



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

CP (IB) No. 38 of 2024

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of:

- 1. Ms. Shilpi Thard,**
- 2. Mr. Amit Jaisingh,**
- 3. Mr. Sumit Jaisingh,**
- 4. Ruchi Lalla and**
- 5. Harsh Tharf**

**..... Applicants/ Financial Creditors
Versus**

M/s. HBS City Private Limited,
Having its Registered Office at:
505 Ceejay House, Dr. Annie Besant road
Worli Mumbai - 400018

..... Corporate Debtor

Order Delivered on :- 07/10/2024

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**



Appearances (Hearing in Physical Mode):

For the Financial Creditor : Adv. Sahil Sethi a/w Adv. Samriddh

Bindal and Adv. Vikash Kumar

For the Corporate Debtor : Counsel, Mr. Shyam Kapadia a/w Adv.

Dhruva Gandhi and Adv. Yash Pandya

ORDER

Per: - Mr. Kuldip Kumar Kareer, Member (Judicial)

1. This is an application filed jointly under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by the five above-named Applicants (hereinafter referred to as "Financial Creditor") seeking initiation of Corporate Insolvency Resolution Process (CIRP) of M/s. **HBS City Private Limited** (hereinafter referred to as "Corporate Debtor") for resolution of financial debt defaulted by the Corporate Debtor amounting to **INR 6,12,36,000** (Rupees Six Crore Twelve Lakh Thirty Six Thousand only). The date of default as stated in the application is 31st July 2021.

Facts of the Case as per the Applicant:

2. The Corporate Debtor is engaged in the business of infrastructure development and had proposed to develop a township project named "HBS City," which included a cluster of residential buildings known as



"North Meadows Residency" (hereinafter referred to as "the Project"), located on land parcels bearing Plot No. 3551 in the Panoli Industrial Estate, Ankleshwar, District: Bharuch, Gujarat.

3. Based on representations made by the Corporate Debtor, the Applicants purchased 16 units in the building known as North Meadow Residency, pursuant to various allotment letters issued between 04.10.2014 and 17.01.2015. The allotment letters further stipulated that in the event the Corporate Debtor failed to develop or construct the said units within 36 months from the date of the allotment, the Corporate Debtor would be liable to refund a lump sum amount to the Applicants, which became due and payable during the year 2017-18. The total amount of deposit given by the Applicants for 16 units is Rs. 57,89,680.
4. The Corporate Debtor defaulted on the terms of the allotment letters by neither delivering the units nor by repaying the lump sum amount of Rs.2,96,53,080 (As specified in allotment letters). Subsequently, the Corporate Debtor issued 16 post-dated cheques (PDCs) in the months of May, June and July of the year 2018. Further, the Corporate Debtor requested the Applicants not to encash the first set of PDCs, as they were likely to bounce due to insufficient funds. Relying on the Corporate Debtor's representations, the Applicants refrained from presenting the first set of PDCs for payment.
5. Therefore, Corporate Debtor issued 35 post-dated cheques between October 2018 and May 2019, in exchange of the first set of PDCs, incorporating an additional interest amount for the delay in repayment, as



mutually agreed between the parties. Out of the 35 Cheques, the Applicant deposited 5 cheques in the bank of which 3 were encashed.

6. In July 2019, the Corporate Debtor stopped making payments to the Applicants. On 15.04.2020, Mr. Sandeep Shah, Vice Chairman and Managing Director of the Corporate Debtor, acknowledged the obligation to pay Rs. 5.67 Crores to the Applicants by way of an e-mail. In the said email, the Corporate Debtor agreed mainly to pay Rs. 5.67 Crores as a lump sum by April 2021, provided post-dated cheques (PDCs) for the payment due in April 2021 and in case of delay, pay 12% annual interest on the principal amount and an additional Rs. 10 lakhs penalty per month.
7. Since the above-mentioned debt remained due even after April 2021, the parties agreed to consolidate and repay the Corporate Debtor's dues to the Applicants by executing the Investment Agreement dated 22nd July 2021, along with a Memorandum of Understanding (MOU) outlining their understanding.
8. As per the key points of the aforesaid Agreement, a total amount of Rs. 6,12,36,000/- (Rupees Six Crores, Twelve Lakhs and Thirty-Six Thousand only) was due from the Corporate Debtor to the Applicants/Financial Creditors by 31st July, 2021. In the event that the Applicants/Investors agreed to extend the due date, the Applicants would be entitled to an additional interest at a rate of 24% p.a., as per Clause 2.3 of the Investment Agreement. The debt was secured by a corporate guarantee from M/s HBS Seaview Pvt. Ltd., a sister concern of the Corporate Debtor, and a personal guarantee from Mr. Sandeep Shah, the promoter of the Corporate Debtor.



