

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)
Company Petition No. IB 889/ND/2020

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

VANDANA RAHEJA &ORS

...APPLICANTS/FINANCIAL CREDITORS

VERSUS

SPAZE TOWERS PRIVATE LIMITED

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 28.10.2021

CORAM:

DR. DEEPTI MUKESH
HON'BLE MEMBER (Judicial)

MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (Technical)

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MEMO OF PARTIES

1. Vandan Raheja
R/O C5/6 Vasant Vihar
New Delhi
2. Vipin Raheja
R/O C5/6 Vasant Vihar
New Delhi
3. Anil Datta
R/O W 23/24 Western Avenue
Sainik Farm, New Delhi 110062
4. Radhika Datta
R/O W 23/24 Western Avenue
Sainik Farm, New Delhi 110062
5. Anjlee Prakash
R/o C 11/1 , DLF City
Phase 1 Gurgaon 122002
6. Ashish Basu
R/O TG-1/7, Orchid Gardens
Suncity Sector 54
Gurgaon, Haryana- 1122003
7. Kalpana Vishwanath Basu
R/O TG-1/7, Orchid Gardens
Suncity Sector 54
Gurgaon, Haryana- 1122003
8. Chirayu Paul
R/o B-8 Old DLF Colony
Gurgaon, Haryana- 122001
9. Nisha Paul
R/o B-8, Old DLF Colony
Gurgaon, Haryana- 122001
10. Hiranand Jethmal Makhijani and Sons (HUF)
Through its Karta
R/O C57, Mayfair Garden

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Haus Khas, New Delhi 110016

11. Mukesh Nanik Mansukhani (HUF)
Through its Karta
R/o C57, Mayfair Gardens
Hauz Khas, New Delhi - 110016.
12. Jaswinder Singh Ghumman
R/o Flat No. D-282, The Belaire
DLF Phase V, Sector 54
Gurgaon, Haryana - 122011.
13. Jayant Nath
R/o 3/75, Raj Nagar
Ghaziabad, Uttar Pradesh.
14. Arun Kumar Joneja
R/o Flat No. 401,
Tower-2, Vipul Greens,
Sohna Road, Gurgaon-122018
15. Late Manmohan Kristian Malik
R/o K-661 A, Sainik Farms
New Delhi - 110062.
16. Sadhna Disha Chawla
E-902, Central Park- 1
Sector-42, Gurgaon - 122002.
17. Neena Sabharwal
R/o H. No. 21 Royalton Tower
Princeton Estate
DLF Phase V Gurgaon.
18. Rajesh Kumar Lodha
R/o 10, Anson Road, 37-15,
International Plaza, Singapore-079903.
19. Rashmi Lodha Rio
10, Anson Road, 37-15,
International Plaza, Singapore-079903.



20. Arvind Kumar Bhadani (HUF)
Through its Karta
R/o G-5, Lajpat Nagar-III
New Delhi - 110024.
21. Ravindra Kumar Bhadani and Sons (HUF)
Through its Karta
R/o G-5, Lajpat Nagar-III
New Delhi - 110024.
22. Renu Gakhar
R/o House No. 23, Road No. 32
East Punjabi Bagh
New Delhi - 110026.
23. Rosemarie D. Jamwal
R/o 3155, Sector - 23 Carterpuri,
Gurgaon, Haryana - 122017.
24. Roma Kapur
R/o T-7/28, DLF City Phase III,
Gurgaon, Haryana - 122002.
25. Sudeep Budhi Raja
R/o H. No. 12, Sector - 2
Chandigarh.
26. Chandrika Budhi Raja
R/o H. No. 12, Sector - 2 Chandigarh.
27. Sumat Mehra
R/o 7/104, Swaroop Nagar
Kanpur, Uttar Pradesh - 208002.
28. Pushp lata Jain
R/o 61/1, Emilta-2, Jasmine Sweet,
Vatika City, Sohna Road.
Sector-49, Gurgaon-122018.
29. Rekha Rani Gambhir
R/O C-2B Vatika Apartments
Mayapuri New Delhi 110064



30. Naveen Sangari
R/o E-14, Greater Kailash Enclave-I,
New Delhi-110048.
31. Kavita Sangari
R/o E-14, Greater Kailash
New Delhi-110048.
32. Sharda Bajaj
R/o A1/8, Prashant Vihar,
Outer Ring Road, New Delhi-110085.
33. Jugal Kishore Bajaj
R/o A1/8, Prashant Vihar,
Outer Ring Road, New Delhi-110085.
34. Jugal Kishore Bajaj (HUF)
Through its Karta
R/o A1/8, Prashant Vihar, Outer Ring Road, New Delhi-110085.
35. Asha Sheth
R/o A-43, Block-A, Haus Khas,
New Delhi-110016.
36. Bharat Sheth
R/o A-43, Block-A Haus Khas,
New Delhi-I 10016.
37. Lalita Kumari Rakyan
R/o B-33, First Floor, South Extension-II,
New Delhi-110049.
38. Jyoti Rakyan
R/o B-33, First Floor, South Extension
Part-11, New Delhi-110049.
39. Ritu Jalswal
R/o A-1/11770, Sarovar Marg,
Panchshil Garden, Navin Shandra,
New Delhi-110032.

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40. Concept Studio (India) Pvt. Ltd.
Through its Director and Authorised Signatory
Vishal Chowdhry
Having its registered office at:
7, Harcharn Bagh , Andheria Morh, Mehrauli
New Delhi-110065.

