

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT V**

C.P.(IB) No. 88 of 2021

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with Rule 4 of the
Insolvency and Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

Mrs. Kakumanu Lakshmi & Ors.

.....Financial Creditor/ Petitioner

Vs

Harihar Infra Ventures (I) Pvt Ltd,

(CIN:U4500MH2013PTC247313)

Shop No. 410 Excellencia Lodha Pupremus
Road, No. 22 Thane, Mumbai City MH 400604

.....Corporate Debtor/ Respondent

Order reserved on: 14.02.2023

Order pronounced on: 15.03.2023

Coram:

Hon'ble Sh. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

For the Financial Creditor: Adv. Pooja Yadav i/b Jayakar & Partners

For the Corporate Debtor: Adv. Anisha Mahajan and PCS Kshitij Lumkad.

Per: Anuradha Sanjay Bhatia, Member (Technical)

ORDER

1. This Company Petition is filed by Applicants, namely (1) Mrs.Kakumanu Lakshmi, (2) Mr. Shrikanth S. Despande, and Mrs. Indira Sripath Rao, (3) Mrs. Veliventi Venkata Gayathri Sowmya, (4) Mrs. Korutla Vijaya Lakshmi, (5) Mr. Krishna Rao Veliventi, and (6) Mrs. Girija Kumari Emani and Mr. Emani Sankar Rao, (hereinafter called "**Financial Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Harihar Infra Venture (I) Private Limited. (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Financial Creditors. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Financial Debt of Rs. 1,96,76,000/-, along with interest of Rs. 40,109/-.

BRIEF FACTS OF THE CASE

2. The Corporate Debtor is involved in the business of construction. The Financial Creditors herein are individuals who had purchased flats from the Corporate Debtor.
3. The agreement was made between the Corporate Debtor and Financial Creditors, to purchase fully furnished Apartment on ownership basis in the construction project known as 'Sai Hermitage'. The Agreements

between the parties have been registered with the Sub Registrar of Assurances Grade I Rahata. The Financial Creditors had paid the entire consideration as per the agreement between the parties. The details of agreements along with consideration, are as follows:

Sr. No	Financial Creditor	Date of Agreement	Consideration Amount	Flat. No.	Date of Payment
1	Mr. Srikanth S. Despande and Mrs. Indira Sripath Rao	30 th December, 2016	28,00,000/-	222, 1 st Floor, Block E	30 th December, 2016
2	Mrs. Kakumanu Lakshmi	9 th December, 2016	23,00,000/-	204, 1 st Floor, Block A	9 th December, 2016
3	Mrs Veliventi Venkata Gayathri Sowmya	18 th April, 2017	28,00,000/-	221, 1 st Floor, Block E	18 th April, 2017
4	Mrs. Korutla Vijaya Lakshmi	8 th May, 2017	28,00,000/-	119, Ground Floor, Block E	8 th May, 2017
5	Mr. Krishna Rao Veliventi	3 rd October, 2016	23,00,000/-	119, Ground Floor, Block A	3 rd October, 2016
6	Mrs. Girija Kumari	7 th February,	23,00,000/-	307, 2 nd	7 th February,

	Emani And Emani Sankar Rao	2017		Floor, Block A	2017
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4. The possession of flats, as per the agreements, to be provided on or before 30.04.2019. However, a grace period of 6 months would be provided if there is a delay in construction of the project which is **'beyond the control'** of the Corporate Debtor.
5. The Financial Creditors, on suggestion of Corporate Debtor, entered into a Leave and License Agreement with Corporate Debtor in respect of flats allotted to them. In order to compensate the Financial Creditors, for having paid the full consideration, the Corporate Debtor had agreed to pay a license fee.
6. After the aforesaid payments, the Corporate Debtor stopped making payments to the Financial Creditors. Subsequently, it was also noticed by the Financial Creditors that construction had not been commenced on the site. Thereafter, the Financial Creditors filed Company Petition No. 2910 of 2019 before this Hon'ble Tribunal, seeking refund of the total sale consideration paid by them along with interest (being the amount payable under the Leave and License Agreements).
7. During the course of proceedings, the Corporate Debtor approached the Financial Creditors for amicable settlement of the disputes between the parties. Accordingly, the Financial Creditors agreed to enter into Consent Terms and settle the disputes, on the terms mutually agreed between the parties. It was agreed that the Corporate Debtor would pay a sum of Rs. 1,96,92,000/- (Rupees One Crore

