

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III**

Item No.01
(IB) – 570(ND)/2022

IN THE MATTER OF:

MR. SUBISH KUMAR TYAGI

..... Applicant/Financial Creditor

VERSUS

M/s. JSS BUILDCON PRIVATE LTD.

..... Respondent/Corporate Debtor

SECTION

Section 7 of the Insolvency and Bankruptcy Code, 2016

Order Pronounced On: 16.05.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open court vide separate sheets. (IB) – 570(ND)/2022 is **dismissed**.

**-SD-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

**-SD-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III
(IB) – 570(ND)/2022**

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

MR. SUBISH KUMAR TYAGI

S/O Dayaram Tyagi,

R/O Dundahera, Ghaziabad,

Uttar Pradesh-201009.

..... Applicant/Financial Creditor

VERSUS

M/s. JSS BUILDCON PRIVATE LTD.

Having Its Registered Office at:

A-202, Old No.202, 1st Floor,

Main Road Chander Vihar,

Mandawali, Delhi-110092.

..... Respondent/ Corporate Debtor

Order Pronounced On: 16.05.2023

CORAM:

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER
(JUDICIAL)**

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Liquidator : Mr. Palash S Singhai, Advocate

For the Respondent : Mr. Rahul Malhotra, Advocate

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(IB) – 570(ND)/2022

Date of Order : 16.05.2023

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

Description of the Parties:

1. This Application has been filed by MR. SUBISH TYAGI, the Financial Creditor (FC)/Applicant on 01.07.2022, before this Adjudicating Authority, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC” or “the Code”) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (“Adjudicating Authority Rules”), for initiating the Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against the Corporate Debtor (CD)/Respondent viz., M/s. JSS BUILDCON PVT. LTD., on the ground that the Corporate Debtor has defaulted to make a Payment of a sum of Rs. 2,34,49,315/- [(Rupees Two Crore Thirty Four Lakh Forty Nine Thousand Three Hundred Fifteen Only) Rs.1,50,00,000 of Principal amount along with Rs.84,49,315 of Interest amount] as on 18.06.2022.

2. The Respondent Company was incorporated on 31.01.2007, as a Company Limited by Shares (Non- govt. Company) having CIN: U67100TZ2014PTC020363, under the erstwhile Companies Act, 1956 with the Registrar of Companies, NCT of Delhi and Haryana. The Authorised Share Capital of the Respondent Company is Rs. 10,00,000/- (Rupees Ten Lakh Only) and the Paid-up Share Capital of the Respondent Company is also Rs. 10,00,000 /- (Rupees Ten Lakh Only). On the date of Application, the Corporate Debtor is engaged in the business of land developers, colonizers, real estate developers, infrastructure creators, builders, state managers, agents and contractors. The Registered Office Address of the Respondent Company is A-202, Old No.202, 1st Floor, Main Road Chander Vihar, Mandawali, Delhi-110092. Therefore, this Bench has jurisdiction to deal with this application. A true copy of the Company Details/Master Data of the Respondent Company

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(IB) – 570(ND)/2022

Date of Order : 16.05.2023

obtained from the website of the Ministry of Corporate Affairs is filed along with the application.

3. **Submissions of the Financial Creditor:**

- a) For the purposes of raising funds for the development of its various projects, the Corporate Debtor, through its Directors, approached the Applicant for availing an unsecured loan facility. The Applicant agreed to extend financial assistance upto Rs.1,50,00,000/- (One Crore Fifty Lakh Only) with interest at the rate of 18% p.a.. The Lender and the Corporate Debtor agreed that there would be a lock-in period of 7 years and upon the expiry of 7 years (from 04.10.2013 to 04.10.2020) (the demand notice wrongly mentioned 9 years which typographical error) the Applicant/Lender will be at liberty to place the demand seeking repayment of the loan along with the interest from the Corporate Debtor.
- b) The Applicant and the Corporate Debtor entered into an oral agreement with each other wherein the Applicant advanced unsecured loan of Rs.1,50,00,000/- which was disbursed from the bank account of the Applicant to the Bank Account of the Corporate Debtor. Copies of Cheques issued are filed along with the application.
- c) The cheques (287110, 287111 and 287112) were duly cleared on 04.10.2013 and the Applicant and Respondent vide their oral agreement agreed that the Corporate Debtor will also allot 3 units in its project, equivalent to the loan amount to secure the loan advanced by Applicant. Further, it was agreed between the Corporate Debtor and Applicant that the tenure of the loan agreement will be 7 years (lock-in period) Further, it was agreed that the loan amount along with the interest accrued shall be payable on demand by our Client after the expiry of the tenure, A copy of Bank statement of Applicant reflecting the disbursement of loan is filed along with the application.