...APPLICANTS/FINANCIAL CREDITORS

VERSUS

SPAZE TOWERS PRIVATE LIMITED
Having Registered Office at:
A-307, Ansal Chambers I 3
Bikaji Cama Place
New Delhi 110066

...RESPONDENT/ CORPORATE DEBTOR

For the Applicant : Mr. Piyush Singh,
Ms. Aditi Sinha, Advocates

For the Respondent : Mr. Vivek Kohli Sr. Adv,
Mr. Sandeep Bhuraria,
Mr. Aman Anand,
Mr. Monish Surendran, Advs

ORDER

AS PER SUMITA PURKAYASTHA (MEMBER TECHNICAL)

1. The present application is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)



Rules, 2016 (for brevity 'the Rules') jointly by 40 Financial Creditors (for brevity 'Applicants') in the project named as "Spaze Corporate Parkk" of corporate debtor, affidavits in support of this application have been filed, by each applicant, with a prayer to trigger Corporate Insolvency Resolution Process against SPAZE TOWERS PRIVATE LIMITED (for brevity 'Corporate Debtor').

2. The Applicants states had purchased commercial office spaces in the project developed by the Corporate Debtor namely "Spaze Corporate Parkk " situated in Gurgaon at Sector 69 and 70 and are financial creditors within the meaning of explanation to Section 5(8)(f) of the IBC. The applicants state that the total number of office spaces in both the towers of the project are 353 with a total area of 2,63,605 sq. ft. it is further submitted that the present application has been filed by 40 Financial Creditors who have purchased a total of 70 office spaces in the project of the Corporate Debtor. Thus it is submitted that the applicants herein, constitute 10% of the total number of allottees complying the Amendment dated 13.03.2020.

3. The corporate Debtor is private company limited by shares incorporated on 27.01.2006, under the provisions of Companies Act, 1956 bearing CIN No. U45201DL2006PTC145529 having registered office at A-307, Ansal Chambers I 3 Bikaji Cama Place New Delhi 110066. The Corporate Debtor company involved in the business of building complete constructions or parts thereof civil engineering.



4. The Applicants state that they had purchased commercial office spaces in the project developed by the Corporate Debtor namely "Spaze Corporate Parkk" situated at Sector 69, 70 Gurgaon, Haryana. The Applicants had considered and agreed to purchase the office spaces since the Corporate Debtor had guaranteed an investment return scheme and on assurance given by the Corporate Debtor, the Applicants purchased a total of 70 units in the Project and entered into separate Memorandum of Understanding(s) for each office space. The MoU(s) were executed and the terms of the MoU were identical with certain variations in relation to the sale consideration of each office space. Clause 9 of the MoU provided for the manner in which the investment return agreed between the Financial Creditors and the Corporate Debtors was payable. Each office space was to be leased out either at the rate of Rs. 55/- per sq ft. per month or at Rs. 65/- per sq. ft per month as agreed under each MoU and also specified the formula to calculate the investment return towards office space. It was specifically agreed that the Corporate Debtor shall lease out the office spaces as per the generally prevailing market rates and the terms.

5. The Applicants further submit that vide letter dated 11.10.2019, the Corporate Debtor informed the Financial Creditors that all the office spaces had been leased out to M/S OFCSPC Worldwide Private Limited (herein referred as the Lessee) in terms of the Lease deed dated 30.09.2019 at a rent of either Rs. 55/- per sq. ft. per month or at Rs. 65/- per sq. ft. per month plus applicable taxes and TDS for a



period of 9(3+3+3) year. The copy of the letter dated 11.10.2019 and Lease deed dated 30.09.2019 have been annexed. On perusal of the Lease Deed, it was found that the lease commencement date was agreed as 01.10.2019 however, the Financial Creditors were shocked to see that the rent commencement date was agreed as 01.04.2020 i.e. after 6 (six) months from lease commencement date. The arrangement was detrimental to the interest of the Financial Creditor because as per Clause 17 of the MoUs, the Corporate Debtor stood completely discharged and absolved of all responsibilities/obligations, including the liability of paying the investment return as and when the office spaces were leased.

6. The Applicants submit that the arbitrary terms agreed by the Corporate Debtor with the Lessee under the Lease Deed clearly shows a mala fide intention of the Corporate Debtor to exempt itself from the liability of paying assured investment returns to the Financial Creditors by leasing the office spaces as rent-free for a period of 6 (six) months. In this regard, it is stated that the prevailing/current rentals in the vicinity of the Project are much lower. Therefore, solely to avoid payment of the investment return as agreed under Clause 9 of the MoUs, the Corporate Debtor had executed this Lease Deed. Moreover, the Corporate Debtor has previously been delaying the payments with respect to the investment returns for the office spaces as agreed between Financial Creditors and the Corporate Debtor under the MoUs. A perusal of the letters dated 11.10.2019 would admittedly



show the amounts pending and due by the Corporate Debtor to the Financial Creditors.

7. The Applicants submits that legal Notices were sent to the Corporate Debtor from 07.12.2019 to 03.03.2020 with respect to their respective office spaces to the Corporate Debtor, raising the following issues: (a) non-payment of investment return; (b) rent free lease period of 6 (six) months; (c) executing the Lease Deed without obtaining the Occupation Certificate; (d) executing the Lease Deed without taking proper security deposit; and (e) executing the lease with one sided terms in favor of the Lessee (f) raising illegal and arbitrary demands from Applicant, etc. Copy of the Legal notices has been annexed. In response, the Corporate Debtor vide letter dated 22.02.2020 only to give vague replies and evasive denials which have no substance and merit. Further, the Corporate Debtor has failed to justify as to why an initial rent-free period of 6 (six) months had been agreed without taking prior consent from the Financial Creditors. This was also not as per the prevailing market terms and conditions in terms of which the Corporate Debtor was to lease the spaces. Copy of the replies issued by the Corporate Debtor is annexed.
8. The applicant filed application under Section 7 of the I&B code, 2016 and as per Form I, Part IV the total amount of debt is Rs. 33,23,69,949/-, is due and payable by the corporate debtor.
9. The Corporate Debtor filed reply dated 26.11.2020 to the application under Section 7 of the I&B Code 2016. It is submitted that the



