

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKTA BENCH,
KOLKATA**

C.P (IB) No.1372 /KB/2020

In the matter of

An application 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.

And

In the matter of:

Sarthak Park Consumer Welfare Society, having its registered office at Plot No. 708, Gope Mohalla, Chira Chas, Bokaro-827015, Jharkhand.

... Financial Creditor

Versus

In the matter of:

M/s Shyama Bhagwati Infrastructure Pvt. Ltd. having its registered office at HE-6, City Centre, Sector-IV, Bokaro Steel City, Jharkhand-827004.

...Corporate Debtor

Date of hearing : 29/04/2022

Order Pronounced on : 12/07 /2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Murari Kumar , Adv.] For Financial Creditor

1. Mr. Amritam Mandal, Adv.] For the Corporate Debtor
2. Ms. Shipra Naskar, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition 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 has been filed by **Sarthak Park Consumer Welfare Society**, through its Member/ Authorized Signatory Mr. Kameshwar Prasad Yadav (hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **M/s Shyama Bhagwati Infrastructure Pvt. Ltd.**, having its registered office at HE-6, City Centre, Sector-IV, Bokaro Steel City, Jharkhand-827004 (hereinafter referred to as the Corporate Debtor).
3. It is submitted that the Corporate Debtor is a Private Limited Company incorporated under the provisions of the Companies Act, 1956. It is further submitted that Corporate Debtor is engaged in the business of housing construction for sale of flats and other allied services in Bihar and all major cities of India. It is submitted that in the year 2012, the Corporate Debtor came up with a Group Housing Multi Storied Residential Project in the name of "SARTHAK PARK" at plot no. 708, Khata No.185 admeasuring total area 43 decimal within Mouza Chas, Thana No. 30, District-Bokaro.
4. It is submitted that in the year 2015, the development agreement was executed between the land owners of the property i.e. Lalmati Devi and Sheo Balak Prasad and Shyama Bhagwati Infrastructure Pvt. Ltd. through its Director Prabhash Chandra (Developer), wherein it was agreed between the parties that all-together 50 flats will be developed on the property out of which 15 flats will be handed to the owner's personal use and the rest 35 flats will belong to the developer which will further be sold to individuals for residential purpose. Further, the developer promised to complete the said Multi Storied residential property within 30 months with further extension of 6 months

from the registration of the development agreement i.e.11.04.2015. Copy of the Development Agreement executed between Respondent No.1 and the land owners i.e. Lalmati Devi and Sheo Balak Prasad is annexed as Annexure-FC-3.

5. It is submitted that the Corporate Debtor made numerous representations through Newspaper advertisements publishing brochures, site maps; and also through property agents for sale of units for the said housing project. The Corporate Debtor made extensive promises of developing a township with the High Class Facilities with respect to quality of construction and provisions of various utility services to be part of said project.

6. It is submitted that on believing the said assurances, the Corporate Debtor through its director entered into Agreement for purchase of residential flat with numerous allottees /applicants on different dates. Clause 16 of the said Agreement for purchase as executed between Corporate Debtor and various buyers described the clauses w.r.t. Possession. The Corporate Debtor at the time of executing the Agreement for purchase, represented to the allottees that the building plans towards the said housing project have been duly sanctioned and accepted by the competent authority and they have all the authority and sanction for developing the Housing Project.

7. It is submitted that as per Clause 23 of the Agreement for purchase of Flat with Builder, it has been unequivocally stated that the buyer/purchaser shall be entitled for the registration of the flat only after the payment of 10% of the sale consideration of the flat. It is pertinent to mention that all the buyers have paid an amount ranging from 10% to 60% of the consideration amount of the flat but till today not a single flat has been registered by the Corporate Debtor.

8. It is submitted that the Allottees/Applicants have booked the respective flats in terms of payment schedule attached with Agreement for purchase

respectively. It is submitted that all the allottees in the present complaint have paid an amount ranging from 10% to 60% for the sale consideration, respectively till now towards the sale of the Flat/Units in the said Housing Project.

9. It is submitted that the Corporate Debtor developed the aforesaid project and completed approx. 60 to 65% of the project which can be verified from the photographs of the various towers of the project. However, in November, 2016 disputes arose between both the directors of the Company related to the project and the project was stopped abruptly.

