

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

Company Petition No. (IB)- 1026/PB/2020

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Mr. Rohit Prasad

.... Financial Creditor

Vs.

M/s S and N Lifestyle Infraventures Pvt. Ltd

.... Corporate Debtor

CORAM:

SH. P.S.N PRASAD, HON'BLE MEMBER (J)

SH. RAHUL BHATNAGAR, HON'BLE MEMBER (T)

Order Delivered on: 28.03.2023

Present:

For Applicant: Mr. Jaideep Singh Adv., Mr. Kartik Dabas Adv.

For Respondent: Ms. Nalini Adv., Mr. Arun Saxena Adv.

ORDER

PER: SH. P.S.N. PRASAD, MEMBER (JUDICIAL)

1. The instant application is filed by Mr. Rohit Prasad (hereinafter referred as 'Applicant') son of Gopal Krishna Prasad residing at T7/1102, L&T Emerald Isle, Saki Vihar, Powai, Mumbai – 400072 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') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. S and N Lifestyle Infraventures Pvt. Ltd (respondent Company), referred to as the corporate debtor.

2. The Respondent Company M/s. S and N Lifestyle Infraventures Pvt. Ltd., (CIN No. U45200DL2008PTC182273) was incorporated on 21.08.2008 under the provisions of the erstwhile Companies Act, 1956 having its registered office situated at G-40, Ground Floor, Gaurav Apartment, SFS DDA Flats, Saket, New Delhi 110017.

3. The details of transactions leading to the filing of this petition as averred is as follows: -

a) Applicant advanced a sum of Rs. 99,99,999/- vide cheque number 088992 dated 28.05.2014 in favour of Respondents herein and established the terms vide a general agreement dated 18.10.2014 where applicant and respondent entered into an memorandum of understanding. The subject matter of agreement was purchase of 5% equity share at a Housing project at The Highlands, Aures Valley, village Challang, Rajpur Road, Dehradun commenced by Respondent.

b) In furtherance it was mentioned in the agreement that the cheque no 088992 dated 28.05.2014 of Rs 99,99,999 favoring the respondent is towards 100% payment in



respect of 5% equity share in above-mentioned Housing project which as per agreement was estimated for execution, completion and handing over in four years. It was also agreed upon by the parties that the investment in equity shall remain with Respondent herein in for the lock in period of 4 years i.e. 4 years from the date of agreement as per clause 6 of agreement placed on record.

- c) Further it was also decided in said agreement that after completion of the lock in period the respondent here in guaranteed to capitalise the applicant's equity share and would pay the applicant herein his investment and profit in the project pro-rated to his equity share. According to the unconditional guarantee given by the respondent, they agreed to pay the applicant herein a minimum amount not less than Rs. 2,00,00,000 as return of capital and profit, in any condition. Respondent also represented in the agreement that full and total amount of Rs. 3,50,00,000 comprising of applicant's equity investment and 5% profit in project as pro-rated will be paid.
- d) Also agreed in case the respondent fails to finish the project in stipulated time period of 4 years and applicant doesn't wish to retain his equity after lock in period, then additional grace period of 3 months may be provided to the respondent upon mutual consent and in that case for



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the additional period an interest of 1.5% per month on the payments due will be paid by the respondent for next 3 months. In case the respondent still is not able to clear the dues then respondent will be bound to transfer the land equivalent to the total payable amount as per market rate to the applicant or his nominees and respondent will not there on enjoy any rights of whatsoever nature or claims towards his land and said land will be treated as fully paid up and freely transferable.

e) It is also stated in the said agreement that the respondent has full rights and powers to construct, develop, market, brand and sell apartments in the said project at Dehradun.

f) Consequently, as submitted by the applicant, even after the end of 4 years and additional three months, no payments have been made by the respondent as agreed to as per the agreement.

g) As per part IV of the application, a sum of Rs. 4,76,00,000/- which includes default amount of Rs. 3,50,00,000 and interest of 18% per annum of Rs. 1,26,00,000 is claimed from the corporate debtor/respondent.