Corporate Debtor executed various MoU with various prospective allottees for delivery of units in the said Project, which includes the Applicants herein. The terms enshrined in the said MoUs were mutually agreed between the parties. It is submitted that Clause 2 and 9 of all of the MoUs executed between the Corporate Debtor and the Applicants herein explicitly provided for the payment of an Investment return ("Assured Return") which was payable from the respective dates prescribed in the MoUs, till the date of leasing out of the said unit to a tenant. Clause 2 of all of the MoUs are similar in nature except for the rate of Assured Return which amount to Rs. 55 or 65 per sq.ft per month, depending on the respective MoU. Clause 2 and 9 of one of the MoUs is reproduced below for the sake of convenience:

"Clause 2 That the First Party will give an Investment return at Rs. 55 per sq. ft. per month w.e.f. 01.01.2011, of the super area till such time the office space is leased out (subject to clause 7 & 9) on behalf of the Second Party by the First Party.

Clause 9 That the First Party has guaranteed the Second Party an Investment return of Rs. 55 per. alt. per month towards the office spaces (super area basis) till the date the said unit/space is put on lease"

10. It is submitted that the Corporate Debtor has paid the Assured Return to the Applicants herein from the commencement date, prescribed in the MoUs, till the date of leasing out of the units - i.e., upto 30.09.2019. The Corporate Debtor submits that the Applicants herein



are speculative investors holding multiple Units in the same Project, and are only interested in profiting from market value changes and are not concerned with the possession of their respective Units. The Applicants are not interested in the taking the delivery of their units rather they are motivated to coerce the Corporate Debtor to refund the basic consideration paid along with an exorbitant rate of interest.

11. It is submitted that the Corporate Debtor has, till date paid an amount to the tune of Rs. 31,26,30,371, which is gross of TDS, to the Applicants herein in light of the Clause 2 and 9 of the MoUs. The applicable TDS has been deducted and the necessary certificate has also been issued to the Applicants herein. A comprehensive statement showcasing the computation of the Assured Return payable to the Applicants, along with the amounts provided to the Applicants is annexed. Further, the accounts of each of the Applicants in the books of the Corporate Debtor reflect the payments of the respective Assured Return paid to the Applicants have been annexed. A bare perusal of the aforementioned statement along with the accounts would reflect that the Corporate Debtor has already paid the Assured Return amount payable to the Applicants herein as provided in the Cause 2 and 9 of the MoUs till the date of leasing of their respective units upto 30.09.2019.

12. It is submitted by the Corporate Debtor that the Applicants herein are taking reliance on Clause 9 of the said MoUs to unilaterally introduce a formula to compute an amount which is allegedly due and payable



by the Corporate Debtor to the Applicants herein. Hence, it is pertinent to reproduce the computation of the amount due of one Mrs. Pushp Jain Applicants No.28, to provide clarity regarding the aforesaid submission. The computation of the amount due as per the Applicants with regard to Office Space No. 1012A, allegedly payable to Applicants No.28, as is reproduced as (Rs. 110.29 x 501 sq.ft x 55 equivalent to Rs, 30,39,041) However, the formula provided in Clause 9 of the said MoU is different and actually only provides for the calculation of Assured Return, till the date of leasing out of the said unit and a formula in case the unit is let out at a monthly rental rate differing from the minimum guaranteed rate provided in the Clause 9 of the MoU. The said clause of the MoU executed between the Corporate Debtor and Mrs. Pushp Lath Jain Applicants No.28 is reproduced herein below for ready reference:

"Clause 9. That the First Party has guaranteed the Second Party an Investment return of Rs 55/- per sq. ft per month towards the proposed office space (super area basis) till the date the said unit is put on lease. Upon completion of the Project, the space would be let out by the First Party to a bonafide lessee at a minimum rate rental of Rs. 55/- per sq. ft per month. The First Party in fulfilment of its above referred guarantee, hereby covenants with the Second Party that in the event the proposed office space is leased at a gross monthly rental of less than the investment return of Rs. 55/- per sq. ft. per month, then the First Party agrees that the sale consideration for the proposed office space shall stand reduced by the amount calculated by the formula

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given below (Assured monthly return of Rs. 55/- per sq.ft. — (less) Actual monthly Rental (if less than Rs. 55/- per sq.ft. per month) = Rs. A multiplied by Rs. 110.29 sq.ft.), towards and by way of compensation to the Second Party for the lower rental guaranteed. In case the proposed office space is leased out by the First Party so as to give a monthly return in excess of the investment return of Rs. 55/- per sq. ft of super area, the agreed sale consideration of the proposed office space shall stand increased by the amount calculated by the formula given below (Actual monthly rental — (less) Assured monthly return of Rs. 55/- per sq.ft. = Rs. A/2 and multiplied by Rs. 110.29 per sq.ft.)."

13. It is submitted by the Corporate Debtor that on bare perusal of the formula reproduced hereinabove, as provided in the Clause 9 of the MoUs, it would reflect that the formula is required to be solely utilized in a situation when the Unit of the allottee is leased out on a rate that is lower or higher, as the case may be, than the rate that is prescribed in the MoUs, Rs. 55 or Rs. 65 per sq.ft. Further, the applicability of the amount computed vide the aforesaid formula is limited solely for the adjustment of the agreed sale consideration of the unit allotted to the respective allottee by the Corporate Debtor. Hence, it is submitted that the formula utilized by the Applicants herein for the alleged amount due and payable by the Corporate Debtor to Mrs. Pushp Lata Jain, Applicants No.28, like all of the other Applicants is totally transverse to the wording of Clause 9 of their respective MoUs. The formula provided under Clause 9 of the MoUs would only be utilized



in case the units were let out above or below the rate of minimum guaranteed rental of Rs. 65 or Rs. 55, as per the MoU which is not applicable in the current matter as the Units of the Applicants were let out at the minimum rate prescribed in the MoUs.

