IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

CP (IB) No.21/MB-IV/2023

Under Section 7 of the IBC, 2016

In the matter of

Mr. Natwar Agrawal (HUF)

through Karta Mr. Natwar Agrawal.

[AADHN2496N]

…Financial Creditor

v/s.

Ms. Ssakash Developers & Builders Pvt. Ltd.

[CIN: U10100MH2009PTC189729]

…Corporate Debtor

Order Delivered on: 02.08.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Financial Creditor: Mr. Amey Hadwale, Ld. Counsel.

For the Corporate Debtor: None.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an application being CP (IB) No.21/MB-IV/2023 filed on 15/12/2022 by Mr. Natwar Agrawal (HUF) through Karta Mr. Natwar Agrawal, the Financial Creditor/Applicant, under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of M/s. Ssakash Developers & Builders Pvt. Ltd, Corporate Debtor.

   1.1. The total amount outstanding is Rs. 3,84,10,332/- (*Rs. 2,50,00,000 principal amount Rs. 1,34,10,332/- from the date of the respective payments till 22.9.2022 however the same shall be subject to actual realization of payments*) due and payable to the Corporate Debtor. The date of default as Specified in Part IV of the application *"02.02.2020 two months from the order dated 02.12.2019 passed by Hon'ble RERA Tribunal".*

2. The applicant had approached the Corporate Debtor for the purchase of 4 flats in "B" Wing, bearing flat nos. 1405, 1406, 1407 & 1408 (hereinafter referred to as 'flats") on the 14th floor of your Project namely "BOBE CHANDRALEKHA CHSL", CTS no. 1138, Borivali Mumbai Sub urban District. 4. Pursuant to deliberations and negotiations the applicant had agreed to purchase the said flat for a total consideration of Rs 282.72 Lacs. Accordingly, basis the assurances of the corporate debtor, the applicant had deposited a total amount of Rs 2,50,00,000/- (Rs 1,40,00,000/- on 01.06.2018 and Rs 1,10,00,000/- on 04.06.2018) i.e., more than 10% of the cost of the flat. Basis the same the applicant was also given an allotment letter on 02/06/2018 & 04/06/2018 respectively.

2.1. As per Section 13 of the RERA the Corporate Debtor was also required to execute written agreement for sale with the applicant upon deposition of the said amount. The applicant has been time and again following up with the Corporate Debtor for executing the written agreement for sale however the Corporate Debtor has been deliberately avoiding the same.

2.2. The applicant states that as the Corporate Debtor did not execute the agreement for sale as per Section 13 of the Real Estate Regulations and Development Act, 2016 and hence, aggrieved by the aforesaid conduct the applicant was coerced to file a Complaint before the Maharashtra Real Estate Regulation Authority ("RERA") u/s 13 of the Real Estate Regulations and Development Act, 2016.

2.3. The said complaint came to be heard by the Hon'ble RERA Tribunal wherein the Hon'ble RERA Tribunal was pleased to pass the order in favour of the Applicant, 8. That the Corporate Debtor had challenged the said order in an Appeal before Hon'ble Maharashtra Real Estate Appellate Tribunal, Mumbai wherein the Hon'ble Maharashtra Real Estate Appellate Tribunal was pleased to dismiss the appeal vide order dated 01/04/2022.

2.4. The Applicant states that the Corporate Debtor failed to comply with the order within the stipulated time of one month as directed by the MAHARERA. Therefor the applicant through its advocates vide notices dated 20.01.2022 and 09.05.2022 called upon the corporate debtor to repay amount of 2,50,00,000/- along with interest.

2.5. The Applicant/Financial Creditor states that after accommodating numerous assurances, the corporate debtor hopelessly defaulted in repayment and complying with the order dated 02/12/2019 therefore the Applicant/Financial Creditor issued a final demand notice dated 22/09/2022, calling upon the corporate debtor to repay the amounts

however neither any response to the said demand notice was received nor the amounts was repaid by the Corporate Debtor.

2.6. This bench vide order dated 17.05.2023 stated that "*last and final opportunity is granted to the Corporate Debtor for filing reply. It is made clear that, if the Corporate fails to file reply before the next date of hearing, the matter will be adjudicated on merits on the basis of materials available on record*". Even after the Corporate Debtor didn't file reply to the present application nor prayed for recall of order dated 17.05.2023.

