

**NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
C.P. (IB)/1043(PB)/2018**

**CA-292/2019,
CA-1043/2019,
CA-1718/2019,
IA-2736/2021.**

IN THE MATTER OF

ANSAL HOUSING & CONSTRUCTION LTD

...Applicant/FC

Registered Office at:

006, 6th Floor, Indraprakash, Barakhamba Road
New Delhi-110001

Also at: 2nd Floor, Ansal Plaza Mall,
Sector-1, Vaishali, Ghaziabad-201010

VERSUS

SAMYAK PROJECTS PRIVATE LTD.

...Respondent/CD

Registered Office at:

111, 1st Floor,
Antriksh Bhawan, 22, K.G.Marg,
New Delhi 110 001

**U/S 7 of IBC, 2016 r/w Rule 4 of INSOLVENCY AND BANKRUPTCY
(Application to Adjudicating Authority) RULES, 2016**

Order Pronounced on: 28.02.2023

CORAM:

CHIEF JUSTICE (Retd.) RAMALINGAM SUDHAKAR

HON'BLE PRESIDENT

MR. AVINASH K. SRIVASTAVA

HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Financial Creditor : Mr. Vikas Tiwari, Mr. Kumar Deepraj, Mr. Achint Gupta, Advs. with Ms. Neha Agarwal, AR

For the Corporate Debtor : Mr. Vivek Kohli, Sr. Adv. Monish Surendram, Mr. Invas Rawal, Advs.

ORDER

PER SH. AVINASH K. SRIVASTAVA, HON'BLE MEMBER, TECHNICAL

1. This is an application, filed on **20.08.2018** under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (Adjudicating Authority Rules), for initiating the Corporate Resolution Process (CIRP), declaring moratorium and for appointment of Interim Resolution Process (IRP), against the Corporate Debtor viz., **M/s Samyak Projects Private Limited, Corporate Debtor, hereinafter referred as 'CD'** for default in repayment of Rs. **35,64,03,784/-** (Rupees Thirty Five Crore Sixty Four Lakh Three Thousand Seven Hundred and Eighty Four Only/-) as on **31.07.2018**.
2. The Financial Creditor (FC) was incorporated on 22.10.1983 under the Companies Act, 1956, having registered office at 606, 6th Floor, Indra Prakash, 21, Barakhamba Road, NEW DELHI — 110001.

3. The CD was incorporated on **13.01.2007** under the Companies Act, 1956 (Now, Companies Act, 2013) having **CIN U45200DL2007PTC157831**, registered office at 111, 1" floor, Antriksh Bhawan, 22, K. G. MARG New Delhi — 110001. The CD is engaged in the business of real estate development/ construction business and was developing a project named "Ansal's Hub 83-II" at Sector 83, Gurgaon, Haryana, in collaboration with the Applicant.

BRIEF FACTS SUBMITTED BY THE APPLICANT/FC ARE AS FOLLOWS:

4. On 27.03.2014, an amount of Rs.25 Crores was advanced as loan by the FC to the CD by way of executing Inter Corporate Deposit (ICD) Agreement. The said loan was for a fixed term of 24 months bearing interest payable @ 24% per annum/ compounded monthly. Further, the amount advanced by the FC was secured against receivables of the CD from following projects-
- a. Ansal Heights'92, Gurgaon
 - b. Ansal Heights'86, Gurgaon
 - c. Ansal HUB'83, Gurgaon
 - d. Ansal Boulevard'83-II, Gurgaon
5. Simultaneously, with the execution of the ICD Agreement dated 27.03.2014, the Corporate Debtor issued 15 post-dated cheques for the purpose of discharging its liability to repay the principal amount of Rs.25 Crores. The inter Corporate Deposit Agreement dated 27.03.2014 has been annexed as **Annexure P-3**.
6. FC further submits that CD failed to discharge its obligation for repayment of loan. CD requested for replacement of three post-dated cheques dated **15.11.2014, 15.12.2014 & 15.01.2015** of Rs. Two Crores each vide letter dated **10.03.2015** with three cheques of Rs.Two Crores each all dated **10.03.2015**. Copy of letter dated 10.03.2015 issued by CD for substitution/replacement of post dated cheques has been annexed as **Annexure-P-4**