14. It is submitted by the Corporate Debtor that prior to the leasing out of the premises to the OFCSPC Worldwide Private Limited, none of the Applicants herein had raised any query pertaining to the amount provided as per the MoU. It was only when the Lease Deed was executed in favor of OFCSPC Worldwide Private Limited and the final letter dated 11.10.2019, for requesting payment for the outstanding dues of the Applicants was sent, the Applicants started raising arbitrary demands. It is submitted that the Applicants herein are liable to pay the balance dues arising out of the units allocated to the Applicants which is also reflected in the letters dated 11.10.2019, issued by the to the Applicants herein requesting them to release the outstanding amount of Rs. 1,83,86,483/-. The amount reflected in the aforesaid letters were duly computed after adjusting the amounts which were payable by the Corporate Debtor to the Applicants, and the security amount provided by OFCSPC Worldwide Private Limited.

15. Further, it is submitted by the Corporate Debtor that the current Application fails to reach even the minimum threshold limit of Rs. 1 Crore prescribed under Section 4 of the Code that is required to be satisfied for initiating the CIRP proceedings of a Corporate Debtor, as no amount is due and payable to the Applicants herein. Further, in



reality, an amount to the tune of Rs. 1,83,86,483/- is actually due and payable by the Applicants to the Corporate Debtor. On bare perusal of the amendment dated 24.03.2020 it is apparent that any Application filed under Section 7 of the Code is required to be undertaken jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less. In light of the above, it is humbly submitted that the current application has been filed by only 40 allottees of the Project and hence, this application is not maintainable on this ground alone.

16. It is submitted by the Corporate Debtor that on the execution of the Lease Deed dated 30.09.2019, as per Clause 17 of the MoUs, the Corporate Debtor stands discharged from the obligations provided in the respective MoUs. The Applicants herein are also claiming Assured Return for the time period when the lease commenced with OFSCPC Worldwide Private Limited -i.e, 30.09.2019, even though as per clause 17 no obligation for payment of any Assured Return whatsoever, exists after the execution of the Lease Deed with OFSCPC Worldwide Private Limited. The veracity of the alleged amount claimed by the Applicant comes substantially in question. Hence, it is apparent that no amount was outstanding towards the Applicant on the date of default, and in reality an amount to the tune of Rs. 1,83,86,483/- stands outstanding from the Applicant to the Corporate Debtor. Clause 17 of the MoU is reproduced herein below for ease in reference:



"17. It is categorically agreed and understood between the parties hereto that after the proposed office space has been leased out, both the parties stand completely discharged, absolved and relived of all responsibilities/obligations under this MOU including the liability of First Party to give investment return."

17. It is submitted by the Corporate Debtor that the Applicants are bent on pursuing a strategy to harass the Corporate Debtor and target it in different forums to extract monies in every possible manner. It is submitted that the Applicants have preferred an Impleadment application before the Arbitral Tribunal seeking impleadment in the arbitration proceedings pertaining to the dispute arising out of the lease deed dated 30.09.2020 in the matter **OFCSPC Worldwide Pvt. Ltd. Vs Spaze Tower Private Limited**. The said application was rejected vide order dated 12.09.2020 wherein it was held that "The Tribunal does not deem fit to accord a hearing to the Objectors who are non-signatory to the contract and the arbitration agreement contained therein, and hence, the Objector's request is rejected." The order dated 12.09.2020 dismissing the Impleadment application has been annexed. The Applicant has also filed **W.P.(C) 523/2020 CM APPL 27448/2020 before the Hon'ble High Court of Delhi** wherein the Applicant has filed a writ petition for classification of the Final Award dated 01/10/2020 of the Arbitral Tribunal as illegal and asking for directions to SFIO to undertake the investigation into the affairs of the Corporate Debtor. The copy of the Writ Petition has been annexed.

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18. It is submitted by the Corporate Debtor that the possession of the units of the Applicants have been duly offered by the Corporate Debtor. That OFCSPC Worldwide Private Limited vide its email dated 11.10.2020 called upon the Corporate Debtor to take over the physical possession of the Demised Premises on 16.10.2020, Further the possession of the units of the Applicants have been offered vide letters dated 17.10.2020, during the pendency of the current proceedings. However, rather than taking the said possession, the Applicants herein are bent up in raising a sham claim for buttressing the Corporate Debtor to secure further monies in blatant contravention to the terms of the MoUs. Copies of the letters dated 17.10.2020 are annexed. It is pertinent to state that the Hon'ble Supreme Court, vide judgement dated 9th August, 2019 in **Pioneer Urban Land and Infrastructure Ltd. Vs. Union Of India, 2019 SCC Online 1005**, has emphasized that Code is not meant to be a recovery mechanism "42. It is also important to remember that the Code is not meant to be a debt recovery mechanism... Thus, any allottee/ home buyer who prefers an application under Section 7 of the Code takes the risk of his flat/ apartment not being complete in the near future, in the event of there being a breach on the part of the developer... Thus, given the bona fides of the allottee who moves an application under Section 7 of the Code it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the NCLT unclear the



Code hoping that some other developer takes over and completes the project .."

