

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II**

CP (IB) 348/MB/C-II/2020

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

Prabina O. Sharma

Flat No. 1202, Rushi Tower CHSL, Swami
Samarth Nagar, Lokhandwala Complex,
Andheri (West), Mumbai – 400053,
Maharashtra, India.

...Financial Creditor/Petitioner

Versus

**Surya Landmark Developers Private Limited
[CIN: U70102MH2008PTC188635]**

603, Nandlal CHSL, Riddhi Palace, S.V. Road,
Borivali (West), Mumbai – 400092,
Maharashtra, India.

...Corporate Debtor/Respondent

Order Delivered on 02.12.2021

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor : Mr. Kunal Chheda, Advocate.
For the Corporate Debtor : Mr. Yogesh Naidu, Advocate.

ORDER

Per: Shyam Babu Gautam, Member

1. This is a Company Petition filed under section 7 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **Prabina O. Sharma**. (“the Financial Creditors”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Surya Landmark Developers Private Limited** (“the Corporate Debtor”).

In order of default of payment of Rs 2,43,89,160/- (Rupees Two Crores Forty-Three Lakhs Eighty-Nine Thousand One Hundred Sixty Only) being (i) Rs 95,00,00,000/- (Rupees Ninety Five Lakhs) towards principal amount of loan and ii) 1,48,89,160/- (Rupees One Crore Forty Eight Lakhs Eighty Nine Thousand One Hundred And Sixty) towards interest at rate of 2% per month as per the Agreement.

The Financial Creditor states that default occurred on 11th January 2019. The amount was provided for period of 3 years on 11th January 2016.

2. The Corporate Debtor is a Public company limited by shares and incorporated on 03.12.2008 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is **U70102MH2008PTC188635**. Its registered office is at 603, Nandlal CHSL, Riddhi Palace, S.V.

Road, Borivali (West), Mumbai – 400092, Maharashtra, India.

Therefore, this Bench has jurisdiction to deal with this petition.

Submissions made by Financial Creditor by way of Application/Petition:

3. On 11.01.2016, Rs 90,00,000/- (Rupees Ninety Lakhs) was transferred to Corporate Debtor and its promoter and on 08.03.2016, the Financial Creditor advanced further Rs 5,00,000/- (Rupees Five lakhs). Hence the total of Rs 95,00,000/- (Rupees Ninety-Five lakhs) was given to Corporate Debtor. **[Exhibit A, Page 22 and page23 of the Petition is proof of loan given].**
4. The amount was provided for period of 3 years at rate of 2 percent. Hence the amount repayable on 11.01.2019. **[Para 5 and Para 7, Page 29 of Petition].**
5. In order of the secure the Financial Creditor A Letter of Mortgage and Letter of Allotment was executed by the Corporate Debtor simultaneously on the same day **[Exhibit B, Page 28 of the Petition and Exhibit C, Page 30 of the Petition].**

A. The Corporate Debtor mortgaged “Flat No 701” B-wing, 7th Floor, in Gokul Dream as and by way of security of the loan amount. Since the Flat was not constructed in order to create legal status for the mortgage, the flat was also allotted in

favour of Financial Creditor. Hence both the documents were executed on the same day. **[Para 2(c) of Affidavit in Rejoinder]**.

B. The Financial Creditor had never requested for converting the loan amount to flat purchase amount. The Flat was mortgaged with an intention that in case Corporate Debtor fails to repay loan amount along with interest, the Financial Creditor could transfer and recover the outstanding amount. **[Para 2(d) of Affidavit in Rejoinder]**.

6. The amount was always treated as a loan amount and that is the reason the Corporate Debtor had issued a cheque 364672 dated 10.08.2018 as a repayment of part principal and interest. However the same had returned due to insufficient fund. **[Exhibit D and Exhibit E, Page 33 and Page 34 of the Petition]**.
7. The Financial Creditor attached record of National E-Governance Services Ltd. (NSEL) is an Information Utility registered with the IBBI under section 213 and 214 of Insolvency and Bankruptcy Code, 2016. The Corporate Debtor has failed to repay the principal and the Interest. **[Annexure -I, page 11 (record of default)]**.
8. The Financial Creditor has also issued a default notice and recalled principal and interest through advocate. However

Corporate Debtor has failed to make the payment. [**Exhibit G, Page 38 of the Petition**].