- d) The Corporate Debtor despite of its assurance to issue 3 units to secure the loan advanced by Applicant, acted in a contrary manner and miserably failed to fulfill its obligation to allot 3 units and execute the Builder Buyer Agreement. It is to the utter shock and dismay that Mr. Piyush as well as Mr. Kumar after the disbursal of the loan into the account of the Corporate Debtor started to ignore the Applicant and refused Applicant in order to to avoid any confrontation otherwise as they would have to execute the Builder Buyer Agreements. The conversations between Applicant and Mr. Kumar clearly show the state of affairs wherein Applicant time and again requested to fix up a meeting with Mr. Piyush Tiwari in order to get the necessary documents for the allotment of 3 units to secure the loan advanced by Applicant.
- e) It is stated that despite, the repeated reminders and follow-ups by Applicant, Mr. Kumar in connivance with Mr. Piyush Tiwari shamelessly ignored the Applicant for 5 long years and this disheartened the Applicant who advanced a substantial amount of income for a loan to the Corporate Debtor for its real estate project. Copies of Whatsapp messages sent by the Applicant to the Representative of the Corporate Debtor are filed along with the application.
- f) It is imperative to say that Applicant has waited long enough to get the necessary documents as promised by Mr. Tiwari and Mr. Kumar, directors/representative of Corporate Debtor, however, it went into vain. Further, no interest as orally agreed between the parties at the time of disbursal of the unsecured loan has been received by Applicant till date even after the expiry of the lock-in period. In view of the same, our Client upon the expiry of the lock-in period of the oral loan agreement was constrained to recall the unsecured loan facility advanced to the Corporate Debtor on 04.10.2013 (vide cheques dated 03.10.2013) along with 18% interest per annum.

- g)** The Applicant sent a Demand Notice dated 10.06.2022 which was duly received by the Applicant vide speed post on 11.06.2022 and vide email on 22.06.2022. In terms of the Demand Notice, the Applicant called upon the Corporate Debtor to repay the outstanding loan of Rs. 1,50,00,000/- along with the interest at the rate of 18% within 7 days from the receipt of the notice. However, the Corporate Debtor failed to repay the debt which became due and payable by the receipt of the demand notice as per the time period envisaged therein i.e. 17.06.2022 and 28.06.2022 and committed a default in terms of the provisions of the Code. A copy of the demand notice dated 10.06.2022 along with proof of service to the Corporate Debtor is filed along with the application.
- h)** It is evident from the records available that the Corporate Debtor is unable to repay its debts owed to the Creditors and it is a Company in distress which requires restructuring in accordance with the provisions of the Code under the supervision of this Adjudicating Authority.
- i)** The Corporate Debtor even after the receipt of the demand notice failed to adhere to the condition stipulated in the aforementioned demand notices and defaulted in repayment of the amount due and payable.

4. Submissions of the Corporate Debtor:

- a)** It is denied that any loan was advanced by the Financial Creditor to the Corporate Debtor on 04.10.2013. It is denied that there was any oral agreement between the parties. It is denied that any interest whatsoever, much less @18% per annum, was payable by the Corporate Debtor to the Financial Creditor. It is denied that there was any lock-in period as alleged. It is denied that there was any agreement for allotment of 3 units in the project of the Corporate Debtor to the Financial Creditor. It is denied that the Financial Creditor knew or was acquainted to Mr. Pratosh Kumar

Sharma. It is denied that Mr. Pratosh Kumar Sharma was at helm of affairs of the Corporate Debtor in October, 2013. It is denied that any Financial Debt is owed by the Corporate Debtor to the Financial Creditor. The contents of the legal notice dated 10.06.2022 are disputed and denied in its entirety. The petition is constituted of false and frivolous facts which is evident from the facts detailed below as well as various documents pertaining to the Financial Creditor.

