IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV

Company Petition No. (IB)-67(ND)/2022

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

In the matter of:

Yadubir Singh Sajwan & Ors.

.... Petitioners / Financial Creditors

Vs.

M/s. Som Resorts Private Limited

.... Respondent / Corporate Debtor

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)

Order Delivered on: 02.08.2022

ORDER

PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

The instant petition has been filed jointly by Mr. Yadubir Singh Sajwan and 25 other financial creditors/ home buyers ('Petitioners') in a class of creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating the Corporate Insolvency Resolution Process ('CIRP') against M/s. Som Resorts Private Limited ('Respondent/Corporate Debtor') on the ground that the Corporate Debtor committed a default in payment of Rs.15,37,19,463/-

2/8 2/8/22

(Rupees Fifteen Crores Thirty-Seven Lacs Nineteen Thousand Four Hundred Sixty-Three Only) including interest @ 18% p.a.

2. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are as follows:-

a) The Petitioners submit that the Corporate Debtor M/s. Som Resorts Private Limited was incorporated under the Companies Act 1956, and launched a commercial cum residential project in December, 2012 under the name and style of *'Casa Italia'* at the land admeasuring 1243.3 sq. mtrs. allotted by UP Housing Development Board bearing Plot No. ML-9 /1, Vasundhara, Ghaziabad, UP.

b) The petitioners submit that the Corporate Debtor vide agreement dated 10.10.2013 appointed M/s. Cosmic Structures Limited ('CSL') as its marketing agency for the marketing and advertising of the project 'Casa Italia'.

c) The petitioners submit that during the period 2012 to 2015, the Financial Creditors / Petitioner no. 1 to 26 had booked space in *'Casa Italia'* project of the corporate debtor namely M/s. Som Resorts Private Limited and had made payments to the Corporate Debtor and its agent Cosmic Structures Ltd for the booked space in the Project 'Casa Italia' with assured possession of the unit within the stipulated time. The petitioners further submit that Petitioners and Corporate Debtors had entered into Builder Buyer Agreement ('BBA') wherein the Corporate Debtor was required to hand over possession to the Petitioners within 36 months from the date of commencement of construction.

d) The petitioner submits that the Corporate Debtor had failed to honor his words and defaulted in handing over the possession of the unit and failed to refund the deposits of the Petitioner.

e) The petitioners submit that the Hon'ble High Court of Delhi vide order dated 11.01.2017 in Winding Up Petition No. 152/2016

titled Rajni Anand v/s Cosmic Structures Ltd had appointed an Official Liquidator for the Cosmic Structures Limited, consequent to which, the official Liquidator had sealed the project *'Casa Italia'* property bearing number ML-9/1, Vasundhara, Ghaziabad considering that the property belongs to Cosmic Infrastructure Pvt. Ltd.

f) The petitioners submit that the petitioners had approached the Economic Offence Wing, of the Delhi Police on 30.01. 2017 for registering a criminal case against the Corporate Debtor and its promoters & directors i.e., Mr. Anuj Gaur, Mr. Rahul Bhardwaj, Mr. Deepak Gupta, Mr. Sandeep Pahwa. The petitioner further submits that pursuant to the complaint, Economic Offence Wing of the Delhi Police registered an FIR No 108/2017 dated 14.06.2017 U/s 420/406/409 R/w 120-B of the IPC and filed charge sheet against the Corporate Debtor and its promoters & directors.

g) The petitioners submit that after consideration and deliberation, a Memorandum of Settlement (MoS) dated 14.09.2018 was executed between M/s. Cosmic Structure Limited, Financial Creditors Association (Project 'Casa Italia') and M/s. Som Resorts Pvt Ltd ('Corporate Debtor') and in terms of the above MOU, the Corporate Debtor undertook to complete the construction of the projects "Casa Italia" within 18 months from the de-sealing of the project site by the Hon'ble High Court of Delhi and promised to hand over possession to the financial creditors failing which the financial creditors are entitled to refund of their amount received from the allottees(s) along with interest @18% p.a. The corporate debtor failed to honor their words and defaulted in handing over the possession within the stipulated time frame.

