S.No.105

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON **11-04-2022** AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

CP(IB) No.743/9/HDB/2019
U/s 9 of IBC, 2016

IN THE MATTER OF:

Shri Uday Gopichand Sanghi **...Operational Creditor**

Vs

Fima Properties Pvt Ltd **...Corporate Debtor**

C O R A M:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)

SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

O R D E R

Orders in CP(IB) No.743/9/HDB/2019 are pronounced as recorded vide separate sheets. In the result, the application is allowed. CIRP is ordered against the Corporate Debtor as per the terms metnioned in the order.

MEMBER (T) **MEMBER (J)**

Karim

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-1

CP (IB) No.743/9/HDB/2019
U/s. 9 of Insolvency & Bankruptcy Code, 2016
R/w. Rule 6 of I&B (AAA) Rules, 2016

In the matter of:

Shri. Uday Gopichand Sanghi, & Smt. Kumud Uday Sanghi
101, Devshree 204, Shivaji Nagar
Nagpur- 440010, Maharashtra

... Applicants/Operational Creditor

Versus

M/s. Fima Properties Private Limited
6-3-896/95/A, Naveen Nagar, Road No.1
Banjara Hills, Hyderabad-500034, Telangana

... Respondent/Corporate Debtor

Date of Order: 11.04.2022

Coram:

Dr. Venkata Ramakrishna Badrinath Nandula, Hon'ble Member (Judicial)
Sh. Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)

Parties/Counsels present:

For the Petitioner: Mr. V.S. Raju, V.B. Raju, Advocate
For the Respondent: Mr. Salvaji Raja Shekhar Rao, M.N. Agastya, Advocate

PER BENCH

1. This Company Petition has been filed by Applicants (*Hereinafter to be referred as Operational Creditors*) under Section 9 of Insolvency and Bankruptcy Code (*Hereinafter to be referred as "Code"*), read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, alleging non-payment of Rs. 1,21,04,782/- *(Rupees One Crore, Twenty one Lakhs, and Four Thousand Seven hundred eighty two only)* including the Interest at the rate of 18% p.a upto 41 months till March, 2019 and Rent penalty calculation at Rs. 20 per square feet per month, said to be due and payable by Respondent (*Hereinafter to be referred as Corporate Debtor*) to Operational Creditor seeking admission of the petition, initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon, vide CP (IB) No.743/9/HBD/2019.

2. The Operational Creditor states that Corporate Debtor is a Private Limited Company incorporated under the Companies Act, 1956 having CIN No. U70102TG2007PTC055876. Its authorised share capital is Rs. 3,00,00,000 and its paid up share capital of Rs 1,00,000/-

3. The Contentions put-forth by the Operational Creditor dated 14.11.2019 are:

3.1. That the 11 Property Holders in the Agreement for Sale were represented by the Corporate Debtor by virtue of Development Agreements cum General Power of Attorneys bearing Document

Registration No. 5666 of 2007 dated 27.12.2007, 5643 of 2007 dated 28.12.2008, 5667 of 2007 dated 27.12.2007, 5665 of 2007 dated 27.12.2007, 5668 of 2007 dated 27.12.2007, 5669 of 2007 dated 27.12.2007, 648 of 2008 dated 31.01.2008, 918 of 2011 dated 30.03.2011 registered in the Office of Sub-Registrar, Golconda, Hyderabad.

3.2. The Corporate Debtor thus became the owner and possessor of the land formed under Survey No. 129/77 of Shaikpet Village and Mandal out of the total extent of 8830.73 square yards equivalent to 7383.55 square meters and having gained the developmental rights, obtained the permission for construction of multistoried residential group Complex consisting of 13 towers in 2 blocks vide permit No. 12/25 in File No. 835/CSC/TP-7/2008 and 67186/26/09/2012 dated 20.10.2009, issued by the Commissioner and Special Officer, Greater Hyderabad Municipal Corporation, Hyderabad and progressed the construction of the group Complex in the name "Fima Hill Top"

