhs Seventeen Thousand Nine Hundred and Thirty Two only), the Petitioners after repeated demands sent a legal notice to the Respondent, by demanding the



Respondent to make complete payment of Rs. 8, 13, 17,932/- along with interest @ 18% per annum from 20.07.2019 till the date of repayment i.e., 12,19,768/-. The total amount due and payable including interest equal to Rs. 8,27,37,700/-. Despite the receipt of the legal notice by the Respondent, there is no reply by the Respondent or compliance of the legitimate demands of the Petitioners by the Respondent with regard to the same.

- (8) It is stated that the Petitioners, as a result of the execution of the buyback agreement, are legally entitled to receive an amount of Rs, 8,13,17,932/- along with interest @ 18% per annum, which is due and payable from the date, the Petitioners exercised the option of making a buyback offer to the Respondent upon the expiry of the 3 year time period. And the said liability/obligation of the Respondent having arisen out of the Buyback Agreement dated 27.06.2015, the transaction falls under the purview of Section 5 (8) (f) of the Insolvency and Bankruptcy Code, 2016, which has commercial effect of the borrowing.
3. The Company Petition is opposed by the Respondent by filing the Statement of Objections dated 11.01.2020 by inter alia contending as follows:
- (1) The Respondent is a Company incorporated in the year 1987, which is involved in the business of developing and constructing high-end luxury residential and commercial complexes, and has completed several residential and commercial projects across South India, spanning 2.5 million square feet. The Respondent Company delivers superior value through extraordinary and imaginative spaces created out of deep customer focus and insight.



(2) It is stated that the Code was further amended as per I& B code (Amendment) Ordinance 2019 published on 28<sup>th</sup> December 2019. The said Ordinance came into force on 28<sup>th</sup> December 2019. Therefore, the Petition itself is not maintainable as they failed to satisfy the conditions mentioned in the said amendment.

(3) It is solvent and profit-making entity and its revenue and profit over the last three years is as follows:

Sl. No.	Year (F.Y)	Revenue (in INR)	Profit before tax in INR)
1.	2016-17	2,78,89,711	96,16,532
2.	2017-18	1,60,44,607	1,05,93,491
3.	2018-19	6,57,64,421	1,89,13,161

The Respondent project is worth over Rs. 300 crores and it has fixed assets in the form of machinery and unsold inventory worth over 90 crores, and also has income yielding assets to meet its operational expenses. It has not taken any further credit apart from operation credit for working capital on the overdraft basis. The Respondent has until date not defaulted even once on the overdraft payments allowed by the Bank to the tune of Rs. 40 crore. It is promptly making all statutory payments such as payment of income tax, sales tax, service tax, making provident fund and ESI contributions and serving debt to the Bank and investors since incorporation.

(4) The Respondent Company is in existence since 1988, and successfully executed over 25 projects across South India, and has a very good reputation as a reliable and trustworthy builder of high-end luxury building. The Respondent Company has given direct/indirect employment to over 300 people whose livelihood is linked to the Project under development. All its previous projects have been successfully completed on time and completely occupied.



- (5) It is stated that the current project of the Respondent Company B & B Opulent spire is one of the most innovative and ambitious real estate projects in Bengaluru, constructed at the heart of one of the busiest and hi-profile areas in Bangalore. The project is a 24-story structure with 86 apartments that embodies every nuance of an elite lifestyle. And the project is almost complete and the structure of the building is complete and interiors are ongoing.
- (6) The Petitioners was paid a total Rs. 4,13,34,068/- (Rupees Four Crore Thirteen Lakhs Thirty Four Thousand and Sixty Eight) in the year 2015 for the purchase of 3 units (Unit 6C, Unit 6D and Unit 7C) in the B & B Opulent Spire. The Respondent agreed to sell the three units at a highly discounted price. Since the Petitioners was one of the early purchasers of the apartments, the Respondent agreed to sell 3 units in the project for a total of Rs. 4,13,34,068/- . The Petitioners made this investment for purchase of high end luxury apartments in one of the most affluent locations in Bangalore knowing fully well the value and the credentials of the Respondent. The Respondent constructed the apartments and the apartments will be ready for handover in one year.
- (7) It is stated that the Petitioners entered into an Agreement dated 27.06.2015 with the Respondent and under the terms of the agreement the Petitioners have claimed the buyback price as follows:

Sl.No.	Apartment	Buyback Price
1	6C	Rs. 3,75,36,000/-
2	6D	Rs. 4,81,92,000/-
3	7C	Rs. 3,69,24,000/-

It is stated the clause V (a) of the agreement states that the minimum buyback price is Rs. 1,62,36,928/- (Rupees One



Crore Sixty Two Lakh Thirty Six Thousand Nine Hundred and Twenty Eight). Further stated that the Petitioners contended that the minimum buy-back price for apartment 6D is Rs. 4,81,92,000/-. The difference between the two amount is Rs. 3,19,55,072/-. Accordingly, the claim of the Petitioners is also significantly reduced. It is alleged that the Petitioners have made a false and malicious claim with malafide intention to cause deliberate harm to the Respondent. Subsequent to the return of Rs. 4,13,34,068/- the agreement to sell and constructions agreement are deemed to have been cancelled. Further stated that the Petitioners are not homebuyers.

- (8) It is stated that there is a significant dispute in the claimed amount, which can be determined and adjudicated only in a trial. The Petitioners are seeking specific performance of the agreement, therefore this Hon'ble Tribunal does not have jurisdiction to adjudicate the matter. Further stated that the Petitioners made the investment for the purchase of apartment units in the project and the construction and completion of the apartment units have faced minor delay. The conclusion of the project report submitted by the third party states that the project is expected to be completed very shortly. Further it is contended that the Petitioners are not Financial Creditors as they have not advanced any loan and thus there is no debt repayable and there is no admission on part of the Respondent. The instant Petition is filed with an intention to recover of alleged outstanding debts. It is an established principle of law that this Hon'ble Forum is not the correct forum for initiating recovery proceedings. The Petitioners, after having received total amount of Rs. 4,13,34,068/-, cannot approach this Tribunal for claiming interest or compensation other than mentioned in the agreement of sale and construction agreements. The agreements dated



27.06.2015 admittedly do not contemplate interest of 18% ,which is being claimed by the Petitioners unilaterally. The appropriate remedy for such recovery would be before the Civil Court since the disputed facts and amounts in question have to be established only by way of trail which cannot be before this Tribunal. They have relied upon against the purchase of the Units. It is stated that Hon'ble Supreme Court in several cases, held that Creditors cannot use Insolvency proceedings as a substitute for debt enforcement or recovery proceedings by relying on Apex Court judgements in in *K Kishan vs Nirman Company Private Limited (2018) 17 SCC 662*, after analyzing the Supreme Court order in *Mobilox Innovations Private limited vs Kirusa Software Private Limited ( 2018) 1 SCC 353* wherein it is *interalia* held that;

*“Following this judgement it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous consideration or as a substitute for debt enforcement procedures”.*

*“The alarming result of an operation debt..... a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees”.*

- (9) It is stated that Real Estate sector, especially high-end luxury sector in real estate is undergoing a slump. All real estate companies are facing delays in completion and delivery of projects. The real estate sector is also facing severe financial crunch. The markets and the real estate industry in general is still coming to terms with the new regulatory regime. In light and despite these unfavourable circumstances and environment, the Respondent has been remarkably been able to complete most of the projects and is shortly expecting capital infusion into this project. The Petitioner No.1 spent considerable time in various



capacities in the finances and real estate sector. The Petitioner is on the Board of few well known real estate companies. He is very well aware of the market situation and the problems faced by the stake holders. Knowing well about the business of Real Estate Sector, the Petitioners have initiated the instant proceedings against the Respondent with an ulterior intention and only to cause reputational damage to the Respondent. Therefore, they have urged the Adjudicating Authority to dismiss the Petition.

