



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA**

**C.P.(IB)/78(KB)2024**

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

**IN THE MATTER OF:**

**SUMANGAL DEALMARK PVT. LTD. & ORS.;**

**... FINANCIAL CREDITOR**

**-Versus-**

**CITYSTAR INFRASTRUCTURES LIMITED;**

**... CORPORATE DEBTOR**

**Date of pronouncement of the Order: 24.10.2024**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)**

**SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

**Appearance (via video conferencing/physically):**

Mr. Ratnanko Banerji, Sr. Adv.	]	<b>For the Financial Creditor</b>
Mr. Joy Saha, Sr. Adv.	]	
Mr. Shaunak Mitra, Adv.	]	
Mr. Sidhartha Sharma, Adv.	]	
Mr. Rishav Dutt, Adv.	]	
Mr. Arjun Asthana, Adv.	]	
Mr. Aman Kataruka, Adv.	]	

Mr. Jishnu Saha, Sr. Adv.	]	<b>For the Corporate Debtor</b>
Mr. Reetobroto Mitra, Adv.	]	
Mr. Rudrajit Sarkar, Adv.	]	
Ms. Arundhati Burman Roy, Adv.	]	
Ms. Pushpa Mishra, Adv.	]	
Ms. Tamongha Saha, Adv.	]	
Mr. Ishaan Saha, Adv.	]	



**ORDER**

***Per: D. Arvind, Member (Technical)***

1. This Court is congregated through hybrid mode.
2. Learned Sr. Counsel/Counsel appearing on behalf of the parties were heard *in extenso*.
3. This application being **C.P.(IB)/78(KB)2024** has been preferred by **Sumangal Dealmark Pvt. Ltd. & Ors.** (Applicant/Financial Creditor) against **Citystar Infrastructures Limited** (Respondent/Corporate Debtor) under Section 7 of Insolvency and Bankruptcy Code (in short “IBC”), 2016 seeking initiation of Corporate Insolvency Resolution Process (in short “CIRP”) of the Corporate Debtor.
4. **Factual matrix of the case is as under: -**

**4.1** Citystar Infrastructures Limited (Respondent/Corporate Debtor) is a company engaged in development of real estate projects.

**4.2** Sumangal Dealmark Pvt. Ltd (Applicant / Financial Creditor) is a company *inter alia* engaged in financing projects developed by such developers.

**4.3** On 18<sup>th</sup> February 2014 an agreement was made between the Corporate Debtor and the Financial Creditor. In terms of this agreement, the Financial Creditor agreed to assist the corporate debtor by providing financial assistance, by making available funds from time to time for meeting the cost of construction and development of the project being developed in terms of a development agreement dated 12<sup>th</sup> February, 2007 made between the Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Limited (in short ‘BSCHSL’) and the Corporate Debtor.



- 4.4** The said development agreement was registered at the Office of Additional Registrar of Assurances – 1, Kolkata and the Corporate Debtor was entrusted to develop the aforesaid property on the terms and conditions mentioned therein.
- 4.5** As per Clause 5 of the agreement made between the Financial Creditor and the Corporate Debtor dated 18<sup>th</sup> February 2014 it has been agreed that the said agreement between financial creditor and corporate debtor is independent of the development agreement dated 12<sup>th</sup> October 2007 made between the said housing society (BSCHSL) and developer/corporate debtor.
- 4.6** It has been agreed in Clause 6 of the agreement that the Financial Creditor by itself and/or through its associates will pay to the corporate debtor interest free security deposit of Rs. 20,00,00,000/- (Rupees Twenty Crores Only) and the corporate debtor will refund the security deposit after completion of the said project mentioned in the development agreement made between the corporate debtor and BSCHSL.
- 4.7** In terms of Clause 7 of the agreement, the Financial Creditor shall arrange funds from time to time for meeting the cost of construction for development of the said property, by itself and/or through its associates.
- 4.8** Out of the said funds infused, the corporate debtor shall be entitled to fulfil its obligations under the Development Agreement made with BSCHSL.
- 4.9** It has been agreed in Clause 9 of the agreement made between financial creditor and corporate debtor, that in lieu of the financing arrangement for development of the project, the profits arrived at from the project will be shared equally between the

IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA

C.P.(IB)/78(KB)2024

Developer (herein, the Corporate Debtor) and the Company (herein the Financial Creditor). The project profit shall be arrived at by sharing the total cost of the project in the ratio of 50:50 including the cost already incurred till date.

