NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

C.P. (IB) 2228(PB)/2019

IN THE MATTER OF:

HT MEDIA LIMITED

having its Registered Office at:

18-20, Kasturba Gandhi Marg,

New Delhi-110001 **...APPLICANT/FINANCIAL CREDITOR**

VERSUS

IMPERIA STRUCTURES LIMITED

having its Registered Office at:

A-25, Mohan Co-operative Industrial Estate

Mathura Road

New Delhi-110044 **...RESPONDENT/CORPORATE DEBTOR**

U/s 7 of IBC, 2016 R/w Rule 4 of the Insolvency And Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Order pronounced on: 26.08.2022

CORAM:

JUSTICE RAMALINGAM SUDHAKAR

HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA

HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant/Financial Creditor : Mr. Sanjeev Bahl, Mr. Madhur Dhingra, Adv.

For the Respondent (Corporate Debtor) : Mr. Sandeep Bajaj, Mr. Vipul Jai, Adv.

ORDER

PER SH. AVINASH K. SRIVATAVA, MEMBER (TECHNICAL)

1) The present application has been preferred by **M/s HT MEDIA LIMITED** (hereinafter referred to as "FC") against **M/s IMPERIA STRUCTURES LIMITED** (hereinafter referred to as "CD") under Section 7 of the Insolvency & Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankcruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate Corporate Insolvency Resolution process against CD for an amount of ₹ **3,24,09,246 (Rupees Three Crore Twenty Four Lakh Nine Thousand Two Hundred Forty Six Only/-)** comprising of ₹ **2,55,53,019 (Rupees Two Crore Fifty Five Lakh Fifty Three Thousand and Nineteen only/-)** towards principal sum paid and ₹ **68,56,227 (Rupees Sixty Eight Lakh Fifty Six Thousand Two Hundred Twenty Seven Only/-)** towards the compound interest as on **01.08.2019.**

2) The Corporate Debtor is a Public Limited Company, a Company limited by shares, incorporated on **05.02.2010** under the provisions of the Companies Act, 1956 having its CIN No.**45400DL2010PLC198791.** Its authorised share capital is **Rs. 10,60,00,000/- (Ten Crore Sixty Lakh Only/-)** while its paidup share capital is **Rs. 4,92,03,000/- (Four Crore Ninety Two Lakh Three Thousand Only/-).** The CD is in the business of infrastructure development.

3) Brief Facts on behalf of the Financial Creditor (FC) are as follows:

i. FC entered into three Apartment Buyer Agreements, (Main Agreements) with the CD in the Project namely "The Esfera" Sector 37, Gurgaon alongwith equal number of corresponding supplementary agreements (hereinafter collectively known as **"ABAs"**) annexed herein as **Annexure I-C, I-D, I-E(colly)** dated 11.07.2013 wherein three unit namely C-1901, C-2103, C-2003 were purchased by Financial Creditor with a condition under clause 60 contained in all the Supplementary Agreements. **Clause 60 reads as follows:**

"Notwithstanding contrary to anything in the Main Agreement dated 11/07/2013 and/or this Supplementary Agreement, the Developer represents, warrants and undertakes that it shall offer to buy-back the said Apartment from the Intending Allottee at the end of 24 months from date of execution of this Agreement at a total buy-back consideration of the Part Payment and other charges paid by the Intending Allottee under the Main Agreement and the Supplementary Agreement alongwith interest @ 12% compounded per annum. Further, the Developer undertakes to release the complete buy-back consideration to the Intending Allottee within 30 days of receiving an acceptance from the Intending Allottee for the said buy-back. The interest shall be applicable from the date of Part Payment and other charges in terms of the Agreements till the realization of amount. It is specifically clarified between both the Parties that the Intending Allottee will have the right, but not any obligation to sell the said Apartment back to the Developer."

ii. It is submitted by FC that under the said agreements, a right has been given to the FC to opt for buy-back after the expiry of 24 months. It is further submitted by the FC that after the expiry of 24 months the CD shall refund to FC the total sale price paid by FC alongwith 12% compound interest per annum. However, despite reminders, the CD did not repay the sum to the FC.