4. The Corporate Debtor has filed its reply/written submissions and has raised objection against the petition as below: -



- a) It is submitted that as per the terms of the Memorandum of Understanding/ General agreement with the applicant dated 18.10.2014 the Applicant invested Rs. 99,99,999 in a housing project to be developed by Respondent. For the investment made by the applicant, 5% equity stake in the housing project was to be given to applicant. The lock in period for the completion of the project was 4 years from the date of the execution of the agreement (18.10.2014).
- b) It is stated that the investment by the applicant was to be capitalized with at least Rs 2,00,00,000 as return on investment and 5% profit and as per clause 8 of the agreement the Respondent/ corporate debtor shall pay an amount of Rs. 3,50,00,000 comprising of return of equity and 5% profit in the project. In case the respondent fails to complete the said project in four years, the applicant's equity survives and respondent will be given extra 3 months to complete the project however even at the expiry of 3 months' respondents fails to complete the project then respondent shall have to transfer the land equivalent to the total amount of capitalization in favour of Applicant.
- c) Respondent stated that date of default mentioned in the petition filed by Applicant is incorrect. The petition mentions the date of default as 28.05.2018 while as per



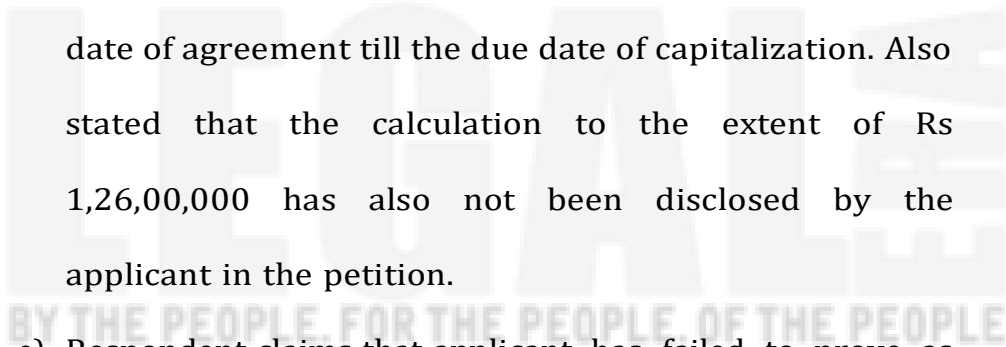
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the agreement entered upon on 18.10.2014 for the lock in period of 4 years, the default date excluding the grace period of 3 months will 18.10.2018 and taking into account the grace period the date of default has to be 18.01.2019.

d) Respondent claims that applicant has claimed an amount of Rs. 1,26,00,000 as interest @18% p.a. and the same is blatantly incorrect as there is no interest at all had been agreed between the parties neither in the agreement dated 18.10.2014 nor anywhere else from the date of agreement till the due date of capitalization. Also stated that the calculation to the extent of Rs 1,26,00,000 has also not been disclosed by the applicant in the petition.

e) Respondent claims that applicant has failed to prove as to how the alleged investment of Rs 99,99,999 falls under the definition of financial debt as given under Section 5(8) of the Code. Prima Facie the applicant has invested in the 5% equity shares in the project and therefore had 5% share in the said project not the company, hence it was never shown as shareholder in the balance sheet of the Respondent company. Also Respondent averred that the said amount has been invested by the applicant on the premise that the said investment shall be returned to applicant with 5% profit





which will be minimum Rs 2,00,00,000 to maximum of Rs. 3,50,00,000 and if such invested amount is not returned then applicant shall get land equivalent to the amount. Hence there is no Time Value of Money in the said transaction. The respondent claims that in the garb of IBC the applicant wants to arm twist the respondent company.

- f) It is further stated as to how, as per clause 12 of the agreement between the parties, the applicant is entitled to land transfer in his name of total amounting to the capitalized investment amount as mentioned in the agreement. Therefor there is no amount which is due and payable by the respondent to the applicant. The default in the agreement transferring the land to the applicant gives no rise to claim under IBC since there is no consideration for the time value of money and therefor it does not fall within the ambit of any of the clauses enumerated under section 5(7) and section 5(8) of the Code.