7. FC further submits that out of the 15 post dated cheques issued by the Corporate Debtor, 7 (seven) cheques were realized, including the three replaced cheques. Corporate Debtor made a payment of Rupees 14.5 Crores (Rupees Fourteen Crore Fifty Lakhs Only/-) to the applicant in discharge of its liability, but thereafter hasn't made any further payment after **02.05.2015**. Certified copies of bank statements of Applicant annexed till the last payment made by the CD has been annexed as **Annexure-P-7**.
8. It is the submission of FC that on 15.10.2016, the CD in unequivocal admission of its liability towards the FC, deposited a sum of Rs.43,26,857/- towards TDS against the interest payable liability of Rs.4,32,68,570/- under the ICD Agreement for FY 2015- 16 and issued TDS certificate. Copies of the TDS certificate issued by the Corporate Debtor for **FY 2014- 15 and 2015-16** has been annexed as **Annexure-P-6**.
9. To prove the existence of Financial Debt and the amount and date of default, FC has annexed the complete ledger account showing all the accounting entries of receipts and payments in respect of the said Inter Corporate Deposit Agreement dated 27.03.20 14, copies of TDS certificates issued by the CD to the FC for financial year 2014-15 and 2015- 16, certified copies of Bank statement reflecting entries of payment and receipts in respect of agreement dated 27.03.2014 (**Annexure P-7**) and Copy of Audited Accounts of Corporate Debtor for the financial year 2016-17 as filed by the Corporate Debtor on the website of Ministry of Corporate Affairs (**Annexure- P-8**). It is submitted by FC that the said Accounts show that the money borrowed by the Corporate Debtor as a Secured Borrowing in the Note related to Borrowings.
10. FC in his submissions submitted that, the Corporate Debtor failed to discharge its full financial obligation under the ICD Agreement dated 27.03.2014, which was agreed to be liquidated within a period of 24 months. FC submitted that as on **31.07.2018** an amount of Rs. 35,64,03,784/- is due and payable. The default occurred on **15.05.2015, however claim continued**

to be recognized by Corporate Debtor by virtue of the admission in audited balance sheet of the Corporate Debtor.

Reply filed By CD is as follows:

- 11.** CD submits that the FC and CD, both being in the business of construction and development, have various running accounts for several other residential/commercial projects as well where both the parties have agreed to collaborate. CD further submits that both parties had entered into four collaboration (Joint Venture Agreements) agreements in the years 2011 and 2013 for four different projects namely:
- i. Ansal Heights' 92 Gurgaon
 - ii. Ansal Heights' 86 Gurgaon
 - iii. Ansal Hub' 83 Gurgaon
 - iv. Ansal Boulevard' 83-II Gurgaon

Copies of agreements dated **18.04.2011, 24.05.2013 and 24.06.2013** are annexed as Annexure-1 (colly).

- 12.** CD further submits that for making payment towards purchase of land for development of Project Ansal Hub'83- II, an advance of Rs. 25 crores were given by the Applicant to the Respondent basis the ICD dated **27.04.2014**.
- 13.** CD further submits that the ICD was secured against the receivable from the projects falling to the share of the CD on account of projects being developed by the FC in collaboration with the CD. Under Clause 4 of the ICD, the CD had assigned the share of receivables of the CD from the Projects in favor of the FC and the FC had the absolute right to adjust the receivables from the Projects forming part of the receivable of the CD against the ICD installments in case the CD committed default in servicing repayment of loan amount of ICD as per the agreed schedule.
- 14.** Further, 15 postdated cheques dated from September 2014 to November 2015 were provided by the Respondent to the Applicant for repayment of the ICD. Out

of the said 15 cheques, 3 were replaced on 10.03.2015 and ultimately 7 cheques totally to Rs. 13 Crores were realized by the Applicant. Further, payments were made through demand drafts and bank transfers by the Respondent; however, the rest of the cheques were never encashed by the Applicant for reasons best known to them even though they were available with the Applicant as security.

15. CD further submits that no notice for default has been raised by the Applicant till date. On the other hand payments have been made by the Applicant/FC to the Respondent after the alleged default as per the ICD. In Fact, the Applicant has been disbursing and making payments to the Respondent from the years 2015 to 2017. Copies of the Bank statements reflecting the aforesaid payments made by the Applicant/FC to the Respondent/CD are annexed as **Annexure-4(colly)**. CD further submitted that If there was any amount that was due and payable by the Respondent to the Applicant, then there was no necessity for the Applicant to disburse the said payments to the Respondent. It belies logic and prudence.