h) The Petitioners further submit that in terms of the Memorandum of Settlement dated 14.09.2018, the Corporate Debtor promised to be responsible and accountable for the payments which were otherwise received by M/s. Cosmic Structure Limited from the

petitioners towards the booked units in 'Casa Italia' and shall be deemed to have been made in the name of the M/s. Som Resorts Private Limited i.e., the corporate debtor.

i) The petitioner petitioners submit that pursuant to the Memorandum of Settlement dated 14.09.2018 and other considerations, the Hon'ble High Court while disposing CA 631/2017 was pleased to de-seal the property of project 'Casa Italia' bearing no. ML-9 /1, Vasundhara, Ghaziabad. The Petitioner further submits that subsequently based on the aforesaid Memorandum of Settlement, Corporate Debtor was able to obtain the order from the Court of Ld. ACMM, Patiala House Court wherein de-freezing of A/c no. 3311367206 was allowed.

j) The petitioners submit that despite the repeated requests to the Corporate Debtor through various correspondences to revert the transaction amount respectively, but the efforts went in vain as no appropriate reverts were received from the Corporate Debtor. The petitioners further submit that the acts of the Corporate Debtor clearly represent that the Corporate Debtor deliberately mislead the petitioners and is avoiding the payment of the outstanding dues of the transaction amount of the Corporate Debtor.

k) The petitioners submit that the present petition is filed by the Petitioners under Section 5(8)(f) of the Code, 2016 and the Corporate Debtor is in default in payment of Rs.15,37,19,463/- (Rupees Fifteen Crores Thirty-Seven Lacs Nineteen Thousand Four Hundred Sixty-Three Only) including interest @ 18% p.a. out of Rs. 6,60,18,065/- (Rupees Six Core Sixty Lac Eighteen Thousand and Sixty-Five) is the principal amount of debt.

3. The corporate debtor has filed its reply cum objections and the averments of the corporate debtor in the reply are stated in brief as below:-

a) The Respondent submits that the Respondent vide agreement dated 10.10.2013, gave the marketing rights to M/s. Cosmic Structures Limited ('CSL') for a period of one year only, wherein as per the covenants of the agreement, M/s. Cosmic Structures Limited shall be entitled to 10% of the sale consideration as its service fee/commission. The Respondent further submits that the agreement does not permit M/s. Cosmic Structures Limited to enter into any agreement with the home buyer or to receive consideration from the buyers in its own name and the agreement clearly stipulates that the sale consideration shall only be received by way of cheques drawn in the name of the respondent.

b) The Respondent submits that the petitioners herein claimed to be allotted certain units in 'Casa Italia', even after the agreement dated 10.10.2013 entered between the respondent and CSL. The respondent further submits that all the petitioners herein-

   i. Claim to have paid consideration directly to Cosmic Structures Limited with no intimation to the respondent.
   ii. Have entered into Builder Buyer Agreements with certain persons unknown and unconnected to the respondent herein.

c) The respondent submits that the respondent was not at all aware of the details of the transactions/adjustments between the petitioners. The respondent further submits that the petitioners had claimed to have paid amount of about Rs.6,60,18,065/- for the units of 'Casa Italia' to M/s. Cosmic Structures Limited out of which the respondent had received a sum of Rs.1,45,03,185/- from M/s. Cosmic Structures Limited towards the sale consideration, which includes the amount paid by several buyers other than the petitioners herein.

d) The respondents submits that M/s. Cosmic Structures Limited went into winding up proceedings and it is an admitted position that M/s. Cosmic Structures Limited did not release the entire amount to the respondent, it had collected for the project 'Casa Italia' except to the tune of Rs. 1,45,03,185/-.The respondent

further submits that all these supervening events were not only beyond the control of the respondent but also outside the knowledge of the respondent which led to difficulties in the implementation of the project 'Casa Italia'.

