



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

Rst. A (IBC) No. 02/7/JPR/2021
CP No. (IB)- 86/7/JPR/2018

(Application under Section 7 read with 60(5) of the Insolvency and Bankruptcy Code, 2016 & Rule 11 of the NCLT Rules, 2016)

IN THE MATTER OF:

SH. GAGAN DEEP SINGH DUGAL

...Financial Creditor

Versus

M/S NINANIYA ESTATES LIMITED

...Corporate Debtor

MEMO OF PARTIES

GAGAN DEEP SINGH DUGAL

R/o 6, Sultanpur Estate Mandi
Road, Mehrauli, New Delhi- 110030

...Applicant

VERSUS

NINANIYA ESTATES LIMITED

R/o 60, Karni Vihar, Ajmer Raod,
Near Rawat Mahila College,
Jaipur, Rajasthan- 302019

...Respondent

Rst. A (IBC) No. 02/7/JPR/2021
CP No. (IB)- 86/7/JPR/2018



For the Applicant : Yoothica Pallavi, Adv.
For the Respondent : Sonal Anand, Adv.

Order Pronounced On: -19.04.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application has been filed on behalf of Gagan Deep Singh Dugal ('Applicant') under Rule 11 of the NCLT Rules, 2016 in Company Petition No. (IB)- 86/7/JPR/2018, to restore the captioned petition and revive the Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor on account of breach of the settlement arrived between the parties.
2. The Applicant submitted that the above-captioned Petition had been admitted as against M/s Ninaniya Estates Limited ('Respondent/Corporate Debtor') by this Hon'ble Tribunal *vide* its order dated 24.12.2020. However pursuant to the admission of the CIRP, the Corporate Debtor offered a settlement, and an Interlocutory Application ('IA') has been filed by the Interim Resolution Professional ('IRP') under Section 12A of the IBC read with regulation 30A of the CIRP Regulations, 2016 seeking withdrawal of the main Petition. The said IA No. 07/JPR/2021 has been allowed *vide* order date 08.01.2021.



3. The present Application has been filed by the Financial Creditor to restore the Company Petition and revive the CIRP against the Corporate Debtor as the terms and conditions of the Memorandum of Understanding II ('MoU') dated 01.01.2021 have not been fulfilled by the Corporate Debtor. Copy of the MoU dated 01.01.2021 is attached as Annexure A2 colly of the present Application.
4. The Applicant submitted that the Corporate Debtor has breached the terms of the MoU II dated 01.01.2021 and an amount of Rs. 68,00,000/- (Rupees Sixty-Eight Only) is outstanding and payable as on date to the Financial Creditor, resultantly the Financial Creditor has preferred the present Application.
5. The details of the transactions leading to the filing of this application averred by the Applicant *vide* Diary No. 2331/2021 dated 11.11.2021 are as follows:
- i. The payment obligations of the Corporate Debtor as undertaken under the MoU II on the basis of which the Company Petition was withdrawn is as follows:

<i>Sr. No.</i>	<i><u>Particulars of instrument of payment</u></i>	<i>Amount (In Rs.)</i>
1.	<i>RTGS No. ICICIR 52021010100246110</i>	<i>1 Crore</i>
2.	<i>Demand Draft No. 501904 dated 01.01.2021</i>	<i>50 lakhs</i>



3.	<i>Post-dated Cheques No. 000907 drawn on ICICI Bank dated 15.02.2021</i>	<i>1.16 crores</i>
4.	<i>Post-dated Cheques No. 000904</i>	<i>1.16 crores</i>
5.	<i>Post-dated Cheques No. 000905 drawn on ICICI Bank dated 15.04.2021</i>	<i>1.18 crores</i>
6.	<i>Transfer of property at C-40, Neeti Bagh, (2nd Floor), New Delhi, along with 2 car parkings. (Admeasuring 2200 Sq. ft.)</i>	<i>5.35 crores</i>
	TOTAL	10.35 crores

- ii. Despite the voluntary undertaking of the said obligation, the Corporate Debtor has defaulted in the payment of Rs. 68,00,000/- (Rupees Sixty-Eight Lakh Only) out of the total outstanding amount of Rs. 10,35,00,000/- (Rupees Ten Crore Thirty-Five Lakh Only).
- iii. The Corporate Debtor issued the first cheque on 15.02.2021 numbered as 907 for Rs. 1,16,00,000/- (Rupees One Crore Sixteen Lakh Only) against its payment obligations under MOU II. However, the said cheque was returned unpaid *vide* Bank Return Memos on 19.02.2021 with an endorsement “*Funds insufficient*”.
- iv. Further, in order to settle for the remaining amount, in June 2021, the Corporate Debtor issued another cheque no. 61868 dated 29.04.2021 for Rs. 68,00,000/- (Rupees Sixty Lakh Only) against



its payment obligations under MOU II. However again, the said cheque was also returned unpaid *vide* Bank Return Memos dated 15.06.2021 with an endorsement “*Funds insufficient*”, on due presentation of the cheque for encashment within the validity period.