**4.10** In terms of the said agreement, the Financial Creditor has advanced financial assistance directly and/or through its associates a sum of Rs. 13,20,00,000/- as detailed below: -

2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	<b>TOTAL AMOUNT DUE:</b> INR 78,73,12,958 (Indian Rupees Seventy Eight Crore Seventy Three Lakh Twelve Thousand Nine Hundred and Fifty Eight only) as on 1 <sup>st</sup> March 2024		
	<b>Break up:</b> / I. <b>Total Principal due</b> as on 1 <sup>st</sup> March 2024 is INR 13,20,00,000 (Indian Rupees Thirteen Crore and Twenty Lakh only) paid in the following tranches by the Financial Creditors through RTGS to the Corporate Debtor:		
	<b>S. No.</b>	<b>Date</b>	<b>Name of Financial Creditor</b>
			<b>Amount (in INR)</b>

NIRYAT PRIVATE LIMITED

*Madhumita Ghosh*  
Authorised Signatory

SAMRIDDHI METALS PRIVATE LIMITED

*Madhumita Ghosh*  
Authorised Signatory

FOR S. M. CARRIERS PVT. LTD

*Madhumita Ghosh*  
Authorised Signatory

IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA

C.P.(IB)/78(KB)2024

45



1	01.09.2015	S M Carriers Private Limited	55,00,000
2	03.09.2015	Samriddhi Metals Private Limited	25,00,000
3	28.02.2014	Sumangal Dealmark Private Limited	3,00,00,000
4	07.03.2014	Sumangal Dealmark Private Limited	50,00,000
5	10.03.2014	Sumangal Dealmark Private Limited	50,00,000
6	11.03.2014	Sumangal Dealmark Private Limited	1,00,00,000
7	12.03.2014	Sumangal Dealmark Private Limited	50,00,000

S M CARRIERS PRIVATE LIMITED

Madhumita Ghosh

Authorised Signatory

SAMRIDDHI METALS PRIVATE LIMITED

Madhumita Ghosh

Authorised Signatory

FOR S. M. CARRIERS PVT. LTD.

Madhumita Ghosh

Authorised Signatory

IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA

C.P.(IB)/78(KB)2024

46

8	14.03.2014	Sumangal Dealmark Private Limited	50,00,000
9	15.03.2014	Sumangal Dealmark Private Limited	50,00,000
10	18.03.2014	Sumangal Dealmark Private Limited	50,00,000
11	19.03.2014	Sumangal Dealmark Private Limited	50,00,000
12	20.03.2014	Sumangal Dealmark Private Limited	1,00,00,000
13	22.03.2014	Sumangal Dealmark Private Limited	50,00,000
14	24.03.2014	Sumangal Dealmark	35,00,000

SM NIRVAT PRIVATE LIMITED  
Machumita Ghosh  
Authorised Signatory

SAMRIDDHI METALS PRIVATE LIMITED FOR S. M. GADHOKI & CO. PVT. LTD.  
Machumita Ghosh Machumita Ghosh  
Authorised Signatory

IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA

C.P.(IB)/78(KB)2024

47



		Private Limited	
15	30.05.2014	Sumangal Dealmark Private Limited	35,00,000
16	21.06.2014	Sumangal Dealmark Private Limited	25,00,000
17	10.07.2014	Sumangal Dealmark Private Limited	75,00,000
18	24.09.2014	Sumangal Dealmark Private Limited	75,00,000
19	27.09.2014	Sumangal Dealmark Private Limited	30,00,000
20	19.11.2014	Sumangal Dealmark Private Limited	50,00,000

Sumangal Dealmark Private Ltd.