3.3. That the Scheduled Property in the Agreement for Sale was "Flat in Block B, Tower No. 12, in the Fifth Floor, bearing No. 5, admeasuring 3181 square feet" (*Hereinafter to be referred as Schedule Property*). The Corporate Debtor offered to sell the above scheduled property to Operational Creditor free from all encumbrances for Sale Consideration of Rs. 2100/ per Square Feet and the Operational Creditor agreed to the same. Thus Agreement for sale was executed on 09.04.2013 at Hyderabad, Andhra Pradesh between the Corporate Debtor and Operational Creditor.

3.4. That the Total Sale Consideration under the indenture in respect of the Schedule Property was fixed at Rs. 66,80,100/-. On 08.04.2013 the Operational Creditor paid the amount of Rs. 6,80,100/-, the same has been acknowledged by the Corporate Debtor. Thereafter Operational Creditor further agreed to pay balance sale consideration of Rs. 60,00,000/- to the Corporate Debtor as per the schedule mentioned in the agreement.

3.5. That the Operational Creditor would pay an additional amount for the additional facilities, which shall not be inclusive of the sale consideration and shall be paid at the time of handing of the Schedule Property.

3.6. That in accordance with the Agreement of Sale, the Corporate Debtor shall complete the project within a period of 2 years from the date of the indenture i.e. 09.04.2013 and further entitled to grace period of 6 months from the expiry of 2 years. As per the penalty clause in the said Agreement, In case of non-completion of the Scheduled Property by the Corporate Debtor within a period of 30 months, the Operational Creditor shall be entitled to receive rent over the said scheduled property to be paid by the Corporate Debtor.

3.7. The said rent shall have to be paid by the Corporate Debtor on monthly basis at the rate of Rs. 20/- per square feet of total square feet formed and in case of such rental payments exceeding 12 months, the Operational Creditor along with likeminded individuals shall reserve the right to get the project completed by alternate means.

3.8. That based on Agreement for sale, the payments were made by the Operational Creditor to Corporate Debtor for purchase of the scheduled property through various invoices dated 02.04.2013 till 01.03.2014 total amounting to Rs. 58,80,100.00. The default has been made by the Corporate Debtor for not allotting the Scheduled Property and completing the project within the required time period that is 30 months from the date of the Agreement of Sale.

3.9. Thereafter the Operational Creditor issued the Demand Notice dated 30.04.2019 in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to Corporate Debtor by RPAD which was received by Corporate Debtor on 13.05.2019. Hence this Application is filed under Section 9 of the Code.

4. The Contentions put-forth by the Corporate Debtor in the Counter dated 21.02.2020 are:

4.1. The Operational Creditor approached the Respondents for purchase of the Schedule Property and both parties agreed to certain terms and conditions which were deduced in the form of Agreement of Sale dated 09.04.2013. As per the Agreement of Sale the Sale Consideration for the Schedule Property was fixed at Rs. 2100/- per Square Feet.

4.2. On 09.04.2013 the Operational Creditor and Corporate Debtor also entered and executed the Memorandum of Understanding (MoU) by which the Operational Creditor would pay and additional amount of Rs. 2400/- Sq. Feet towards additional amenities in toto. By virtue of which the Cost of the Schedule Property was fixed at Rs. 4500/- which would total to Rs. 1,43,14,500/- (One Crore, Forty Three Lakhs, Fourteen Thousand and Five Hundred Only)

4.3. That the Operational Creditor paid a sum of Rs. 47,80,100 against the total Sale Consideration of value 1,43,14,500/-. A sum of Rs. 95, 34,400 was further due towards the Sale Consideration.

4.4. The Dispute between the parties was with respect to allotment of Flat and payment of balance sale consideration. The Operational Creditor failed to disclose the dispute raised by the Corporate Debtor which arose out of the Agreement of Sale. Rather than paying the balance sale consideration and registration of flat, the Operational Creditor initiated proceedings under the Insolvency and Bankruptcy Code, 2016.