5. The applicant submitted a rejoinder/written submission wherein averments made by the corporate debtor in the reply were denied and it was stated that -

- a. The present application falls within the jurisdiction of this Hon'ble Tribunal and the same is evident from contents of the petition.



b. As per the agreement the Applicant (second party to the agreement dated 18.10.2014) advanced a loan to the Corporate Debtor to enable construction for commercial sale of their housing project at The Highland, Aures Valley, Village Challang, Rajpur Road, Dehradun for a consideration of Rs 99,99,999/- paid to the Corporate Debtor (first party to the agreement dated 18.10.2014) via cheque no: 088992 dated 28.05.2014, and being reflected as equity share holder of the second party in the said project.

c. The Adjudicating Authority to take note of clause 7 of the said agreement wherein the Corporate Debtor gave an unconditional guarantee to return of capital and profit of Rs 2,00,00,000/- (Rs Two Crores) after a lock in period of 4 years. Also at Clause 8 of the contract, corporate debtor committed to capitalize the said equity in the project, along with 5% share of profits by paying a full and total payment of Rs. 3,50,00,000 (Rs Three Crore and Fifty Lakhs only) upon completion of the project.

d. Further, the lock-in period referred to under the aforementioned Clause has been defined under Clause 6 of the agreement, as a period of 4 years from the date of the agreement that is 18.10.2014. And the conjoint reading of the aforementioned Clauses of the agreement, it is crystal clear that the Financial Creditor had not



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purchased equity in the said project in perpetuity and that there was a specified date (lock in Period) by which the debt amount was to be repaid at a prescribed rate of return.

- e. That the Annual Returns and Balance sheets of filed by the Corporate Debtor proves that no equity shares were ever allotted or disbursed by the corporate debtor to the financial creditor. Hence, the plea taken by the Corporate Debtor that Financial Creditor has invested in the equity, is against the factual position, as it is not reflected in the Balance Sheets and returns filed by the Corporate Debtor of 2013-14, 2014-15, 2015-16 and 2016-17.
- f. That the amount had been raised for economic gain by the corporate debtor who as per clause 3 of the agreement "have full rights and powers to construct, develop, market, brand, and sell the apartments in the project at Dehradun". Hence this debt has the commercial effect of borrowing, as the terms of the transaction included utilizing the debt for construction and commercial sale of this project, and return of double amount (Rs. 2 Crores) of the capital borrowed (Rs I Crore) and total return payment of Rs 3 Crores 50 Lakhs after 4 years, and completion of project. Therefore, it qualifies as a financial debt under Section 5(8) (f) under IBC.



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g. Reliance was placed by the applicant on the judgments in the cases of:

Pioneer Urban and Infrastructure Limited v. Union of India & Ors. in WP Civil No. 43 of 2019 dated 09.08.2019 by **Hon'ble Supreme Court of India**, wherein it was held that –

“would subsume within it raised under the transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing...so long as an amount is "raised under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advanced for temporary use so that a flat/apartment is given back to the lender”

Also referred to the judgement dated 21.01.2019 in matter of **Pushpa Shah v. IL&FS Financial Services Limited Company Appeal (AT) (Insolvency) No. 521 of 2018** by **Hon'ble NCLAT, New Delhi:**

“Financial Debt can be segmented into two types: One is disbursed against the consideration for the time value of money. The second is any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing'.

And in the matter of **Dr B.V.S Lakshmi Vs Geometrix Laser Solutions Pvt. Limited Company Appeal (AT)**



(Insolvency) No. 38 of 2017 by **Hon'ble NCLAT** New Delhi dated 22.12.2017:

"A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument. For example, for any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has disbursed. The disbursement against the 'consideration for the time value of money' is the main factor."

Also, **Hon'ble NCLAT** in the matter of **Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd. (AT) (Insolvency) No. 07 of 2017:**

"In other words, while Applicants were investors and have chosen a committed return plan, the Corporate Debtor, on the other hand, raised the amount by way of a sale purchase agreement which has the commercial effect of a borrowing. Therefore, as per Section 5(8)(f) of IBC, the amount invested by the Applicants fell within the meaning of 'financial debt'."

- h. That the definition of 'financial debt' is an inclusive definition (not exhaustive) and the judiciary has powers to interpret and bring in other situations and set of facts which can be considered as financial debt and not given in the definition. It is submitted that the Applicant falls under the definition of Financial Creditor as defined



under Section 5 (7) of the Insolvency and Bankruptcy Code, 2016 and corporate resolution proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 can be initiated.

