**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL**
**NEW DELHI**
**BENCH-VI**

**IB-2026/(ND)/2019**

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

**In the matter of:**

1. **Rajan Arora,**
   s/o Late Sh. H.L. Arora,

2. **Nitin Arora,**
   s/o Late Sh. H.L.Arora,

3. **Sangita Rani Arora**
   s/o Late Sh. H.L.Arora,

4. **Punita Arora,**
   s/o Late Rajan Arora,

5. **Tarun Arora,**
   s/o Late Sh. H.L.Arora,

6. **Sonal Arora,**
   s/o Sh. Tarun Arora,

7. **Punita Arora,**
   s/o Sh. Rajan Arora,

**All R/o**
B-47, Gujrawalan Town,
Part-1, Delhi-110009

**All through their SPA Holder:**
Sh. Rajan Arora,
R/o B-47, Gujrawalan Towan,
Part-1, Delhi-110009

...Financial Creditor/Petitioner

**Versus**

**M/s MMR SAHA Infrastructure Pvt. Ltd.**
Having its Registered office at:-
A-10, B-1, Third Floor,
Mohan Cooperative Industrial Estate Ltd. ,
Badarpur, Delhi-110044.

**Also at:**
B-11, Sector-57,
Noida, U.P. -201301

...Corporate Debtor/Respondent Company

**Coram:**

**DR. P.S.N. PRASAD**
**Hon'ble Member (Judicial)**

**DR. V.K. SUBBURAJ**
**Hon'ble Member (Technical)**

Counsel for Operational Creditor: Mr. Varun Khathuria, Advocate

**Order Delivered on** 27.07.2020

## ORDER

### PER DR. V.K. SUBBURAJ, MEMBER(TECHNICAL)

1. This is a petition filed by Shri Ranjan Arora and others, the petitioners/financial creditors seeking to initiate CIRP on the respondent/corporate debtor M/s MMR Saha Infrastructure Pvt. Ltd., under Section 7 of IBC 2016 for the alleged default on the part of the corporate debtor in settling an amount of Rs. 97,56,774/- including the interest component towards the assured returns as promised by the corporate debtor. The details of the transactions

leading to the filing of this petition as averred by the petitioner are as follows:

i. The financial creditors 1 to 3 purchased a unit bearing No. HS-B-004, admeasuring 2500 sq. ft. vide MOU dt. 01.02.2014 at a price of Rs. 8,400/- per square foot amounting to a total sale consideration of Rs. 2,10,00,000/- (Rupees two crores ten lakhs only). The applicants/ financial creditors have paid an amount of Rs. 2,17,00,000/-(Rupees two crores seventeen lakhs only) towards the sale consideration of their unit which is in fact more than the agreed sale consideration for the unit.

ii. The financial creditor no. 4 to 7, purchased a unit bearing no. HS-B-003, admeasuring 2400 sq. ft. situated in Block/Tower High Street in the project of the corporate debtor in Sector-52, Noida, known as "52nd Avenue", vide MOU dt. 03.02.2005 at a price of Rs. 8,400/- per square foot amounting to a total sale consideration of Rs. 2,01,60,000/- (rupees two crores one lakh sixty thousand only). The applicants/financial creditors have paid an amount of Rs. 1,90,82,810/- (Rupees one crores ninety lakhs eighty two thousand eight hundred ten only) towards the sale consideration of their unit till date.

iii. The said units were purchased under the "assured return scheme" as per which the corporate debtor was required to pay an assured return calculated @ 14% per annum, on the payments made by the applicants/financial creditors, to be paid to the applicants as per their proportionate share in the unit, each month, till their unit was complete and ready in all respects and its possession was offered to them. After handing over the possession of the unit, the corporate debtor had further undertaken to get the first leasing of the units done a minimum monthly rent of Rs. 150/- per sq. ft. per month. In addition to the above MOU, the applicants had also signed and executed the Unit Buyers Agreement/Allottee agreements which contained details terms and conditions of allotment of the unit. Two sets of the said agreements were signed by the applicants and delivered to the corporate debtor for signatures but were never received back from the corporate debtor.