- b)** The Financial creditor is an acquaintance of Mr. Piyush Tiwari who was the erstwhile director/shareholder of the corporate Debtor. When the monies were advanced by the Financial creditor in the account of the Corporate Debtor, the management and the control of the Corporate Debtor were with Mr. Piyush Tiwari.
- c)** It has been wrongly alleged that the dealings of the Financial Creditor were with Mr. Pratosh Kumar Sharma in 2013. Mr. Pratosh Kumar Sharma who is currently the director of the Corporate Debtor was appointed as the Director on 19.03.2015 which is evident from the Master Data of the Corporate Debtor filed along with the petition. Thus, it is evident that the Financial Creditor has lied on oath that Mr. Pratosh Kumar Sharma knew the Financial Creditor or dealt with him at the time of advancement of monies. Further, the fact that the Financial Creditor was the acquaintance of Mr. Piyush Tiwari is also evident from the Whatsapp chat filed along with the petition. In the entire chat, the Financial Creditor is calling upon and requesting Mr. Pratosh Kumar Sharma to setup a meeting or make him meet Mr. Piyush Tiwari. It is nowhere in the entire chat that the Financial Creditor called upon Mr. Pratosh Kumar Sharma/the Corporate Debtor to repay the alleged Financial Debt.
- d)** Accordingly, a Memorandum of Understanding dated 03.10.2014 was executed between the Financial Creditor and M/s Shubhkamna Buildwell & Estates Pvt. Ltd., another concern of Mr. Piyush Tiwari. Under the said MOU, M/s Shubhkamna

Buildwell & Estates Pvt. Ltd. had agreed to allot and the Financial Creditor had agreed to purchase 5000 sq. ft. area @Rs.3000/- per sq. ft. for consideration of Rs.1,50,00,000/-. The said consideration of Rs.1,50,00,000/- was the same which was remitted in the account of the Corporate Debtor and later transferred to the account of M/s Shubhkamna Buildtech Pvt. Ltd. It was further agreed that M/s Shubhkamna Buildwell & Estates Pvt. Ltd. had the option to buy back the said flats at a premium of Rs.1500/- per sq. ft. Thus, the said company agreed to pay Rs.2,25,00,000/- against the principal amount of Rs.1,50,00,000/- bearing profit @3.33% per month (40% annually), aggregating to Rs.75,00,000/- upon expiry of 15 months. Copy of the Memorandum of Understanding dated 03.10.2014 was executed between the Financial Creditor and M/s Shubhkamna Buildwell & Estates Pvt. Ltd. which is filed along with the application.

- e) It is an admitted matter of fact that there exists no Financial Debt which is owed by the Corporate Debtor to the Financial Creditor which is evident from the conduct of the Financial Creditor who had filed claim(s) before the resolution professional in respect of the above flats in the Corporate Insolvency Resolution Process of M/s Shubhkamna Buildtech Pvt. Ltd. It transpires that certain claims of the Financial Creditor were rejected and others were accepted/admitted. Copy of the list of admitted claims in the CIRP of M/s Shubhkamna Buildtech Pvt. Ltd. is filed along with the application.
- f) The present petition filed before this Tribunal filed by the Financial Creditor is liable to be dismissed on the sole ground that the Financial Creditor has not come to this Tribunal with clean hands and is guilty of suppressio veri and suggestio falsi and is not entitled to any relief whatsoever from this Tribunal. The Hon'ble Supreme Court of India has held in the judgement reported as "S. P. Chengelvaraya Naidu vs. Jagannath & Ors."

reported as (1994) 1 SCC 1 that a person who comes to Court by suppressing material facts is not only guilty of committing fraud on the opposite part but the Court as well.

- g)** The Financial Creditor admits that the monies advanced to the Corporate Debtor were transferred to M/s Shubhkamna Buildwell & Estates Pvt. Ltd., pursuant to which the MOU dated 03.10.2014 was executed between the Financial Creditor and the said company. Thereafter, the Financial Creditor chose to get allotted in the project of M/s Shubhkamna Buildtech Pvt. Ltd. Hence, there remained no liability whatsoever of the Financial Creditor qua the Corporate Debtor. Further, there is no averment in the said legal notice to the effect that the amount of Rs. 1,50,00,000/- was advanced as loan, instead the same was advanced as an investment which did not bear any interest. The only alleged obligation was to allot flats in the project of the Corporate Debtor.
- h)** Having failed in all endeavours, the Financial Creditor had filed an application dated 11.03.2022 under Section 156(3) of Cr.P.C. praying for registration of an FIR against the Corporate Debtor and its directors Mr. Pratosh Kumar Sharma and Mr. Ankit Sharma. The said application was also filed against one Mr. Pradeep Kumar Sharma alleged to be the director of the Corporate Debtor. It is pertinent to mention that Mr. Pradeep Kumar Sharma has never been the director or any person associated with the Corporate Debtor at any point of time whatsoever. The averments made in the said application before CJM, Gautam Budh Nagar are at complete variance when compared to the contents of the present petition under response. A simple investment was made in the project for which flats were to be allotted to the Financial Creditor and when the same were not allotted, the Financial Creditor merely requested to refund the monies. There is no averment of any advancement of loan by the Financial Creditor or any obligation on part of the Corporate Debtor to pay any alleged interest. There is no averment of

Financial Debt having been advanced to the Corporate Debtor by the Financial Creditor.