10. It is submitted that the dispute between the Directors lingered on to such extent that one of the Directors namely Rakesh Srivastava asked the IDBI bank to “Block” & “Stop” the current account no. 0185102000004046 of M/s Shyama Bhagwati Infrastructures Pvt. Ltd. The IDBI bank vide letter dated 12.01.2017 froze the current account of M/s Shyama Bhagwati Infrastructure Pvt. Ltd.

11. It is submitted that vide various letters including of dated 01.02.2017, Prabhash Chandra, one of the Director of the Corporate Debtor informed to the buyers of the project that due to the prevailing dispute between the directors of the Corporate Debtor, the Bank account of the Corporate Debtor has been frozen by Rakesh Shrivastava, the other director of the company and therefore, in these adverse condition of the company, no further development in the construction of the multi storied apartment project can be carried out, so as to safeguard the buyer’s investment.

12. It is submitted that as per the Agreement for purchase of flat with the builder, possession was to be delivered to the allottees/applicant within 36 months from start of the construction at site i.e. in the year January, 2016. That the said period of 36 months got over on January, 2019 but the

Corporate Debtor nevertheless failed to deliver the possession of the said units in the housing project leading to severe financial crisis as well as mental harassment to the Financial Creditor.

13. It is submitted that after the receipt of the aforesaid letter dated 01.02.2017 from Respondent No.1, the land owners along with other buyers /allottees wrote various letters to the Board of Director of the Corporate Debtor to enquire about the status of the construction of the multi-storied housing project and how long will the construction work take due to the internal dispute of management. The buyers/allottees further stated that if the possession of the Sarthak Park would not be handed over till January, 2019, then all the flat buyers would be compelled to form consumer welfare society for Sarthak Park Project in order to safeguard the prevailing interest of the buyers/allottees.

14. It is further submitted that the Corporate Debtor through its Director Prabhash Chandra replied to the aforesaid letter of the buyers apologizing for not keeping up to date with construction link plan as per Agreement for purchase and further stated that if the "Sarthak Park" Project is not handed till January,2019, the Corporate Debtor will hand over the project to the Consumer Welfare Society if formed by the members.

15. That it is submitted that the they got shocked and flabbergasted to see the public notice dated 11.06.2018 wherein the Registrar of Companies vide public Notice through Form No.STK-5 dated 01.06.2018 proposed to remove/ strike off the names of the Corporate Debtor because of non- operational of business for a period of two immediately preceding financial years.

16. It is submitted that the Registrar of Companies vide Pubic Notice through Form No. STK-7 dated 11.09.2018 published notice that pursuant to sub-section (5) of Section 248 of the Companies Act, 2013, the Corporate

Debtor's name has been struck off from the register of the Companies and the Corporate Debtor stood dissolved. However, it is apposite to mention that the present application is maintainable even if the Company has been struck off in terms of the landmark judgment passed in the matter titled as “ **Hemang Phophalia vs The Greater Bombay Co-operative Bank Limited and Anr.**”, wherein the Hon'ble NCLAT has held that “the Adjudicating Authority which is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of Corporate Insolvency Resolution Process' under sections 7 and 9 of the I & B Code based on the application, if filed by the 'Creditor' (Financial Creditor or Operational Creditor) or workman within twenty years from the date the name of the Company is struck off under sub-section(5) of Section 248.

17. It is submitted that the Corporate Debtor with mala fide intention stopped the working of the project “Sarthak Park”. It is further submitted that there is no work of construction that is going on at the site for more than past two years. The applicant contacted the Corporate Debtor various times to enquire about the handing over of the possession of the flats or to return their money back but the Corporate Debtor did not pay any heed to the request of the Buyers/allottees. The Corporate Debtor did not function well due to their internal disputes and stopped the construction of the said project abruptly.

18. It is submitted that the recent photographs of the project show that no work activity is going on at the project site since for last more than 2 years. The Corporate Debtor has abandoned the Housing project and no one is there at the project site to respond. The Financial Creditor suffered huge loss of interest and mental agony as neither they are able to utilize their hard earned money nor the property in question was timely handed over to them. There is no probability that the flats would be handed over to the Financial Creditor in the near future.