iii. The FC pleads that vide letter dated 10.07.2018 addressed to the CD, it invoked the process of Buy-Back in consonance with clause 60 of the supplementary agreement to all the three apartment buyer agreements and sought refund as per the said terms of ABAs. However, no payment was ever received by FC. Hence FC was constrained to serve legal notice dated 24.05.2019 demanding repayment in terms of clause 60 of **ABAs.**

iv. It is further submitted by the FC that in accordance to clause 60 of the ABAs, the CD is under absolute obligation to buyback the units as mandated by the said clause, breach of which constitutes a default under the arrangement between the parties.

v. FC further submits that CD malafidely wanted to club the aforementioned ABAs with an entirely different issue i.e. Advertising Agreement dated 11.07.2013. The alleged Advertising Agreement and a copy of correspondence dated **24.07.2013** has no rationale with the present case and just been placed by CD to confuse and manipulate the Hon'ble Adjudicating Authority. It is further pointed out by the FC that the transaction between the parties under the said advertising agreement is separate and distinct transaction and the same is evident from the fact that ABAs do not even refer to the said advertising agreement in any manner which further shows that the two are completely different and distinct transactions.

vi. It is specifically submitted by the FC that the present application is not barred by limitation. FC submits that CD in its reply has categorically admitted the fact that FC had sent the letter dated **10.07.2018** and legal notice dated **24.05.2019** calling upon it to perform its obligations in accordance to the agreements executed between the parties. It is further submitted by FC that the cause of action first arose on **10.07.2015,** when the amount/sum became due in terms of Clause 60 of the supplementary agreements. The further cause of action again arose when the FC sent letter dated **10.07.2018** to the CD and when the FC issued legal notice dated **14.05.2019** to the CD.

vii. It is further submitted by the FC that settlement talks between the parties were going on since Sept, 2016 as admitted by the CD in the Emails filed by the CD in ts reply as **Annexure G.** There were several other personal meetings and discussions which happened between the representatives of both the parties until 2018 but the CD miserably failed to perform its obligations and thereby committed default. The debt is admitted as the amount is not disputed.

4) Brief Facts of the Application contended by Corporate Debtor (CD) are as follows:

i. CD submits that the Application is barred by law of limitation as the date of default for the purpose of this Application is July 10, 2015. And the period of limitation started from July 10, 2015 and ended on July 9, 2018. CD submits that the FC has relied on the letter dated July 10, 2018 and legal notice dated 24 May 2019 issued. FC submits that the issuance of the letter or the Legal Notice cannot extend the limitation period.

ii. CD further submits that there is no default on the part of CD. There is no cause of action for the FC to file the present application. It is pointed by the CD that CD has obtained RERA registeration and has been granted time till December 2020 to complete the project and offer possession in the project to the Applicant allottee.

iii. CD further submits that it is a solvent and profitable company and a fully functional and running concern. Its various projects involve more than 60,000 customers, 10,000 employess and nearly 50 to 70 conractors. In 2013 a total number of 2815 units were delivered up by the CD, which figure increased upto an approximate 6774 units in the year 2014, and approximately 9226 units in the year 2015. That in the year 2016 the number of units delivered went upto an

approximate number of 12,000 units which are exclusive of the pending project.

iv. CD relied on the judgment of **M/s Design Worx Infrastructure India Pvt. Ltd. Vs. Premier Restaurant Pvt. Ltd.** wherein Hon'ble NCLAT held that the insolvency proceedings cannot be used as debt recovery tool.

v. CD submits that the transaction between both the parties does not solely consist of three apartment buyer agreements and is not merely a simple purchase of units against payments of monies by FC, rather FC and CD entered into an advertising agreement dated **11.07.2013** whereby CD agreed to advertise project of CD in the print publication of the FC that are owned by FC. To ensure that there was continuity of business from CD for the term of advertising agreement as a common business practice, barter deals are arranged between companies that avail advertising services and those that provide advertising services, wherein a security is provided to the publishing company in the event the company availing the advertising services does not provide business for the term of agreement. Pertinently, the advertising agreement and apartment buyer agreements are to be read together alongwith correspondence as exchanged between the parties to understand the nature of barter transaction between FC and CD.