- v. Following to this the Applicant made multiple reminders through E-mails, calls, and legal notice for the outstanding payment of Rs. 68,00,000/- (Rupees Sixty-Eight Lakh Only). The Corporate Debtor once again sought time to make the payments till 30.08.2021 and also provided a post-dated cheque dated 30.08.2021 however the same has been dishonoured due to insufficient funds.
- vi. Sequential to this the Applicant issued a final Notice dated 02.07.2021 seeking immediate payments of the outstanding amounts of Rs. 68,00,000/- (Rupees Sixty-Eight Lakh only) and denied any further extension of time. Copy of the final notice dated 02.07.2021 attached as Annexure-A 12 of the Application.
- vii. Further the Applicant issued a notice dated 07.07.2021 under Section 138 of the Negotiable Instruments Act, 1881, seeking payment of the outstanding amounts. However, no response to the said correspondence was received from the Corporate Debtor.



As the Corporate Debtor gave various reassurances, time and again, every time a notice was issued by the Financial Creditor, and would seek an extension of time, the Financial Creditor graciously made allowances and accommodated the delay till date. However, as the Corporate Debtor stopped responding to further correspondences and blatantly disregarded the payment obligations, the Financial Creditor, thereafter, issued yet another notice dated 08.09.2021 under Section 138 of the Negotiable Instruments Act, 1881, as the final warning of payment. However, till date, neither a payment has been received nor a response to the said notices.

6. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 1059/2022 dated 08.04.2022 stating as follows:

- i. The Respondent submitted that an Application has been filed U/s 7 of the IBC claiming to be a homebuyer alleging default of Rs. 7.15 crores and the same had been admitted *vide* order dated 24.12.2020. Subsequently, an MoU has been executed between the parties herein whereby the Corporate Debtor agreed to pay a sum of Rs. 10.35 crores pursuant to which an application was filed by the Financial Creditor through the IRP U/s 12A of the



IBC R/w Regulation 30A of CIRP Regulations, 2016 seeking withdrawal of the Application.

- ii. The Corporate Debtor has already paid a sum of Rs. 9.67 Crore till date and the same has been admitted by the Applicant. Irrespective of that, the Corporate Debtor has filed the present Application seeking revival of their original petition for the balance payment of Rs. 68,00,000/- (Rupees Sixty-Eight Lakh Only)
- iii. The Corporate Debtor submitted that the present Application is liable to be dismissed on the grounds of a threshold. Further, the amount in default is only Rs. 7.15 Crores only however the Applicant is claiming a sum of Rs. 10.35 Cr. The MoU based on which the original application was withdrawn explicitly records “*the investor expressed his desire to exit the project*”, which infers that the Applicant wanted an easy exit and misused the process of law.
- iv. The Corporate Debtor has already paid a sum of Rs. 9.67 Cr. against the agreed amount of Rs. 10.35 Cr. Further, the Corporate Debtor relied on the case of *Ankit Goyat V. Sunita Agarwal & Anr.; reported as (Company Appeal (AT) (Insolvency) No. 1020 of 2019* wherein it was observed that “*the I&B Proceedings is*



not a recovery proceeding and we place reliance on the ratio of the decision of this Tribunal in Binani Industries Limited' Vs. ' Bank of Baroda & Anr.' Company Appeal (AT) (Insolvency) No. 82 of 2018 wherein it was observed that the IBC is not a recovery proceeding. In fact, the I&B Code prohibits and discourages recovery in several ways”.

- v. It is further submitted that subsequent to the execution of the MoU dated 01.01.2021, the Financial Creditor approached the IRP for withdrawal of CIRP and to release the Corporate Debtor from the rigours of insolvency. In the Application filed by the Applicant through the IRP under Section 12A of the IBC r/w Regulation 30A of CIRP Regulations, 2016 no liberty was sought whatsoever by the Financial Creditor to revive the proceedings in case of any default on the part of the Corporate Debtor. The IRP filed an application dated 07.01.2021 for withdrawal of CIRP and the Application was allowed *vide* order dated 08.01.2021.
- vi. The Corporate Debtor submits that the Applicant has breached the terms of the MoU wherein as per Para 10 of the MoU, the Applicant was required to return the personal Cheques issued by the managing director of the Corporate Debtor and grab cheques from the Corporate Debtor however the Applicant refuses to



return the said Cheques in order to hold out a threat of proceeding U/s 138 of the NI Act, 1881 personally against the MD.

- vii. It is further submitted that even otherwise the present amount claimed in default is Rs. 68,00,000/- which does not meet the bar of Rs. 1 Cr as per the Notification bearing S.O. 1205(E) used by the Central Government through Ministry of Corporate Affairs dated 24.03.2020 and hence this Application is in any case not maintainable and is liable to be dismissed.

7. The Financial Creditor has filed its written arguments *vide* Diary No. 2496/2022 dated 22.08.2022 and stated that:

- i. The Applicant submits that as per clause 14 of MoU II dated 01.01.2021 it is mentioned that “*....in case of any default by the Company of the Developer, the investor shall be free to seek revival of the Application filed by him under Section 7 of the IBC along with proceedings under S. 138 of the N.I. Act, 1881.*”

Accordingly, in view of the above said liberty in the MoU II the Company Petition was permitted to be withdrawn *vide* order 08.01.2021.