19. It is submitted that due to the delay in handing over the project, all the

residential members of Sarthak Park Project consented to form a society in the name of “Sarthak Park Consumer Welfare Society” with the primary objective to develop the land of the society and complete the pending construction of the building, flats and other amenities and further to promote and support resident engagement in the management, maintenance and development of their homes.

20. It is submitted that legal notice dated 16.12.2019 was sent to the Corporate Debtor with a request to deliver encumbrance free possession. However, the Corporate Debtor has till date not paid any heed towards the issues raised by the Financial Creditor and possession of the units at the said housing project is still awaited. (Annexure-FC-13).

21. It is submitted that the act and conduct of the Corporate Debtor were always mala fides and the Corporate Debtor has deliberately made the buyers/ allottees to suffer due to undue delay in handing over the possession of flats/ apartments with the mala fide intention. Therefore, the Corporate Debtor has intention to cheat the Financial Creditor since the inception of their booking of the flats and due to which the Financial Creditor has suffered huge loss, damages, great mental pain, agony and the pecuniary losses etc.

22. It is submitted that the total amount of principal debt is Rs.1,33,49,419/-and interest of Rs. 1,14,34,373/- which totals up to Rs. 2,47,83,792/-

23. **In reply to the petition**, the Corporate Debtor filed an affidavit of Rakesh Ranjan Srivastava, one of the Directors of the Corporate Debtor. It is submitted that in the year 2010, one Mr. Prabhash Chandra the other Director of the Corporate Debtor had approached him to invest funds into real estate business and after much persuasion of Mr. Prabhash Chandra, Corporate Debtor agreed to invest substantial amount into the business of

Real Estate and both of them decided to incorporate a company for pursuing such real estate business and ultimately M/s Shyama Bhagwati Infrastructure Private Limited was incorporated on the 8th day of July, 2011 before the Registrar of Companies, Bihar and Jharkhand. Mr. Prabhash Chandra, with a planful misrepresentation and false assurance persuaded him to form a company with him as the other co-director.

24. It is submitted that Corporate debtor after its incorporation entered into a development project at Gope Nagar, Chira, Chas, Bokaro, Jharkhand on the piece and parcel of land having total area of about 43 decimals bearing plot no. 704 and 708 under Khata No. 185 within revenue thana no. 30 by virtue of agreement executed on 30.07.2011 and 20.02.2012 and the project of development of a multi storyed building complex thereon in the name and style of "Sarthak Park" after sanction of the map vide file no. BD 139/ 2020 on 16.01.2013.

25. It is submitted that initially, after the business had started and the residential project gained its pace, from time to time, Corporate Debtor invested a sum of Rs.2,12,30,000/- from the year 2011 to 2016 on several occasions and as per the demand and request of the other Director namely Mr. Prabhash Chandra, upon his persuasion. During the course of business an amount of Rs. 65,00,000/- was returned to him thereby, an amount of Rs. 1,47,30,000/- is stated to be still outstanding and payable by the other director namely Mr. Prabhash Chandra to me. The development project continued only with such loan and/or investment which was agreed between them to be refunded to with interest from the income of the project.

26. It is submitted that upon mutual discussion and arrangements between the two directors, the Corporate Debtor was incorporated under the provisions of the Companies Act, 1956, having its registered office at HE-6, City Centre Sector-4, Bokaro Steel City, Jharkhand for starting a Group

housing multi storied residential project in the name of “Sarthak Park” at plot no. 708, Khata No. 185 admeasuring total area of 43 decimal with Mouja Chas, Thana No. 30, District-Bokaro in the name and style of M/s Shyama Bhagwati Infrastructure Private Limited in which both the directors had equal 5000 shares of the company.

27. It is submitted by the director swearing the affidavit that since he was out of station and could not manage the day to day affairs of the Corporate Debtor, he provided substantial funds to the project as and when requested by the other director namely Mr. Prabhash Chandra, upon mutual trust and good faith. That by the passage of time, it became clear that the other director namely Mr. Prabhash Chandra, started to hover greedy eyes on the funds of the corporate debtor and raising untenable pretext and malafide intention to evaded giving proper accounts of the project and taking undue advantage of being a local resident, Mr. Prabhash Chandra, without his assent and knowledge started raising advances from the proposed purchasers of the flats under construction and arbitrarily manipulating the accounts of the corporate debtor.