4.5. That the Agreement of Sale and MoU were executed on 09.04.2013. That the Cause of action started on 01.03.2014, the date on which the Operational Creditor made the last payment was never received by the Corporate Debtor. The present petition was filed in this Hon'ble Tribunal on 13.11.2019 and the said petition is barred by limitation as the date of limitation for filing Petition in this Hon'ble Tribunal expired on 28.02.2017

4.6. The claim was based on Breach of Contract between the Parties and the limitation for breach of Contract is covered under Section 55 of the Limitation Act which is mentioned below:

"For compensation for the breach of any contract, express or implied, not herein specially provided for-----Three years. ------ When the

contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases".

4.7. The Debt which was claimed by the Operational Creditor is disputed as well as time barred and falls under Section 5(6) of the Insolvency and Bankruptcy Code, 2016. The Demand Notice in Form No. 3 dated was received by the Lower Rank Official and who missed to place it before the Management, due to which Management of the Corporate Debtor genuinely could not reply to the same. The Corporate Debtor had several times reminded the Operational Creditor to make balance payment of Sale Consideration and Amenities and therefore it is the Operational Creditor which owes money to the Corporate Debtor.

4.8. The Corporate Debtor relied on the case of **Drulam India Private Limited vs. Sharma Kalypso Private Limited**[1] where Hon'ble NCLAT held that *"not giving of reply by the Corporate Debtor to the Demand Notice in Form No. 3 issued by the Creditor will not take away the right of the existence of dispute before the Adjudicating Authority"* further contending that it will apply to the present case.

4.9. The Operational Creditor had selectively placed facts by concealing facts regarding the existence of disputes with regard to Agreement of Sale.

[1] Company Appeal No. 351 of 2018

4.10. The debt without admitting, if taken on face value does not qualify under the Operational Debt. Reliance was placed on Section 5(20) and Section 5(21) of the Code which talks of *"Operational Creditor"* and *"Operational Debt"* respectively which is mentioned below

"Section 5 (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

"Section 5 (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 3 [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

4.11. Therefore, the Operational Creditor had not supplied any goods or services and the Claim is time barred and based on disputed facts.

5. A Rejoinder has been filed by the Operational Creditor denying the averments in the Counter and reiterating the contentions put forth by the Operational Creditor.

6. In light of the above, following points are framed for consideration by this Adjudicating Authority

(i) Whether there is an Operational Debt due and payable by the Corporate Debtor, if so whether the Corporate Debtor has defaulted in the payment of the same to Operational Creditor?

Point (i)

7. **Whether there is an Operational Debt due and payable by the Corporate Debtor, if so whether the Corporate Debtor has defaulted in the payment of the same to Operational Creditor?**

7.1 Learned Counsel for the Operational Creditor, submits that the Operational Creditor filed this Application under Section 9 of the Code as the Corporate Debtor failed in discharging the Operational Debt of Rs. 1,21,04,782/- *(Rupees One Crore, Twenty one Lakhs, and Four Thousand Seven hundred eighty two only*). Learned Counsel would submit that cause of action arose on 09.04.2013 pursuant to the Agreement of Sale entered into between Applicants as well as Respondent Corporate Debtor. It is submitted that as per the Agreement, the Operational Creditor paid an amount of Rs. 58,80,100.00 towards Schedule Property to Corporate Debtor, and the terms of the above sale agreement provide for in the event of non-completion of the project and handing over of the Flat as per the agreement of sale within stipulated period of 30 months or 2 years 6 months from the effective date of this Agreement, then the Operational Creditor is entitled for rent over the subject property from the Corporate Debtor.

