

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT- III**

IB-936/ND/2020

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

The Vilas Condominium Association

Through its authorized representatives

Having its Registered Office

Akashneem Marg

Sector-25

Gurgaon, Haryana- 122002

...Financial Creditor/Applicant

Versus

MGF Developments Limited

Registered Address

4/17-B, MGF House,

Asaf Ali Road

New Delhi-110002

...Corporate Debtor

Coram:

Shri Bachu Venkat Balaram Das
Hon'ble Member (Judicial)

Shri Narender Kumar Bhola
Hon'ble Member (Technical)

Delivered on: 30.11.2021

Appearances:

Financial Creditor
Corporate Debtor

: Mr. Piyush Singh and Ms. Aditi Sinha (Advocates)
: Mr. Gaurav Mitra, Sr. Advocate, Mr. Akhil Sachar
and Ms. Sunanda Tulsyan (Advocates)

ORDER

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The present application under Section 7 of the IBC Code, 2016 has been filed by M/s. The Vilas Condominium Association consisting of homebuyers having 327 units allotted in the name of members of the Association, the Financial Creditor seeking to initiate CIRP against MGF Developments Limited, the Corporate Debtor. According to the Financial Creditor, the default amount under various heads are as follows:

(a) The amount of Interest-Bearing Maintenance Security (IBMS) collected from the home buyers is not refunded to the Association of Home Buyers as per law, despite repeated request. Principal Amount in default Rs. 11,48,01,577 (Rupees Eleven Crores Forty-Eight Lakhs One Thousand Five Hundred Seventy-Seven Only), interest amount in default Rs. 10,34,80,468/-

(b) That the common area maintenance and common area Electricity Charges which the Corporate Debtor is supposed to pay for the period from the date of accrual of maintenance

charges till the date of allotment to a home buyer, is not paid by the Corporate Debtor despite repeated request. Principal amount in Default Rs. 1,82,02,620/- (Rupees One Crore Eighty-Two Lakhs Two Thousand Six Hundred Twenty Only).

(c) That the Corporate Debtor has also defaulted in not making the payment towards the defect/deficiency in service committed by it, despite repeated request from the Financial Creditors. Principal amount in Default Rs. 23,21,13,410/- (Rupees Twenty-Three Crores Twenty-One Lakhs Thirteen Thousand Four Hundred Ten only).

2. It is the case of the Financial Creditor that the Corporate Debtor had collected Interest Bearing Security Deposit Charges (IBMS) from the Members of Financial Creditor which was in the nature of a corpus security deposit in lieu of the maintenance services. This deposit was an interest-bearing deposit and thus attracted the time value of money. The Financial Creditor has submitted that as per Clause 11.2 (a) of the agreement (Annexure P-2) the Corporate Debtor was bound to collect charges at the rate of Rs. 50 per square ft. of the super area of the unit. The Corporate Debtor has failed to refund the IBMS charges even though he was obliged to do so as soon as the maintenance work was handed over to the Financial Creditor. According, to the Financial Creditor an amount of Rs. 11,48,01,577 along with interest amounting to Rs. 10,34,80,468/-

are due from the Corporate Debtor towards IBMS Charges. The Financial Creditor has further submitted that the Corporate Debtor has failed to pay common area electricity charges to the tune of Rs. 1,82,02,620/- and the Corporate Debtor has also defaulted in not making the payment towards the defect/deficiency in service committed by it, despite repeated request from the Financial Creditors.

3. The Corporate Debtor in its counter affidavit, has refuted the submission made by the Financial Creditor with respect to the IBMS Charges, the Corporate Debtor has submitted that an amount of Rs. 8,33,43,608/- was deposited by the residence/owners and the same stands adjusted on the expenses incurred towards the project complex and providing additional facilities for the Residents. Relying upon the clause 11 of the agreement, the Corporate Debtor has submitted that the IBMS charges can be utilized for payment towards upgradation of DG Sets, electric sub-station and other capital plants/equipments, further the said amount has been used for construction of a state-of-the-art clubhouse with specialty Restaurant, swimming pool and 62-seater mini theatre for the allottees of the occupants of the complex. He has further submitted that an additional some of Rs. 10 lakhs has been incurred towards air-conditioning of the lobby of various towers A,B,C,D,E,F,G,H, a sum of Rs. 20 Lakh has been incurred towards providing temporary

toilets and waiting rooms for Chauffeurs/staff of the resident. The Corporate Debtor has further submitted that he has incurred for installation of LED lights, creation of electrical infrastructure of 4,500 KDA etc.