28. It is submitted that mala fide intention of the other director namely Prabhash Chandra on several occasions requested for providing and /or handling over with the copy of the proper account and audits of the Corporate Debtor but with one pretext or the other Mr. Prabhash Chandra, with mala fide intention did not provide the proper accounts and audits of the corporate debtor to him and after much persuasion on or about 20th August, 2016, he sent him the valuation report for the site.

29. It is submitted by the Ld. Counsel for the Corporate Debtor that upon perusing of such valuation report, it became palpably clear that taking the advantage of the dormant position of the other director, Mr. Prabhash Chandra, siphoned off funds from the project to his own pocket for his

personal gains by manipulating the accounts and the audit reports for which I was constrained to request the branch manager of the IDBI Bank Limited, Ranchi to provide the bank statements of the current account of the corporate debtor from 07.09.2011 till the date of the letter i.e. 23.10.2016 and in pursuance to such request was made by Srivastava branch manager vide an email dated 29th October and 31st October, 2016 has forwarded the bank statements for the period 07.09.2011 till 10.10.2016, whereas the bank statements shows that an amount of Rs. 30,20,000/- was transferred by the other director to his own proprietorship firm namely Gigat Co. and another sum of Rs.4,93,000/- was transferred by him in to his own personal account as well as his wife's account.

30. It is submitted that by that time disputes and differences cropped in between the Directors as Mr. Srivastava was not getting any proper accounts and audit reports and could easily sense the malfunctioning and/or mismanagement by the other Director namely Mr. Prabhash Chandra, and upon confrontation, it was mutually decided that the project would be handed over to another development company namely Yuvi Heights Infrastructure.

31. It is submitted that to hide the mismanagement and malfunctioning of the affairs of the company and to distract the position the other Director Mr. Prabhash Chandra, by letter 14.11.2016 and 15.11.2016 wrongly and/or fraudulently made allegations against him of not showing the interest in day to day affairs of the operation of the Corporate Debtor and unilaterally scheduled meeting of Board of Directors without taking prior approval and consent from him. It is pertinent to mention that before incorporation of the corporate debtor itself, it was mutually decided and agreed upon that as the answering director was out stationed in Nagpur and could not look after the day to day affairs of the Corporate Debtor, Mr. Srivastava would arrange for the necessary funds for running of the projects and the other director namely Mr. Prabhash Chandra, being the local person of Bokaro would look after the day to day affairs of the business.

32. It is submitted that vide letter dated 28th December, 2016 written to the other Director namely Mr. Prabhash Chandra, Mr. Srivastava vehemently denied and disputed all his allegations by stating true facts and called upon him to render true accounts of the corporate debtor with all books of accounts containing cash books, bank books journals, invoices, bills, vouchers etc., the forms submitted to the Registrar of Companies, income tax returns, and audited reports since its inception with copies forwarded to Registrar of Companies and various other authorities.

33. It is submitted that on several occasions and vide several emails and representations, Mr. Srivastava had requested the other director namely Prabhash Chandra to provide all the books of accounts, ledgers bills and vouchers for the financial year 2014-15, 2015-16, but such accounts were never provided to Mr. Srivastava in spite of several reminders and requests.

34. It is submitted that till May, 2018 the other Director Prabhash Chandra evaded from providing with the complete accounts, ledgers, bills and vouchers for the financial year 2015-16, 2016-17, 2017-18 and also did not provide with the complete details of the flats booked along with customer name and contact number as well as the project sanctioned letter for loan from LIC housing finance corporation.

35. It is submitted that due to non-filing of the statutory compliances for the deliberate and mala fide inaction on the part of the other director Prabhash Chandra, a notice dated 19.05.2018 was received from the office of the Registrar of Companies, Jharkhand for removal of the name of companies from the Registrar of Companies.

36. It is submitted that vide letter dated 27th May, 2018, Srivastava has duly replied to the false and frivolous allegation as raised by the other director

Prabhashh Chandra and made it clear that the Board meeting will remain suspended till the records and documents are provided to him as per his requisition in several earlier representation.