iv. As per the terms of the MOU executed between the parties, the corporate debtor was required to pay and was also paying, a monthly assured return of Rs. 2,45,000/- (rupees two lakhs forty five thousand only), before TDS, to the applicants/financial creditors 1 to 3 as per their proportionate share in the unit, one or before the 6th day of each calendar month.

v. Similarly, the corporate debtor was required to pay and was also paying, a monthly assured return of Rs. 2,13,788/- (rupees two lakhs thirteen thousand seven hundred eighty eight only), before TDS, to the applicants/financial creditors 4 to 7 as per their proportionate share in the unit, on or before the 6th day of each calendar month.

vi. The corporate debtor has been erratic in payment of assured returns to the applicants/ financial creditors and has actually and effectively paid the assured return to the applicants/financial creditors till the month of December, 2017, which to was paid in October, 2018, for all the applicants/financial creditor except for Mr. Tarun Arora to whom it was paid in December, 2018. Thereafter, no assured returns have been paid to the applicants/financial creditors have visited the office of the corporate debtor on several occasions demanding the payment of their assured returns but the corporate debtor has avoided and delayed the payment of assured returns citing one excuse or the other and has further failed to apprise the applicants regarding the true and correct timelines regarding the completion of the project where their units are locate. The corporate debtor has repeatedly assure the applicants that it will clear the arrears of the assured returns soon and has even discussed the option and possibility of refunding the entire amount paid by the applicants along with compensation for loss of opportunity but has failed to act on either of the two proposals till date.

vii. The applicants/financial creditors sent an email to the corporate debtor on 10.05.2019 and 17.05.2019, respectively, demanding the payment of assured returns and arrears thereof but to their utter shock and disbelief, they received a reply from the corporate debtor on 30.05.2019, in which the corporate debtor, in furtherance of its malafide intentions, has resorted to falsehood and lies and has cooked up false and concocted stores with the sole intent to delay and avoid the obligation of the payment of the assured returns to the applicants. In the said email the corporate debtor has falsely alleged that it had informed the applicants that it will not be paying the monthly assured returns them due to the prevailing market conditions which is totally false and incorrect as no such communication or intimation was ever made by the corporate debtor. The said allegations and claims are vague and ambiguous as they are not substantiated by any specific dates or times and are further not backed by any verifiable or traceable correspondence and is clearly a vexatious and a deliberate and malafide attempt on the part of the corporate debtor to harass the applicants and to further avoid and delay the payment of arrears of assured returns to them. In fact, it is for the first time in over 4 years that the corporate debtor sent any communication to the applicants/financial creditors and is in fact also the first time that the corporate debtor claimed that there are adverse market situations in the real estate industry.

viii. The applicants/financial creditors sent a legal notice dated 06.06.2019, demanding the payment of their assured returns of Rs. 42,75,760/- (rupees forty two lakhs seventy five thousand seven hundred sixty only) alongwith interest 9% on the delayed amounts to the registered office address of the corporate debtor as per the records of the MCA but the same was returned back unserved as the said address was incomplete with the remarks "Insufficient address". Thereafter, the applicants sent the said legal notice to the alternate address of the corporate debtor at Noida, on 18.06.2019, which was duly served upon the corporate debtor but the applicants/financial creditors have not received any response from it till date. However, after reconciling their accounts, the applicants realized that they had actually received the monthly returns till December, 2017, and not till October, 2017, as mentioned in their legal notice. However, be that as it may, the corporate debtor is still liable to pay the monthly assured returns to the applicants/financial creditors till their unit is complete and ready in all respects and its possession is offered to the applicants/ financial creditors.