- ii. It is submitted that there was a breach of the settlement agreement between the parties leading to continuous defaults in making the payment of Rs. 10,35,00,000/- (Rupees Ten Crore Thirty-Five



Lakh Only). Further, the Corporate Debtor duly admitted its liability of Rs. 68,00,000/- (Rupees Sixty-Eight Lakh Only) in the reply dated 28.06.2021 to the legal notice dated 22.06.2021.

iii. Additionally, the Applicant relied on the following judgments: -

A. *M/s ICICI Vs. M/s. OPTO Circuit Ltd. (Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021 decided on 28.04.2022)*

B. *Vivek Bansal Vs. Burda Druck India Pvt. Ltd. CA (AT) (Ins) No. 552 of 2020.*

C. *Pawan Putra Securities Private Limited Vs. Wearit Global Limited (2022) ibclaw.in 217 NCLT (NCLT Kolkata Bench 24.02.2022).*

8. The Corporate Debtor has also filed its written synopsis *vide* Diary No. 2742/2022 dated 13.09.2022 and, the arguments or contentions taken in the reply have been reiterated in the written synopsis. Therefore, the same are not been reproduced and in addition to that the Corporate Debtor relied on the following judgements:

A. “*Ankit Goyat v. Sunita Agarwal & Anr.*” reported as (CA)(AT) (Insolvency) No. 1020 of 2019;

B. “*Binani Industries Limited v. Bank of Baroda & Anr.*” reported as Company Appeal (AT) (Insolvency) No. 82 of 2018;



- C. *“Nidhi Rekhan v. Samyak Projects Ltd.; 2022 SCC Online NCLAT 46;*
- D. *“Navin Raheja v. Shilpa Jain & Ors.” reported as (Company Appeal (AT) (Ins) No. 864 of 2019);*
- E. *“Pioneer Urban Land and Infrastructure Ltd. & Anr. v. UOI”;*
2019 SCC Online SC 1005;
- F. *“SRLK Enterprises LLP v. Jalan Transolutions (India) Ltd.”*
reported as (Company Appeal (AT) (Ins) No. 294 of 2021);
- G. *“Prafulla Purushottamroa Gadge v. Narayan Mangal & Anr.”*
bearing Co. Appeal (AT) (Ins.) No. 498 of 2021;
- H. *“Manish Kumar v. Union of India”;* (2021) 5 SCC 1;
9. We have closely gone through the facts of the case, documents placed on record before us, submissions made and arguments advanced we find that the Financial Creditor in this matter filed an insolvency petition under section 7 of the IB Code against the Corporate Debtor which was admitted *vide* order dated 24.12.2020. Thereafter, an MoU dated 01.01.2021 has been executed between the parties, wherein the Corporate Debtor agreed to pay a sum of Rs. 10,35,00,000/- (Ten Crore Thirty-Five Lakh Only) to the Financial Creditor.
10. Pursuant to this arrangement between the parties an Application has been filed through IRP U/s 12A of the IBC r/w Regulation 30A of the



CIRP Regulations, 2016 seeking to withdraw the insolvency petition filed under Section 7 of the Code. The said Application is allowed *vide* order dated 08.01.2021. However, in the said order we notice that no liberty was given to the Petitioner to revive the Petition.

11. Further it is pertinent to note that the Applicant himself has mentioned in the written arguments that more than 90% of the amount has been paid by the Corporate Debtor. IBC is not a recovery proceeding where the party may repeatedly come to the Court. The Corporate Debtor had paid a sum of Rs. 9,67,00,000/- (Rupees Nine Crore Sixty-Seven Lakh Only) which is 93.40% of the total outstanding liability.

12. The law on the subject has been categorically laid down by the National Company Law Appellate Tribunal in the matter of *SRLK Enterprises LLP Vs Jalan Transolutions (India) Ltd. in Company Appeal (AT) (Ins) No. 294 of 2021 dated 08.04.2021* held that:

“..... We notice that vide order dated 09.05.2019 passed by this Bench, the petition A-1721(ND)2018 was withdrawn at the instance of the Financial Creditor and the CIRP was terminated. We further notice that no liberty was given to the Petitioner to revive the application. So, considering this, we are of the considered view that since this Adjudicating Authority was not the part of the settlement arrived in between the parties, rather the settlement was arrived outside the Tribunal. It was on the submissions of the Applicant the main petition was dismissed as withdrawn and the CIRP was



terminated. Therefore, we have no reason to recall our earlier order. Accordingly, the prayer of the Applicant to recall the earlier order is hereby rejected.”

13. Hence time and again it has been expressed and explained by the various Courts that the Provisions of IBC, 2016 are not for the recovery of money; but here the intent of the Applicant reveals that the Applicant invokes the provisions of IBC, 2016 in order to enforce recovery against the Corporate Debtor; the same should not be allowed. In the circumstances, the Rst. A (IB) No. 02/7/JPR/2021 is not allowed and IB No. 86/7/JPR/2018 cannot be restored.

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**