37. **During the course of arguments, Ld. Counsel for the Financial Creditor** submitted that this petition has been preferred jointly by more than 10% of the total number of such 37 residential allottees, who have been allotted residential flats vide agreement for purchase of flat with builder under the same real estate project “Sarthak Park” as all the Members have given consent for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor. It is submitted that this application is maintainable and valid even if the Corporate Debtor Corporate Debtor has been struck off, in terms of landmark judgment passed by Hon’ble NCLAT in the matter titled as **“ Hemang Phophalia vs. The Greater Bombay Cooperative Bank Limited and Anr. And “Elektrans Shipping Pvt. Ltd. Vs. Pierre D’ Silva & Anr.”** wherein it was held that in view of the provisions of Section 250(3) read with Section 248(7) & (8), an application under section 7 and 9 will be maintainable against the Corporate Debtor even if the name of the Corporate Debtor has been struck off , as the liability of every director, manager or any other officer who was exercising any power of management shall continue and may be enforced as if the company had not been dissolved.

38. Ld. Counsel for the Financial Creditor further submitted that the Corporate Debtor consisted of two directors/partners who entered into a development agreement on 11.04.2015 with the landowners to develop a housing project consisting of 50 flats in the name of “Sarthak Park”. It was represented by the Corporate Debtor that the said project would be handed over with actual possession to its allottees within January, 2019 as per the said agreement. The Corporate Debtor, however failed in completing the project, which was disrupted after developing 60 to 65% of the construction due to sudden internal conflict between the directors of the Corporate Debtor. It was informed by one of the Directors namely Prabhash Chandra vide

intimation notice dated 01.02.2017 to all the allottees (applicants) herein. All the allottees / applicants raised queries regarding the status of construction through letters but no response was given by the Corporate Debtor.

39. It is submitted that the applicants have made the investment in this project from their own hard earned money. It is submitted that the Registrar of Companies vide public notice dated 01/06/2018 & 11/09/2018 struck off the names of the Corporate Debtor from the register due to the reason that the company was not functioning up to mark for the two financial years and the Corporate Debtor has failed to fulfil its obligations whereby the applicants/ allottees have suffered in huge loss, damages, great mental tension and pecuniary losses. It is submitted that due to the delay in handing over the project. The allottees of the project decided to form a society vide Memorandum of Association in the name of Sarthak Park Consumer Welfare Society and notified the Corporate Debtor vide letter dated 16.12.2019 to deliver the possession but there was no response. It is submitted that the Corporate Debtor has neglected to provide any probable or satisfactory solution to the applicants. The applicants, therefore, filed the present petition to initiate CIRP in respect of the Corporate Debtor. In reply to the petition, the Corporate Debtor allegedly claimed for non-payment of sale consideration which is uncertain and an absurd ground. The Corporate Debtor has twisted the material facts with mala fide intention. It is submitted that the Corporate Debtor has intentions to cheat the applicants from the very beginning due to which the applicants have suffered losses, damage etc.

40. **Ld. Counsel for the Corporate Debtor, however** submitted that one of the Directors of the Company. Mr. Prabhash Chandra had approached the other director namely Rakesh Ranjan Srivastav to invest funds into real estate business and ultimately M/s Shayma Bhagwati Infrastructure Private Limited was incorporated on 8th July,2011 before the Registrar of Companies, Bihar and Jharkhand.

41. It is submitted that Mr. Prabhash Chandra with a planful

misrepresentation and false assurance persuaded the other director Mr. Srivastava to form company with him as the other co-director. It is submitted that Mr. Srivastava has his other business and residence at Nagpur, Maharashtra and was not in a position to look after day to day affairs of the Corporate Debtor and it was mutually decided that Mr. Prabhash Chandra would look after the day to day affairs of the business, maintain the accounts and look after the project works. It was decided that Mr. Srivastava would mainly invest funds to carry out such project. It is submitted that Mr. Srivastava was only a sleeping director and Mr. Prabhash Chandra would act as an active director and would look after the affairs of the Corporate Debtor and shall remain responsible for the day to day transactions of business.