- i) Further, without prejudice to the above, it is submitted that Form-2 filed along with the petition is not proper and as per the format provided in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Further, the Form-1 filed is not proper and as per the format provided in the Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016.

5. In Rejoinder, the Applicant has reiterated that the Respondent is relying upon the documents belonging to another matter or CIRP of the Shubhkamna Buildtech Pvt. Ltd. wherein the Applicant also filed its claim and the same has been admitted for the amount disbursed directly to the Shubhkamna Buildtech Pvt. Ltd. and not the amount disbursed to Respondent. It is the Respondent who has produced incorrect documents belonging to a loan disbursed by the Applicant in another project which is under Insolvency and the claim of the Applicant therein is admitted to the extent the amount was disbursed. The alleged MoU dated 03.10.2014 was executed between the Applicant and the Shubhkamna Buildwell & Estates Pvt. Ltd. for the project Shubhkamna Epic and the amount admittedly paid to Respondent is reflected therein to be allegedly transferred to Shubhkamna Buildwell & Estates Pvt. Ltd. However, in reality, the alleged MoU was never acted upon and no amount was ever transferred by the Respondent to Shubhkamna Buildwell & Estates Pvt. Ltd.

6. **Analysis and Findings**

- i. We have heard the Ld. Counsels appearing for both parties from time to time. We have also perused the documents on record.
- ii. It is contested by the Financial Creditor that the claims of Applicant accepted in the CIRP of Shubhkamna Buildtech Pvt.

Ltd. are for the flats which were allotted to Applicant and for the same, the Applicant disbursed the amount directly to Shubhkmana Buildtech Pvt. Ltd. which can be seen from page 20, 22 and 23 of the Rejoinder.

- iii.** The Financial Creditor opted to retain the flats and not exercise the option of buy back the same after the expiry of the term of the MOU i.e. on 03.01.2016. Shubhkamna Buildtech Pvt. Ltd. (sister concern of Shubhkamna Buildwell & Estates Pvt. Ltd.) allotted the flats to the Financial Creditor against the investment made by it on 03.11.2017. The Financial Creditor had filed claim before the RP in respect of the above flats in the CIRP of the Shubhkamna Buildtech Pvt. Ltd. In view of the above factual matrix, it is evident that there exists no Financial Debt between the Financial Creditor and the Corporate Debtor.
- iv.** In Rejoinder (Para 19), the Financial Creditor has asserted that there was an alleged lock-in period of 9 years, whereas in the petition it has been stated that the alleged lock-in period was of 7 years and there was a typographical error i.e. lock-in period of 9 years in demand notice dated 10.06.2022 (@Pg. 52 of petition). The Financial Creditor approbates and reprobates to suit his convenience. Further, if there was an alleged lock-in period of 9 years, the petition is itself premature as the said period of 9 years would have expired on 03.10.2022 and the petition was filed on 01.07.2022.
- v.** It is contended by the Corporate Debtor that the alleged interest rate of 18% is ex facie illegal as contested and barred by the provisions of the Usurious Loans Act, 1918 read with the provisions of Punjab Relief of Indebtedness Act, 1934 as applicable to Delhi. As per the provisions of the said Acts, a maximum interest of 7.5% per annum is payable on the secured loan and 12.50% per annum is payable on unsecured loans. Even otherwise the interest rate of 18% is completely ex facie illegal and exorbitant. Without prejudice, the Financial Creditor is a

speculative investor and cannot claim status and benefits as a Financial Creditor under Explanation (i) of Section 5(8)(f) of the Code, and it is not an interested party in the financial well-being, growth, and vitality of the Corporate Debtor, but is just interested in his investment.

- vi.** It is submitted that as it is a settled law, the pre-requisites for an application under Section 7 of the Code are the existence of 'financial debt' and a 'default', and as evident from the facts in the preceding paragraphs, it cannot be said that there is any financial debt, much less any default and therefore the present application is not maintainable.

Hence, we are inclined to **dismiss** this application.

7. **Order**

In light of the above facts and circumstances, it is hereby ordered as follows:-

- i.** The Application bearing **IB-570/ND/2022** filed by the Applicant under Section 7 of the Code r/w Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **dismissed**.
- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
- iii.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

-SD-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

-SD-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)