vi. CD submits that on **24.07.2013** an arrangement termed as partnership for growth was reached between FC and CD. From a perusal of the bank statements of both the FC and CD, it is seen that payment of approximately **Rs. 2,52,97,488/- (Rupees Two Crore Fifty Two Lakh Ninety Seven Thousand Four Hundred and Eighty Eight Only/-)** was first paid by FC to the CD. The said amount has been debited from the account of FC on **26.07.2013.** That another sum of **Rs. 2,55,53,019/- (Rupees Two Fifty Five Lakh**

Fifty Three Thousand and Nineteen Only/-) was then paid by CD to FC. It is pleaded that the said units were given only as a security to FC so as to ensure commitement of business for the term of agreement. The document and the correspondences dated **24.07.2013** including partnership for growth are annexed as **Annexure E** to support the above plea.

vii. CD further submits that as part of the barter transactions as above and based on an understanding between FC and CD, FC and CD entered into three apartment buyer agreements where an amount of **Rs. 84,32,496/- (Rupees Eighty Four Lakh Thirty Two Thousand Four Hundred and Ninety Six Only/-)** in respect of each agreement was paid towards booking of three units in the project being developed by the CD by the name and style of ESFERA, located at Gurgaon. The purpose of booking these three units by FC vide apartment buyer agreements was not for FC own residential purposes but with an intent that FC will hold it as security so that commitment of advertising and business to the tune of **Rs. 4,64,60,035/- (Rupees Four Crore Sixty Four Lakh Sixty Thousand and Thirty Five Only/-)** from the CD continued during the term of the advertising agreement.

viii. It is also stated by CD that as per one release order which pertained to the month of Nov-Dec 2013, it has been expressly stated that the Release order is being made in terms of advertising agreement with cash proportion to be 45% and in lieu of property to be 55%, which exhibits that payments are in lieu of the property. This further supports the fact that the claim made by the FC is not a single transaction but is a part of a larger transaction herein being barter arrangement between the parties to promote each other business.

ix. CD further states that the said fact is further evidenced from the invoices raised by the FC, as and when advertising services were availed by the CD. The payments being made by the CD which has been duly recorded in the ledger of the CD also show that payments are being made under the 'barter sharing' mechanism. A copy of the ledger,invoice and the release order is annexed as **Annexure F.**

x. CD stressed upon its arguments that the claim does not qualify to be a Financial Debt under section **5(8)(f)** of the Code, as amended. Further, CD submitted that the FC failed to show that the amount disbursed to the CD was given against time value consideration of money. Further, the FC is claiming to be an 'allottee' and the Application has been filed before this Adjudicating Authority on the basis of an Apartment Buyer Agreement, the claim of the Financial Creditor has to fulfil the necessary ingredients as laid down by the Hon'ble Supreme Court of India vide its judgement dated Aug 19, 2019 in **Pioneer Urban Land and Infrastructre Ltd. Vs UOI** bearing writ Petition (civil) No. 43 of 2019. CD further submitted that as per **Pioneer Judgement(supra)** certain clarifications were given by the Hon'ble Supreme Court of India that have to be taken into consideration by this Adjudicating Authority while deciding such Application filed by an 'allottee' before this Adjudicating Authority. He submits that it is pertinent to mention that the said parameters are significant in deciding the bonafides of the FC and the true purpose for invoking the proceedings under the Code with respect to 'allottee'. The relevant portion **(para50)** of the judgement is reproduced herein:

"It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided under Sections 214 to 216

of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, prima facie at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the Corporate Debtor to its death...."

xi. CD further submits that even assuming without admitting that this Hon'ble Adjudicating Authority is of the view that the Financial creditor has purchased the said units he then would still have to make good his submissions of not being a speculative investor but rather a genuine home buyer. As it is patently clear that the said units were to merely act as security in terms of the Agreement. The FC is not entitled to invoke the provisions of IBC to recover money.

xii. CD in its reply submits that even for argument sake it is considered that respondent was liable to pay any money to the Applicant in terms of buy-back understanding, it is admitted contention on part of FC that said liability arose on **10.07.2015**. However, the FC has filed this application under Section 7 in August 2019. It is therefore clearly barred by limitation and is estopped from raising the present dispute after an inordinate delay of four years.

