IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH, KOLKATA

CP(IB) No. 1342/KB/2019
CA(IB) No.1552/KB/2019

IN THE MATTER OF

An application Under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC, 2016) read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016), for initiation of Corporate Insolvency Resolution Process.

And

IN THE MATTER OF

Anumati Consultancy & Services Private Limited, CIN: U74140WB1994PTC062579, having its Registered Office at 229 A.J.C. Bose Road, Crescent Tower, 9th Floor, Kolkata-700 020, West Bengal .

... Financial Creditor

-Versus-

IN THE MATTER OF

Wellside Global Private Limited, CIN: U55101WB2007FTC114214, having its Registered Office at 7 Ho Chi Minh Sarani, Kolkata-700 071,West Bengal.

... Corporate Debtor

Date of Hearing : 08th January, 2020

Order Delivered on : 13th January, 2020

Coram:

Madan B Gosavi, Member (Judicial)
Virendra Kumar Gupta, Member (Technical)

For the Financial Creditor : 1. Mr. Ratnanko Banerjee, Senior Advocate
2. Mr. Kanishk Kejriwal, Advocate
3. Ms. Ashika Daga, Advocate

For the Corporate Debtor : 1. Mr. Ahim Choudhuri, Senior Advocate
2. Mr. Samik K. Chakraborty, Advocate
3. Mr. Mayank Kakrania, Advocate

ORDER

Per Virendra Kumar Gupta, Member (T)

1. This application under section 7 of IBC, 2016 has been filed by the Financial Creditor namely Anumati Consultancy & Services Private Limited to initiate Corporate Insolvency Resolution Process against Corporate Debtor namely Wellside Global Private Limited as the Corporate Debtor has committed default in payment of outstanding debt. The amount claimed to be in default is Rs.66,81,20,672/- comprising of principal amount of Rs.14,06,70,000/- and accrued interest @ 18% per annum from the date of payment of such sum.

2. The facts, in brief, are that the Financial Creditor paid a sum of Rs.13,50,00,000/- in 2010 to the Corporate Debtor for purchase of a commercial property which was to be built by Corporate Debtor. Letter of Intent ("LOI") was also executed for availability of commercial space on lease rental for the use of Financial Creditor at a specified rent. However, such LOI was never implemented. In September, 2015, the Financial Creditor came to know that there were some regulatory issues in relation to this project, hence, both the parties entered into an understanding to have the residential units to be built by the Corporate Debtor in lieu of the commercial property equivalent to amount already paid by the Financial Creditor. The Purchase Agreements were entered into between the parties on November 12, 2015. This project was again stopped by Kolkata Municipal Authority on account of violation of sanction plan. Hence, on April 27, 2019, the Financial Creditor terminated the Purchase Agreement and requested the Corporate Debtor to return the entire sum of Rs.14,06,70,000/- along with interest at the rate of 18% per annum from the date of receipt till the date of payment. Reply was filed by the Corporate Debtor on 30th May, 2019 to which Financial Creditor also replied.

3. The Ld. Senior Counsel, in the background of these facts, contended that the petitioner was a Financial Creditor in terms of provisions of Section 7 of IBC, 2016 and there was a debt due and payable since the Corporate Debtor had failed to deliver the property in question. The default had also occurred.

4. The Ld. Senior Counsel for the Financial Creditor drew our attention to the notice / minutes of Kolkata Municipal Corporation regarding the violations done by the Corporate Debtor. Based upon this, he contended that in 2017 stay was imposed and till date no progress had happened, hence, the Corporate Debtor was not in a position to meet its contractual obligations and, therefore, the Financial Creditor was left with no other choice but to repudiate the contract and demand the money back which had been given by Financial Creditor to the Corporate Debtor, along with interest. He drew our attention to page no.81 to 84 of the Paper Book containing copies of notice/termination letter dated 27th April, 2019 given by its Advocates wherein it had been clearly mentioned that the Corporate Debtor was apparently not in a position to perform its obligation undertaken under the Purchase Agreements and hand over the possession of Units purchased by the Financial Creditor, hence, it was obliged to return the money of the Financial Creditor. The Ld. Senior Counsel further submitted that the amount offered by the Corporate Debtor amounted to its admission of liability though such amount was not acceptable to the Financial Creditor. In this regard, he drew our attention to page no. 97 to 100 of the Paper Book. He also relied on the decision of the Hon'ble Supreme Court in the case of Pioneer Urban Land & Infrastructure Limited & Anr. -vs.- Union of India & Ors., reported in (2019) 8 SCC, page 416, and drew our attention to paragraphs 67 & 68 of the order to contend that the claim of a home buyer was a financial debt and there was a default/breach, hence, the Corporate Debtor was liable to repay the same and failing which initiation of CIRP was the only option.

5. The Ld. Senior Counsel appearing on behalf of the Corporate Debtor contended that the agreements entered into between the parties dated 12th November, 2015

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were binding and identical in terms & conditions. It was also contended that it was not a case of statutory dues arising from a sovereign action but it was a case of debt arising out of contractual arrangement between the parties, hence, the terms & conditions of such agreements were to be given effect to in toto. Thereafter, our attention was drawn to clause 4.3 of Article IV and clause 9.1 to 9.4 of Article IX of the agreement. Based upon these two clauses two fold arguments were made, first argument was that the debt was not due and payable as on the date of filing of this petition and even on the date of hearing of petition for the reason that as per the provisions of clause 4.3, Corporate Debtor had a total period of 54 months from the date of signing of the agreement to hand over possession of the said units which was expiring in May, 2020. Thus, it could not be said a default had occurred as on date and, therefore, this petition was liable to be dismissed for this reason alone.