19. It is submitted by the Corporate Debtor that the Corporate Debtor has obtained the Occupation Certificate for both the Towers A & B, and has offered possession to the allottees with units in these towers. True copy of Occupation Certificate dated 28.01.2020 in relation to Towers A & B is annexed. Further it is submitted that possession has been offered to all the Applicants herein during the pendency of these proceedings subject to clearing of outstanding dues. It is submitted that the Hon'ble Supreme Court has made it clear that in determining whether to entertain a petition at the instance of a real estate allottee, and in determining "default", the Tribunal will consider whether the allottee is "genuinely interested in purchasing the flat". This is because insolvency proceedings have serious consequences including potential corporate death. Such serious consequences cannot be triggered at the instance of a speculative allottees who is seeking refunds in relation to ready and available flats, and who has no real interest in the health and resurrection of the Corporate Debtor. The stance of refusal to accept possession by the Applicants, and to press a Application under the Code demonstrates without doubt that they are all speculative investors who are more interested in seeking refunds with enormous Interest, under the threat of coercive measures. In such cases, where the Occupation Certificates have been received and where possession can be immediately offered at the stage

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of considering the above NCLT proceeding, there is no question of "default" occurring within the meaning of the Code, and no question of any allottee hoping for another developer to takeover and complete the project in question as the Project is already complete. In the present case approx. 96 allottees have already taken possession, where the project is complete, Occupation Certificates have been obtained, and possession has already been offered, there is no question of an allottee losing faith" in the management of the Corporate Debtor. In such situations, an application under Section 7 would not be maintainable, and it ought to be rejected at the very outset.

20. The Corporate Debtor submits that the Hon'ble Supreme Court in **Pioneer Urban Land & Infrastructure Ltd. Vs. Union of India (UOI) and Ors** has also observed that *"there can be situations when an allottee who has knocked at the doors of the National Company Law Tribunal is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. In such a situation it is the duty of the developer to point out and showcase 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. Hence, in such situations recourse is provided under Section 65 of the Code, wherein the real estate developer can also point out that the insolvency resolution process under the Code has been Invoked fraudulently, with malicious*

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intent, or for any purpose other than the resolution of insolvency. "

Further, in this regard it is pertinent to showcase the tenant of law emphasized in para 34 and 35 of the judgment, of the **Hon`ble National Company Law Appellate Tribunal in Navin Raheia Vs. Shilpa Jain and Others Company Appeal (ATI (Insolvency) No. 864 of 2019** wherein while affirming the views of the Hon`ble Supreme Court In Pioneer Urban Land & Infrastructure Ltd. (Supra), the Appellate Tribunal has observed that:

"34. As per the aforesaid decision of the Hon`ble Supreme Court the 'Corporate Debtor can refer to Section 65 and point out that insolvency resolution process has been Invoked fraudulently, with malicious intent, for any purpose other than me resolution or Insolvency.

35. The Real Estate developer may do so 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. The Developer can also point out that in a Real Estate market which is kiting, the allottee does not, In fact, want to go ahead with its obligation to take possession of the fiat/ apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it." Hence, it is clear that the present Application has been filed maliciously, and hence each of the Applicant ought to be penalized under Section 65 of the Code, as mandated showcased in the judgments showcased herein above.

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21. It is submitted by the Corporate Debtor that the alleged amounts claimed by the Applicants as "debt" due to them are inaccurate and highly inflated. It is submitted that the Corporate Debtor has paid each and every Applicant, the Assured Return due and payable as per the terms and conditions under the MoU. Hence, the sums would not fall within the definition of "financial debt" under the Code and the Applicants would not be entitled to receive this amount. A bare perusal of the Application will show that the Applicants have also failed to adequately explain the basis for the calculation of their claims. In as much as the computation is essential for determining the claim of the Applicants, in the absence of the same, the form is bereft of material particulars and is liable to be rejected on this ground alone.

22. It is submitted by the Corporate Debtor that the Hon'ble Supreme Court in Pioneer Judgment has held that, in order to show that there has been a default for amount due and payable, an allottee must satisfy the Tribunal that the following have occurred.

- i. Real estate developer has failed to offer possession of the unit;
and
- ii. The real estate developer has failed to offer compensation for the delayed period in terms of the buyer agreement; or
- iii. Amount claimed as otherwise become due and payable under the buyer agreement.



Thus, The Corporate debtor submits that it is evident that no default has occurred In the Section 7 Application, and hence no case is made out against the Corporate Debtor for initiation of CIRP. The allottees have failed to discharge the burden of prima fade establishing 'default' and therefore the present Section 7 Applications ought to be dismissed as being non-maintainable.

23. Both the parties were heard and the order was reserved. The Learned Counsels for both the parties were directed to file written submissions.

The Applicants filed their written submission dated 13.03.2021 and has placed the following submissions:

a. The claim of the Financial Creditor in the Section 7 application is mainly two-fold:

- i. monthly investment return as per Clauses 2 and 5 of the Memorandum of Understandings ("MoU"); and
- ii. guaranteed monthly rental on leasing of the office space as per Clause 9 of the MoUs.

b. The claim of the Financial Creditors in the Section 7 application arises out of the MoUs which were executed in 2010-2012 between the Corporate Debtor and the Financial Creditors. All the MoUs are verbatim similar for all the Financial Creditors as only the unit number, area of the unit and the total sale consideration are different. That as per Clauses 2 and 3 of the MoUs, the Financial Creditors had paid 100% of the total sale consideration to the