e) The respondent submits that the respondent and the petitioners being fully aware of the illegalities carried out by M/s. Cosmic Structures Limited entered into a settlement agreement/ memorandum of settlement dated 14.09.2018. The respondent submits that in terms of the memorandum of settlement dated 14.09.2018, following material acts were required to be performed by the petitioners and respondent in seriatum i.e., *Since in the present case, the allotment and agreements were entered into between the petitioners and Cosmic directly without knowledge or intimation to the respondent and the respondent had agreed to accept the entre money paid by the petitioners to Cosmic subject to proof and release from official liquidator, it was agreed under clause 10, that the petitioner's association was obliged to provide the copies of allotment agreements and/ or receipts evidencing the proof of allotment to them by Cosmic and proof of payment by them towards the allotment to Cosmic.*

f) The respondent submits that in the absence of any payments by the petitioners and due to the fact that the money was yet not released from the official liquidator, since the petitioners had failed to provide the documentary proof as stated above. The respondent further submits that the petitioners had started raising baseless claims and were in willful and persistent breach of their obligation to provide the documentary proof of allotment and payments to M/s. Cosmic Structures Limited. In order to support their case, the respondent relied upon citation **Pioneer Urban Land and Infrastructure Ltd & Anr versus Union of India & Ors (Writ Petition (Civil) No. 413 of 2019)** and **Anil Kumar Tusiani v. Rakesh Kumar Gupta and anr. Company Appeal (AT) (Ins) No. 35 of 2019.**

g) The respondent submits that the petitioner rests their claim entirely on the Memorandum of Settlement dated 14.09.2018 and it is an admitted position that the said MoS was entered because the petitioners imprudently paid the amount to M/s. Cosmic Structures Limited who was not entitled to collect same. The respondent further submits that accordingly no debt whatsoever is due and payable by the respondent to the petitioner, on the contrary, the petitioners are liable to compensate the respondent for the loss caused due to material default on the petitioner's part.

4. The petitioners filed the rejoinder to the reply submitted by the corporate debtor. The submissions of the petitioners in the rejoinder are stated herein in brief:-

a) The Petitioners submit that as per the Builder Buyer Agreement, the petitioners had invested their hard earned money towards the purchase of the units of the project 'Casa Italia' as evident from the receipts attached in the petition and therefore and the corporate debtor failed to complete the project within a period of 36 months as stipulated in the Builder-Buyer Agreement, thereby giving rise to default in terms of Section 3(12) of the Code, 2016.

b) The Petitioners submit that the petitioners being aggrieved by the fraudulent acts of the corporate debtor and lapse of considerable amount of time, the petitioners filed a complaint and lodged FIR No. 108/2017 before Economic Offence Wing. The petitioners further submit that the corporate debtor wrote a letter dated 14.;11.2017 to the EoW, admitting that the petitioners have booked a unit in the Project 'Casa Italia' either directly or through its agent M/s. Cosmic Structures Limited and there are total of 69 homebuyers.

c) The Petitioners further submit that consequently on the request of the corporate debtor, the petitioners entered into a tripartite full and final settlement agreement/memorandum of settlement dated

14.09.2018, wherein the corporate debtor sought a time period of 18 months from the date of de-sealing of the project by the project by the Hon'ble High Court, Delhi and the said project was de-sealed by the Hon'ble High Court, Delhi vide its order dated 30.01.2019, however, due to lapse on the part of the corporate debtor, the project was actually de-sealed on 23.05.2019.