Submissions made by the Advocate of Corporate Debtor by way of Affidavit in Reply:

A. BARRED BY LAW OF LIMITATION:

9. The cause of action has arisen on 8th March 2016, the date of which the final instalment was paid by the Financial Creditor, which was 5 Years ago, and hence, the present Petition is barred by the laws of Limitation and the Financial Creditor has deliberately and mischievously deposited a security cheque to bring the Petition into ambit of Limitation, and hence the same be disregarded.
10. The Financial Creditor is relying on the Letter of Mortgage dated 11th January 2016 but is deliberately concealing the fact that the same was superseded by the Letter of Allotment which was issued later on the same date.

B. NO FINANCIAL DEBT IS DUE AND PAYABLE BY CORPORATE DEBTOR COMPANY TO THE FINANCIAL CREDITOR:

11. It was submitted that the Financial Creditor fails to prove that any Financial Debt as contemplated under the provisions of the code

is due and payable by the Corporate Debtor Company to the Financial Creditor.

12. The Corporate Debtor states that Financial Creditor fails to disclose/provide/annex any Financial Contract as defined under Rule 3(d) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The relevant provision is reproduced herein for ready reference:

“Financial contract” means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;

13. In view of the failure to establish any financial contract wherein the Corporate Debtor Company is liable to repay the alleged amount of Rs.2,43,89,160/-, the Company Petition deserves to be dismissed.

C. THE FINANCIAL CREDITOR COMPLIES WITH THE MINIMUM THRESHOLD PROVIDED FOR ALLOTTEES AS PER THE CODE:

14. The Financial Creditor has taken contrary pleas in the Company Petition regarding his status as Financial Creditor of the Corporate Debtor Company. On one hand, the Financial Creditor claims to be allottee in relation with the Flat No. 701 in proposed project known as “Gokul Dreams”. However, the Corporate Debtor was

subsequently terminated from the project and thus handover of Flat No. 701 became impossible. Pursuant to such termination, the Corporate Debtor assured all its allottees that they shall be provided with respective flats in their other projects, which fact is well known to the Financial Creditor and she also claimed a flat from the Corporate Debtor in another project and on the other hand, the Financial Creditor has filed this Petition.

15. In the project in question, the Corporate Debtor has sold all the 49 flats/units to bonafide purchasers and on the Corporate Debtor's termination from the said project, the Corporate Debtor have assured all 49 bonafide flat/unit purchasers that they shall receive their respective flats in other project of the Corporate Debtor, however, the Financial Creditor herein, is the only individual who is not satisfied with the assurances of the Corporate Debtor and has filed this Petition.
16. The Corporate Debtor further submits that in case of the Financial Creditor being treated as allottee, the Petition is not maintainable in terms of proviso to section 7 (1) of the Insolvency and Bankruptcy Code, 2016. The provision is reproduced herein below for ready reference:

“(1) A financial creditor either by itself or jointly with 2 [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file application for initiating corporate insolvency resolution process

against a corporate debtor before the Adjudicating Authority when a default has occurred.

Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against a corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission”...

17. Therefore, the Corporate Debtor submits that this petition cannot be maintained as the Financial Creditor fails to meet the requisite criteria under section 7 as an Allottee under real estate project and the same is liable to be filed by not less than 10% of the total flats/unit purchasers and the present Petition is liable to be dismissed with exemplary costs on this ground alone.

Rebuttal to the submissions of the Corporate Debtor by the Financial Creditor:

18. Submissions on issues raised by the Corporate Debtor

A. ISSUE OF LIMITATION:

It is denied that the Application is barred by Limitation. In loan arrangement, amounts were to be repaid after lock-in period of three years. Hence the amounts were advanced in 11.01.2016 and the limitation commences from 11.01.2019. i.e date of default as per the Application. **[page 6 of the Petition]**.