Corporate Debtor at the time of booking itself i.e. 2010-2012. That a conjoint reading of Clauses 7, 9 and 16(b) of the MoUs clearly details out that the Financial Creditors had given the authority to the Corporate Debtor only to negotiate and facilitate the lease, but clearly as per Clause 16(b) of the MoUs, the Corporate Debtor could neither be a party nor shall be privy to such lease agreement. That the Corporate Debtor has defaulted in paying the investment return from January 2019 and when the Corporate Debtor was not in a financial position to pay the investment return, in a hurried and illegal manner, the Corporate Debtor entered into an illegal and sham lease deed on 30.09.2019 with the lessee company. The said lease arbitrarily gave a 6-month rent-free period to the lessee company without consulting or making any of the Petitioners to be a party to the lease deed.

c. As per the demand letter dated 11.10.2019 issued by the Corporate Debtor to the Financial Creditors there is a clear admission by the Corporate Debtor of the debt due. The Corporate Debtor vide the said letter dated 11.10.2019 has tried to raise a demand against the Financial Creditors by giving a credit of the pending assured return from 01.05.2019 to 30.09.2019 and also giving a credit of the 3-months' security deposit. Also basis the unit wise Ledger Accounts as admitted by the Corporate Debtor, an amount of Rs. 1,49,40,3554/- is the total balance outstanding to be paid to the Financial Creditors. That the Corporate Debtor has wrongfully raised a demand in complete and violation of Clause II of the MoUs



as these charges were to be paid from the date of execution of the conveyance I sale deed by the Corporate Debtor. It is an admitted fact that the Corporate Debtor had received the Occupation Certificate only on 28.01.2020 and offered possession of the units to the Financial Creditors only on 17.10.2020; moreover, the execution of the sale deed was offered by the Corporate Debtor on 24.11.2020. Therefore, there is no question of any amount which would fall due as on 11.10.2019 to be paid by the Financial Creditors to the Corporate Debtor and the credit of the assured returns due and the 3-months' security deposit was wrongly adjusted and never paid to the Financial Creditors.

- d. That the Corporate Debtor vide letter dated 11.10.2019 while admitting the pending assured returns due from January 2019, made some fictitious demands contrary to the MOU. The Corporate Debtor claimed in the said letter IFMS charges, which were actually to be paid as per Clause 12 of the MOU only after the expiry of the first lease (which had not happened as on 11.10.2019), also additional Fire Fighting Charges and External Electrification charges were claimed which were actually payable only as per Clause 11 of the MOU i.e. from the date of execution of sale/conveyance deed. Also, under one head the Corporate Debtor asked for 'Miscellaneous Charges' which were non-explanatory, arbitrary and contrary as per MOU. Similarly, Sales consideration as per Clause I of the MOU is 100% paid and also acknowledged by



the Corporate Debtor in Clause 3 of the MOU, still "Basic Cost including GST" was wrongfully demanded and adjusted.

- e. That also the Corporate Debtor has taken a defence that when the lease was terminated by the lessee on 06.06.2020, the Corporate Debtor and the lessee company invoked arbitration and finally an Award dated 01.10.2020 was passed whereby the 3-months' security deposit paid by the lessee company was to be forfeited by the Corporate Debtor. It is pertinent to point out that in the said arbitration, the Financial Creditors were not made a party therein and only to that limited extent of challenging the arbitration, the Financial Creditors had approached the Hon'ble Delhi High Court. It is submitted that after passing of the Award, whereby the 3-months' security deposit of Rs. 4,44,34,965/- was forfeited, the Corporate Debtor has failed to refund that amount to the Financial Creditors on a pro-rata basis and has only wrongfully adjusted the same vide letter dated 11.10.2019. That admittedly the Corporate Debtor have adjusted the assured return due from May 2019 till September 2019 and the 3-months' security deposit paid by the lessee company of amount Rs. 4.4434,965/-, by giving a credit vide letter dated 11.10.2019. As stated above, this amount has not been paid by the Corporate Debtor to the Financial Creditors and has therefore resulted in a default as per Section 3(12) of the Code.
- f. The Applicant states that as per the law laid down by the Hon'ble Supreme Court ***Innoventive Industries Ltd. v. ICICI Bank***



1(2018) I SCC 4071, Pioneer Urban Land and Infrastructure Ltd v. Union of India [(2019) 8 SCC 416] it has been held as follows:

“Dispute or adjudication may be important for adjudication of Section 9 but not for Section 7 under the Code as has also been held in *Innoventive Industries Ltd. v. ICICI Bank* 1(2018) I SCC 4071”. The relevant observations in this regard are as under:

“27. The scheme of the Code is to ensure that when a default takes place in the sense that a debt becomes due and is not paid the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes nonpayment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the



information utility or other evidence produced by the financial creditor to sage itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

- g. The Applicant further submits that in **Pioneer Urban Land and Infrastructure Ltd v. Union of India [(2019) 8 SCC 416]** the Hon'ble Supreme Court has observed and held as under:

"68. Thus, In order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default" which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor.

69...What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment even if it arises out of breach of contract, which is due from any person notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order...."



h. That in a Section 7 application, the Adjudicating Authority only has to determine:

- i. Whether the Financial Creditors in a class have filed the application jointly having 10% mandate as per the first proviso to Section 7 of the Code?
- ii. Whether "the default" has occurred as per the agreement executed between the parties.
- iii. Whether the application is complete and there are no disciplinary proceedings against the proposed Insolvency Resolution Professional?

Therefore, the default by the Corporate Debtor is with respect to payment of assured return for the months of January 2019, February 2019, March 2019, April 2019, May 2019, June 2019, July 2019, August 2019 and September 2019, which amounts to Rs. 4,72,95,975 and refund of 3-months' security deposit which is Rs. 4,44,34,965. The "Default amount" as per the section 7 application of the Petitioner's is 33,23,69,949/- which also includes amount as calculated as per Clause 9 of the MOU. Also, from January 2019 till date the Corporate Debtor has neither paid investment/assured return nor paid the guaranteed lease rent.