Findings:

3. This bench has carefully gone through the documents and pleadings available on record and considered the arguments.

3.1. This bench notes that the Hon'ble Madras High Court in the case of ***Cholamandalam Investment and Finance Company Ltd. V. Navrang Roadlines Private Limited (O.S.A (CAD) no. 115 of 2022***, following the decision of Hon'ble Supreme Court in case of ***Kotak Mahindra Bank v. A. Balakrishnan & Anr. Civil Appeal No. 689 of 2021*** held at para 12 that – " *A mere perusal of the above observations of the Hon'ble Supreme Court in the decisions cited supra, shows that the liability in respect of a claim arising out of a recovery certificate issued by the DRT would be considered as "financial debt" within the ambit of Section 59(8) of Insolvency and Bankruptcy Code, 2016. It has also held that the underlying claim of the Bank/Claimant under the lending documents would have to be categorised as a "financial debt" under Insolvency and Bankruptcy Code, 2016. Therefore, a recovery certificate issued in respect of the same claim, which is essentially a crystallization of the claim through the process of adjudication, had also be classified as a "financial debt" under Insolvency and Bankruptcy Code, 2016. Consequently, the nature of the underlying claim of the creditor, would determine the categorisation*

of the amount payable under the final decree passed adjudication of the same claim. The liability arising out of an arbitral award or a court proceedings".

3.2. Accordingly, this bench is of the considered view that decree would be categorised as either financial or operational debt depending on the nature of the underlying claim which stands crystallised through the arbitral or court the nature of the debt due under decree would depend on the nature of transaction from which the decretal debt has arisen. In the present case the applicant had obtained a Decree from RERA in capacity of allottee in a Real Estate Project and allottee in Real Estate Project is covered under the definition of Financial Debt contained in under Explanation to Section 5(8)(f) of the Code. Accordingly, the applicant, being holder of a decree in capacity of allottee is a Financial Creditor.

3.3. At this juncture, this bench considers appropriate whether an allottee holding a decree from RERA would fall under the class of Home Buyers within category of Financial Creditor or it would cease to be an allottee under the class of Home Buyers, but shall remain a Financial Creditor, to determine whether the threshold limit prescribed under second proviso to section 7(1) of the Code or under section 4 of code would apply. This bench finds that second proviso to section 7(1) prescribes the threshold limit specifically in relation to Home Buyers Class so as to discourage multiple applications being filed by the allottees in a Real Estate Project. This bench feels that an allottee in Real Estate Project, who subsequently becomes a Decree Holder under RERA Act, continues to be a creditor in the class of Home Buyers and shall continue to be governed by the threshold limit prescribed under second proviso to section 7(1) of the Code.

3.4. The second proviso to section 7(1) prescribes the threshold limit in relation to Home Buyers Class for filing an application u/s 7 of the Code

> *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 the*

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:

3.5. In the present case, it is not in dispute that the threshold prescribed under second proviso to section 7(1) of the Code is not met in the present case, the application could not have been maintainable had the applicant filed this application without obtaining decree under RERA. Accordingly, the applicant cannot be allowed to claim eligibility to file application u/s 7 in terms of section 4 of the Code, because if it is made permissible it would tantamount to circumventing the provisions of second proviso to section 7(1) of the Code. In other words, what is not permissible directly shall become permissible via RERA decree route. Accordingly, this bench feels that present petition is hit by bar under second proviso to section 7(1) of the Code.

4. Considering the facts placed before us, this bench is of the view that in such circumstances, that the present case deserves to be dismissed under Section 7 of the Insolvency and Bankruptcy Code, 2016.

ORDER

5. The petition bearing CP(IB) 21/MB-IV/2023 filed by Mr. Natwar Agrawal (HUF) through Karta Mr. Natwar Agrawal, the Financial Creditor/Applicant, under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of M/s. Ssakash Developers & Builders Pvt. Ltd, Corporate Debtor is **Dismissed.**

6. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before

any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/- Sd/-

PRABHAT KUMAR
Member (Technical)
02.08.2023.

KISHORE VEMULAPALLI
Member (Judicial)