16. CD submits that there is a dispute between the Applicant and the Respondent, arbitration proceedings with regard to the said Projects are currently pending adjudication before Retd. Justice A.K. Sikri wherein claims worth Rs. 10,148 Crores have been claimed by the Respondent against the Applicant before the Ld. Arbitrator.

17. Further, CD submitted that the amount that was jointly invested in land cannot be termed as financial debt. For this proposition, CD relied on the judgment of Mukesh N. Desai Vs. Piyush Patel and Ors. (Company Appeal (AT) (Ins) No. 789 of 2020 wherein it was held that “the amount invested in the land cannot be said to be a ‘Financial Debt’ as defined under Section 5(8) Code.”

Further CD relied upon the judgement of Samyak Projects Private Limited Vs. Ansal Housing Limited (Company Appeal (AT) (Ins) No. 384 of 2022 wherein Hon’ble Appellate Tribunal held that:

“6. The Joint Development Agreement between the parties makes it clear that both the parties are to share profits according to the percentage and mechanism as provided therein. Present was the case of sharing revenue profit by both the parties. Present was not a case where any Operational Debt was owed by the Corporate Debtor to the Appellant so as to initiate Section 9 Application. Various clauses of the Joint Development Agreement have been noticed and Revenue, Sharing Concept is the key to the Joint Development Agreement and the Joint Development Agreement also contemplated arbitration between the parties in event of any dispute. It has been informed by the Learned Counsel for the Respondent that Arbitration Proceedings have already been initiated and are pending between the parties. We are of the view that no grounds have been made out to entertain this Appeal. The Appeal is dismissed.”

- 18.** Applicant/FC in its rejoinder submitted the argument that what is the justification available with the CD for deducting and consequently depositing TDS of an amount of Rs. 43,26,857/-. Further, Applicant/FC submits that the said joint venture agreement(s) are completely independent commercial understanding and has no direct and/or indirect relation with the ICD agreement. It is submitted that the loan advanced under the ICD agreement was meant/agreed to be repaid within a period of 24 months. Further, it is submitted by the Applicant/FC in his rejoinder that the ‘future receivables’ of the borrowers under the collaboration (joint venture agreement) agreement was just a security under the ICD with an optional right with the lender to adjust the same against the ICD agreement.
- 19.** Further, it is the submission of Applicant/FC that the lender cannot be compelled to wait and/or be compelled to exercise its option especially when it was unequivocally agreed in the ICD agreement that the entire liability shall be liquidated by the borrowers/CD in 24 months.

ANALYSIS AND FINDINGS:

- 20.** We have heard the parties at length, perused the documents, written submissions, reply and rejoinder filed by the parties. The main controversy in the instant case at hand is the interpretation of the Inter Corporate Deposit Agreement (ICD) entered between the parties. We have perused the ICD as well as the joint venture agreements entered between the Applicant/FC and Respondent CD in the years

2011 and 2013. It is not disputed that both the applicant and Corporate debtor are in the business of construction and real estate.

21. On perusal of all the agreements entered between the parties, we find that before the application under section 7 was filed, there are various projects with which both the parties are associated having their respective shares. At this juncture, we may like to cite a relevant judgement in the matter of **Phoenix ARC Private Limited versus Spade financial Services Limited and Ors. (2021) 3 Supreme Court Cases 475** by Hon'ble Apex Court wherein it was held that:

“Section 5(8) of IBC stipulates that the essential ingredient of a financial debt is disbursal against consideration for the time value of money. A transaction which is sham or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive i.e. the real agreement between the parties is something other than advancing a financial debt.”

“Further, IBC recognizes that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors.”

22. It may not be out of place to note that there may be variety of real estate development contracts under different names which can be entered upon which may have a component in the nature of a loan. For example Collaboration Agreement, Joint Development Agreement, Inter Corporate Deposit Agreement, the purpose of which is the mutual binding legal relationship in exchange of consideration. It is a settled law that investment in any project or company per se does not come under the purview of financial debt as understood under the Code. What has to be seen is the real intention between the parties. Parties have rigorously contended regarding the encashing of cheques, non payments, bank statements etc. First question which is to be considered here is - whether the mutual arrangement entered between the parties on mutually agreeable conditions is covered under the definition of “*financial debt*” under the Code or not? It seems that the ICD read with Joint Venture Agreements entered upon is in nature of

commercial business transactions wherein the loan was advanced in order to pay money to the owners of land being mutually developed by Applicant and Corporate Debtor namely **Ansal Hub' 83 etc.** This is evident from the recitals of the ICD Agreement, **relevant portion of which is extracted below:**