7.2 The Undisputed Agreement of Sale dated 09.04.2013 inter alia provides for Penalty Clause, which is as below-

- *That, as foresaid in the immediate preceding clause the VENDOR shall be vested with and be entitled for a period of 30 months (2 Years for completion with a grace period of 6 months thereof) from the Effective Date of this indenture for completion of the entire project, in* *regard it is hereby expressly agreed that in the event the VENDOR does not complete the project within the said period of 30 months in Toto, then the Vendee herein shall be entitled to be paid "Rent" over the Schedule Property by the VENDOR.*

- *That it is hereby expressly agreed and understood that such amount of "Rent" shall be paid by the VENDOR on monthly basis @ of INR 20/-per Square Feet of total Square Feet formed under the Scheduled Property.*
- *If such 'rental payments' by Vendor to Vendee, exceeds twelve months. The Vendee along with like minded vendees, reserves the right for alternative means of having the project completed.*

7.3 Since, the sum claimed as due and payable being the rent, the subject debt is an operational debt. As per the Ledger filed by the Corporate Debtor a sum of Rs. 47,80,100 has been paid.

7.4 As per the Demand Notice issued by the Operational Creditor, a sum of Rs. 1,17,97,646 has been claimed as due and payable by the Corporate Debtor. Admittedly this Demand Notice was not responded despite receipt. Needless to say, in term of Section 8(2) of Insolvency and Bankruptcy Code, 2016 if the Corporate Debtor fails to make payment within 10 days form the date of receipt of demand notice the Operational Creditor is entitled to file application under Section 9 of the Code.

7.5 The Corporate Debtor however while refuting the claims made by the Operational Creditor averred that Operational Creditor failed to disclose the dispute raised by the Corporate Debtor that arose out of the

Agreement dated 09.04.2013. It was further argued that the Corporate Debtor, instead of paying balance sale consideration, has chosen to initiate these proceedings with ulterior intentions. The Corporate Debtor also claimed that the Operational Creditor selectively filed material thereby concealing the full facts with regard to existence of dispute with respect to Agreement. Further the Corporate Debtor also disputed the status of Operational Creditor and averred that the applicant do not qualify and satisfy definition given under Operational Creditor and Operational Debt under the Code.

7.6 As rental income clearly falls under the definition of Operational Debt, we cannot bar the Operational Creditor to claim his dues under Section 9. We also observe that the mandatory requirement of issuance of notice under Section 9 of the Code, has been complied with by the Operational Creditor vide notice dated 30.04.2019. However, the Corporate Debtor has not given any reply to the notice which fact has been accepted by the Corporate Debtor in his Counter affidavit, however by offering a feeble explanation that it was received by a lowest rank official in the Company and was not put up to Management. This contention cannot be acceptable as for all the actions of the officials of the Corporate Debtor the management is solely responsible and as such we do not give credence to this averment made by the Corporate Debtor.

7.7 Thus, in the instant case, there is no record whatsoever of existence of any dispute as to the Debt, has been raised before receipt of Demand Notice. Thus, existence of Operational Debt and its default by the Corporate Debtor, stands established. Point is answered accordingly.

7.8 Accordingly, the Adjudicating Authority admits this Petition under Section 9 of the Code declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions: -

(A) The Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(B) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(C) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(D) That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

(E) That this Bench hereby appoints Shri. Parupudi Srinivasu registration no. IBBI/IPA-002/IP-N00588/2018-2019/11985 as Interim Resolution Professional, whose contact details are:

E-mail: parupudi1954@gmail.com

Address: D No.1-1-191, Flat-301, Siri Laxmi Arcade, Chikkadapally, Hyderabad, Telangana, 500020.

as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code. Proposed IRP to file Form-2 within 2 days of receipt of this order. Authorisation for Assignment is valid to 13.12.2022. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

(F) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

(G) The Applicant/Operational Creditor is directed to deposit an amount Rs. 2,00,000 (Rupees Two Lakh only) with the IRP to meet the initial CIRP expenses including the fee of IRP.

(H) The Operational Creditor is directed to communicate this order to the IRP appointed in this case.

(I) The Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.

11.04.2022

VEERA BRAHMA RAO AREKAPUDI	**DR. N V RAMAKRISHNA BADARINATH**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Rohit