42. It is further submitted that the Corporate Debtor after its incorporation entered into a development project at Gope Nagar, Chira, Bokaro, Jharkhand on the piece and parcel of land having total area of about 53 decimals bearing plot no. 704 and 708 under Khata No. 185 within revenue thana no. 30 by virtue of agreement executed on 30.07.2011 and 20.02.2012 and the project of development of a multi storied building complex thereon in the name and style of " Sarthak Park" after sanction of the map vide file no.BD 139/2020 on 16.01.2013.

43. It is submitted that initially after the business had started and the residential project gained its pace, from time to time Mr. Shrivastav had invested a sum of Rs.2,12,30,000/- from the year, 2011 to 2016 on several occasions and as per the demand and requests of the other Director namely Mr. Prabhash Chandra upon his persuasion. During the course of business an amount of Rs.65,00,000/- were returned to Mr. Shrivastav thereby, an amount of Rs.1,47,30,000/- is still outstanding and payable by the other director namely Prabhash Chandra to Mr. Shrivastav. The development project continued only with such loan and/or investment which was agreed between the two directors to be refunded to with interest from the income of the project.

44. It is submitted that as Mr. Srivastava was out stationed and could not manage the day to day affairs of the corporate debtor, and he provided substantial funds to the project as and when requested by the other director namely Mr. Prabhash Chandra, upon mutual trust and good faith.

45. It is submitted that within a year, i.e. by the end of 2015 it become slowly and apparently clear to Mr. Srivastava that Mr. Prabhash Chandra being the other director of the Corporate Debtor was siphoning off the funds as being invested by him by manipulating the books of accounts and not providing the audits of the Corporate Debtor with him.

46. It is submitted that from the Bank statement it revealed that Mr. Prabhash Chandra transferred Rs.30,20,000/- to his personal proprietorship firm namely Gigat Co. and a sum of Rs. 4,93,000/- to his wife's account.

47. It is submitted that by a letter dated 28th December, 2016 Mr. Srivastava called upon Mr. Prabhash Chandra to render true accounts of the Corporate Debtor with all books of accounts containing cash books, bank books journals, invoices, bills, vouchers etc., the forms submitted to the Registrar of Companies, income tax returns, and audited reports since its inception with copies forwarded to Registrar of Companies and various other authorities.

48. It is submitted that seeing no other alternative to stop the other Director Prabhash Chandra from siphoning off the funds of the project, Mr. Srivastava vide a mail dated 29th December, 2016 requested the IDBI bank to block the current account of the corporate debtor and on the basis of his request, the bank authorities froze the account.

49. It is submitted that as the affairs of the Corporate Debtor are in

disputed state and no functions are being carried on vide a mail dated 1st January, 2017 a notice was sent to the Registrar of Companies and other authorities with a copy marked with the other Director Prabhash Chandra for completing the statutory compliances of the Corporate Debtor with the respective authorities.

50. It is submitted that on several occasions Mr. Srivastava has requested the other director namely Prabhash Chandra to provide all the books of accounts, ledgers bills and vouchers for the financial year 2014-15, 2015-16, 2016-17 but such accounts were never provided to him in spite of several reminders and request.

51. It is submitted that the other Director Prabhash Chandra not only provided with the accounts for the past financial years but also did not provide with the copy of the project approval for loan from LIC Housing Finance Corporation, list of all customers with contact number, KYC details of all customers, details of the flat booked till then, copy of booking form of all the customers and the date of completion of job phase wise. Letters dated 2nd March, 2017, 4th March, 2017, 29th March, 2017 and 15th April, 2017 is annexed as R-12 of the Affidavit -in-Reply.

52. It is submitted that in the meantime, due to non-filing of the statutory compliances for the deliberate and mala fide inaction on the part of the other director Prabhash Chandra, a notice dated 19th May, 2018 was received from the office of the Registrar of Jharkhand for removal of the name from the register of companies.

53. Ld. Counsel for the Corporate Debtor has submitted that there was nexus between the Director Mr. Prabhash Chandra and the applicants in this petition and the present petition is a sham petition and barred by limitation.