“ANSAL HOUSING & CONSTRUCTION LTD., having its Registered Office at 15 UGF, Indra Prakash, 21 Barakhamba Road, New Delhi 110001 through its Executive Director, Shri KK Singhal hereinafter referred to as the "LENDER", (which expression shall unless the context otherwise requires include its successors in-interest and permitted assigns) of the SECOND PART

“WHEREAS the Borrower had approached the Lender for grant of an Inter Corporate Deposit (ICD) of Rs. 25 crores (Rupees Twenty Five Crores only) for making the payment to the land owners pertaining to the land purchased by the Borrower in Sector 83, Gurgaon for development of the Project Ansal's Hub 83-11 by the Lender in collaboration with the Borrower.

AND WHEREAS the Lender had considered the request of the borrower and has placed an ICD of Rs. 25 crores (Rupees Twenty Five Crores only) on the terms and conditions as agreed between the Lender and Borrower.

The parties hereto are now desirous of formally recording the said terms and conditions in writing which are recorded hereinafter.”

23. In the Joint Development Agreements entered into between the Applicant and the Respondent for the four projects (see, para 11 **ibid**), there is a particular percentage of sale realisations from sale of areas to be developed/constructed which both the parties intended to share between them. As an illustration in the JVA for **ANSAL HUB 83-II, Gurgaon**, the share percentage is extracted below (page no 27 of the reply filed by CD):

“13 SHARING OF AREAS/RECEIVABLES

13.1 That in consideration of the contribution/obligation of the First Party and the Developers under this Agreement, it has been mutually agreed that the entire sales realizations from sale of saleable/ super built up areas to be developed/constructed in terms of this Agreement

by the Developers shall be shared by the parties in the ratio as given hereunder :-

First Party = 32.50%

Developer = 67.50%

24. On perusal of the Inter Corporate Deposit Agreement(ICD) entered between the parties, we find a similar clause of receivables which both the parties mutually agreed. Relevant portion from the ICD is extracted below:

“4. The above mentioned ICD shall be secured against the receivable falling to the share of the Borrower ("Borrowers Receivable") on account of following projects being developed by the Lender in collaboration with the Borrower:

Ansal Heights' 92, Gurgaon

Ansal Heights' 86, Gurgaon

Ansal's Hub'83, Gurgaon

Ansal's Bub'83-11, Gurgaon

5. The Borrower has assigned the "Borrowers Receivables" in favour of the Lender and the Lender has an absolute right to adjust the Borrowers Receivable against the ICD installments in case the Borrower commits default in servicing the interest on monthly rests or repayment of installments of Principal Loan amount of ICD as per agreed Schedule.”

25. On perusal of the ICD together with Joint Venture Agreement entered into between the parties, we do not find any force in the contention of the Applicant that the said joint Venture agreement(s) are completely independent commercial understanding and has no direct and/or indirect relation with the ICD agreement. In fact, we note that JVAs are executed prior to ICD i.e in the year 2011 itself wherein first party (Respondent/CD) collaborated with Developer (Applicant/FC) to develop the project. On perusing the recitals of 'JVA', it is found that it is the CD who made an offer to Applicant (Developer) to develop the project and also to market and sell the same as the Applicant (Developer) has an excellent track record of development of various real estate development projects of large sizes. Further, it is the CD who had made substantial investment by way of payment to the owners

for acquiring rights for development of the proposed group housing scheme.

Relevant portion of the JVA is extracted below:

“AND WHEREAS the First Party is desirous to use the expertise of the developer to develop the project envisaged on the said land and also to market and sell the same as the developer has an excellent track record of development of various real estate development projects of large sizes and magnitudes.

WHEREAS based on the aforesaid representations by the First Party and after verifying the relevant documents, the Developers has agreed to collaborate with the First Party to develop a Group Housing Scheme on the said land in terms of the license obtained by the Owners from Director Town and Country Planning, Haryana on the terms & conditions as briefly mentioned hereunder.”