SM NIRYAT PRIVATE LIMITED  
Madhumita Ghosh  
Authorised Signatory

SAMRIDHI METALS PRIVATE LIMITED  
Madhumita Ghosh  
Authorised Signatory

FOR S. M. CARRIER PRIVATE LIMITED  
Madhumita Ghosh  
Authorised Signatory





48

21	29.05.2018	S.M. Niryat Private Limited	15,00,000
Total			13,20,00,000

**4.11** The disbursement of the amount of Rs. 13,20,00,000/- has not been disputed by the Corporate Debtor.

**4.12** After advancing Rs. 13,20,00,000/-, the Financial Creditor found no progress in the said project, and consequently, started demanding the return of “interest free security deposit” with interest that Financial Creditor would have earned in the market, by calculating 18 per cent from the date of disbursement.

**4.13** The Financial Creditor claims that the total amount in default is a sum of Rs. 78,73,12,958/- (Rupees Seventy-Eight Crore Seventy-Three Lakh Twelve Thousand Nine Hundred and Fifty-Eight Only), and hence, this application has been filed under Section 7 of IBC, 2016.

**5. Ld. Counsel for the Applicant/Financial Creditor: -**

**5.1** Ld. Counsel for the applicant submits that the amount in default is Rs. 78,73,12,958/- (Rupees Seventy-Eight Crore Seventy-Three Lakh Twelve Thousand Nine Hundred and Fifty-Eight Only) and the date of default is 24.12.2022. This application has been filed in 2024, and consequently, it has been filed on time.





**5.2** He brought to our attention, the Board Resolution passed by the Corporate Debtor on 28<sup>th</sup> January, 2014, wherein, it has been resolved by the Board to enter into an agreement with the Financial Creditor for financial assistance in respect of development of land admeasuring an area of about 5 Bighas 8 Cottahs 9 Chittacks and 14 Sq. Ft. situated at 1/530A Gariahat Road, Kolkata – 700 068 (land allotted in terms of development agreement made between corporate debtor and BSCHSL).

**5.3** He also brought to our attention the recitals in the agreement dated 18<sup>th</sup> February 2014 which reads as under:

“Whereas the Developer has approached the said Company to assist the Developer by providing total financial assistance to meet the total cost of construction and development of the said property to be developed by the said Developer and the said Company has agreed to assist the Developer by providing desired financial assistance and making available funds from time to time for meeting the cost of construction and entire development of the said property”.

**5.4** He also brought to our attention the Clause 5 of the agreement which states that this agreement is for financial assistance and it is independent of the Development Agreement dated 12<sup>th</sup> October, 2007 made between the Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Limited (BSCHSL) and the Corporate Debtor, to contend that the agreement made between the applicant and the corporate debtor is not a joint venture agreement in the development of the project and the applicant is merely a financial assistance provider in the entire scheme of things.



**5.5** He also brought to our attention that, in terms of the agreement dated 18<sup>th</sup> February 2014 between the corporate debtor and the financial creditor, financial assistance was given to the corporate debtor by the financial creditor directly as well as through their associate companies as under: -

- (i)** Loan from S M Niryat Private Limited on 29.05.2018 for a sum of Rs. 15 lacs against interest of 12% per cent per annum, he submits that even TDS has been deducted on the interest payable by the corporate debtor acknowledging this disbursement clearly as a loan as evidenced by the 26 - A statement maintained by the Income Tax portal.
- (ii)** Rupees 55 lacs as advanced from S. M. Carriers Private Limited during the period of financial year 2014-15.
- (iii)** Advances from the financial creditor Sumangal Dealmark Private Limited for a sum of Rs. 12 crores 25 lakhs during the period of financial year 2014-15.
- (iv)** Advance against property from Samriddhi Metals Private Limited for a sum of Rs. 25 lakhs on 03.09.2015, all the above financial assistance given by the financial creditor and its Associates or in terms of the agreement made between the financial creditor and the corporate debtor on 18<sup>th</sup> February 2014.

**5.6** However, assistance rendered by S M Niryat Private Limited has been considered as loan against interest at the rate of 12% per

annum by both the financial creditor as well as the corporate debtor.

