

(2019) 09 NCLT CK 0040

In the National Company Law Appellate Tribunal, Principal Bench, New Delhi

Case No : Company Petition No. IB-964(PB) Of 2018

Urvashi Nangia

APPELLANT

Vs

Sana Realtors Private Limited

RESPONDENT

Date of Decision : 17-09-2019

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 4

Insolvency And Bankruptcy Code, 2016 — Section 5(8)(f), 7, 7(5), 13(2), 14, 14(1), 14(2), 14(3), 14(4), 15, 17, 18, 19, 20, 21

Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Person) Regulations, 2016 — Regulation 6

Citation : (2019) 09 NCLT CK 0040

Hon'ble Judges : M.M. Kumar, CJ;Dr. Deepti Mukesh, J

Bench : Division Bench

Advocate : Dheeraj Gupta, Sanam Siddique, Rishabh Sehgal

Judgement

Dr. Deepti Mukesh, J

1. The Present Application is filed under section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'Code, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Urvashi Nangia (for brevity 'Applicant') with a prayer for initiation of Corporate Insolvency process against M/s. Sana Realtors Private Limited (for brevity 'Corporate Debtor').

2. The Applicant Urvashi Nangia is an allottee of a real estate project. The applicant is ex-facie a financial creditor in terms of the provisions of Section 5(8)(f) and explanation inserted by the Second Amendment Act, 2018 w.e.f. 06.06.2018. The challenge to the aforesaid amendment has been repelled by the Hon'ble Supreme Court in the judgement rendered in the case of Pioneer Urban Land and Infrastructure Ltd. & Anr vs. Union of India & Ors. [Writ Petition (Civil) No. 43 of 2019 decided on 09.08.2019]. Therefore, no doubt is left that the

applicant is a Financial Creditor.

3. The Respondent M/s. Sana Realtors Private Limited is a company incorporated on 27.07.2004 under the provisions of the Companies Act, 1956 having its registered office at H-69, First Floor, Outer Circle, Connaught Place, New Delhi-110001 and CIN U70101DL2004PTC127884. The Authorized share capital of the Corporate Debtor is Rs. 3,01,00,000/- and Issued, Subscribed and Paid up share capital of the company is Rs. 3,00,56,000/-.

4. It is the case of the Applicant that the Corporate Debtor launched a project by the name of Precision Soho Towers on Main Sohna Road, in Sector-67, Gurgaon in the year 2010 and it was widely publicized with firm promises and assurances for timely delivery of the possession and the monthly assured returns to attract buyers. In pursuance of that, the applicant got interested in the units offered by the Corporate Debtor and entered into four Memorandum(s) of Understanding dated 25.08.2010 with the Corporate Debtor in respect of Spaces No's 714, 715, 716, 717 on 7th Floor at the Complex each admeasuring 525 sq. ft. for a combined sale consideration of Rs. 48,30,000/- (Rupees Forty-Eight Lakhs thirty thousand only).

5. The Financial Creditor submitted that the payment of Rs. 43,47,000/- (Forty-Three Lakhs and Forty-Seven Thousand Only) out of the total sale consideration of Rs 48,30,000/- (Rupees Forty-Eight Lakhs thirty thousand only) was made to the corporate debtor through cheque dated 19.10.2010 and the remaining balance amount of Rs. 4,83,000/- (Four Lakh Eight Three Thousand Only) was agreed to be paid at the time of handing over of possession to the financial creditor.

6. The Financial Creditor submitted that the Corporate Debtor promised an assured investment return as per the clause 4 of the MoU which reads as under:

"The Developer shall pay the assured investment return Rs. 25,567.50(Rupees Twenty-Five Thousand Five Hundred Sixty-Seven and Paise Fifty Only), to the second party of the Proposed Space on or before 10th of every month. "

Hence the total amount against 4 units amounting to a sum of Rs. 1,02,270/- was payable monthly with effect from 10.08.2010 on or before 10th day of every month. The assured return were to be paid till the time the premises were constructed by the Corporate Debtor and leased out.