d) The Petitioners submit that vide Memorandum of settlement dated 14.09.2018, the corporate debtor gave the undertaking that *'All the agreements/allotment letters and receipts and any other document issued by confirming party (i.e., M/s. Cosmic Structures Limited) regarding the units booked by the members of the Second Party (namely the Petitioners), shall be accepted by the first party (namely the corporate debtor).* The petitioners further submit that the corporate debtor had acknowledged the amount invested by the petitioners in project 'Casa Italia' by the MoU dated 14.09.2018.

e) The petitioners submit that non-completion of the project 'Casa Italia' has no connection with the submission of allotment documents with the corporate debtor. The petitioner further submits that the allotment documents has not been submitted with the corporate debtor by the petitioners for two primary reasons:-

   i. The project has been sealed by UP Awas and Vikas Parishad Construction Division vide order dated 14.07.2016, on the grounds of unauthorized construction, against the map approved by the relevant authority.

   ii. The Corporate Debtor has failed to open an escrow account, due to its failure to obtain necessary registration from RERA under the RERA Act, 2016.

f) The Petitioners further submit that if the corporate debtor was aggrieved by the alleged breach of the MoU dated 14.09.2018 by the petitioner, the corporate debtor should have initiated necessary legal proceedings before the competent forum. Even

otherwise, existence of any such dispute shall not bar the proceedings under Section 7 of the Code, 2016.

g) The Petitioners submit that the corporate debtor failed to complete the construction of the project 'Casa Italia' by 23.10.2020 primarily due to non-registration of the Project with RERA under the Real Estate (Regulations and Development) Act, 2006 and due to sealing of the project by UP Awas Vikas, in light of unauthorized construction, thereby leading to default in terms of the Code, 2016.

5. Ld. Counsel for the petitioners relied on the following judgments:
   a) *M/s. Innoventive Industries Ltd versus ICICI Bank & Anr.(Civil Appeal No. 8337-8338 of 2017), wherein the Hon'ble Supreme Court had elaborately discussed the scope of Petition filed under Section 7 of the Code.*
   b) *Pioneer Urban Land and Infrastructure Ltd & Anr versus Union of India & Ors (Writ Petition (Civil) No. 413 of 2019).*
   c) *Karan Goel versus M/s. Pashupati Jewellers & Anr (Company Appeal (AT)(Ins) No. 1021 of 2019), Vinayaka Ex[ports & Anr versus M/s. Colorhome Developers Pvt Ltd (Company Appeal (AT)(Ins) No. 06 of 2019) wherein the Hon'ble NCLAT held that pendency of dispute or any civil-criminal proceedings is not a bar to admit the petition under Section 7 of the Code, 2016.*

6. Ld. Counsel for the respondent relied on the following judgments:
   a) *Pioneer Urban Land and Infrastructure Ltd & Anr versus Union of India & Ors (Writ Petition (Civil) No. 413 of 2019).*
   b) *Anil Kumar Tusiani v. Rakesh Kumar Gupta and anr. Company Appeal (AT) (Ins) No. 35 of 2019.*
   c) *Ankit Goyal v. Sunita Agrawal and anr. Company Appeal (AT) (Ins) No.1020 of 2019.*
   d) *Flat Buyers Association Winter Hills-77 Gurgaon v. Umand Realtech Pvt Ltc and ors. Company Appeal (AT) (Ins) No. 926 of 2019.*

7. We have heard Ld. Counsels for both the parties and perused the averments made in this petition, reply and rejoinder filed by the parties. The relevant documents annexed with the respective submissions have

been examined in detail. On the basis of the pleadings, the following points of determination have been answered:

I. **Whether the present petition is hopelessly time barred?**

II. **Whether the petitioners are entitled to maintain the present petition being homebuyers and meet the threshold limit of 100 of such allottees or 10% of the total number of such Allottees?**

III. **Whether there was any relation between M/s Cosmic Structures Ltd and the Corporate Debtor i.e. M/s Som Resorts Pvt. Ltd. and whether M/s. Cosmic Structures Ltd was entitled to receive the amount from the Petitioners on behalf of the Respondent Corporate Debtor to book the units in project 'Casa Italia'?**