6. Thereafter, the Ld. Senior Counsel submitted that interest calculated by the Financial Creditor was against the contractual terms. It was vehemently argued that, in fact, no interest was payable on the repayment/refund of amount as per the provisions of clause 9.1(i)(a) which was applicable as termination had been done prior to the issuance of fit out notice and as per this clause, whatever amount was payable to the Financial Creditor, the Corporate Debtor was ready to pay and, in fact, had the draft prepared for that amount.

7. As regards the other contentions made by the Financial Creditor, it was communicated that there was no working behind the back of the Financial Creditor. From time to time, the issues had been duly communicated to them. It was also contended that corrective measures were being contemplated and taken. However, results were not obtained as desired, hence, for that, the no malafide could be attributed to the conduct or intention of the Corporate Debtor.

8. In the rejoinder, the Ld. Senior Counsel emphasised that it was not a case of termination but repudiation of the contract, hence, clauses of the agreement relied

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on by the Corporate Debtor were not applicable. He again reiterated the submissions made earlier.

9. Before proceeding further, we consider it pertinent to reproduce following clauses of the Agreement dated 12th November, 2015 as under:

Article IV : Construction and hand over

4.3 Subject to the Second Party having complied with each of the terms, conditions etc. Stipulated herein to the satisfaction of the First Party No.2 including the Second Party having made timely payment of all amounts, deposits, etc., and further subject to Force Majeure Events, within a period of 48 (forty eight) months from the date hereof with a grace period of 6 (six) months thereafter, the First Party No.2 will subject to and without prejudice to the provisions of this Agreement endeavour to hand over to the Second Party the bare shell of the Said Unit; being in an incomplete state and condition, constructed in the limited manner and in accordance with the specifications detailed in the Sixth Schedule hereunder witten ("Specifications").

Article IX : Termination of the Agreement and consequences thereof

9.1 Depending on the date of termination of this Agreement by the Second Party and/or the First Party No.2, as the case may be in terms hereof, the under-noted amounts shall, without any further act, deed or thing by the First Party No.2 an/or the Second Party stand forfeited in favour of the First Party No.2 as mutually agreed pre-determined liquidated damages from out of all the sums paid/deposited till such date by the Second Party to/with the First Party No.2 and/or any third party as the specific instructions of the First Party No.2 (irrespective of the account towards which such sum may have been paid/deposited by the Second Party), and the balance, if any ascertained by the First Party No.2 as payable by the Second Party to the First Party No.2 shall forthwith and immediately on demand be paid by the Second Party to the First Party No.2:-

i) On termination prior to the issuance of the Fit Out Notice:

(a) a sum equivalent to 5% (five percent) of the Consideration Amount; and (b) the Interest if any due, accrued and payable by the Second Party as ascertained by the First Party No.2; and (c) the amounts deducted by the Second Party as TDS while making any payment to the First Party No.2; and (d) all amounts paid by the Second Party towards any of the Taxes.

10. It is an undisputed fact that in terms of Agreement dated 12th November, 2015 the Financial Creditor has been allotted three flats in a residential project to be built by the Corporate Debtor. It is also not in dispute that in terms of clause 4.3 of Article IV of the said Agreement, the period with extension for delivery of the aforesaid flats ends in May, 2020. It is also not in dispute that the buyer of these flats is a financial creditor in terms of provision of section 7 of IBC, 2016. It is also an undisputed fact in the present case that the buyer in question (Financial Creditor) is the only buyer, hence, provisions of section 7 as amended by recent Ordinance do not come in way as regard the maintainability of this petition.

11. In the background of above facts, when we look at the scheme of the IBC, 2016, the preliminary condition is that there must be a debt which is met. The second condition is, such debt must be due and payable. In regard to this, as apparent from the provisions of clause 4.3 of Article IV of the Agreement between the parties as mentioned herein above, it is established that the delivery of the said flats has to be given upto May, 2020. Having said so, if we accept the contentions of the Financial Creditor that it may not be possible owing to prohibition on construction due to violation of sanction plan, hence, debt should be considered due and payable particularly when the Financial Creditor has repudiated the contract. This is particularly in the background of the fact that Financial Creditor does not wish to give effect to the provisions of the contract in toto i.e., if, based upon termination notice, the amount is considered as due and payable, then, obviously clause 9.1(i) of Article IX of the Agreement shall come into play. Hence, in our considered view,

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based upon the above proposition, it cannot be said that debt becomes due and payable. Thus, on this ground itself, we are of the considered opinion that this petition is pre-mature at this stage and thus, not maintainable. In view of this, we do not consider to express any opinion on the other contentions raised by the parties. Accordingly, we dismiss the same, however, no order as to cost.

12. Petition **CP(IB) No. 1342/KB/2019** is **dismissed**.

13. Application **CA(IB) No. 1552/KB/2019** is filed by the Corporate Debtor for dismissal of the petition filed by the Financial Creditor. This stands disposed of as a consequence of our order in **CP(IB) No. 1342/KB/2019**

14. Registry is hereby directed to communicate the order to the Operational Creditor and the Corporate Debtor by Speed Post as well as through E-mail.

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

Sd 14/1/2020

(Virendra Kumar Gupta)
Member (Technical)

Sd 14/1/2020

(Madan B. Gosavi)
Member (Judicial)

Signed on 13th January, 2020.

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