Furthermore, without prejudice to date of default, even if the date of default is considered as the date of cheque bouncing, the date of Application would still be in limitation.

B. ISSUE OF LETTER OF INTENDED ALLOTMENT:

- i. The Corporate Debtor is relying on Letter of Intended Allotment and has argued that the Letter of Allotment is a subsequent document. However, both the documents have been brought on record in the Application. The amounts were

advanced as loan and hence the letter of Mortgage was addressed to Financial Creditor. Since the mortgage of flat that was not constructed was not possible, the Corporate Debtor had issued Letter of Allotment so that security interest is created that can be invoked in case of default.

- ii. Without prejudice to rights and contentions, if the Letter of Allotment was a subsequent document, then in that case entire amount of Ninety Lakhs should have reflected as earnest amount.
- iii. Hence it is very evident that both the documents were simultaneously executed in order to safe guard loan amount of Financial Creditor.

C. ISSUE OF NO FINANCIAL DEBT DUE AND PAYABLE:

It is denied that there is no financial debt due and payable. The Corporate Debtor has issued the cheque towards interest that has returned. The amounts were advanced as loan for interest amount agreed between parties.

D. MINIMUM TRESHOLD FOR ALLOTTEES:

- i. The amount is given as and by of loan and not for booking a flat. Hence the Application is filed in capacity of Financial loan and not Allotment. Therefore, the question of minimum threshold does not arise. Furthermore, without prejudice to

rights and contentions it is a bizzare situation that after opting to purchase a flat, Corporate Debtor did not request for alleged security deposit cheque. Hence the contention of Corporate Debtor is false and baseless.

- ii. Further in order to protect the Financial transaction, letter of mortgate and letter of Allotment were entered on the same day.
19. It is therefore submitted the amounts were advanced as loans for period and interest that was agreed. The mortgage deed and letter of allotment were executed in order to protect the loan amount. In other words the transaction can be called as a secured loan transaction. The reason of of securing the loan amount vide two separate documents is addressed above. It is denied that Financial Creditor has been enquiring for possession of the Flat in capacity of Allotee. In fact, Financial Creditor was interested in capacity of secured creditor so that the security can be invoked and loan amounts can be realised.
 20. It is also submitted that the issue of flat purchasers suffering and adjusting the flat purchasers in another project is an attempt to gain sympathy. The Corporate Debtor is trying to misguide the Hon'ble Tribunal. The question of allotting a new flat in another project does not arise because the Financial Creditor has recalled the loan and is not a flat purchaser.

21. We have heard the arguments of Financial creditor and Corporate Debtor and perused the records.
22. In the present case in hand it is noted that the amount were advanced as per agreement on 11.01.2016 for period of 3 years being lock in period at the rate of 2% per month interest rate therefore amount becomes due on 11.01.2019. The Financial Creditor also issued default notice and recalled principal and interest through advocate, however Corporate Debtor has failed to make the payment.
23. We also consider the facts of the case in the lights of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition.
24. The Financial Creditor has proposed the name of **Mr. Prakul Thadi**, Registration No. IBBI/IPA-002/IP-N01149/2021-22/13806, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written consent in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration.

25. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.
26. It is, accordingly, hereby ordered as follows: -
- (a) The petition bearing **CP (IB) 348/MB/C-II/2020** filed by **Prabina O. Sharma**, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Surya Landmark Developers Private Limited [CIN: U70102MH2008PTC188635]**, the Corporate Debtor, is **admitted**.
- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
- (i) 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;

- (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium:
- (i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1)

of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) **Mr. Prakul Thadi**, Registration No. IBBI/IPA-002/IP-N01149/2021-22/13806, having address at Flat no. 1405, J Block, Rainbow Vistas, Green Hills Road, Moosapet, Hyderabad – 500018, Telangana, India [email: prakulthadi@hotmail.com], is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge

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to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

- (h) The Financial Creditor shall deposit a sum of Rs.1,00,000/- (Rupees Three Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

02.12.2021
SAM

Sd/-

JUSTICE P. N. DESHMUKH (RETD.)
Member (Judicial)