IV. **Whether there was any default on the part of the Respondent Corporate Debtor in completion of the project 'Casa Italia' and in repayment of the amount to the Petitioners and whether on that basis corporate insolvency resolution proceedings can be initiated against this Corporate Debtor?**

V. **Relief (s).**

POINT NO. I

8. Before going into the merits of the present case, this Adjudicating Authority after considering the averments made by the Petitioner in Pt. 2 of Part IV of the Form-1 and upon perusing the records submitted by the Petitioners, had raised a query to the Ld. Counsel of the Petitioners about the claim being barred by the law of limitation.

9. As regards the claim being barred by the law of limitation, the Ld. Counsel for the petitioners submits that period of limitation for an Application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore three

years from the date when the 'Right to Apply' accrues i.e., failure to deliver the possession of the units booked in 'Casa Italia' project. Ld. Counsel for the Petitioner also submits that there is an acknowledgement of debt from the Corporate Debtor several times as evident from the Builder Buyer Agreement executed between the Petitioner(s) and the Corporate Debtor, Memorandum of Settlement dated 14.09.2018 and other communications. The Ld. Counsel for the petitioners further placed reliance on the **Suo Motu Writ Petition (Civil) No(s).3/2020 in Re: cognizance for extension of Limitation,** wherein the Hon'ble Supreme Court vide order dated 23.03.2020, has inter alia observed as under:

> *"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the Country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the Country in filing their Petitions/Applications/Suits/Appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).....*

10. With regard to the issue of the claim of the petitioners being barred by the law of limitation, we observe that the cause of action or default in the case of homebuyers arises only when the agreed/promised date of possession as per the builder buyer agreement has lapsed and till date the possession is not handed over. Given the fact that the default is for the date of possession only, the limitation for the said period does not end because the date of possession does not arrive, until and unless the project is completed and the possession is handed over to the homebuyers/petitioners, thereby, resulting in a continuing/ recurring

cause of action in the case before us. This settled proposition of law has been reiterated by the Hon'ble Supreme Court in the matter of **Samruddhi Co-operative Housing Society Ltd v. Mumbai Mahalaxmi Construction Private Limited (Civil Appeal No 4000 of 2019), decided on 11.01.2022** wherein it was held that:

> *"12. Section 22 of the Limitation Act 1963 provides for the computation of limitation in the case of a continuing breach of contract or tort. It provides that in case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. "*
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> ************
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> *"15. A **continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement**. Section 3 of the MOFA imposes certain general obligations on a promoter. These obligations inter alia include making disclosures on the nature of title to the land, encumbrances on the land, fixtures, fittings and amenities to be provided, **and to not grant possession of a flat** until a completion certificate is given by the local authority."*

11. We find that the present petition filed under Section 7 of the Code, 2016 qualifies the test of limitation since the possession of the units in the project *'Casa Italia'* are not handed over till date, which is in breach of the Builder Buyer Agreement and therefore, amounts to continuing default committed by the Corporate Debtor.

POINT NO. II

12. Now, we deal with the merits of the present case. In order to initiate the CIRP against a corporate debtor on an application filed by financial creditors who are allottees under Section 7 of the Code, 2016, it must primarily qualify the threshold limit of not less than 100 of such

allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less as envisaged under second proviso to the Section 7(1) of the Code. We are satisfied that in compliance of the said proviso, this instant petition has been jointly filed by 26 allottees out of total of 69 allottees i.e., more than 10% in the 'Casa Italia' project, which satisfies the criteria as provided in second proviso to the Section 7(1) of the Code, 2016.

POINT NO. III & IV

13. With regard to the Corporate Debtor's contention that the respondent vide agreement dated 10.10.2013, had given the marketing rights to M/s. Cosmic Structures Limited for a period of one year only, after careful reading of the said agreement and examining nature of relationship between the parties, we are of the view that the agreement dated 1010.2013 is purely an agency agreement, wherein M/s. Cosmic Structures Limited was acting as an agent of the Corporate Debtor.