4. The Financial Creditor as well as the Corporate Debtor have filed various documents in support of their case. We have gone through the pleadings and documents on record and also heard the submissions made by the learned Counsel appearing for the Financial Creditor as well as Corporate Debtor.
5. The main contention of the Financial Creditor is that the IBMS charges have not been properly used for the purposes for which they have been charged under clause 11.2 of the agreement. In order to appreciate the issue it is pertinent to refer to clause 11.2 of the agreement which reads as follows:

Interest Bearing Maintenance Security "IBMS",

- a) *In order to secure adequate provision of the maintenance services and due performance of the FLAT ALLOTTEE(S) in paying, promptly, the maintenance bills and other charges as raised by the Maintenance Agency, the FLAT ALLOTTEE(S) agrees to deposit, as per the Schedule of Payment and to always keep deposited, with the DEVELOPER/Maintenance Agency, an interest bearing maintenance security (IBMS) calculated at the rate of Rs. 50 (Rupees Fifty only) per square ft. of the Super Area of the Flat carrying a simple yearly interest, as per the applicable rates on fixed deposits (applicable to one year fixed deposit) accepted by State Bank of India at the close of each financial year on 31 March calculated from the date of realisation of the amount by the DEVELOPER. In case of failure of the FLAT*

ALLOTTEE(S) to pay the maintenance bills, other charges on or before the due date, the FLAT ALLOTTEE(S), in addition to permitting the DEVELOPER to deny him/her/it/them the right to avail the maintenance services, also authorizes the DEVELOPER to adjust, in the first instance, the interest accrued on the IBMS against such defaults in the payment of maintenance bills and in case such accrued interest falls short of the amount of the default, the FLAT ALLOTTEE(S) further authorizes the DEVELOPER to adjust the principal amount of the IBMS against such defaults. If due to such adjustment in the principal amount, the IBMS falls below the agreed sum of Rs, 50/- per square ft, of the Super Area of the Flat, then the FLAT ALLOTTEE(S) hereby undertakes to make good the resultant shortfall within 15 (fifteen) days of demand by the DEVELOPER, The DEVELOPER reserves the right to increase the IBMS from time to time in keeping with the increase in the cost of maintenance services and the FLAT ALLOTTEE(S) agrees to pay such increases within 15 (fifteen) days of demand by the DEVELOPER. If the FLAT ALLOTTEE(S) fails to pay such increase in the IBMS or to make good the shortfall as aforesaid on or before its due date, then the FLAT ALLOTTEE(S) authorizes the DEVELOPER to treat this Agreement as cancelled without any notice to the FLAT ALLOTTEE(S) and to recover the shortfall from the sale proceeds of the Flat and the parking space and to refund to the FLAT ALLOTTEE(S) the balance of money realized from such sale after deducting therefrom the entire earnest money, interest on delayed payments, any interest paid, due or payable and all other dues as set out in this Agreement. It is made specifically clear and it is so agreed by and between the Parties hereto that this part of this Agreement relating to IBMS, as stipulated in this clause, shall survive the conveyance of title in favour of the FLAT ALLOTTEE(S) and the DEVELOPER shall have first charge/lien on the Flat in respect of any such non-payment of shortfall/increases, as the case may be.

- b) The DEVELOPER shall, at its sole discretion, have the right to refund/offer to refund, at its sole option, to the FLAT ALLOTTEE(S), in full and final settlement of the IBMS, if already paid by the intending allottee to the DEVELOPER, after adjusting therefrom any outstanding maintenance bills and/or other outgoings of the FLAT ALLOTTEE(S), at any time including upon