4. Heard Mr. Sanjay Nair, learned Counsel for the Petitioners, and Mr. Shyam Sundar.H.V., learned Counsel for the Respondent. 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. Shri Sanjay Nair, learned Counsel for the Petitioner, while reiterating the various averments made in the pleadings as briefly stated supra, has further stated that the Petitioners are Financial Creditors having extended loan subject to buyback flats, failing which selling to other parties and having exercised first option to get the money back, the Petitioners deemed to have extended loan rather than to buy flats so as to come under definition of Home Buyers, which is the second option, which was not exercised. Therefore, the Petitioners deemed to have extended loan to the Respondent and thus they are to be financial Creditor as defined under the provisions of Section 7 of the Code. He has asserted that the outstanding amount of Rs. 12,26,52,000/- is not in dispute as balance of buyback price. Though the Respondent paid a part payment of Rs. 3,00,00,000/- (Rupees Three Crores only) on 01.01.2019, and another payment of Rs. 1,13,34,068/- (Rupees One Core Thirteen Lakhs Thirty Four Thousand and Sixty Eight only) on 20.06.2019, the Respondent failed to pay the remaining



amount of Rs. 8,13,17,932/-. Therefore it is a fit case to initiate CIRP in respect of the Corporate Debtor appointing IRP, imposed moratorium etc.,

6. Mr. Shyam Sundar H.V., learned Counsel for the Respondent, on the other hand, while reiterating the various averments made in the reply statement dated 11.01.2020, as briefly stated supra, has stated that the instant Company Petition is not maintainable, as per I & B Code (Amendment) Ordinance, 2019 published on 28.12.2019. The Respondent is a solvent Company and it has never got complained in defaults for any loan or statutory dues. The Petitioners paid only Rs. 4,13,34,068/- in the year 2015 for purchase of 3 units (Unit 6C, Unit 6D and Unit 7C) in the B & B Opulent spire. Since the Petitioner was one of the early Purchasers of the apartments, the Respondent has offered 3 units at very low price. On paying the principal amount to the Petitioners, the instant Petition is not maintainable in the absence of any element of interest mentioned in the Agreements in question. Therefore, the Petitioners failed to establish that the Debt in question and thus urged the Adjudicating Authority to dismiss the instant Petition.
7. Before adverting the issue of debt and default question, it is necessary to refer relevant terms mentioned in three Agreements even dated 27.06.2019,

**Clause V:**

It is clearly agreed to between the parties that as on 5<sup>th</sup> August 2018, inspite of the fact whether the project has achieved the practical completion or not, the Second Party shall have the absolute discretion to exercise the following options:

- a. Option to offer the Schedule B property and the Schedule C Residential Apartments to the First Party for a buyback after completion of three (3) years from the date of commencement of the project, at a minimum price (hereinafter referred to as the



minimum buyback price) of Rs. 3,75,36,000/- in which event, the First Party shall be bound to accept the offer made by the Second Party and effect as a onetime payment for the same within a period of 60 days from the date of offer made against which, the said agreements to sell and the constructions agreements will be cancelled or assigned in favour of person/s identified by the First Party.

- b. It is further agreed to between the parties that in case the Second Party exercise the option to assign their rights under the agreements for sale and constructions agreement infavour of any person/s identified by the Second Party, then, in that event, incase the sale price and consideration agreed to be paid by such assignee or nominee is less than Rs. 3,75,36,000/- (Rupees Three Crore Seventy Five Lakhs thirty six Thousand only) i.e., the minimum back price reserved and agreed upon under this agreement, then in that event, the First Party shall be bound to pay to the Second Party, the difference between the sale price and consideration agreed to be paid by assignee or nominee of the Second Party and Rs. 3,75,36,000/- which is the minimum buyback price fixed between the parties and agreed to by the First Party.

**Clause VI:**

The First Party shall enter into agreements to sell and construction agreement with the Second party in respect of the Schedule B Property and the Schedule C Residential apartments, which agreements shall be treated as a part and parcel of this agreement and shall be read together for all intents and purpose.

**Clause VII:** The First Party shall duly hand over one set of photo copies duly certified as true copies of the documents of title relating to the Schedule A property, one set of the building plan sanction and commencement certificate from the Bruhat Bangalore Mahanagara Palike, one set of the other clearances and permissions obtained from the various government authorities and other agencies for the project and one set of the Occupancy certificate received from the Bruhat Bangalore Mahanagara Palike on completion of construction of the project in all respects.