9. The Corporate Debtor communicated its inability to discharge the amounts due on or before the due date specified in the Investment Agreement, i.e., 31st July 2021. To secure the repayment, the Corporate Debtor issued and delivered 26 Post-Dated Cheques (PDCs) dated between 31st July 2021 and 31st March 2022, amounting to Rs. 7,40,10,298/- (Rupees Seven Crores Forty Lakh Ten Thousand Two Hundred and Ninety-Eight). This amount was calculated inclusive of the additional interest in accordance with Clause 2.3 of the Investment Agreement. However, all of the cheques provided by the Corporate Debtor were dishonoured with the reason cited as "Payment stopped by Drawer." till date, the Corporate Debtor has only made four payments via RTGS through its entities HBS Auto and ANC SEZ Private Limited totalling Rs. 59,90,641/- Accordingly, the total outstanding debt, as of 8th November 2023, amounts to Rs. 9,03,92,051/-, inclusive of compound interest calculated at 24% per annum.
10. The Applicant submits that a default amounting to Rs. 9,03,92,051/- as on 08.11.2023, has been committed by the Corporate Debtor and the present petition satisfies the threshold limit prescribed under Section 4 of the IBC. Further, the present Application under Section 7 of the IBC is complete and no disciplinary proceedings are pending against the proposed Interim Resolution Professional Mr. Deepak Joshi.

Reply on Behalf of the Corporate Debtor: The reply of the Corporate Debtor is briefly recapitulated below:



11. The Petitioners had paid a total amount of Rs. 57,89,680 /- in various instalments but as per the Corporate Debtor, the whole sum of 57,89,680 /- was returned back to the Applicants before 36 months and much prior to the execution of the Investment Agreement, an aggregate sum of Rs. 97,60,639/- (Rupees Ninety-Seven Lakh Sixty Thousand Six Hundred and Thirty-Nine Only) was paid to the Petitioners on the various dates. As on the date of execution of the Investment Agreement and the MOU, there were, thus, no disbursed sums which were due and payable to the Petitioners under the Allotment Letters.

12. The Particulars of payments of Rs. 97,60,639/- (Rupees Ninety-Seven Lakh Sixty Thousand Six Hundred and Thirty-Nine Only) is given as: -

| Sr. No. | Name | Amount Paid back | Date of payment RTGS/Cheque |
|----------------|----------------------------------|-------------------------|---|
| 1. | Ruchi Lalla | 25,17,301 | 26.03.2019 |
| 2. | Sumit Jaisingh | 8,50,000 | 06.05.2019 and 14.06.2019 |
| 3. | Amit Jaisingh/Shilpi Thard | 16,98,497 | 11.12.2018, 16.01.2019, 12.02.2019, and 01.03.2019 |
| 4. | Shilpi Thard | 46,94,841 | 16.10.2018, 31.12.2018, 03.11.2018, 11.12.2018, 16.04.2019, 29.04.2019, 03.06.2019 and 09.08.2019 |
| | Total | 97,60,639 | |



