

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KOCHI**

**IA(IBC)/98(KOB)/2022
IN**

IBA/11 (KOB)/2020

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

Order delivered on: 23.06.2022

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Anil Kumar. B, Member (Technical)

Michael Meenattor
S/o. Mani J Meenattoor,
Villa No. 43, Trinity Gardens,
Aluva-Kaladi Road,
Desom, Aluva – 683 102.

... Applicant/Intervenor

Verses

P.T Joy
Interim Resolution Professional of
MIR Realtors Private Limited,
First Floor, JB Plaza,
Edappally – Thripunithura Road,
Near NSS Hostel, Padivattom,
Edappally PO,
Oberon Mall Junction,
Ernakulam, Kochi – 682 024.

...Respondent

Parties/Counsel present (through video conference)

For Applicant/Intervenor	... S/Sh. Ashok B Shenoy, Gireesh P.S, Raymond George Dias, Arjun R Naik - Advocates
For Respondent	... Shri. Sankar P Panicker - Advocate

ORDER

Per: Ashok Kumar Borah, Member (J)

This IA has been filed under Section 60(5) of IBC, 2016 by Michael Meenattoor, who is stated to be a Financial Creditor of M/s. MIR Realtors Private Limited being a “home buyer” who had contracted to purchase four separate Residential Apartments from the Corporate Debtor.

2. The Corporate Debtor through four separate agreements dated 26/07/2010, 28/07/2010 & 29/07/2010 agreed to complete the construction of the aforesaid four Apartments in the multi storeyed residential building complex “MIR Jade Heights Tower 1” constructed in 53 cents of land in Kakkanad Village of Kanayannur Taluk in Ernakulam District and agreed to handover its possession by 31/03/2012 and towards consideration for the same, received from the Applicant Rs. 1,87,34,756/- (Rupees one crore eighty-seven lakh thirty-four thousand seven hundred fifty-six only) and a further sum of Rs.1,44,077/- (Rupees One lakh forty-four thousand seventy-seven only), totaling Rs.1,88,78,835/- (Rupees one crore eighty-eight lakh seventy-eight thousand eight hundred thirty-five only).

3. The applicant stated that in the year 2014, he filed a complaint against the Corporate Debtor before the Kerala State Consumer Disputes Redressal Commission, Thiruvananthapuram as Complaint No. 28/2014. Since the Corporate Debtor did not complete the construction of the aforesaid four apartments and handed over it to the applicant, the said complaint was allowed by the Commission vide order dated 07/12/2017 directing the Corporate Debtor to complete the construction of the Apartments and handover the same to the applicant within six months from that date allowing interest at the rate of 10% per annum from 31/03/2012 till the date of delivery.

4. However, the Corporate Debtor has not so far handed over the Apartments to the Applicant. While so on 16/11/2021, this Tribunal admitted IBA/11(KOB)/2020 and appointed respondent herein as the Interim Resolution Professional (IRP). The IRP issued public notice dated 21/12/2021 and pursuant thereto applicant submitted his claim in Form – CA before the respondent on 31/12/2021. The respondent through his mail dated 28/02/2022 directed the applicant to submit four separate claims for each Apartments. The applicant submitted four separate claims in Form – CA on 28/02/2022. The respondent by his e-mail dated 11/03/2022 informed the applicant that his claim amount of Rs. 1,88,78,833/- (Rupees One crore eighty-eight lakh seventy eight thousand eight hundred and thirty three only) is admitted in full and applied interest at the rate of 8% per annum upto 31/03/2012 in terms of Regulation 16A (7) of CIRP Regulations.

5. The contention of the applicant is that the respondent Corporate Debtor is bound to handover the possession of four Apartments to the applicant within the time stipulated and that the applicant is ready and willing to take possession of the Apartments thereof as is where is condition. Going by Section 55(6)(b) of Transfer of Property Act, 1881, the applicant has a statutory charge on the four Apartments to the extent of the monies paid by him to the Corporate Debtor. He has also stated that in the light of order date 04/02/2020 of the **NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No. 926 of 2019** and order dated 03/12/2021 of the **NCLAT, Chennai Bench in Company Appeal (AT)/(CH)(INS) No. 217 of 2021**, the Corporate Insolvency Resolution Process (CIRP) required to be confined to a project in relation to which it is initiated. Hence, the applicant is entitled to get the possession of the four Apartments, which are not comprehended in the project thereof and subject to CIRP being not governing the project in which the subject four Apartments covenanted to be handed over to the applicant are comprised. In order to prove the veracity

of his claim, he has produced various documents filed by him before the Corporate Debtor as also the agreement entered into between them. Hence, he has sought the following relief:

“Direct the respondent-Insolvency Resolution Professional under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 to hand over possession to and in favour of Applicant, the 4 Apartments comprehended by Annexures A1 to A8 Agreements, being Apartment Numbers 2285, 2311, 2312 and 2302 in the multi storeyed residential building complex named “MIR Jade Heights Tower 1” constructed in 53 cents equivalent to 21.447 areas of land comprised in Re-survey Numbers 324/1 and 3 of Kakkanad Village of Kanayannur Taluk in Ernakulam District.”

6. The respondent/RP has filed a counter affidavit stating that he has received the claim of Rs. 8,62,60,401/- (Rupees Eight Crore Sixty-two lakh sixty thousand Four hundred and one only) on 31/12/2021 from the applicant and that he has admitted Rs. 3,87,61,517/- (Rupees Three crore eighty-seven lakh sixty one thousand five hundred and seventeen only) under the provisions of IBC. The prayers sought by the applicant in this IA are *prima facie* beyond the provisions of the IB Code. Section 14(b) of IBC, 2016 directs the Adjudicating Authority to specifically prohibit transactions resulting in transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein. Section 43(2)(a) which deals with the Preferential Transaction prohibits transfer of property or an interest thereof of the Corporate Debtor for the benefit of a Creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor.

7. He has also stated that IBA/11(KOB)/2020 was admitted on 16/11/2021 and post the admission of CIRP there was no business activity or operations performed by the Corporate Debtor and hence any action performed by the Corporate Debtor cannot be interpreted as “*done in the usual course of Business*” following the provisions of IBC. The RP has

accepted the valid claims, prepared Information Memorandum and published the Expression of Interest.

8. It is also stated that during the pendency of the CIRP, the applicant cannot enforce the rights against the Corporate Debtor due to the specific prohibition of initiation of legal process as specified in Section 14 of the IBC. Every Creditor who has lodged claim has an equal opportunity to get the dues towards him by resolving the insolvency. This Tribunal has not acceded to the request for projectwise resolution of the insolvency in IA(IBC)/39(KOB)/2022 and IA(IBC)/51(KOB)/2022 filed by intervenors which has been dismissed and that there is no separate books of accounts maintained for each of the projects for the Corporate Debtor. Hence the judgments quoted by the applicant are not applicable to this matter. In case the possession of the Apartments is handed over to the applicant during the CIRP, then the applicant will be in a beneficial position compared to others and will be in straight conflict with Section 43(2)(b) of the IBC, 2016 as the company is currently not functioning, the possession of the flat cannot be given to the applicant under exception given in Section 43(a) of the IBC.

9. We have heard the learned counsel Shri. Ashok B Shenoy appearing for the applicant and Shri. Sankar P Panicker appearing for the RP and have gone through the pleadings and documents produced by the applicant. The only question to be considered in this application is whether during the period of CIRP, the relief sought by the applicant to handover possession of four Apartments to the applicant can be allowed. In this connection it is profitable to quote Section 43(2)(b) of the IBC, 2016 which is as under:

“43. (1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53

A reading of the above would make it clear that if the prayer of the applicant is allowed which will be in the nature of transferring/alienating or disposing off the Corporate Debtor any of its assets or any legal rights or beneficial interest therein. This will result in change in the status of the assets of the Corporate Debtor after the commencement of Insolvency Resolution Process. The transfer has the effect of putting such Creditor or surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53. Moreover, while admitting the application moratorium has been ordered under Section 14 of the IBC.

10. In view of the above, the RP cannot handover the possession of the four Apartments to the applicant. The applicant is to wait till the CIRP is concluded. Hence, we do not find any merit in this application. Thus, **IA(IBC)/98(KOB)/2022 is dismissed.**

Dated this the 23rd day of June, 2022

Sd/-

**(Anil Kumar. B)
Member (Technical)**

AJ

**ASHOK KUMAR
BORAH**
Digitally signed by ASHOK
KUMAR BORAH
Date: 2022.06.24 11:12:11
+05'30'
**(Ashok Kumar Borah)
Member (Judicial)**