7. The Applicant asserts that the corporate debtor has paid assured returns only till August 2014 and thereafter no payment was received from the corporate debtor. The Corporate Debtor has defaulted for 44 months in making payment towards the assured returns and as on April 2018, the total sum amounting to Rs. 44,99,880/- (Rupees Forty-Four Lakh Ninety-Nine Thousand Eight Hundred and Eighty only) became due and payable by the corporate debtor to the applicant.

8. The Applicant submits that as per clause 8 of the MoU, the Corporate Debtor

assured to complete the structure in all respects including obtaining of Occupancy Certificate within 36 months subject to grace period of 12 months from May 2010 i.e. by May 2014. Clause 8 is set out below verbatim for a ready reference:

"The Developer assures the buyer that the proposed building shall be completed in all respect including obtaining of occupation certificate within 36 months from May 2010 subject to a grace period of 12 months. In the event the developer fails to complete the said building within a period of 36 months, then the buyer at its sole discretion opt the cancellation of the said space and the developer without delay within 15 days refund the amount paid by the buyer plus penalty of Rs 2600/-per sq.ft. which is exclusive of the return paid by the developer upto the date of refund. "

9. The Applicant has averred that the corporate debtor was called upon and a letter dated 21.11.2014 was sent to the Corporate Debtor to pay the outstanding amount of Rs. 8,18,160/- (Eight Lakh Eighteen Thousand One Hundred and Sixty) for the assured returns from the period April 2014 to November 2014 and in pursuance of that the outstanding dues of the assured returns till August 2014 was cleared by the corporate debtor. The Applicant again issued a letter dated 04.01.2016 reminding the corporate debtor that the assured returns have only been cleared till August 2014 and the remaining balance was required to be paid. The Applicant has asserted that the executives of the corporate debtor from time to time had assured to clear the outstanding payments to the applicant, but no payment has been made till date.

10. It is submitted by the applicant that the corporate debtor kept on requesting for few months to clear the payment as the company was suffering a cash crunch but till date neither the payment has been made against the assured returns nor the possession of the unit is offered or leased out as per the obligation undertaken by the corporate debtor and hence the default continues till date.

11. Ld. counsel for the Applicant submits that a legal notice dated 08.05.2018 was sent to the Corporate Debtor invoking clause 8 of the MOU already reproduced in para 7 (supra) seeking cancellation of allotment of all the units in the complex and thereby calling the corporate debtor to refund the payment of Rs. 43,47,000/- made by the Applicant towards booking of 4 spaces/units along with stipulated penalty of Rs. 57,75,000/- and also the payment towards assured returns amounting to Rs. 44,99,880/- totaling to a sum of Rs. 1,46,44,880/-. It is stated that the default in payment of assured returns by the corporate debtor is continuing.

12. The Corporate Debtor replied to the legal notice vide letter dated 21.05.2018 by asserting that the respondent had called upon the applicant to take the possession of the units in 2016 hence they are not liable to make the payment towards assured returns as alleged by the financial creditor.

13. The Applicant submitted that the total amount claimed towards assured

returns and towards refund of initial disbursed payment alongwith stipulated penalty is Rs. 1,46,44,880/- which became due and payable by the corporate > debtor, hence present application was filed. As per Form 1 under 'Part IV the breakup of debt which fell due in terms of principal amount with interest and arrears of assured returns is given.

Part-IV

S.No.

Particulars of Financial Debt

1

Total amount of debt granted and date of disbursement

Rs. 1,46,44,880/- (Rupees One Crore Forty-six Lakh Forty-Four Thousand Eight Hundred and Eighty Only) Comprising of Rs.43,70,000/- Disbursed vide cheque dated 16.08.2010 for an amount of Rs. 4,00,000/- vide cheque dated 18.09.2010 for an amount of Rs. 15,00,000, vide cheque dated 19.10.2010 for an amount of Rs. 10,00,000/-, vide cheque dated 19.10.2010 for an amount of Rs. 14,00,000/- and vide cheque dated 19.10.2014 for an amount of Rs. 47,000 all drawn on Canara Bank. [Comprising of total penalty of Rs. 57,75,000/- in terms of clause 8 (total amount against all 4 units) and the payment towards assured returns amounting to Rs. 44,99,880/-(total outstanding against 4 units)].