**Clause VIII: In additional to the other rights each of the parties herein has against the other relating to the matters**



**mentioned above in this agreement, each of the parties herein shall have the right to enforce specific performance of this agreement against the other.**

It is not in dispute that per 3 Agreements in question, even dated 27.06.2019, the Respondent has paid total principle amount of Rs. 4,13,34,068/- for all three plots in two instalments of Rs. 3,00,00,000/- paid on 01.01.2019, and another Rs. 1,13,34,068/- paid on 20.06.2019. Therefore is not in dispute that the Respondent has paid the principle amount in lieu of buyback agreement. Therefore the only dispute if any arises is whether the Respondent is liable to pay the difference of buyback price in the absence of mentioning about payment of interest. Moreover, once the Respondent exercised first Option, the Sale Agreements in question also stands cancelled and any dispute arise out of first option, the Party has to invoke provisions of **Specific Performance Act, 1963 as per Clause VIII** to enforce the terms of Agreements in question.

8. As per general Clause V of the Agreements in question, one of the options available to the Petitioners is to offer the scheduled Property to the Respondent to Buy-Back the Flats in question at minimum price mentioned therein. In the event, the Petitioner exercise first option, the Respondent is bound to accept the offer and thus pay such amount as a onetime payment within a period within a period 60 days from the date of offer and resultantly the Constructions Agreements and Agreements to sell in question stand cancelled or to be assigned in favour of persons identified by the Respondent. And as per Clause VI of the Agreements, Agreements to sell and Constructions should be ready together for interpretation. However, the Petitioners have not placed any document(s) to show that they have exercised such option except contending that the Respondent have paid the principal amount in



full. They have also not placed a copy of Legal Notice dated 29.07.2017, though they have contended that they have sent such notice to the Respondent. The Petitioners have placed only three emails dated 14.01.2019, 05.03.2019 and 20.05.2019 in support of their contention that they are entitled for the Claim made in the instant Petition. The Petitioners have not surrendered the Agreements in question to the Respondent to claim any further amount. It is relevant to extract those emails to know the nature of demand made by the Petitioners.

**a) email dated 14.01.2019 (Page 186, Annexure -F) which reads as under:**

“Dear Mr. Bhaskar

*You are please aware that I have been patiently waiting for you to settle the committed buy back of at least 2 flats at your project at Jayanagar. After waiting for 3 long years, I exercised the option with a request that you may buy back at least 2 flats at your Jayanagar project in the first week of August 2018. After grace period of two months you were to buy back at least two flats in September 2018. But you did not do it giving the market conditions as the reason and promised that you will buy back one flat on 2<sup>nd</sup> January 2019 and the second flat on 2<sup>nd</sup> March 2019.*

*You paid only 3 crores during the first week of Jan and promised that the balance for one flat will be shortly. As it did not happen, I politely reminded you of your promises. On hearing me you got upset and spoke to me very rudely without extending any normal courtesies and you accused me that I am talking cheaply without understanding the market conditions. When I entered into the contract with you, I never agreed that you may make payments to me depending on the market conditions. You clearly agreed to buy back on whatever promises that was made to me. I agreed to your every request patiently and getting angry and reacting to me like what you did is unbecoming of a gentlemen. You cannot speak to me hurting my feelings, sentiments and insulting me when I just reminded you of your own promises.*

*I do understand that you are going through lot of stress on account of various reasons relating to your business. But that does not mean you can accuse me and talk to me taking undue liberties of my kindness and understanding. Instead of appreciating my stand on the issue, its very unfortunate and sad you chose to speak to me*



*when I have done no wrong. Ou please ask yourself on your heart whether I deserve such a treatment.*

**b) Email dated 05.03.2019 (Page 187 Annexure -Q) reads as under:**

*Dear Mr. Bhaskar,*

*I am referring to my mail of 14<sup>th</sup> January on the above subject. You are kindly aware of that the discussions we are having on the above subject.*

*You are also aware that I spoke to you on the subject and you requested for some more time. Finally unilaterally decided that you will pay the amounts that were due as per options in respect of two flats, first one on Jan 2<sup>nd</sup> 2019 and the second one on 2<sup>nd</sup> March 2019.*