14. In **National Textile Cooperation Ltd vs. Nareshkumar Badrikumar Jagad & Ors.(CIVIL APPEAL NO. 7448 of 2011), Hon'ble Supreme Court held that** *"the expression 'agency' is used to connote a relation that exists where one person has authority or capacity to create legal relation between the person occupying the position of principal and third party. In fact Section 182 of the Indian Contract Act, 1872, defines an agent as a person employed to do any act for another, or to represent*

others in dealings with third parties and the person for whom such act was done or who was so represented was so-called "the principal". An agent is merely an extended hand of the principal and cannot claim independent rights. From the above, it can be inferred that an agent can conduct the business of his principal according to the custom and business practices which prevail in the relevant industry."

15. At this juncture, it is advantageous to refer principle laid down in the case of ***Chairman, Life Insurance Corporation vs. Rajiv Kumar Bhasker*** reported in (2005)6 SCC 188 wherein the Hon'ble Supreme Court held that an agency can be created expressly or by necessary implications. Followings were laid down in paragraphs 26, 27 and 28:-

> *"26. The definition of 'agent' and 'principal' is clear. An agent would be a person employed to do any act for another, or to represent other in dealings with third parties and the person for whom such act is done or who is so represented is called the principal. It may not be obligatory on the part of the Corporation to engage an agent in terms of the provisions of the Act and the rules and regulations framed thereunder, but indisputably an agent can be appointed for other purposes. Once an agent is appointed, his authority may be express or implied in terms of Section 186 of the Contract Act.*
> *27. For creating a contract of agency, in view of Section 185 of the Indian Contract Act, even passing of the consideration is not necessary. The consideration, however, so far as the employers are concerned as evidenced by the Scheme, was to project their better image before the employees.*
> *28. It is well-settled that for the purpose of determining the legal nature of the relationship between the alleged principal and agent, the use of or omission of the word "agent" is not conclusive. If the employee had reason to believe that his employer was acting on behalf of the Corporation, a contract of agency may be inferred."*

16. The rule as to agency is expressed in maxim "qui facit per alium, facit per se". It is founded on a contract, express or implied, by which one of the parties confides to the other, the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and renders an account of it. Further, we are not convinced with the contention of the corporate debtor that the said agreement was for only one year as the corporate debtor failed to bring on record any publication wherein the corporate debtor had renounced its association with M/s. Cosmic Structures Limited.

17. With regard to Corporate Debtor's contention that the allotment agreements were entered into between the petitioners and M/s. Cosmic Structures Limited directly as well as the payments were made directly to M/s. Cosmic Structures Limited without the knowledge or intimation to the corporate debtor, and accordingly no debt whatsoever is due and payable by the respondent to the petitioner, we are of the view that the marketing agreement dated 10.10.2013 between the corporate debtor and M/s. Cosmic Structures Limited is a matter of internal affairs of the corporate debtor and the petitioners being outsider are not privy to the internal affairs of the corporate debtor and doctrine of indoor management applies herein, therefore, it is not open to the corporate debtor to take advantage of such irregularity at the cost of the petitioners.

18. In this connection, it would be advantageous to refer the case decided by **Hon'ble Calcutta High Court, Charnock Collieries Co. Ltd. v. Bholanath Dhar,** where the Hon'ble High Court held *"the lender has the right to presume that the managing agent was authorized or approved by the Board of Directors. When the lender advanced money to the firm, he was allowed to believe that the managing agent had received the permission of the Board of Directors for the borrowing of certain amounts."*

19. We are further of the view that whether M/s. Cosmic Structures Private Limited was sufficiently empowered to allot, sanction the units and receive the payments were all issues which were beyond the knowledge of the petitioners and the petitioners had no occasion to doubt the authority of M/s. Cosmic Structures Private Limited and therefore, the petitioners cannot be penalized, even if, it be the case of the corporate debtor that M/s. Cosmic Structures Private Limited did not carry authority to execute the builder buyer agreement or to receive the payments for the units allotted in 'Casa Italia' project.