54. It is submitted that self-contradictory statements have been made in paragraph 3 and 5 of the petition, whereas in paragraph 3, it was stated that the developer had avowed to complete the said multi-storied residential property within 30 months with further extension of 6 months from the registration of the development agreement i.e. 11.04.2015 and the period of 36 months expires on 10.04.2018 and on the contrary at paragraph 5, it was stated that the builders shall give possession of the flat to the flat purchasers on or before January, 2019.

55. Ld. Counsel further submitted that Clause 23 of the agreement for sale is absurd and detrimental to the interest of the Company. It is absolutely absurd proposition that without paying the entire consideration amount of the respective flats, proposed buyers shall be entitled for registration of the flat only after the payment of 10% of the sale consideration of the flat which would itself show that the agreements are all sham documents prepared at the instance of the other Director namely Prabhash Chandra in connivance with the applicants and the said clause itself is opposed to public policy and contradiction to the statute and laws of the land.

56. It is submitted that purported letter dated 1st February, 2017 was never issued to any of the applicants and even if for the sake of arguments, it is admitted that such purported notice was issued, it was issued unilaterally and arbitrarily by the other Director Prabhash Chandra behind the back of Mr. Srivastava, in a most illegal and unlawful manner and it palpably shows the nexus and connivance between the Director Prabhash Chandra and the applicants in the present case.

57. It is submitted that no legal notice (Annexure FC/13) was ever received by Mr. Srivastava at any point of time and all the notices were issued with common object and intention to take over the project work from the Corporate Debtor and to proceed with the construction work by the other Director

Prabhash Chandra. It is submitted that the issuance of legal notice toward save the limitation as it does not amount to acknowledgement of the debt on the part of the Corporate Debtor. Most of the individual claims of the applicants jointly and severally are time barred by law of limitation, even before the issuance of notice dated 11th September, 2018 and thereafter on 16th December, 2019 as pleaded in the application.

58. Ld. Counsel for the Corporate Debtor has submitted various instances where the claims of the applicants are barred by limitation which according to the Ld. Counsel or part of the record.

59. **It is submitted that another** glaring fact to be noted is that most of the cheques as issued by the applicants individually are issued mostly in the year 2013 and 2014 and few of them have been issued in the year 2015 and 2016, and most of the cash payments without cash receipts have been issued after the purported date of arising of the cause of action as pleaded in paragraph 23 to save the limitation purposefully and deliberately. It is also required to be noted that after operation of the bank account was freezed, the corporate debtor has not received any payment from any proposed buyer, which shows the mala fide intention of the other director namely Prabhash Chandra.

60. It is submitted that this is to be noted that when Mr. Srivastava stopped funding the project & Prabhash Chandra failed to get more money from the other director, he started applying all types of illegal pressure, then the other director adopted another way by conspiring to usurp and grab the entire property and all money (Rs.1,47,30,000/-), invested by the answering director in this project. Prabhash Chandra prepared all these notices by himself on behalf of the customers (each and every line and sentences, the entire matter are exactly the same). All planning has been done in association with the customers. The society has also been formed on the direction of Prabhash Chandra to fulfill all his mala fide intentions. Through his wife, own

brother & Own Sister-in-law, Relatives & Close Friends, Prabhash Chandra is very much there in the society as a conspirator behind the curtain and handling the thing in his own way. The entire scenario has been plotted under conspiracy to make “ Shyama Bhagawati Infrastructures Pvt. Ltd.” insolvent & which will be no more in existence along with One Director. As a result no fingers or questions will be raised on conspirator Prabhash Chandra for handling funds and manipulating accounts of the company arbitrarily and there will be no question of returning of Rs.1,47,30,000/-, the investment of the answering director. When Company’s Bank Account was Operative from 07.09.2011 to 28.12.2016, then Prabhash Chandra has collected cash of approx. 76 Lakhs from the customers & no amount either in cash or by cheque has been paid by any customer after 28.12.2016. Construction at site was stopped from April, 2016, even then Prabhash Chandra went on collecting cash from the customers and never discussed/informed about the cash collection to the answering director.

61. In the light of the recent judgment passed by the **Hon’ble Supreme Court on 14th August, 2020 in Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt. Ltd.**, the individual claims of the applicant in the instant application are well barred by the law of limitation and cannot be extended in view of the reference to the principal of acknowledgement as purportedly claimed in the instant application.