*You have paid so far only 3 crores and the balance is yet to be paid. Now as you commitment you have to pay all the amount due in respect of two flats by 2<sup>nd</sup> March 2019. What is the status?*

*Last time when we spoke, you had mentioned that you will clear all the amounts due well before 2<sup>nd</sup> march as you have finalized the sale of your office. I have not heard anything from you so far. I am sure you may received the sale proceeds of your premises.*

*It nearly 9 months that the amounts have become overdue and I greatly appreciate if you please arrange to settle it as per agreement without any further detail.*

**c) Another Email dated 20.05.2019 (Page 188, Annexure - R) reads as under:**

*"I am inviting your kind attention to my earlier dated 5<sup>th</sup> March where in I sincerely requested you to honour your commitment in letter and spirit. In spite of my repeated reminders over the phone, several messages you never returned my calls or replied to any of my messages. Even you chose not to reply to my mails. I repeatedly tried to reach out to you through Mr. Bhoja Raju. Of late I am told that you are not replying to his phone calls and messages.*

*After the option became due in June 2018, I met you personally and requested to pay me as per the agreement. You requested for some time assuring me that you will pay me by selling some assets. You paid me only once during January 2019 a sum of Rs. 3 crores and assured me that you will pay me further 3 crores on 2<sup>nd</sup> March and balance thereafter. But no further payments are made though I tried to reach out to you several times. I don't understand why you should avoid me to even meet or take my calls or to reply to my mail. This is totally unbecoming of a person of your background to treat me in this*



*fashion. You don't seem to have elementary courtesy to respond for a senior citizen like me. I am 75 year old senior and I don't have to take this tension at this advance age. I have lot of health issues like I am diabetic with several health complications. Doctors have advised me to lead a tension free life. I am extremely disburbed with your attitude. You are totally responsible if anything happens to me.*

*Please understand that at this age, don't force to me to take extreme action. Please pay me full amount due in respect of all the 3flats without any further delay. If I don't hear from you or you pay up I am left with no other alternative except to explore all other avenues which I would like to really avoid. I am appealing and requesting you not force me into take any extreme step. Please cooperate and don't allow it to escalate.*

9. As per emails stated above, the Respondent has paid the principal amount of all three Agreements in question in two instalments viz Rs.3,00,00,000/- (Rupees Three Crores only) on 01.01.2019 and Rs.1,13,34,068/- (Rupees One Crore Thirteen Lakhs Thirty Four Thousand and Sixty Eight only) on 20.06.2019. Admittedly, there is no interest mentioned in the Agreements in question. However, the Petitioners added interest too unilaterally. Another material blunder committed in making claim in the instant Petition is that though Buy-Back price mentioned in the Agreement for Residential Apartment bearing 6 D was mentioned as Rs. 1,62,36,928/, it was wrongly claimed Rs.4,81,92,000/ which is the price fixed for second option. There is no mention of interest either in the Agreements or Agreement to sale and Development Agreement. However, interest for Rs. 12,19,768/- was claimed @ 18 p.a without mentioning it in Agreements and unilaterally. So the claim made in the Petition is not made even as per Agreements in question and debt itself is disputed. The Petitioners have not exercised their option in the first instance to claim further amounts that too after accepting principal amount in total. Even as per Agreements in question, there are two options for the



Petitioners either to offer Flats to Respondent itself or to any other third party subject to agreed price or to get registered the Flats in question in their names. There is no rationale in fixing Buy back price and it appears to be fixed in lump sum and therefore, it can be offered to the Respondent in lump sum. In the absence of any document produced in support of first Option, the claim in question justified so as to take it as legally liable to pay. Therefore, the Petitioners failed to prove that they are entitled to recover Debt in question, in terms of Agreements in question.