13. Moreover, these payments were made despite the fact that nothing in the Allotment Letters entitled the Petitioners to such a refund. In order to coerce the Respondent, Ms. Shilpi Thard, resorted to slanderous emails to the Respondent and also to the Promoters of the Respondent, by threatening to disseminate false information about the Respondent, to launch defamatory campaigns, if additional exorbitant amounts were not paid. She, also, created websites like www.victims-of-sandeep-shah-hbs-realtors.org and uploaded videos on YouTube containing defamatory statements about the Respondent and its Promoters. Consequently, to safeguard its reputation, the Respondent was compelled under extreme duress to execute the Investment Agreement and the MOU, along with other ancillary documents. Admittedly, the Respondent has also paid an additional amount of Rs. 60,51,152/- (Rupees Sixty Lakhs Fifty-One Thousand One Hundred and Fifty-Two Only) to the Petitioners which are as follows: -

| Sr. No. | Particulars | Amount (In Rs) | Date of payment |
|---------|---------------|----------------|-----------------|
| 1. | Amit Jaisingh | 21,68,956/- | 06.08.2021 |
| 2. | Shilpi Thard | 21,68,956/- | 06.08.2021 |
| 3. | Shilpi Thard | 15,15,152/- | 13.09.2021 |
| 4. | Harsh Thard | 1,15,556/- | 06.08.2021 |
| | Total | 60,51,152 | |

14. From the aforesaid, it is clear that the Respondent has paid a total amount of Rs. 1,58,11,791/- (Rupees One Crore Fifty-Eight Lakhs Eleven



Thousand and Seven Hundred and Ninety-One Only) on an investment of Rs. 57,89,680 under the Allotment Letters.

Rejoinder filed by the Applicant

15. In the rejoinder filed by the Applicant it has been stated that the Applicants agreed to purchase 16 units in the building called the North Meadow Residency and the Respondent issued allotment letters to the Applicants. The applicant has further stated that a sum of Rs.57,89,680/- was given to the Corporate Debtor between 04.10.2014 and 17.01.2015 against the said 16 allotments of units. According to the Applicant as per the allotment letters, a sum of Rs.2,96,53,080/- was payable by the Corporate Debtor to the Applicants. However, the Applicant committed default in respect of the terms and conditions of the allotment letters and did not return the money as agreed in the allotment letters. Most of the post-dated cheques issued by the Corporate Debtor were dishonoured. The Corporate Debtor paid only the sum of Rs.22,93,338/- between October and December 2018, thereafter between January and June another payment of Rs.84,35,460/- was made by the Corporate Debtor while the remaining outstanding debt of Rs.3,26,32,501/- was not paid. The Applicant further reiterated the averments made in the application and controverted those made in the written reply filed by the Corporate Debtor and prayed for the admission of the Application under Section 7 of the Code.

Analysis and Findings:

16. We have heard the counsel for the parties and have gone through the records.



17. During the course of arguments, the Counsel for the Applicant has argued that the Corporate Debtor has not disputed the execution of the Memorandum of Understanding and the Investment Agreement but has failed to repay the amount agreed to in the said agreement. The Counsel for the Applicant has further argued that the debt in question is a financial debt in terms of Section 5(8)(f) of the Code as it arises out of the allotments of 16 units in the project called 'North Meadows Residency'. The Counsel for the Applicant further pointed out that as per the terms and conditions of the allotment letters the corporate debtor was to pay a sum of Rs.2,96,53,080/- to the Applicants in case it failed to handover the possession of the 16 units to the applicants within a period of 36 months. Subsequently, the project was abandoned by the Corporate Debtor and no possession was given to the Applicants and in order to discharge its liability towards the Applicant, the Corporate Debtor executed an Investment Agreement and Memorandum of Understanding agreeing to pay the outstanding dues along with interest. Thus, according to the Counsel for the Applicant, the money was advanced to the Corporate Debtor against sale consideration of residential units and the payments have to be treated following within the definition Section 5(8)(f) of the Code. Therefore, since the Corporate Debtor has committed a default in the repayment of the same, the instant application deserves to be admitted.
18. On the other hand, the Counsel for the Respondent has argued that the alleged debt, which is said to be arising out of the Investment Agreement dated 22.07.2021 and Memorandum of Understanding of the same date, does not fall within the definition of the financial debt and the