20. We further find that the builder buyer agreements for units in the project 'Casa Italia' are executed between the Corporate Debtor i.e., M/s. Som Resorts Private Limited as *the developer* and the Petitioners as *the proposed space buyers,* and, therefore the very document establishes beyond doubt that the said units were allotted as well as payments were received with the consent/knowledge of the corporate debtor. We therefore find no force in the corporate debtor's contention.

21. We find that one Mr. Sandeep Pahwa having DIN:06499522 is holding directorship in M/s. Som Resorts Private Limited as well as in M/s. Cosmic Structures Limited and on lifting the 'corporate veil' of M/s. Som Resorts Private Limited, we find that M/s. Cosmic Structures Limited and M/s. Som Resorts Private Limited are being managed either directly or indirectly by the same person namely Mr. Sandeep Pahwa.

22. The principle of lifting the 'corporate veil' is an exception to the distinct corporate personality of a company or its members and is well recognized not only to unravel tax evasion but also where protection of public interest is of paramount importance and the corporate entity makes an attempt to evade legal obligations, than, lifting of veil is necessary to prevent the corporate entities to misuse the principle of distinct corporate personality. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.

23. The doctrine of lifting the corporate veil can be invoked, if the public interest so requires or if there is allegation of violation of law by using the device of a corporate entity. In the present case, the corporate debtor (M/s. Som Resorts Private Limited) has used another corporate entity M/s. Cosmic Structures Limited to enter into builder buyer agreements

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and collect the money from the petitioners with an ulterior motive to conceal the real transaction. Moreover, while discerning true nature of the entire transaction, we have not to merely see that payment has been made to M/s. Cosmic Structures Limited, but also the substance that payments for the units booked in project 'Casa Italia' are towards the Builder Buyer Agreements which are duly executed between the homebuyer and corporate debtor as the developer. It would not be fair to the petitioners/homebuyers, if the corporate debtor indirectly achieved its agenda i.e., defrauding homebuyers in the disguise of separate legal entity by concealing the real nature of the transaction, what could not be achieved directly.

24. Consequently, having regard to the Code being a beneficial piece of legislation, we are inclined in favour of the hapless homebuyers and lift the 'Corporate Veil' of M/s. Som Rseorts Private Limited to look into the real nature of transactions, so that any such maneuvering by M/s. Som Resorts Private Limited (corporate debtor) and M/s. Cosmic Structures Limited does not succeed.

25. Hence, on the basis of facts before us, we come to the conclusion, that M/s. Cosmic Structures Limited was indirectly controlled by the same directors, who are controlling the management of the corporate debtor and ultimate beneficiary of the impugned transaction is the respondent corporate debtor i.e., M/s. Som Resorts Private Limited herein.

26. At this juncture, we find it relevant to refer **Pioneer Urban Land and Infrastructure Ltd & Anr versus Union of India & Ors (Writ Petition (Civil) No. 413 of 2019),** wherein the Hon'ble Supreme Court held that:-

> *Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, 111 when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where 112 customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving "exchange", i.e.*

advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project

27. Further, on perusal of the Clause 1 of MOS dated 14.09.2018, we find that the corporate debtor had duly acknowledged the payments made by the petitioners to M/s. Cosmic Structures Limited towards the units booked in project 'Casa Italia'. The relevant extract of Clause 1 of the MoS dated 14.09.2018 is reproduced herein verbatim:-