execution of the Conveyance Deed, and thereupon, the DEVELOPER shall stand completely absolved/discharged of all its obligations and responsibilities concerning the IBMS, including but not limited to issues of repayment, refund and/or claims, if any, of the FLAT ALLOTTEE(S) on account of the same. In the alternative, the DEVELOPER shall have the sole right to transfer and handover the corpus of the IBMS of the FLAT ALLOTTEE(S), after adjusting therefrom any outstanding maintenance bills and/or other outgoings of the FLAT ALLOTTEE(S), to Maintenance Agency and/or to the society/association of flat allottee(s)/owner(s)/ occupant(s) and/or any other body, as and when the same is formed, at any time, including upon execution of the conveyance deed and thereupon the DEVELOPER shall stand completely absolved/discharged of all its obligations and responsibilities concerning the IBMS including but not limited to issues of repayment, refund and/or claims, if any, of the FLAT ALLOTTEE(S) on account of the same and all clauses dealing with or concerning the IBMS in this Agreement and in the conveyance deed, as and when executed, as far as they are applicable to the DEVELOPER shall cease to be valid and effective. It is hereby specifically agreed to by the FLAT ALLOTTEE(S) that such transfer of IBMS shall not be linked to any manner whatsoever to the implementation of the Haryana Apartment Ownership Act, 1983 by the DEVELOPER with respect to the Complex. That the FLAT ALLOTTEE(S) agrees that upon transfer of the IBMS by the DEVELOPER to Maintenance Agency / association of flat allottee(s)/ owner(s)/occupant(s) and/or any other body or in case where fresh IBMS is sought from the FLAT ALLOTTEE(S) as stipulated hereinabove, Maintenance Agency / association of flat allottee(s)/owner(s)/occupant(s) and/or any other body shall have the sole right and shall be fully entitled to modify/revise all or any of the terms of the IBMS, Maintenance Agreement, etc. including but not limited to the amount/rate of IBMS, etc.

6. A bare perusal of the above said clause shows that provision for IBMS has been made in order to pay maintenance bills, other charges raised by the maintenance agency, etc. It has been stated

said in clause of the agreement that the IBMS charges cannot be utilised for any other purposes other than that has been mentioned in the said clause. The Corporate Debtor has himself admitted that the amount has been utilized for the purpose of construction of a club, restaurant, swimming pool and 62-seater mini theatre.

7. The Hon'ble Supreme Court in *Innoventive Industries Ltd. V. ICICI Bank* {(2018) 1 SCC 407} *Pioneer Urban Land and Infrastructure Ltd. V. Union of India* {(2019) 8 SCC 416} and reiterated in *Manish Kumar Sinha V. Union of India & Anr.* {Writ Petition No. 26 of 2020} in a Section 7 application, the Adjudicating Authority only has to determine.
 - a. 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?
 - b. Whether "the default" has occurred as per the agreement executed between the parties, which in the present case is the BBA executed at Annexure P-2 of the Section 7 application?
 - c. Whether the application is complete and there are no disciplinary proceedings against the proposed Insolvency Resolution Professional?
8. As far as first condition is concerned, the association members hold 327 Units; therefore, first condition is satisfied. Now, it is important to analyze about the second condition, for that we have already

discussed in detail above in paragraph 5 and 6 of this order that there is breach of clause 11.2 of agreement, hence, the (b) condition also stands satisfied and as far as last condition is concerned, the application is complete and there is no disciplinary proceeding pending against the Interim Resolution Professional proposed by the financial creditor as evident from Form-2. In addition to it, Section 5(8)(f) of IBC, 2016 is also very relevant to produce here, which is as follows:

“5. Definition.

(8) “Financial Debt” means a debt along with interest, if any, which disbursed against the consideration for the time value of money and includes-

.....

(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 purpose of this 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 Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

.....”

Since, the financial creditor satisfies all the requirement of section 7 of IBC, 2016. We are therefore, satisfied that the applicant/Financial Creditor has made out a case under Section 7 IBC for admission and a clear case of default has been established. Hence, the Corporate Insolvency Resolution Process of Corporate Debtor is initiated from the date of this order and the captioned application filed by Financial Creditor is **admitted**.

9. The financial Creditor has also proposed the name of the Resolution Professional for appointment of IRP. Mr. Gaurav Katiyar having Regn. No. IBBI/IPA-001/IP-P00209/2017-18/10409 (Email ID: cagauravkatiyar@gmail.com) is hereby appointed as Interim Resolution Professional (IRP) as has been proposed by the Financial Creditor. There is no disciplinary proceeding pending against the IRP as evident from the Form-2 dated 12.08.2020. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

10. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:

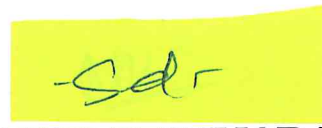
- a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor's assets or any legal right or beneficial interest therein;
- c. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor

11. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

12. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.
13. The financial Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this order as per the provisions of IBC, 2016.
14. The financial Creditor is directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.
15. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.
16. The Order is pronounced by this Adjudicating Authority through Virtual Hearing.



(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)



(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)