
(2021) 06 NCLT CK 0019
In the National Company Law Appellate Tribunal
Case No : IB-3081/(ND) Of 2019

Mr. Siddhartha Shankar Dey	Vs	APPELLANT
M/s Emerald Tourist Homes Private Limited		RESPONDENT

Date of Decision : 09-06-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 — Rule 4
Indian Penal Code, 1860 — Section 34, 406, 417, 420

Citation : (2021) 06 NCLT CK 0019

Hon'ble Judges : P.S.N. Prasad, Member (J); Narender Kumar Bhola, Member (T)

Bench : Division Bench

Advocate : Mani Bhushan Sinha

Final Decision : Dismissed

Judgement

P.S.N. Prasad, Member (Judicial)

1. This is an application filed by Mr. Siddhartha Shankar Dey to initiate corporate insolvency resolution process (â??CIRPâ?) against M/s Emerald

Tourist Homes Private Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 (â??the Codeâ?) for the alleged default on the part of

the Respondent in settling an amount of Rs. 8,57,000/- (Eight lakh Fifty-Seven Thousand Rupees only). The details of transactions leading to the filing

of this application as averred by the Applicant are as follows:

i. The applicant stated that the Respondent is a Building and Construction Company registered in Delhi. Further the applicant stated that an SMS

regarding the new launching project of Respondent was received by him. That the applicant upon finding lucrative option of the investment invested in

the project with the name of â??Emerald Riveraâ??.

ii. The applicant submits that the Clause no. 3 of the Agreement cum Memorandum of understanding ref. no. ETH/ER/DL/04/12/2012-2013 states

that there is commitment amount to be paid to Investor after 90% of the payment is received by the Respondent till March, 2013. That a quarterly

payment of Rs. 15,750/- will be paid to the applicant quarterly w.e.f. March, 2013 till September, 2013 or till the possession is not handed whichever is

later.

iii. That on 07.11.2012 a deal was finalized between the applicant and Respondent wherein, the deal of one 350 sq. ft. flat in the said project against

the consideration amount of Rs 8,75,000/- @ Rs 2500 per sq. ft. along with PLC of Rs. 8750 @ Rs. 2500/- per Sq. ft. with total consideration of Rs.

9,45,000/- was finalized. The applicant further submitted that a part booking amount of Rs. 50,000/- and a payment of Rs. 37,500/- on 04.12.2012 was

made to the Respondent by the applicant.

iv. The applicant stated that the Respondent issued the Booking acknowledgement No. 842 dated 04.12.2012 as confirmation of booking and also

issued the receipt No. 019 dated 05.12.2012 of amount of Rs. 87,500/-. That a Buyer Seller Agreement was signed between the parties wherein, the

applicant paid a cumulative amount of Rs. 3,75,000/- through cheque No. 053753 and 071002 dated 24.12.2012 of Axis Bank and SBI Bank

respectively and the Respondent issued the acknowledgement slip no. 048 dated 14.01.2013.

v. That the applicant paid the Respondent Rs. 4,00,000/- in cash and acknowledgement Slip no. 049 dated 14.01.2013 was issued with a condition that

rest of the payment will be paid by the applicant on possession.

vi. The applicant submitted that upon realizing that construction on the said project has not started a Legal Notice dated 25.11.2014 was delivered to

the Respondent. Since no reply was received to the said notice the applicant filed a complaint bearing case no. 3016 of 2016 in the district court of

Kamrup (Metro) at Guwahati under section 420, 406 417, 34 of Indian Penal Code, 1860. Furthermore, the Judicial Magistrate First Class, Kamrup

(Metro) on 28.01.2019 has issued a Warrant of arrest against the Directors of Respondent Company i.e., Mr. Suresh Saini and

Mr. Rajesh Saini.

2. The Tribunal issued notice to the Respondent through all modes, however no

one has represented/Appeared on behalf of the Respondent. Hence, the Respondent vide order dated 07.01.2021 is set ex-Parte.

3. The Learned counsel for the applicant while advancing the arguments has submitted that since the Honâ??ble Supreme Court has decided the

Writ Petition(C) No.26 of 2020 Manish Kumar v/s Union of India and Anr .in January, 2021 in relation to mandatory threshold of 10% or 100

Buyers for the admission of the application from Home Buyers against any builder, Financial Creditor submitted that the it does not fall within that

threshold because there were no Builder Buyer Agreement, The agreement as termed as MOU on guaranteed return plan with commitment amount

to be paid back to the Financial Creditor and the Financial Creditor is not an â?? allotteeâ? but an â??intended allotteeâ? as there were no allotment

or builder buyer agreement with the Corporate Debtor and hence that was only the investment opportunity given by the Corporate Debtor to Financial

Creditor by way of offering assured and guaranteed return plan with the Commitment amount of Rs 15,750/- quarterly to be paid to Financial Creditor

by Corporate Debtor between March, 2013 to September, 2014 by way of MOU.

4. We have gone through the documents filed by the Financial Creditor and heard the arguments advanced by the Learned counsel. The applicant has

claimed the default on part of the Respondent for Rs. 8,57,000/- (Eight lakh Fifty-Seven Thousand Rupees only).

5. Before proceeding with the merits of the matter, we have to see whether the petition answers the test of Limitation. It is evident from the Part 2 of

Form 1 which has been filed by Financial Creditor that no date of default has been mentioned in the Form 1. Hence, on perusal of the application filed

under section 7 of IBC, 2016, the date of default can be ascertained as 22.12.2014, the date on which the Corporate Debtor sent a mail to the financial

Creditor accepting that the said project has been delayed and acknowledged the liability. Whereas, the financial Creditor has filed the present

application under section 7 of IBC, 2016 on 21.11.2019.

6. Hence, applying the date of default criterion laid down by the Honâ??ble Supreme Court, we find that the Present application filed under section 7

of the IBC, Code, 2016 fails the test of Limitation as far as the Code is concerned as it is clearly evident that the date of default i.e., 22.12.2014 had

occurred over three years prior to the date of filing of application i.e.,

21.11.2019, thus, the present application is time barred.

7. In light of the reasons stated above, after giving careful consideration to the entire matter, hearing the arguments of the Financial Creditor and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal Dismiss this petition.