> *"1.That all the payments made by the 31 members ofthe Second Party to CSL shall be adjusted to the First Party towards the sale consideration for the booked spaces by the 31 members in the project called Casa Italia at ML-l, Sector - 9, Vasundhara, Ghaziabad, U.P. It is agreed between the First Party, Second party and Confirming Party that whatever amounts have been paid by the 31 members of the Second Party for booking/allotment of spaces in the project of Casa Italia, and any amount invested in any project of Cosmic by the members of the second party subsequently transferred to Casa Italia Project by the confirming party, paid either to CSL or the First Party, shall be adjusted by the First Party in the total sale consideration of the booked spaces by the said members."*

POINT NO. V – (CONCLUSION)

28. We accordingly observe that the citations *Anil Kumar Tusiani v. Rakesh Kumar Gupta and anr. Company Appeal (AT) (Ins) No. 35 of 2019, Ankit Goyal v. Sunita Agrawal and anr. Company Appeal (AT) (Ins) No.1020 of 2019 and Flat Buyers Association Winter Hills-77 Gurgaon v. Umand Realtech Pvt Ltc and ors. Company Appeal (AT) (Ins) No. 926 of 2019* referred on behalf of respondent are not helpful and we come to the conclusion that M/s. Cosmic Structures Limited was not only working as an agent of the corporate debtor, but was directly or indirectly managed

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by the respondent corporate debtor and ultimately the beneficiary was the corporate debtor, who not only failed to complete the project 'Casa Italia' within the due period of time stipulated in the Builder Buyer Agreement/ MoS dated 14.09.2018, but also failed to return the amount paid by the petitioners.

29. In view of the aforesaid discussion and proposition of law settled by the Hon'ble Supreme Court in **Pioneer Urban Land & Infrastructure Ltd.** (Supra), we are fully satisfied that the petitioners are genuine home buyers and are genuinely interested in taking the possession of the units in project 'Casa Italia', therefore the alleged principal amount of Rs.6,60,18,065/- paid to the Corporate Debtor/M/s. Cosmic Structures Limited is a financial debt which is in default and the petitioners are genuine allottees/financial creditors.

30. We find that the instant petition is filed in the proforma prescribed under Section 7 of the Code, 2016 read with Rule 4(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and is complete. We are satisfied that there is a debt of more than Rs.1 crore i.e., above the threshold limit as envisaged under Section 4 of the Code, 2016 and the same is in default.

31. In light of the reasons stated above, after giving careful consideration to the entire matter, hearing the arguments of both the parties and upon appreciation of the documents placed on record to substantiate the claim and averments, ***we hereby admit the instant petition***

(C.P.(IB)/67(ND)/2022) and accordingly Corporate Insolvency Resolution Process against the M/s. Som Resorts Private Limited ('Corporate Debtor') is initiated.

32. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Sumit Shukla, for appointment as Interim Resolution Professional having registration number IBBI/IPA-003/IP-N00064/2017- 2018/10550 having office at C-401, Ithum, Plot No. 40, Sector 52, Noida with email - id. Sumit_shukla@rediffmail.com. Mr. Sumit Shukla has agreed to accept the appointment as the interim resolution professional and has signed the communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Sumit Shukla as per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

33. Mr. Sumit Shukla, having registration number IBBI/IPA-003/IP-N00064/2017- 2018/10550 having email id: sumit_shukla@rediffmail.com is appointed as an Interim Resolution Professional for corporate debtor.

34. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

35. We direct the applicants financial creditor to deposit a sum of Rs. 2 Lakhs with the Interim Resolution Professional namely Mr. Sumit Shukla 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 Financial Creditors. The said amount however is subject to adjustment towards Resolution Process cost as per applicable rules.

36. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> "(a)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;
> (b)Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
> (c)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;
(d)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)The IB Code 2016 also prohibits *Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period."*

37. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

38. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.

39. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing a appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

40. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.

Sd-

(DR.BINOD KUMAR SINHA)
MEMBER (T)

Sd-

(DHARMINDER SINGH)
MEMBER (J)