- Ninety-Six Lakhs Ninety-Two Thousand only) in 12 equal instalments as per the payment schedule annexed to the Consent Terms. The First instalment was payable from 28.01.2020. Further, Post Dated Cheques were handed over by the Corporate Debtor to the Financial Creditors, as per the Consent Terms.
8. The parties entered into Consent Terms on 11.12.2019. Accordingly, this Hon'ble Tribunal accepted the Consent Terms and dispose of the Company Petition No 2910 of 2019 in terms of the Consent Terms. The Hon'ble Tribunal further granted liberty to Financial Creditors to approach this Hon'ble Tribunal in case of default.
 9. The Corporate Debtor, vide email dated 30.01.2020, requested the Financial Creditors not to deposit the cheques dated 28.01.2020 before 10.02.2020. In this reference, the Financial Creditors, vide an email dated 04.02.2020, informed the Corporate Debtor that they would be depositing the post-dated cheques on 10.02.2020. Accordingly, on 10.02.2020, the Financial Creditors deposited the first set of post-dated cheques dated 28.01.2020, which were returned for the reason '**Funds Insufficient**'.
 10. The Corporate Debtor requested for a further period of a week to make the aforesaid payments and assured that the payments would be made via RTGS. However, Corporate Debtor, despite furnishing the bank details, failed to make payments.
 11. Subsequently, the Financial Creditors deposited the second set of post-dated cheques dated 28.02.2020, which were also returned for the reason '**Funds Insufficient**'. Therefore, the Financial Creditors filed this present Company Petition.

REPLY OF THE CORPORATE DEBTOR

12. The Corporate Debtor, in its reply, submitted that Applicants claimed Rs. 1,96,76,000/- including interest of Rs. 40,109/- and further claimed an interest @18% per annum from the date of filing of the present Petition until realisation. The Consent Terms dated 11.12.2019 stipulated settlement amount as Rs. 1,96,92,000/- whereas the total consideration amount as mentioned by the Applicants is Rs. 1,53,00,000/-. Further, no date of default is mentioned in the Application. However, on the perusal of the calculation chart of the interest component, annexed with the petition, it appears that the date of default to be 11.02.2020 when the cheques of the applicants were allegedly dishonoured. It is further submitted that the amount claimed to be in default under the present Petition is as per alleged breach of Consent Terms, dated 11.12.2019 under which the Corporate Debtor agreed to pay the Applicants an amount of Rs. 1,96,92,000/- as full and final settlement of entire claim between the Corporate Debtor and the Applicants. It was pleaded that such amount does not fall within the definition of Financial Debt as contained under Section 5(8)(f) of the Code. It has been submitted that Applicants are not Financial Creditors and do not fall within the definition of Section 5(7) of the Code as Home Buyers for the amount claimed to be in default for alleged breach of Consent Terms dated 11.12.2019, which was a debt in respect of payment of dues. It was, therefore, submitted that the present Application under Section 7 of IBC is not maintainable and is liable to be dismissed.
13. The Corporate Debtor, in its reply, raised the issue that the present Application is hit by threshold limit. On this point, the Corporate Debtor stated that the Date of filing of the Application is 04.08.2020.

The Consent Term dated 11.12.2019 stipulated payment of Rs. 1,96,92,000/- to the Financial Creditor in 12 equal instalments i.e. 12 tranches starting from January 2020 to December 2020 through Post Dated Cheques. The Applicants have annexed documents of dishonour of only First and Second Tranche i.e January and February 2020 and therefore, the alleged default amount for January and February 2020 was Rs. 32,82,000/- only, which was below increased threshold limit of Rs. 1,00,00,000/- as required for filling of an application under Section 7,9, and 10 of the Code. Therefore, the Application is barred by the Notification issued by MCA dated 24.03.2020.

14. The Corporate Debtor further submitted that Section 10A was inserted vide notification dated 05.06.2020, with effect from 25.03.2020 which prohibits the initiation of Insolvency proceedings under Section 7, 9 and 10 of the Code for any default arising during the six months from March 25, 2020 (extendable upto one year). The Corporate Debtor submitted that for this reason, any default alleged against him in the payment of third to twelfth instalment as per the Consent Terms dated 11.12.2019 could never be subjected for initiating CIRP against the Corporate Debtor by the Applicants.

15. The Corporate Debtor submitted that present Petition filed by the Applicants, does not constitute the threshold of 100 such Home Buyers/ allottees or of 10% of the total Home Buyers/ allottees and hence, should not be admitted.

FINDINGS

16. We have heard the counsel appearing for parties and perused all the material on record.

17. The present petition is filed to Initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor for the default in payment amounting to Rs. 1,96,76,000/-, along with interest of Rs. 40,109/-.