10. The other questions arise for consideration are whether the instant Petition is filed with an intention to recover alleged outstanding amount after receiving principle amount in question in full or to initiate CIRP on justified grounds; whether the Respondent is insolvent/solvent Company; whether the Petitioners approached the Tribunal with clean hands with bonafide intention.
11. As detailed supra, the Petitioners have admittedly received Principle amount in full with no element of interest mentioned in the Agreements in question. And the instant Petition is filed under the guise of provisions of Code, with an intention to recover the difference between principle amount and Buy-back payments as referred to in Agreements in question and also unilaterally imposing condition of interest for failure to pay difference of amount. It is settled position of law that provisions of Code cannot be invoked as a substitute for debt enforcement or recovery proceedings. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*,<sup>1</sup> has inter alia, held that IBC, 2016 is not intended to be substitute to a recovery forum. In another latest judgment rendered in

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<sup>1</sup> (2018) 1SCC 353



*Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd.*,<sup>2</sup> Supreme Court of India, 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 Adjudicating Authority, while examining an application filed under Section 9 of the Code, will have to determine:

- a) Whether there is an 'operational debt' as defined exceeding Rs.1Lakh?
- b) Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- c) Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of 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.

12. As stated supra, the Respondent Company is admittedly solvent and profit and reputed Company, having successfully executed 25 projects across South India, and the Project B & B Opulent Spire, the current project of the Respondent Company, in which the Petitioners have invested three Flats, as detailed, is stated to be one of the most innovative and ambitious real estate projects in Bengaluru, constructed at the heart of one of the busiest and hi-profile areas in Bangalore. The project is a 24-story structure with 86 apartments that embodies every nuance of an elite lifestyle. And the project is almost completed and the structure of the building is complete and interiors are ongoing to be completed. Therefore, the Petitioners have the second option to

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<sup>2</sup>(CA No.9597 of 2018) dated 23<sup>rd</sup> October, 2018, 2018,(2018) 147 CLA 112 (SC)



get Flats registered in their name as per the Sale Agreement. However, the Petitioners choose to receive Principle amount in full and raising various claims contrary to what they are legally entitled as per the Agreements in question and that too without following the terms and conditions of Agreements in question. Moreover, as per clause/term 11 of Agreements for Sale in question, which is part and parcel of all agreements in question, as stated supra, there is an Arbitration provision, which says "The Parties agree, that in case of any dispute arising in respect of this Agreement, the matter shall be referred to Arbitration in accordance with provisions of Arbitration and Conciliation Act, 1996 and the proceedings shall be held at Bangalore etc. However, the Petitioners have to invoke said Arbitration clause in order to resolve the disputes with regard to settlement of claim made in the instant petition instead of invoking provisions of Code. It is relevant to refer provisions of Section 2 of the Code, which inter alia says that the provisions of the Code can be invoked by the parties mentioned therein, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy as the case may be. And there are 86 residences spread over 2 acres and if insolvency proceedings are initiated at the instance of Petitioners, on untenable grounds, it would not only affects several home buyers but also affect public interest at large.


13. It is also relevant to point out here that the Petitioner No. 1 is stated to be involved in financing real estate sector and he is on Board of few well know real estate Companies. Therefore, the first Petitioner knowing well about market situation and problems being faced by Real Estate Sector and nature of investments being made in those projects, the Petitioners being husband and wife are not justified to invoke the provisions of Code and have not



come to the Tribunal with clean hands and on bonafide grounds to seek relief.

14. The Proceedings contemplated under the provisions of Code are summary in nature and disputed questions of facts and law cannot be gone into those proceedings as several disputed questions of facts and law as mentioned supra. Wherein even Debt in question is not established. Therefore, other remedies available to the Petitioners as per Agreements in question and also as per law like initiating suit for specific performance or to file suit to get decree for recovery of alleged outstanding amount by adducing appropriate evidence and documents etc.
15. For the aforesaid reasons and circumstances, we are of the considered opinion that the Petitioners has failed to establish the claim as made in the Company Petition, so as to constitute default to initiate CIRP in respect of the Respondent and thus it is liable to be rejected by reserving liberty to the Petitioners to invoke appropriate civil remedy.
16. In the result, CP (IB) No.331/BB/2019 is hereby rejected by reserving liberty to the Petitioners to invoke appropriate civil remedy for their grievances.
17. No order as to costs.

  
**ASHUTOSH CHANDRA**  
**MEMBER, TECHNICAL**

  
**RAJESWARA RAO VITTANALA**  
**MEMBER, JUDICIAL**

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