24. The Corporate Debtor filed their written submission dated 23.03.2021 and has placed the following submissions:



- a. The Corporate debtor has submitted that the Project is complete and the units of the Applicant have been delivered. The Corporate Debtor has annexed Occupation Certificate dated 28.01.2020, letters dated 17.10.2020 requesting the Applicants to take possession of their respective units and letters dated 24.11.2020 requesting the Applicants to come forward to execute conveyance deed of their respective units. Hence, it is apparent that the Units of the Applicants have been duly provided to them as per the MoUs. However, till date the Applicants have failed to come forward to take possession of their units and get the conveyance deed executed in their favor. It is pertinent to mention that no specific date of delivery of the units of the Applicants is prescribed in the MoUs, and thus no default arises even with respect to the date of delivery of the units of the Applicants.
- b. The amount claimed by the Applicants in the said application is arising out of Clause 2 and 9 of the MoU on account of Assured Return. The Corporate Debtor has been diligently paying the assured return since 2010-2011 till the units of the Applicants were leased out to OFCSPC Worldwide Private Limited as per Clause 16 of the MoU. A total of Rs.31,26,30,371/- as Assured return has been paid to the applicants till 30.09.2019. The payment made by the Corporate debtor can be substantiated by the Statement and the ledgers of the Applicants which have been annexed with the reply.



c. The units of the Applicants were duly leased out by the Corporate Debtor to OFCSPC Worldwide Private Limited taking into consideration the minimum guaranteed rate of Assured Return, no adjustment of the sale consideration was required. Moreover, on execution of the said lease deed all of the obligations of the Corporate Debtor, Inter alia, the payment of Assured return with respect to the units of the Applicants stood discharged as per Clause 17 of the MoU. In fact the Applicants are liable to pay the Respondent Company an amount to the tune of Rs. 1,83,86,483/- as per the letter dated 11.10.2019, issued by the Corporate Debtor to the Applicants . Hence, on the date of filing of the Application no amount was due and payable by the Corporate Debtor to the Applicants. Thus, it is apparent that the Applicants have utilized the formula provided in Clause 9 of the MoU for raising a sham claim without any justification whatsoever. Even though the Application has been preferred on account of Assured Return, yet the Applicants have failed to quantify the alleged amount which according to them arises out of Assured Return.

d. The Applicants despite the completion of the Project, were not coming forward to take possession of their respective units and execute the sale deeds/ title documents in their favor, hence, the Corporate Debtor issued the final demand letter dated 11.10.2019. In the said letter the Corporate Debtor after giving credit of the amounts due to the respective Applicants, Inter alia, 3 months security deposit of Rs. 4,44,34,956/- which was provided by



OFCSPC Worldwide Private Limited, raised a net demand of Rs. 1,83,86,483/- which is due and payable by such Applicants to the Corporate Debtor. The said adjustments were undertaken subsequent to the execution of the lease deed with OFCSPC i.e., 30.09.2019 which is a registered document wherein the stamp duty of Rs. 26,68,000/- has been paid & which is not in dispute. Further, in para 8 of the Written Submissions of the Applicants, they have clearly agreed to the quantum of the charges that have been demand in the letters dated 11.10.2019 which was demanded after the constructive possession of the units of the Applicants were provided to the Applicants on 30.09.2019. The only dispute arises with respect to the timing of the raising of the said demand by the Corporate Debtor. The Corporate Debtor had Immediately upon receipt of the Final Award dated 01.10.2020, with respect to the arbitration proceedings with OFCSPC, issued letters for possession to all of the Applicants on 17.10.2020 and subsequently even requested the Applicants to get the conveyance deeds executed in their favor for their respective units vide letters dated 24.11.2020.

e. Clause 16 of the MoU explicitly states that, the Applicants authorizes the Clause 16 of the MoU explicitly states that, the Applicants authorizes the Corporate Debtor to negotiate and finalize the terms of the lease with any suitable lessee. Sub-clause (h) of Clause 16 also confers the right of first leasing on the Corporate Debtor while categorically stating that the choice of the



lessee and the lease rent etc. would be binding on the Applicants. A power of attorney is also provided in the said clause which states that the Applicant ratifies and confirms all acts done by the Corporate Debtor as its attorney with respect to the lease. The only obligation on the part of the Corporate Debtor was to notify the Applicants regarding the terms and conditions of the lease as per Clause 7 which was duly undertaken vide letters dated 11.10.2019. Thus, it is apparent that all of the necessary authority to enter into the lease with OFCSPC Worldwide Private Limited on behalf of the Applicants was already granted to the Corporate Debtor by the Applicants. Even the 6 month fit out period that has been prescribed under the Lease Deed dated 30.09.2019 is a market practice which is evident from a bare perusal of the copies of the lease deeds that are attached with the Reply wherein a fit out period of 6 months to 12 months has been provided.