application is liable to be dismissed on this ground alone. The Counsel for the Corporate Debtor has further argued that the applicant paid only a sum of Rs. 57,89,680/- under the allotment letters issued to them in respect of 16 units. However, the Corporate Debtor could not construct the units in the project in question and as against the payment of Rs.57,89,680/-, sum of Rs.22,93,338/-+ Rs. 84,35,460/- in all sum of Rs.1,07,28,798/- has already been repaid to the Applicants, as admitted in the rejoinder filed by the Applicants. In this manner, the Corporate Debtor has already repaid Rs. 1,67,19,439/- to the applicants against their investment of Rs. 59,90,641/-. Thus, there is no default on the part of the Corporate Debtors nor the debt claim can be said to be following within the definition of the financial debt.

19. The Counsel for the Corporate Debtor has further pointed out that in the Investment Agreement, the Corporate Debtor is shown to have promised to pay 'hardship compensation' which cannot be equated with a financial debt. The Counsel for the Corporate Debtor further argued that there has been no disbursal of any amount to the Corporate Debtor and the application is only a dressed up one, which is devoid of any merit and is required to be dismissed with cost, being gross abuse of the process of law.
20. We have thoughtfully considered the contentions raised by the Counsel for the parties.
21. The instant application under Section 7 has been premised on the facts that the applicants applied for as many as 16 residential units in a project called North Meadows Residency which was to be dwelled and



constructed by the Corporate Debtor. Admittedly, the Applicant paid a sum of Rs.57,89,680/- against the 16 allotment letters issued to them between 04.10.2014 and 07.01.2015. The said allotment letters have been placed on record. A perusal of the allotment letter dated 04.10.2014 reveals that the total value of the unit was Rs.8,37,000/- out of which a sum of Rs.3,09,690/- had been paid, as mentioned in the allotment letters itself and the balance amount of Rs.5,27,310/- was to be paid on receipt of notice for taking possession. It is further stipulated in Clause 6 of the allotment letter that if upon completion of 36 months from the date of allotment letter, the company was unable to complete the construction and handover possession of the unit, it will be liable to refund an amount of Rs.21,16,271/- which shall include the amount of part payment (Rs.3,09,690/-) together with the amount of compensation payable to the allottee and on payment of such amount, the allotment letter shall stand cancelled. The terms and conditions in all the allotment letters are similar and only the amount of the respective units and the advanced amount paid by the applicants/allottees.

22. It is also not disputed that the project in question was not completed by the Corporate Debtor nor the possession of any unit was offered to the applicants. As the Corporate Debtor failed to repay the agreed amount mentioned in the allotment letters to the Applicants, Investment Agreement and Memorandum of Understanding were executed between the parties on 22.07.2021 whereby the Corporate Debtor agreed to repay a sum of Rs.6,12,36,000/- to the Applicants on the due date i.e.31.07.2021. It was further agreed between the parties in the Investment Agreement dated 22.07.2021 that in case the due date was



agreed to be extended the applicants would be entitled to additional hardship compensation calculated at the rate of not less than 24% per annum compounded at least annually.

23. It is the admitted case of the Applicants in the rejoinder that a sum of Rs.22,93,338/- was paid by the Corporate Debtor in October to December 2018 and another sum of Rs. 84,35,460/- was further paid by the Respondent between from January and June 2019. In this manner, a total sum of Rs. 1,07,28,798/- has already been returned by the Corporate Debtor against the total allotment money of Rs. 57,89,680/- paid by the Applicant at the time of issuance of the allotment letters to them.
24. Now, the question arises whether the amount in question can be treated as a financial debt or not. Here, it is pertinent to mention that in the allotment letters against the payment of Rs. 8,37,000/- against the total sale consideration of Rs. 8,37,000, if the possession was not delivered within 36 months, the Corporate Debtor was liable to pay an amount of Rs. 21,16,271/- out of which, only a sum of Rs. 3,09,690/- had been paid. It is specifically mentioned in the allotment letters itself that the aggregate amount repayable after 36 months in the event of non-delivery of possession would include part payment made by the allottee together with the amount of compensation payable by the company. Therefore, the substantive part of the amount claimed as per the allotment letters is on account of compensation. There is no mention in any of the allotment letters that the aggregate amount would include any interest as such. Apart from the allotment letters, the Applicant has



also relied upon the Investment Agreement and Memorandum of Understanding dated 22.07.2021