2. Consequent to the issuing of notice by this Tribunal as well as service of application copy by the financial creditor, the corporate debtor filed its reply on 16.10.2019 in which the following contentions are raised by the corporate debtor:-

   i. The present application is not maintainable as there is no default as defined in Section 2(12) of the Code towards the payment of debt as defined in 2(11) of the Code to the applicant on the part of the respondent as alleged in the petition in terms of Memorandum of understanding dated 01.02.2014. It is relevant to mention here that aforesaid memorandum of understanding in the absence of the signing of the Unit-Buyer's Agreement with the respondent after the execution of the memorandum of understanding dated 01.02.2014, would not acquire the status of financial debt is payable to Buyer's under assured return only upon signing of the Unit-Buyer's Agreement of the Unit No. HS-B-004 and in the absence of the singing of the Unit-Buyer's Agreement, the applicants does not entitle to any such payment as agreed in the memorandum of understanding in terms of clause 7 which is as under:

"The assured return shall be payable only upon the execution of the Unit-Buyer's Agreement on the Company's standard format. The allottee irrevocably agrees to execute the Unit-Buyer's Agreement and abide by the terms and conditions thereof. This MOU shall be conterminous thereof. This MOU shall be conterminous and read in conjunction of the Unit-Buyer's Agreement. The MOU shall be governed by and subject to the terms and conditions of the Unit-Buyer's Agreement unless the same is contrary to the understanding reduced between the parties herein. The termination/cancellation of the Unit-Buyer's Agreement shall result in termination/cancellation of this MOU."

It is relevant to mention here that Unit-Buyer's Agreement in respect of the above said unit had not been executed between the applicants and the respondent company till date though the two sets of the Unit-Buyer's Agreement were given to the applicants on 22nd March, 2016. In the absence of the execution of the Unit-Buyer's Agreement, the applicants in terms of clause 7 supra in entitle to the payment of assured return under the MOU only after the execution of the Unit-Buyer's Agreement and the

MOU is co-terminus with Unit-Buyer's Agreement. Thus, in view of the above submissions, the present application deserves to be dismissed with exemplary cost.

ii. The assured return which are being paid up-to the month of December, 2017 is to be refunded by the applicants being they were not entitled for any such payment in terms of the MOUs' signed between the applicants' and respondent company.

iii. That the applicants have claimed the default in the payment of assured return in terms of the memorandum of understandings without informing or placing on record the Unit-Buyer's Agreements which is mandatorily to be executed between the parties to seek the payment of assured return in terms of Clause 7 of MOU Supra. In the absence or default in the terms of MOU which is binding in nature on both the parties to the agreement, the amount of debt in default shown in the petition does not qualify the provision of Sections 2(11) and 2(12) of the Code.

iv. Be as it may be, it is respectfully submitted to this Hon'ble Tribunal that real estate market especially in NOIDA/Greater NOIDA is seen as downtrend after acquisition of the land were quashed by the Hon'ble High Court, farmers agitation for the claim of enhanced compensation to their acquired land and intervention of the NGT wherein the development of the real estate projects were stayed within the radius of 10 KM from the Okhla Bird Century. The respondent company considering the above intervening circumstances explained to the respondent and informed that after the payment of assured return for the month of December, 2017, the respondent shall not pay any further payment towards assured return as neither the market condition supports and further it is not advisable to pay assured return for such a long period whereby the u nit sold to applicants shall at zero cost. It is relevant to mention here that withdrawal of the assured return in terms of Clause 10 of the MOUs can be exercised by the respondent company whose decision is final and is binding upon the parties. The clause 10 of the MOU is as under:

"The Allottee confirms that he/she/it is aware of the assured return scheme being offered by the company and has understood the terms and conditions applicable in relation thereto and as such agrees and undertakes to be bound by the same. The Company reserves to modify, amend or withdraw the assured return scheme as its sole discretion at any point of time and the allottee agrees not to raise any claim or objection in this regard." (Emphasis applied).