62. It is submitted that the Hon’ble Apex Court on various occasions has held, in the recent judgment in Civil Appeal No. 2842 of 2020 and Civil Appeal No. 3063 of 2020 in **Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors.** passed on 1st February, 2021 as passed by the Constitutional Bench of the Hon’ble Apex Court, which states that the collusive or sham transactions with the Corporate Debtor will not amount to financial debt within the meaning of the IBC, 2016. It was held that the IBC recognizes that, for success of an insolvency regime, the real nature of the transaction has to unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of rights of its legitimate

creditors.

63. It is submitted that a transaction which is sham and collusive would only create an illusion that money has been disbursed to a borrower with an object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different and /or ulterior motive. In other words, the real agreement between the parties is something other than advancing a financial debt.

64. Since the commercial arrangements between the applicants herein and one of the Directors of the Corporate Debtor namely Prabhash Chandra behind the back of the other director was collusive in nature, it would not constitute a financial debt.

65. After hearing Ld. Counsel for the parties, we find that this petition is not maintainable because all these applicants who are stated to have booked their flats and deposited the amount with the Corporate Debtor have joined hands and made an association to file this application because individual applicants could not have filed any such application but since the claim of most of the applicants had become time barred, and since some of them are related to one of the Directors of the Corporate Debtor namely Prabhash Chandra, a letter was issued by that Director to bring all their claims within limitation. Letter dated 28th May, 2018, written by the said Director to all the applicants specifically referring to the agreement dated 17th July 2015 being agreement for purchase of flat with the builder. Clause 8 of the said agreement, however, specifically provided the amount of consideration to be paid by the applicants who booked their flats as under:-

“ That, the Flat Purchaser will pay to builder rest of the amount of consideration amount of flat sale excluding the initial payment amount and booking amount in the following manner:-

- (i) 10 percent at the time of foundation.
- (ii) 10 percent at the time of tie beam.
- (iii) 10 percent at the time of First roof casting
- (iv) 10 percent at the time of Second roof casting

- (v) 10 percent at the time of Third roof casting
- (vi) 10 percent at the time of Fourth roof casting
- (vii) 10 percent at the time of Fifth roof casting
- (viii) 10 percent at the time of brick work” .

66. It is surprising to note that none of these applicants have made the payment adhering to this term of the agreement. The total consideration for the said flat was between 17 lakh to 20 lakhs, some of them have not even paid 10% of the price. After paying the booking amount, all of them had gone into deep slumber and did not deposit the remaining amount of purchase price as agreed in the agreement. Nor did they claim refund of the said amount. And finally it is clear from the record that due to the disturbance between the Directors, the Project had been deserted for quite a long time. With a view to give life to the dead claims of the applicants, most of whom were known to or related to the said Director, this application has been filed at the behest of the said Director Mr. Prabhash Chandra in collusion with all these applicants for mutual vested interest. The Corporate Debtor has placed before us the detailed facts and submitted that a petition C.P No. 92/2021 under section 241-242 of the Companies Act is also pending before this bench between the parties. If we exclude the time barred claims of the applicants, this petition is even otherwise not maintainable being below the threshold limit. What is surprising is that a few of them have deposited as meager a sum as Rs.51,000/- or Rs. 50,000/- and without making any further payment they are claiming possession of the flat. None of the applicants have made payment as per the terms of the agreement.

67. The basic principle of law under the Indian Contract Act, 1872 is that, the parties to the agreement are equally bound to perform their respective parts and if a party does not perform its part, it cannot ask the other party to play its corresponding duty or part. The applicants in this matter have deposited the 10% amount or even less with the Corporate Debtor pursuant to the agreement between them and except for the letter dated 28th May, 2018 which is disputed by the Corporate Debtor as having been issued by the

company, which was based on the alleged decision taken by the board meeting of the company which was attended to only by one of the Directors Prabhash Chandra in the absence of the other Director, who has denied the issuance of that letter, it appears to a collusive petition.

68. After going through all the facts and hearing Learned Counsel for the parties, we do not see any *bona fide* substance in this petition and the petition is, therefore, dismissed.

69. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this the 12th day of July, 2022

PJ