25. We have perused the said agreements. By way of the Investment Agreement, the Corporate Debtor agreed to pay a sum of Rs. 6,12,36,000/- as total refundable dues as on the due date which was 31.07.2021. In the Investment Agreement, there is no bifurcation of the amount of Rs. 6,12,36,000/-. It is only mentioned that total refundable dues of Rs. 6,12,36,000/- would be inclusive of the agreed hardship compensation. Again, there is no mention even in the Investment Agreement that the aggregate amount of Rs. 6,12,36,000/- included any amount on account of interest on the initial payment of allotment money paid by the Applicants. Therefore, in totality, the Applicants paid a sum of Rs. 57,89,600/- as allotment money at the time of issuance of the allotment letters. As against this amount, the Corporate Debtor repaid a sum of Rs. 1,07,28,798/- which has been admitted by the Applicants in the Rejoinder filed by them. There is no contract with regard to the payment of interest in the allotment letters as well as the Investment Agreement dated 22.07.2021. There is no clause with regard to the payment of interest by the Corporate Debtor and it has been specifically stated in both documents that the aggregate amount payable by the Corporate Debtor would include compensation/hardship compensation. It is well settled that whenever any amount is repayable as compensation on account of breach of contract by a party to a contract, the same cannot be treated as financial debt falling within the definition of Section 5 (8) of the Insolvency and Bankruptcy Code, 2016. In this context, it would be pertinent to mention that compensation is always in the shape of a liquidated or



unliquidated damage which are determined/ascertained by a court of law. In this regard, a reference can be made to the law laid down by the *Hon'ble Supreme Court in Union of India Vs. Raman Iron Foundry (1974) AIR, Supreme Court, pg. 1265* whereby it has been held that damages are the compensation which a court of law gives to a party for the injury which he has sustained. However, the aggrieved party does not get damages or compensation by reason of any exiting/obligation on the part of the person who has committed the breach. It was further held that such party gets compensation as a result of the fiat of the court and further that no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. That being so, the compensation part of the claim of the Applicants cannot be said to be payable, merely, on the basis of the terms and conditions incorporated in the allotment letters or in the Investment Agreements. For recovery of such compensation, the Applicants are required to approach an appropriate court of law/forum to get determined there the exact amount of compensation for the breach of the contract of allotment or for not providing the possession of the units within a period of 36 months. Under no circumstances can the compensation part of the claim be treated as a financial debt.

26. As regards the rest of the amount, excluding compensation, as stated above and is also not disputed by the Applicants that they paid only a sum of Rs. 57,89,680/- as initial allotment money to the Corporate Debtor. It is also admitted that against the said amount of Rs. 57,89,680/-, the Applicants have already received a sum of Rs. 1,07,28,798/- from the Corporate Debtor. Therefore, the Corporate Debtor has already refunded the principal amount of allotment letters



and has also paid some amount on account of compensation also. There is no interest clause either in the allotment letters or in the Investment Agreement or Memorandum of Understanding. Therefore, it cannot be said by any stretch of imagination that any financial debt is due and payable by the Corporate Debtor on default of which it can possibly be pushed into insolvency under Section 7 of the Insolvency and Bankruptcy code, as desired by the Applicants.

27. As a result of the above discussion, we are of the considered view that the Applicants have failed to make out a case for admission of the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 as they have not been able to establish the existence of a financial debt and its default committed by the Corporate Debtor. In these circumstances, we are left with no option but to dismiss the Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016. Accordingly, **C.P. (IB) No. 38/2024 is hereby dismissed.** However, the parties are left to bear their own cost. File be closed and consigned to records.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sushil

Sd/

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)