18. The admitted facts in brief are:

- i. Petitioners herein are individuals who had purchased flats from the Corporate Debtor and for the same, both parties entered into an Agreement, which was also registered with the Sub-Registrar. Petitioners had paid the entire consideration as per the agreement between the parties. The possession of flats was not delivered on time and to compensate the Petitioners, the Corporate debtor agreed to pay license fee and for the same entered into Lease & License Agreement.
- ii. As Corporate Debtor had stopped making payments to them, the Petitioners herein filed Company Petition No. 2910 of 2019 before this Hon'ble Tribunal seeking refund of the sale consideration paid by them along with interest. The said petition was disposed of as Corporate Debtor approached the Petitioners for amicable Settlement of dispute. The parties, then agreed to enter into Consent Terms and settle the dispute. The Corporate Debtor agreed that he would pay a sum of Rs. 1,96,92,000/- (Rupees One Crore Ninety-Six Lakhs Ninety-Two Thousand only) in 12 equal instalments as per the payment schedule annexed to the Consent Terms. The parties entered into Consent Terms on 11.12.2019.
- iii. Accordingly, this Hon'ble Tribunal accepted the Consent Terms and disposed of the Company Petition No 2910 of 2019 in terms of the Consent Terms dated 11.12.2019. on 10.02.2020, the

Petitioners deposited the first set of post-dated cheques dated 28.01.2020, which were returned for the reason '**Funds Insufficient**'. Subsequently, the Petitioners deposited the second set of post-dated cheques dated 28.02.2020, which were also returned for the reason '**Funds Insufficient**'. Therefore, the Petitioners filed this present Company Petition.

19. The Ld. Counsel for the Corporate Debtor raised certain contentions which are as follows:

- i. The Applicants are not Financial Creditors if the default amount is claimed as per the Consent Terms dated 11.12.2019;
- ii. The alleged default amount under Consent Terms (for January and February 2020) comes to Rs. 32,82,000/- which is below the threshold limit of Rs. 1,00,00,000/- as stipulated vide Notification dated 24.03.2020;
- iii. No Application can be filed for default on or after 25.03.2020 upto 25.12.2020 as per the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 and Notification dated 24.09.2020;
- iv. The Applicants failed to meet the condition precedent to file a petition under Section 7 of the IBC i.e. to meet the threshold of 100 number of allottees and/ or are 10% of the total allottees for the same project.

20. With regard to the first contention raised by Ld. Counsel appearing for Corporate Debtor that Petitioners are not Financial Creditors as per the provisions of the Code. It was argued by the Ld. Counsel appearing for the Petitioners that the Leave & License Agreement was entered between the parties, and the license fee was contemplated to be paid by Corporate Debtor as returns/interest for having paid the entire consideration by Petitioners. The Settlement agreement/

Consent terms were entered between the parties on 11.12.2019 because the Corporate Debtor could not repay total sale consideration paid by Petitioners along with interest (amount payable under the Leave and License Agreement). It is further submitted by the Ld. Counsel for the Petitioners that debt which is payable by the Corporate Debtor, therefore, can be termed as financial debt as the agreement was entered into in lieu of advancing the entire consideration to the Corporate Debtor.

21. It is brought to the notice of this Bench that the Settlement agreement/ Consent Terms was entered into between the parties against the non-payment of the total sale consideration along with the interest by Corporate Debtor as per the given agreements, and therefore, merely on the basis of Settlement agreement/ Consent terms, the nature of the claim would not be changed. It is further submitted by the Ld. Counsel for the Petitioners that principal consideration is Rs. 1,53,00,000/- along with interest (stated as license fees payable under Leave and License Agreement) with further 18% from the date of filing the present Petition till the date of realisation. It was, therefore, submitted that the 'financial debt', as named in sale agreement, cannot be renamed under the head 'settlement amount' and the Settlement agreement/ Consent Terms dated 11.12.2019, cannot be read in isolation. The Bench is of the opinion that amount claimed, is the amount due to Financial Creditors under the Original Petition i.e. Company Petition No. 2910 of 2019 and not the settlement amount as alleged under the Consent Terms dated 11.12.2019. Therefore, the contention raised by the Corporate Debtor does not survive.