Respondent company had withdrawn the assured return scheme as agreed in the MOUs' w.e.f. January, 2018 as such, the respondent company had not paid any amount to the applicants after the assured return for the month of

December, 2017. The applicants has filed the present petition on account of the default in the payment of the assured return w.e.f. January, 2018 onwards only. The respondent company once exercised its opinion to withdraw the assured return after December, 2017 in exercise of their right provided in the clause 10 supra, the outstanding amount so claimed for the period beyond December, 2017 will not in any manner fall within the definition of "debt" or "default" as provided in Sections 2(11) and 2(12) of the Code.

3. The financial creditors filed rejoinder to the reply filed by the corporate in which they have opposed the contentions made by the corporate debtor as follows:-

   i. The present stand has clearly been taken by the corporate-debtor as an afterthought in order to create some kind of a defence as the first time the corporate-debtor has raised this point is in its reply dated 30.05.2019 which has sent as a reaction to the emails sent by the applicants to them. In this regard it is submitted and reiterated that as mentioned in the application, two sets of the Unit Buyer's Agreements were signed by the applicants and sent to the Corporate-debtor for counter signatures, but have not been received back till date. Since the applicants had completed the necessary formalities of signing and handing over the Unit Buyer's Agreement, the Corporate-debtor started making payment of the monthly returns to them and the mere fact that the Corporate-debtor has paid the monthly assured returns to the applicants for a period of almost four years, till December, 2017, is proof of the same.

ii. It is submitted that the Corporate-debtor, in its reply, clearly admits that it is unable to pay the assured returns due to the downturn in the real estate market and therefore, the present application should be admitted on this ground alone as it has been held in a catena of judgments that change of market scenario is cannot be a ground, reason or excuse for not fulfilling the contractual obligations.

iii. It is submitted that the Corporate-debtor by way of its reply is deliberately and malafidely attempting to shift the onus of the failure of the project by trying to create a moonshine defence of "force majeure" events in order to mislead this Hon'ble Tribunal, rather than attributing the failure of the said project to its actions/inactions. It is also pertinent to mention here that in fact the corporate-debtor has for the first time, by way of its present reply brought the above facts and circumstances to the knowledge of the applicants/Financial-creditors which further clarifies that the present stand of the Corporate-debtor is an afterthought.

iv. It has further been held in a catena of judgments that arbitrary and one-sided agreements are illegal and cannot have a binding effect and therefore, the Corporate-debtor cannot compel or enforce its illegal terms upon the applicants.

4. We have gone through the details of the documents filed by the parties and heard the arguments made by the counsels of both sides. The major point raised by the corporate debtor is that the debt has not yet become due as per the conditions of MOU executed between the parties that the assured returns shall be payable only upon the execution of the Unit Buyer Agreement on the company's standard format and the financial creditors have not yet completed this condition. It is also contended by the corporate debtor that pending execution of such agreement the assured returns were paid to the financial creditors upto December 2017 in terms of MOU to maintain the relationship though they are not eligible for this amount and that the paid amount is to be refunded by the financial creditors. Another defence taken by the corporate debtor is that the corporate debtor is at liberty to withdraw the payment of assured returns scheme at any point of time and the allottee agrees not to raise any claim or objection in this regard.

5. A perusal of the clause of MOU signed between the parties on 1st February, 2014 reveals that the assured return shall be payable only upon execution of the Unit Buyer's Agreement on the Company's standard format. The financial creditors have not shown any proof to establish the fact that they have got the Unit Buyer's

Agreement duly executed by both the parties. As a result of failure to produce the duly signed Unit Buyer's Agreement, it is considered that the debt has not yet become due. As a result the petition fails and is disposed off as dismissed with no Costs.

-Sd-

**(Dr. V.K. SUBBURAJ)**

**MEMBER (TECHNICAL)**

-Sd-

**(Dr. P.S.N. PRASAD)**

**MEMBER (JUDICIAL)**

Deepak