- f. The Applicants are bent on pursuing a strategy to harass the Corporate Debtor and target it in different forums to extract monies in every possible manner. It is submitted that the Applicants have preferred an Impleadment application before the Arbitral Tribunal seeking impleadment in the arbitration proceedings pertaining to the dispute arising out of the lease deed dated 30.09.2020 in the matter ***OFCSPC Worldwide Pvt. Ltd. Vs Spaze Tower Private Limited***. The said application was rejected vide order dated 12.09.2020 wherein it was held that "*The Tribunal does not deem fit to accord a hearing to the Objectors who are non-signatory to the*

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contract and the arbitration agreement contained therein, and hence, the Objector's request is rejected." The order dated 12.09.2020 dismissing the Impleadment application has been annexed. The Applicant has also filed **W.P.(C) 523/2020 CM APPL 27448/2020 before the Hon`ble High Court of Delhi** wherein the Applicant has filed a writ petition for classification of the Final Award dated 01/10/2020 of the Arbitral Tribunal as illegal and asking for directions to SFIO to undertake the investigation into the affairs of the Corporate Debtor.

g. The National Company law Appellate Tribunal in **Navin Raheia Vs. Shills. Jain and Others Company Appeal (AT) (Insolvency) No 864 of 2019** has held that a situation may rise wherein 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. And thus would qualify as a speculative Investor.

h. Further, the correctness of the information provided in the application field under Section 7 of the Code is absolutely essential for adjudicating an application requesting initiation of the CIRP proceedings qua a Corporate Debtor. The Hon`ble Appellate Tribunal in **Shubha Sharma Vs. Mansi Brar and Mr. Company Appeal (AT) (Insolvency) No. 83 of 2020** while identifying a speculative investor and setting aside the Order which initiated the CIRP proceedings of a solvent company had observed that Incorrect



information was provided in the application, interalia, the date of default which is crucial for an application filed under Section 7 of the Code. In the present case the date of default provided in the Application is the date on which the lease was undertaken with OFCSPC Worldwide Private Limited —i.e., 30.09.2019 even though no amount was due and payable by the Corporate Debtor to the Applicants on the said date. Without prejudice to the above, in the Written Submission the Applicants are now claiming that Assured Return is payable by the Corporate Debtor to the Applicants from January 2019 onwards, and thus there is severe ambiguity even on the date of default. Thus, by presenting the present Application, the Applicants are trying to utilize the provisions of the Code to send a financially solvent company for Insolvency resolution which is clearly not the objective of the Code. The provisions prescribed under the Code are being blatantly misused to coerce unlawful monies out of the Corporate Debtor even after receipt of their respective units and more than twice the total consideration of their Units as Assured Return.

25. The date of default as per the application, is in the year 2019. The present application is filed on 20.06.2020. Hence, the application is within in the period and is not barred by limitation.
26. The registered office of the Corporate Debtor is situated at Delhi and therefore this tribunal has jurisdiction to entertain and try this application.

[Handwritten signature]

27. In order to deal with the issue in hand, We would like to make a reference to Section 7 of the Code:

"7. (1) A financial creditor either by itself or jointly with 1[other financial creditors, or any other person on behalf of the financial creditor, as may be notified² by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred."

It is understood that Section 7 lays down for initiation of the CIRP by a Financial Creditor or Financial Creditor. The financial creditors can file an application before the Adjudicating Authority along with the proof of default. The requirement to provide proof of default ensures that financial creditor does not file frivolous application which prematurely puts the Corporate Debtor into insolvency proceedings for extraneous considerations.

28. We have perused the documents placed on record. It is observed that the Claim of the Financial Creditor in the present application arises out of the MoUs executed in 2010-2012, with respect to Assured Monthly investment return to be received from the Corporate Debtor and the monthly rent received by the Corporate Debtor and paid to the Financial Creditor for their respective office space unit leased to OFCSPC Worldwide Pvt. Ltd. As per the averments mentioned by the Financial Creditor the default has occurred since the Corporate Debtor has not paid the Assured Investment return from January 2019.

1. On perusal of the documents it has been observed that the Corporate Debtor has not placed on record the bank statement reflecting the payment of Assured monthly investment returns (since January 2019) paid to the respective financial creditors or any other document to evince the genuineness of the fact that the payment has been received by the Applicant. Further while perusing the lease deed dated 30.09.2019 entered between the Corporate Debtor and OFCSPC Worldwide Pvt. Ltd, it has been observed that the lease commencement date was agreed as on 01.10.2019 however, the rent commencement date was agreed as on 01.04.2020 i.e after 6 months from the lease commencement date which is detrimental to the interest of the Financial Creditor as Clause 17 of the MoUs stipulate that the Corporate Debtor shall stand completely discharged and absolved of all responsibilities as and when the office spaces are leased. We are of the view that once the Adjudicating Authority is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. The Adjudicating Authority is not required to look into any other criteria for admission of the application. Accordingly the application is admitted. Hon'ble Supreme Court in the matter of M/S. Innoventive Industries Ltd. V. ICICI Bank & Anr., (2018) 1 SCC 407, has held that:

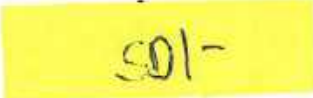
30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself

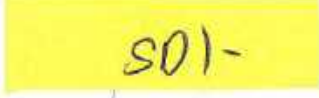
that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

29. The applicant has proposed the name of Mr. Gaurav Katiyar to be appointed as IRP, who is be and hereby appointed as IRP of corporate debtor having registration number IBBI/IPA-001/IP-P00209/2017-18/10409 having address at D-32, East of Kailash, New Delhi 110065 and email-id cagauravkatiyar@gmail.com . The IRP has filed consent in form-2 of the Insolvency & Bankruptcy Board of India (Application to Adjudicating Authority) Rule 2016 and make disclosures as required under IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016.

30. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the corporate debtor prohibiting the corporate debtor as per proviso (a) to (d) of section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come in force.

31. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Gaurav Katiyar to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days for the date of receipt of this order by the applicant. The amount however is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the applicant.
32. In terms of above order, the application stands admitted in terms of Section 7 of IBC, 2016. A copy of the order shall be communicated to the applicants as well as to the Corporate Debtor above named by the Registry. Applicants are also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of the order shall also be forwarded to IBBI for its records and to ROC for updating the master data. ROC shall send compliance report to the Registrar, NCLT.


MS. SUMITA PURKAYASTHA
MEMBER (T)


DR. DEEPTI MUKESH
MEMBER (J)