- 5.7** Amounts given by other entities including the financial creditor has been treated as interest free security deposit returnable with 50% of the profit earned upon completion of the project.
- 5.8** In terms of close 6 of the agreement dated 18<sup>th</sup> February 2014: he submits that the advances termed as refundable interest free security deposit is nothing, but financial debt disbursed against the consideration for the time value of the money. In this case, instead of, fixed interest, the time value of money is the profit that would be derived from the projected funded. He pointed out that the disbursement is not in the nature of any investment as the agreement does not contemplate sharing of any assets or liabilities or losses but mandates only sharing of profit. Therefore, above arrangement has the commercial effect of borrowing.
- 5.9** He brought to our attention the judgment rendered by the **Hon'ble Supreme Court** in **Orator Marketing Pvt. Ltd. vs. Samtex Desinz Pvt. Ltd. 2021 SCC OnLine SC 513** and particular reference to Paras 29 and 31, *wherein it has been held that financial debt does not expressly exclude interest free loan, financial debt would have to be considered to include interest free loans advance to finance the business operations of a corporate body.*
- 5.10** He also relies on the judgment rendered by the **Hon'ble Supreme Court** in **Pioneer Urban Land and Infrastructure Limited and Another vs. Union of India and Others (2019) 8 SCC 416**: in this case *the home buyers were treated as financial creditors and the time value of money for them has been determined as the constructed home in lieu of money advanced.*



- 5.11** He referred to paras' 68, 69, 70 and 71 of the judgment to contend that what was advanced, is a loan and just because it has been referred as "refundable interest free security deposit", it does not take away the actual characteristics of the transaction, which is nothing but lending of money against share of profit in lieu of interest.
- 5.12** He submits that the corporate debtor has no intention to complete the project and, therefore, the question of returning the refundable security deposit along with profit share as contemplated in the agreement has become a big question mark. Therefore, the applicant has no other choice but to claim the amount advanced by calculating interest based on the market rate, i.e., the rate the financial creditor would have earned had he lent money to the other borrowers in the market. Hence, 18% per annum has been considered from the date of disbursement and the amount in default has been worked out accordingly.
- 5.13** Since the corporate debtor unilaterally terminated the agreement on 24.12.2022, corporate debtor should have returned the amount disbursed along with along with adequate compensation on the same day. Therefore, applicant has taken, the date of default as the date of termination of the agreement by the corporate debtor and accordingly, this application filed in 2024 is well within the prescribed time limit.
- 5.14** Since the defaulted amount is in far more than threshold amount, this application deserves admission and accordingly he urged that the corporate debtor may be put into Corporate Insolvency Resolution Process (in short 'CIRP').



**6. Ld. Counsel for the Respondent/Corporate Debtor: -**

- 6.1** Ld. Sr. Counsel appearing on behalf of the corporate debtor submits that the applicant is a financial partner to the project being developed by the corporate debtor by virtue of development agreement dated 12<sup>th</sup> October 2007 made between the Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Limited (in short 'BSCHSL'). As per the agreement, the project will have to be completed within three years from the date of sanction of the complete plan by the Kolkata Municipal Corporation.
- 6.2** The interest free security deposit advanced by the applicant is required to be refunded only after the completion of the said project, as per Clause 6 of the said agreement.
- 6.3** He submits that the Kolkata Municipal Corporate did sanction the plan on 08<sup>th</sup> March 2018 subject to payment of Rs. 4,97,21,868/- as fees. However, the applicant did not fund this amount despite repeated requests, and consequently, the respondent was unable to obtain the sanctioned plan from the Kolkata Municipal Corporation.
- 6.4** In this context, disputes are pending with arbitrator and the claims have been made by both the parties against each other.
- 6.5** He submits that the entire money of Rs. 13.2 crore disbursed by the financial creditor has been utilized for vacating the occupants, from the land allotted for the project.
- 6.6** He submits that on 23.11.2022, the financial creditor has sent an email demanding return of the security deposit by artificially calculating 18% interest per annum from the date of



disbursement and the same was replied by saying that the question of return of the refundable security would arise only after the completion of the project, as per the agreement made between the corporate debtor and the financial creditor on 18<sup>th</sup> February, 2014. Further in the same reply, the corporate debtor had made a claim of Rs. 5 crores towards damages incurred due to delay in project because of non-cooperation of the applicant herein.