5) We have perused the averments, documents produced and the contentions raised by the Financial Creditor and Corporate Debtor.

6) On perusal of the Apartment Buyers Agreement, it is clear that intending allottee (hereinabove "HT Media Limited") has agreed to purchase the three apartments having details (Apartment no. C-1901, C-2103, C-2003). For the same, a consideration of **Rs. 84,32,496/- (Rupees Eighty Four Lakh Thirty Two Thousand Four Four Hundred and Ninety Six Only/-)** each on account of booking and instalment amount with service tax has been paid against the said apartments via cheque no 207623 dated 17.07.2013, cheque no 207624 dated 17.07.2013 and cheque no 207625 dated 17.07.2013 and a further sum of **Rs. 85,177/- (Rupees Eighty Five Thousand One hundred and Seventy Seven Only/-)** for each apartment on account of instalment amount has been paid by HT Media.

7) At page 18 of the Apartment Buyers Agreement against Entry/point 3 "Amount Paid By Intending Allottes With

Application", it is stated clearly that the intending allottee has already paid amount of **Rs. 85,17,673/- (Rupees Eighty Five Lakh Seventeen Thousand Six Hundred and Seventy Three Only/-)** being part payment towards the cost of the said Apartment (C-1901) at the time of application and similarly for other two apartments namely C-2103, C-2003. The receipt of the payment was also acknowledged by Imperia Structures Limited (hereinabove the "Corporate Debtor").

8) The fact of apartment buyer agreement between company (Imperia Structures Limited) and intending allottee (HT Media Limited) is also recorded in the Supplementary Agreement **(page 56 of the IB/2228/2019 @ Para A)**, wherein it is clearly stated that company has agreed to sell and buyer has agreed to purchase the Apartment situated in Tower C, Apartment No 1901, Floor No. 19th, Super Area 1650 sq. feet @ BSP Rate Rs. 41,00 per sq. feet for a total price of **Rs. 87,26,894/- (Rupees Eighty Seven Lakh Twenty Six Thousand Eight Hundred and Ninety Four Only/-)**. This is also stated in other 2 Apartment Buyer Agreements. It is also recorded in the Supplementary Agreement **(pg 60 of the IB 2228/2019)** that out of the total price of **Rs. 87,26,894/- (Rupees Eighty Seven Lakh Twenty Six Thousand Eight Hundred and Ninety Four Only/-)**, an amount of **Rs. 2,09,221/-(Rupees Two Lakh Nine Thousand Two Hundred and Twenty One Only/-)** is the balance payment to be payable within **180 days** of the receipt of valid Notice of Possession by the Intending Alllottee and Part payment of **Rs. 85,17,673/-(Rupees Eighty Five Lakh Seventeen Thousand Six Hundred and Seventy Three Only/-)** must be paid within 14 working days of signing the Main agreement and the Supplementary Agreement. HT Media has already paid the part payment of **Rs. 85,17,673/-(Rupees Eighty Five Lakh Seventeen Thousand Six Hundred and Seventy Three Only/-).**

9) Further, on perusal of Supplementary agreement, **clause 60** contains a non obstante clause which reads as follows:

Notwithstanding contrary to anything in the Main Agreement dated 11/07/2013 and/or this Supplementary Agreement, the Developer represents, warrants and undertakes that it shall offer to buy-back the said Apartment from the Intending Allottee at the end of 24 months from date of execution of this Agreement at a total buy-back consideration of the Part Payment and other charges paid by the Intending Allottee under the Main Agreement and the Supplementary Agreement alongwith interest @ 12% compounded per annum. Further, the Developer undertakes to release the complete buy-back consideration to the Intending Allottee within 30 days of receiving an acceptance from the Intending Allottee for the said buy-back. The interest shall be applicable from the date of Part Payment and other charges in terms of the Agreements till the realization of amount. It is specifically clarified between both the Parties that the Intending Allottee will have the right, but not any obligation to sell the said Apartment back to the Developer." (emphasis supplied)

At this juncture, it is pertinent to mention here that financial creditor / HT Media did not avail the benefit of buy back clause at the end of 24 months from the date of execution of supplementary agreement.

10) Financial Creditor invoked clause 60 at a very belated stage i.e. in its letter dated 10.07.2018 for the first time which is after expiry of 5 years from the date of execution of supplementary agreement. If the Developer (CD) did not offer to buy back as per clause 60 of the Supplementary Agreement, the FC could have approached him and could have taken appropriate legal steps to invoke this clause. However, FC took the step of sending a notice to CD to abide by clause 60, 3 years after the date when clause 60 became invokable. It is nothing but an afterthought. Assuming that Clause 60 provides for a buy back offer by CD which CD did not offer to FC,

then it was for FC to invoke the clause for payment then and there. FC did not recall the amount paid with interest immediately after expiry of 24 monhs. Both FC and CD abandoned clause 60 and it stood invalid due to efflux of time. As time is the essence of clause 60 as it stood alone by the intent of parties. The Applicant cannot give clause 60 a new Lease of Life after it had worked itself out. The highlighted portion of the clause 60 gives a right to FC to hold on to the apartment. If no claim for return is made after 24 months then parties are reverted back to the original agreement only.

11) We are of the view that inclusion of clause 60 in the Supplementary Agreement does not alter the basic nature of the apartment Buyer Agreement which is a valid agreement that takes place in such type of transactions between home buyers and developers of real estate.

12) Further, CD has stated in its objections/reply that it has obtained the RERA Certificate to complete the project and offer the possession by the year 2020. In the course of arguments, Ld. Counsel for CD stated that CD would be in a position to offer possession of the Apartments to the FC. Considering all these facts collectively, we are of the opinion that FC is a homebuyer. A homebuyer, to invoke IBC, the essential criteria to move an application under section 7 is 100 numbers or 10 % whichever is lesser.

13) FC in this instant application has nowhere submitted or argued that it constitutes either 100 in number or 10 percent of the total allottees in the same real estate project. FC is now claiming the benefit of the buyback clause **(clause 60)**. The landmark judgment of Hon'ble Supreme Court in **Pioneer Case(supra) (para 50) quoted in Para 4)x (ibid)** is also relevant here as the intention of the FC is for recovery of money by jumping out of the project.

14) In view of above, this petition is not maintainable because:

i. FC has filed this application on the basis of Apartment Buyer Agreement, annexed with the application and is very well covered in

the definition of **'allottee'** in accordance toExplanation to Section 5(8)(f). Therefore, we hold that FC is a homebuyer.

ii. The Advertising agreement is altogether a separate transaction from ABAs. It would not be appropriate to club the Advertising agreement with the ABAs. FC could very well have pursued its cause of action under clause 60 of ABAs after 24 months of signing of ABAs, but it has filed its claim in accordance to clause 60 at a very belated stage, hence clause 60 cannot be of any aid to FC.

iii. To get the relief as a homebuyer, the essential condition is of either 100 in number or 10 percent of the total allottees in the same real estate project, for an application to be admitted under section 7 of the Insolvency and Bankruptcy Code, 2016, in case of default. But, this essential criteria is not fulfilled in the instant case.

15) In view of the above, we do not find merit and are not inclined to admit this application of initiating CIRP against CD under section 7 of the IBC, 2016. The application is hereby **DISMISSED.**

Copy of the order be sent to both the parties.

(RAMALINGAM SUDHAKAR)
PRESIDENT

(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)