2

Amount claimed to be in default and the date on which the default occurred

Rs. 1,46,44,880/- (Rupees One Crore Forty-six Lakh Forty-Four Thousand Eight Hundred and Eighty Only). The default occurred on 01.09.2014 and is continuing till date.

14. The Corporate Debtor has filed its reply to the application and has taken the stand that the corporate debtor has been repeatedly asking the applicant to take the possession vide letter dated 01.06.2016 and from then onwards continued to offer possession till 2017, on payment of balance amount. The Corporate Debtor has further mentioned that due to various reasons the project got delayed for more than two years and there is no clause to pay interest as claimed by applicant. Admittedly the occupancy certificate was issued on 18.07.2017 which is annexed with the additional documents filed by corporate debtor.

15. The Applicant in the rejoinder dated 16.10.2018, submitted that there is nothing on record to suggest that the corporate debtor offered possession to the Applicant. Further, as per clause 8 of the Memorandum of Understanding, the corporate debtor had undertaken to pay assured returns and penalty @2600/- per sq. ft. and the said financial debt has become due and payable to the Applicant. The interest @21% pa is inferred from the stipulation of principle of

parity and equality as per clause 10 of MoU.

16. Having heard the learned counsels for the Applicant and the Corporate Debtor and having perused the paper books, it is beyond doubt that the default has occurred with respect to the payment of the financial debt due to the Applicant.

17. Admittedly the assured returns from August 2014 onwards are not paid which is not controverted by the corporate debtor. The penalty as per clause 8 gives sole discretion to the applicant in case of failure to offer of possession within 36 +/-12 months i.e. by May 2014 to cancel said space and to get the refund from the corporate debtor within 15 days along with penalty. As per reply of the corporate debtor it is admitted that the occupation certificate was obtained in the year 2017 and when occupation certificate is received in 2017 how can the corporate debtor offer possession in 2016 to the applicant as claimed by it. The corporate debtor has not produced any completion certificate. Even if the defense for delay is considered in present case, the delay is more than three years and hence non-payment of assured returns and penalty by the corporate debtor as per MoU will amount to default. The intent of the code to protect the allottee would be completely defeated, if such a defense of the corporate debtor is to be accepted.

18. The Judgment in this matter could not be pronounced earlier as the issue concerning constitutional validity of explanation to sub section 8(f) of Section 5 of the Code, 2016 was subject matter of challenge before Hon'ble the Supreme Court in a bunch of petitions. In the lead case titled as Pioneer Urban Land and Infrastructure Limited and Another V. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) the Judgment has now been pronounced on 09.08.2019. We have gone through the Judgment and find that the directions issued by the Hon'ble Supreme Court do not in any manner advance the case of the Corporate Debtor and the application deserves to be admitted.

19. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. This Tribunal is satisfied that a default has occurred and the application under Section 7 is complete. The name of the IRP has been proposed and his/her consent in Form 2 has been duly filed. There are no disciplinary proceedings pending against the proposed Interim Resolution Professional.

20. As a sequel to the above discussion, this application is admitted and Mr. Sudhir Kumar Agarwal with the address 415, Naurang House No. 21, Kasturba Gandhi Marg, New Delhi and email-id ska003@gmail.com, and having registration number IBBI/IPA-001/IP-P00195/2017-18/10374 is appointed as the Interim Resolution Professional.

21. In pursuance of Section 13(2) of the Code, this Tribunal directs that the Interim Insolvency Resolution Professional shall immediately make public

announcement with regard to admission of this application under Section 7 of the Code. We also declare moratorium in terms of Section 14 of the Code. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the Corporate debtor prohibiting proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in vogue.

22. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, inter alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation by the ex-management or its ex-directors the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

23. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Sudhir Kumar Agarwal to meet out the expense to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

24. Keeping in view the aforesaid, the Application stands admitted in terms of Section 7 of IBC, 2016. A copy of the order shall be communicated to the Financial Creditor, Corporate Debtor and the IRP by the Registry at the earliest. In addition, a copy of the order shall also be forwarded to IBBI for its records. Petitioner is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.