- 6.7** He further submits that in the email respondent requested the applicant to pay the balance sum of Rs. 6,80,00,000/- (20 crores – 13.2 crores) along with Rs. 5 crores towards losses and damages due to delay in the project as the delay is attributable to the non-cooperation of the financial creditor in meeting its obligation. Copy of both the emails are in page nos. 144 to 149 of the application filed by the financial creditor.
- 6.8** He brought our attention that the pleadings made before sole arbitrator by both the parties, wherein claims and counter claims have been made and the dispute is pending for disposal.
- 6.9** He also brought to our attention that the agreement dated 18<sup>th</sup> February 2014 did not provide for refund of interest free security deposit any time before completion of the development of the said premises and provided for refund only thereafter without interest. The agreement however provided for sharing of profits equally after development and completion of the project.
- 6.10** He submits that disbursement is investment and even in arbitration, the applicant has claimed only damages apart from seeking direction for return of refundable security deposit, and not interest.



**6.11** He further submits that even in the lenders books of account no interest has been accrued and shown as receivable.

**6.12** He relies on the judgment passed by the **Hon'ble NCLAT** in **Mukesh N. Desai in Company Appeal (AT) (Insolvency) No. 780 of 2020** to contend that MoU/Agreement made between the financial creditor and the corporate debtor have reciprocal rights and obligations, and consequently, the agreement is a 'Joint Development Partners agreement entered a consortium of sorts for developing the land. For any breach of terms of the said agreement, Section 7 application is not maintainable as the amount cannot be construed as 'Financial Debt'. He quoted paras 14 and 15 of the said judgment, which is reproduced, for the sake of convenience, as under: -

*“14. In the instant case, on mutual Agreement, the 'Corporate Debtor' and other parties decided to transfer 25% of the land to the Appellant herein on a price decided jointly. As per Clause 4 of the MoU, the Appellant shall fund the cost of construction to the 'Corporate Debtor'/developer, till the sample flat is ready. It was correlatively decided that both parties have rights to book flats with mutual consent Clause 6 stipulates that whatever income is earned from the sale of flats, the Appellant is entitled to 25% of the Net Profit.”*

*“15. The MoU entered is an Agreement of reciprocal rights and obligations. We are of the earnest view that both parties being 'Joint Development Partners' who entered into a consortium of sorts for developing the subject land and for any breach of terms of the contract, Section 7 Application filed under the Code would not be maintainable as the amount cannot be construed as 'Financial Debt' as there is*





*no sum(s) i.e., owed, assigned or transferred to in compliance of the provisions of Section 5(8) of the Code. To reiterate, being a profit share owner, who in the event of the success of the Project would receive the residual gain, the amount invested in the land cannot be said to be a 'Financial Debt as defined under Section 5(8) of the Code. Hence, the ratio of the Judgements relied upon by the Learned Counsel for the Appellant are not applicable to the facts of this case.'"*

**6.13** He also brought to our attention the judgment passed by the **Hon'ble NCLAT in *Harendra Singh Khokhar vs. Indarprashta Buildtech Pvt. Ltd. and Another*** to contend that the agreement made between the financial creditor and the corporate debtor is for joint development of property where the role of the applicant is to provide finance and the role of the respondent is to develop and construct and build the project, and the said case law is squarely applicable to the case in hand.

## **7 Analysis & Findings: -**

**7.1** In this case, we find that there is a development agreement dated 12<sup>th</sup> October, 2007 between the Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Limited (in short 'BSCHSL') and the corporate debtor for developing parcels of land measuring 5 Bighas 8 Cottahs 9 Chittacks and 14 Sq. Ft. be the same a little more or less together with Buildings, erected thereon which has since been renumbered as Municipal Premises No. 1/530A Gariahat Road, (Being Plot No. 530A Jodhpur Park) Kolkata – 700 058 ("Said Property/Project").

**7.2** To develop the project entrusted to the corporate debtor by the said society, i.e., Bengal Secretariat Co-operative Land Mortgage



Bank and Housing Society Limited (in short 'BSCHSL') an agreement has been made between the financial creditor and the corporate debtor on 18<sup>th</sup> February 2014.