- 26.** Further, on perusal of ICD, we noted that it is the borrower(Respondent) who had approached the lender for grant of an inter corporate deposit of 25 crores rupees for the payment to the land owners pertaining to land purchased by borrower in Sector 83, Gurgaon for development of project Ansal Hub 83 II, Gurgaon. In consideration, lender (Applicant) was given a security against receivables falling to the share of borrower. **(See, Para 16, 18 (ibid)).**
- 27.** Considering all these facts, we may infer without doubt that it is the mutual business understanding of both the parties and the payment of the price for land by Applicant to Respondent preceded by the offer given by the Respondent to Applicant for development owing to their expertise are linked events in a collaboration and (Applicant) Developer vide “ICD” further lent money to Respondent for paying to the land owners only. It is difficult to hold that both the agreements have nothing in common or that these are independent. In our considered opinion, both JVAs and ICD are linked together for the development of projects.
- 28.** Further it is found in the bank statements produced by the CD that the Applicant had disbursed money in the years 2015 to 2017 and the same is taken on record. The question arises here is that when the Respondent had defaulted in the year

2015 itself, why the Applicant was disbursing money to CD? We may therefore infer that both the parties are working together for the development of real estate projects.

29. From a careful reading of the terms and conditions of the various agreements i.e. JDA and ICD agreement, it seems that the real intention of the parties is to enter into arrangement/collaboration wherein both are interested in the development of the project and both are sharing benefits of the same in a particular ratio. CD relied upon the judgement by **Hon'ble NCLAT in Appeal (AT)(Ins) 384 of 2022** wherein Hon'ble NCLAT dismissed the Appeal, upholding the order of dismissal by Adjudicating Authority in **CP(IB)/249/2019**. Relevant portion of the Order of the Adjudicating Authority is extracted below:

“17. On reading the various clauses of the JDA, which is almost identical in all the three JVAS, it appears to be a case of joint Development by proportionate participation of both the parties and sharing of the profits or the built-up area in the manner specified in the JVA. Nowhere, in the JVA, there is an indication to the effect that Respondent has to provide services to the Petitioner, if both are to share the project by putting the land and development works and sharing the land and technical support for development and share the profits, it can be only termed as a case of JV Project and not a case of service provider by one party or the other. It is also to be noticed that in case of dispute, it is a case for Arbitration between the parties in the JVA. We also find that there are clauses in the JVA which state even in respect of interest collected from customers for late payment, which should be shared between landowner and developer in a particular ratio. It therefore goes beyond mere construction and development, it goes further subsequent to the completion of the project, If the units are given to the intending purchaser and there is a delay in payment even that will be shared between parties. The revenue sharing concept which is the key to this JVA makes it very clear that it cannot be termed as a service owed by the Respondent to the petitioner; both will have to sail together or sink, because of the JVA. Furthermore, we also notice that at page 136 to 145, are the statements given by the respondent in the normal course of business, stating details of the property under development and the share of the petitioner under the JVA.

20. The reading of it makes it clear that in terms of the JVA a substantial amount of Rs. 23,44,53,000/- has been received by the petitioner from the respondent/corporate debtor and there is a balance of Rs. 03,92,18,660/-. This should at best be termed as an ongoing business

liability which should been resolved between the parties in terms of the JVA. This makes it clear that it is not a case of debt but is a case of liability as between one partner and the other partners in the JVA."

This reasoning applies to the facts of the present case as well.

30. For the aforementioned reasons, we are of the opinion that the said contract is in nature of joint development of projects , rather than a loan agreement simpliciter. Both parties are more particularly involved in the development/construction of said project whereas as per the definition of Sec 5(8) "financial debt" means "*a debt alongwith interest (if any) which is disbursed against the **consideration for the time value of money.***" In our opinion, the ICD agreement cannot be read alone and is not covered in the definition of Financial Debt rather the parties appear to have entered into an agreement with a different motive i.e. development of the project and sharing the proceeds therefrom. There is no case to hold that it is a case of admitted debt and default. No case is made out under the code. Parties may pursue the matter to seek appropriate remedy as per law.

ORDER

31. We find no merit in this case for Admission under Section 7 as "*financial Creditor*".

The **CP(IB)/ 1043(PB)/2018** is **DISMISSED**.

32. In the light of above order, all pending application i.e., **CA-292/2019, CA-1043/2019, CA-1718/2019, IA-2736/2021** stand disposed of.

File be consigned to the record.

-sd-

RAMALINGAM SUDHAKAR
PRESIDENT

-sd-

AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)