- i. That the Corporate Debtor has admitted to liability in the mail exchanges and proposed to pay Rs. 1.5 Crores to the Financial Creditor in equal installments of 50 lakhs every month starting from July 2020. Thus, the Financial Creditor ought not to be misconstrued as an equity shareholder or investor, as the sole aim of this debt as borne out from the contract was return of the capital with interest after 4 years, and no land was sold/no apartments allocated, or any equity shares issued to the financial creditor.
- j. That the mention of specific date on which amount is to be repaid at prescribed interest establishes that the amount has been raised for economic gain and has commercial effect of borrowing given that the transaction also included purchase of equity by applicant.
- k. That there was an element of time value of money as repayment was to be made after the expiry of lock in period of 4 years. Hence the amount is within the ambit of "financial debt" under the IBC
- l. That the Applicant is a financial creditor in terms of the IBC and ought not to be misconstrued as an equity



shareholder or investor. Moreover, the Applicant does not have any share in the company of the Corporate Debtor. Therefore, by no stretch of imagination can the financial creditor be termed as an equity share holder since the Corporate Debtor failed to comply with terms of the aforesaid agreement which was duly signed and accepted by the Corporate Debtor. Therefor in view of the facts and circumstances as aforesaid, prayed that the Corporate Debtor is liable to pay the total outstanding amount of Rs. 3,50,00,000/- (Rupees Three Crores and Fifty Lakhs only) and further interest at the rate of 18% per annum till realization of the aforesaid outstanding dues.

6. We have heard Ld. Counsel for both the parties and perused the contents in the application, reply and rejoinder and also written submissions filed by the parties. Since the registered office of the respondent / corporate debtor is in Delhi, this Tribunal having territorial jurisdiction over the Union Territory of Delhi, therefore is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

7. We have to consider following issues:

- i. Whether the parties have entered into contingent or forward sale agreement?



- ii. Whether the amount claimed by the applicant as per Part IV of Application amounting to Rs. 4,76,00,000 (Principle Amount of Rs 3,50,00,000 plus interest Rs 1,26,00,000) is a financial debt under section 5 (8) (f) of I & B code?
- iii. Whether the Applicant falls in the category of Financial Creditor as per Section 5 (7) of I & B code?

Issue i : Whether the parties have entered into contingent or forward sale agreement?

8. The applicant and respondent entered in the general agreement dated 18.10.2014 which is an admitted document. According to applicant, a sum of Rs 99,99,999 was paid to Respondent via cheque dated 28.05.2014 (approximately 5 months prior to memorandum of understanding) on condition that Respondent will give 5% equity in the Housing Project of respondent in Dehradun. After four years (lock in period) from signing the agreement Respondent will capitalize or purchase the equity holding in project from applicant and will repay at least Rs 2,00,00,000 and total sum of Rs. 3,50,00,000 comprising of repayment and 5% profit in the Project as per equity holding on pro-rata basis. In case the respondent fails to repay, a grace period of 3 months will be given to Respondent by mutual agreement between the parties' subject to payment of interest @1.5% on remaining amount payable by the end of 4 years. After the grace period if any dues are remaining or



respondent fails to capitalize Applicant's equity, then respondent will be bound to transfer land equivalent to the total payable amount as per market rate to the applicant, such land being fully paid-up and freely transferable.

9. As clearly stated in the Clause 1 of said agreement - the subject matter of the agreement was purchase of 5% equity share by the applicant in the housing project of Respondent at The Highlands, Aures valley, Dehradun. The clause 5 of the agreement states that the said amount has been paid by the Applicant (Second Party) to the Respondent (First Party) by cheque no: 088992 dated 28-05-2014 drawn on ICICI Bank favouring M/s. S and N Lifestyle Infraventures Pvt. Ltd. towards 100% payment in respect of 5 percent equity share in the said Project. That, Respondent represents and the Applicant agrees that the estimated period required for execution, completion and handing over of Project is 4 years.