**7.3** The recital to the agreement reads as under: -

- (i) **“AND WHEREAS** *The Bengal Secretariat Co-Operative Land Mortgage Bank and Housing Society Limited, herein referred to as the “Society” is the absolute owner of ALL THAT parcels of land measuring 5 Bighas 8 Cottahs 9 Chittacks and 14 Sq. Ft. be the same a little more or less together with Buildings, erected thereon which has since been renumbered as Municipal Premises No. 1/530A Gariahat Road, (Being Plot No. 530A Jodhpur Park) Kolkata: 700 058 ("Said Property").”*
- (ii) **“AND WHEREAS** *by virtue of a Development Agreement dated 12<sup>th</sup> October 2007 made between the said Society and the said Developer **and registered at Additional Registrar of Assurances - 1, Kolkata under Registration No. I-03773/14,** the said 'Developer' was entrusted to develop the aforesaid property on the terms and conditions as recorded therein. A copy of the said Development Agreement attached herewith.”*
- (iii) **“AND WHEREAS** *the developer has approached the said Company to assist the Developer by **providing total financial assistance** to meet the total cost of construction and development of the said property to be developed by the said Developer AND the said Company has agreed to assist the Developer by*



**providing desired and financial assistance and making available funds from time to time** for meeting the cost of construction and entire development of the said property on the terms and conditions hereinafter stated ("Said Project").”

**7.4** Clause 5 of the said agreement clearly states as under: -

“The said Developer (Corporate *Debtor*) and the said Company (Financial *Creditor*) do hereby confirm that this agreement is independent of the Development Agreement dated 12<sup>th</sup> October 2007 between the Society (BSCHSL) & Developer (Corporate *Debtor*)”

**7.5** In terms of the said agreement the financial creditor is supposed to render financial assistance (which has been termed as interest free security deposit) of Rs. 20 crores, which the corporate debtor is required to refund after the completion of the said project along with 50 per cent of the profit share, in lieu of interest, which is normally charged in any financial assistance / loan arrangements.

**7.6** Clause 9 of the Agreement states that in lieu of this arrangement, the profits arrived at from the project would be shared equally between the Developer and the Company. The project profit should be arrived at by sharing the total cost of the project in the ratio of 50:50 including the cost already incurred till date.

**7.7** Therefore, the agreement clearly contemplates return of the so-called interest free security deposit unlike usual development agreements where each partner is entitled to get share of the constructed premises, which they are entitled to sell and get back the amount invested along with profits or losses.



**7.8** We have gone through the judgment relied by the Ld. Sr. Counsels from both the sides which are reproduced as under: -

In the judgment rendered by the **Hon'ble NCLAT** in **Mukesh N. Desai in Company Appeal (AT) (Insolvency) No. 780 of 2020**: in the said case, the appellant was not only entitled to 25 per cent of the ownership of the project developed, but the Hon'ble Tribunal also noted that the corporate debtor decided to transfer 25 per cent of the land to the appellant therein.

In that case, the appellant shall fund the cost of construction, and both the parties have rights to book flats with the mutual consent and whatever income earned from the sale of flats, the appellant is entitled to 25% of the net profit.

The MoU had reciprocal rights and obligations, and therefore, it was held by the Hon'ble Tribunal that it is a Joint Development Partners Agreement and consequently, the applicant therein was not entitled to file Section 7 application under the Code.

**7.9** However, in the given case there is a clear contemplation of return of interest free security deposit. We have also noted that the applicant is not securing anything in the entire scheme of things, for the amount to be called as "security deposit". Hence, instead of going merely by the words "security deposit" we need to understand the intention between the parties, when they executed the said agreement dated 18<sup>th</sup> February 2014.

**7.10** The agreement contemplates return of the amount after completion of the project, with consideration in the form of share in profit.



**7.11** The agreement does not provide any ownership right to the applicant in the premises to be constructed by the respondent. It has been expressly stated in the agreement made between the Applicant and the respondent that the development agreement made between the Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Limited (in short 'BSCHSL') and the respondent herein is independent and different from the agreement executed between the financial creditor and the corporate debtor. Therefore, it is very clear that financial creditor is not a joint venture partner or co-owner of the project or joint developer in the scheme of things.

**7.12** The other judgment cited by the Ld. Sr. Counsel for the corporate debtor passed by the **Hon'ble NCLAT in Harendra Singh Khokhar vs. Indarprashta Buildtech Pvt. Ltd. and Another** reported in **2022 SCC OnLine NCLAT 4254** in that case also there was a development agreement between the parties unlike the current scenario where the financial creditor is not a party to any development agreement of any project.

Therefore, we are of the view that the cases cited by the Ld. Sr. Counsel for the Corporate Debtor will not come to his rescue.