22. The second contention raised by the Ld. Counsel for the Corporate Debtor that default amount under Consent Terms dated 11.12.2019,

is below the threshold limit of Rs. 1,00,00,000/- as per the Notification dated 24.03.2020. Addressing the same, the Ld. Counsel appearing for the Petitioners submitted that the Consent Terms was made against the liability of Corporate Debtor, discharging its debt due under the Sale Agreements and Leave & License Agreement. The Ld. Counsel for the Petitioners, further submitted that the Consent Terms dated 11.12.2019 was breached as the First and Second tranche of Post-Dated Cheques were dishonoured dated 10.02.2020 and 28.02.2020 respectively, specifying the reason being '**Funds Insufficient**'. The Return memos for the same are annexed to the Petition as Exhibit E and Exhibit F. The Ld. Counsel, further submitted that since the default occurred on 10.02.2020 and 28.02.2020 which is prior to 24.03.2020, the petition will not be hit by the Notification, In addition to this, the consent terms explicitly provided that "any default' In making payments as per the stipulated schedule in Consent Terms would amount to breach of Consent Terms, which gave right to the Petitioners to approach this Hon'ble Tribunal. This bench, therefore, is of the considerate view that the two defaults in honouring the Post-Dated Cheques, amount to breach of the entire consideration of Rs. 1,96,92,000/- under the Consent Terms dated 11.12.2019, which meets the Threshold limit of Rs. 1,00,00,000/- specified under Notification dated 24.03.2020.

23. The Ld. Counsel for the Corporate Debtor further raised the contention that no Application could be filed for default between March 2020 upto December 2020, as per the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 and Notification dated 24.09.2020. Addressing the given issue, the Ld. Counsel appearing for the Petitioner submitted that the provisions of 10A would not be applicable, if the default was committed prior to 25 March 2020. It was further submitted that the default was committed

prior to 25.03.2020, and therefore, provisions of Section 10A would not apply. The Bench is of the opinion that the date of default is 10.02.2020, which is prior to the notification date and the entire consideration of Rs. 1,96,92,000/- under the Consent Terms dated 11.12.2019, which meets the threshold limit of Rs. 1,00,00,000/-. Therefore, it is concluded that the present petition is not barred by the provisions of Section 10A of the Code.

24. It is important to note that Legislature introduced Section 10A of the Code in order to protect defaulting borrowers by barring initiation of CIRP applications against such borrowers for a limited duration of one year from 25th March 2020 till 25 March 2021. The intent of the legislation was to provide temporary protection to borrowers. The Bench is of the view that Corporate Debtor, in no way, can misuse this provision and set away from the debt taken prior to the introduction of the provision of Section 10A.

25. The Ld. Counsel for the Corporate Debtor further raised the contention that Petitioners failed to meet the condition precedent to file a petition under Section 7 of the IBC i.e. to meet the threshold of 100 number of allottees and/ or are 10% of the total allottees for the same project. Addressing the same, the Petitioners submitted that the Corporate Debtor failed to provide any substantial proof over construction of 400 flats on the said premise and therefore, no other allotments were made except in favour of Petitioners. Therefore, it is concluded that Financial Creditors, being the only allottees in the Project, meet the requisite threshold to maintain the present Petition. The bench is of the view that information relating to allotment of flats to other allottees are not available in the present case, and also proof for the same is also not provided by the Corporate Debtor. Therefore,

this Bench concludes that the present Petitioners, meet the required threshold.

26. It is important to note that Original Company Petition No. 2910 of 2019 was filed against the Corporate Debtor for the default amount of 1,53,00,000/-. The same petition was disposed of as Corporate Debtor and Petitioners agreed to enter into Consent Terms dated 11.12.2019 and amicable Settlement of dispute. The Corporate Debtor has already admitted the default, and in discharging the same, on 11.12.2019, the Consent Terms was entered between them. The Original Petition would have been admitted if the Consent Terms was not entered into. The Bench is of the considerate view that the Corporate Debtor is trying to convert the Original Financial Debt under the name of Consent Terms, which cannot be done otherwise, under the purview of law. All the contention of the Corporate Debtor is required to be dismissed on this particular ground itself.

27. Considering the above facts, we come to conclusion that the nature of Debt is a “Financial Debt” as defined under section 5 (8) of the Code. It has also been established that there is a “Default” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of ‘**debt**’ and ‘**default**’, for admission of a petition under Section 7 of the I&B Code, have been met in this case.

ORDER

- a. The above Company Petition No. (IB) 88/2021 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Harihar Infra Ventures (I) Pvt Ltd**

- b. This Bench hereby appoints **Mr. Naren Sheth**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00133/2017-18/10275 and having Email Id: mkindia58@gmail.com as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

- c. The Financial Creditor shall deposit an amount of Rs. Five Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

- d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. Accordingly, this Petition 88 of 2021 is **allowed**.

1. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)