10. Therefore, we are not convinced by Applicant's contention that Applicant advanced a loan to the Corporate Debtor to enable construction for commercial sale of their housing project at The Highland, Aures Valley, Village Challang, Rajpur Road, Dehradun for a consideration of Rs 99,99,999/-. We have examined the terms and conditions of the agreement to understand the intention of parties. On reading the agreement in entirety it was manifestly clear that the Agreement is a sale agreement with settled base return and profits amounting to contingencies with a maximum ceiling. It was



an investment done by the applicant in the housing project where he was 5% equity holder in the project and Therefore had a share in the profit to the tunes of 5%. It can be said that the clauses of the Agreement clearly demonstrating the terms, should be read in accordance with Doctrine of Strict Interpretation.

Issue ii : Whether the amount claimed by the applicant as per Part IV of Application amounting to Rs. 4,76,00,000 (Principle Amount claimed of Rs 3,50,00,000 plus interest Rs 1,26,00,000) is a 'financial debt' under section 5 (8) (f) of I & B code?

Issue iii: Whether the Applicant falls in the category of Financial Creditor as per Section 5 (7) of I & B code?

11. While determining both **Issue ii** and **Issue iii** together, on bare perusal of **Section 5 (7) of Insolvency and Bankruptcy code** "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred ;

Section 5 (8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;



[Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

We are of the view that as per the debt claimed by Applicant i.e against the investment of Rs 1 crore, claiming Rs 3.5 Crore as principle and Rs 1.26 Crore interest is a Lucrative Agreement Situation. Moreover, in event of Non-payment by Respondent, Applicant has secured his interests as per clause 12 of agreement, by way of transfer of land by respondent to applicant for amount payable as per the market value.

Here it would be pertinent to refer to the judgment of Hon'ble NCLAT in the case of **Ankit Goyal vs. Sunita Agarwal** [Company Appeal (AT)(INS) No. 1020/2019] wherein it was held that *“in a situation where the allottee seeks to benefit from a **“lucrative agreement”** when he is “securing” his money by way of the agreement which gives him a lien over the flat/s, he cannot be considered a financial creditor but is a speculative investor who cannot be given benefit as a financial creditor under section 5(8)(f) of the IBC.”*



We would like to refer to the judgement by Hon'ble Supreme Court of India in the matter of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. vs Axis Bank Ltd. & Ors** [(2020) 8 SCC 401] wherein it was held that:

“.....what is intended by the expression “financial creditor” is a person who has direct engagement in the functioning of the corporate debtor ; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganization of corporate debtor’s business when there is financial stress. Hence, a financial creditor is not only about in terrorem clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically interwoven with the well-being of the corporate debtor”

Hon'ble NCLAT in **Sudha Sharma vs Mansi Brar and Anr.** [Company Appeal (AT) (INS) No. 83 of 2020] emphasized:

“that money deposited/invested for speculative purpose does not entitle a person to take advantage of clause (f) of section 5(8) and be considered a financial creditor by virtue of being an allottee of a housing unit/flat.”



Also the subsequent order of Hon'ble Supreme Court in **Mansi Brar Fernandes versus Sudha Sharma and Anr.** [*Civil Appeal No. 3826/2020*] which affirms the order of appellate Tribunal in the matter of **Nidhi Rekhan vs M/s Samyak Projects Private Limited**, Company Appeal (AT) (Ins) no 1035 of 2020 stating that: *"the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A-1201 and E-1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a "financial creditor" as defined under explanation of section 5(8)(f) of the IBC."*

We are of the view that the status of "Financial Creditor" cannot be accorded to a person who, in the garb of a lender comes in the project as a speculative investor and for mere recovery of monies files exorbitant claims. Therefore, the benefit of section 5(8)(f) of IBC will not enure in his favour and the amount claimed in Part IV of the application doesn't amount to become Financial Debt as per code.

12. Therefore, the present application filed under section 7 of the IB Code 2016 against the corporate debtor is not maintainable.



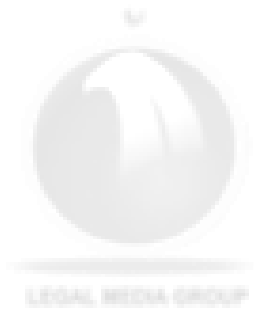
13. In the light of the above this Tribunal concludes that, this application cannot be admitted and is hereby dismissed.

Sd/-

**SH. RAHUL BHATNAGAR
MEMBER (T)**

Sd/-

**SH. P.S.N PRASAD
MEMBER (J)**



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