**7.13** On the other hand, we find that the judgment quoted by the Ld. Sr. Counsel for the applicant in the case passed by the **Hon'ble Supreme Court in Orator Marketing Pvt. Ltd. vs. Samtex Desinz Pvt. Ltd.** reported in **2021 SCC OnLine SC 513** the relevant para no. 31 of the said Order is as under: -

"The definition of 'debt' is extensive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest



free loans advanced to finance the business operations of a corporate body”.

**7.14** In the given case, it is not that money has been advanced without any compensation. In lieu of interest, the agreement provides for paying 50 per cent of the profit share made from the project to the financial creditor. It may be relevant to note that the agreement does not provide for sharing of losses, unlike the normal Joint Venture Agreements where the partners are required to share profits and losses in the agreed ratios. Thus, the financial creditor has lent money with clear intention of getting compensation (time value of money) in the form of profit.

**7.15** We find that the corporate debtor has unilaterally terminated the agreement on 24.12.2022. However, while doing so the respondent has admitted that the agreement dated 18<sup>th</sup> February 2014 is only financing agreement. The relevant portion of the letter of the corporate debtor terminating the agreement is reproduced as under: -

“As is evident from the agreement of 18<sup>th</sup> February 2014, the same was only a financing agreement. The entire development of the premises in question was, however, clearly dependent on the financial commitment made by you in the same. As despite being repeatedly called upon to provide the balance security money and the moneys required to obtain the sanctioned plan from the Kolkata Municipal Corporation and thereafter to commence construction activity at site you failed and/or neglected to provide the same, despite being aware of the diverse comments to rehabilitate the shop/stall owners whom we had shifted to a portion of the said premises, you brought the project to a dead halt, which, as you are aware, created diverse problems and



subjected us to substantial loss and damage. In your e-mails under reference, you thereafter made it abundantly clear that you do not intend to perform your financing obligations under the agreement of 18th February 2014 on which development of the premises in question was and continues to be dependent. In such circumstance, we are left with no option but to terminate the financing agreement".

**7.16** Once, the agreement is terminated the corporate debtor cannot hold on to one Clause of the same agreement which allows him to refund the amount upon completion of the project. Moment there is no denial by the corporate debtor that he has received 13.2 crores from the financial creditor, the same will have to be returned to them, upon termination of the agreement that too by the corporate debtor unilaterally on 24.12.2022.

**7.17** Therefore, the debt and default has been established and the defaulted debt, according to us is a financial debt as funds disbursed by the financial creditor meets the definition of financial debt under Section 5(8) of IBC. The amount has been disbursed against consideration for the time value of money in the form of 50 per cent of the share profit. The disbursement contemplates return of the amount after the completion of the project. Thus, the transaction has the commercial effect of borrowing as defined under Section 5(8)(f) as well, apart from main Section 5(8) of IBC".

**7.** In view of the above facts and circumstances of the case, we are of the view that this application being **C.P.(IB)/78(KB)2024** deserves to be allowed and is hereby **admitted** accordingly.





8. The present petition made by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.

9. **Accordingly, it is, hereby Ordered as follows: -**

(a) This application being **C.P.(IB)/78(KB)2024** filed by **SUMANGAL DEALMARK PVT. LTD.**, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **CITYSTAR INFRASTRUCTURES LIMITED**, the Corporate Debtor, is ***admitted***.

(b) There shall be a moratorium under Section 14 of the IBC.

(c) 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.

(d) Public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(e) **Mr. Aditya Kumar Tibrewal**, registration number **IBBI/IPA-001/IP-P00743/2017-2018/11249**, email: [adityatibrc@gmail.com](mailto:adityatibrc@gmail.com), is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid



Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP shall be compliant with such Regulations, Circulars and Directions 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 Code.

- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or 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 to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report about the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs. 3,00,000/- (Rupees Three Lakh 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) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby 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) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means 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.

10. **C.P.(IB)/78(KB)2024** to come up on **10.12.2024** for filing the progress report.
11. The Registry is directed to send e-mail copies of the Order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
12. Urgent certified copies of this Order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.
13. File be consigned to records.

**D. Arvind**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

**Order signed on: 24<sup>th</sup> of October 2024.**

*Ar. [steno]*