

**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
CP (IB) – 234(PB)/2019**

Order 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:

Ms. Rita Malhotra and Ors.

..... Financial Creditor

Versus

M/s Orris Infrastructure Pvt. Ltd.

Registered Office:

RZ-D-5, Mahavir Enclave, New Delhi- 110045

CIN No.: U70109DL2006PTC151295

..... Corporate Debtor

Order Pronounced On: 19.09.2023

CORAM:

**CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Financial Creditor: Mr. Rajat Malhotra and Mr. Sunil Malhotra, Advs.

For the Corporate Debtor: Mr. P. Nagesh, Sr. Adv., Mr. Ranjana Roy, Mr. Akshay Sharma, Mr. Shikhar Upadhyay, Advs.

ORDER

1. The present application was filed on 23.01.2019 before this Adjudicating Authority under Section 7 of the Insolvency and

Bankruptcy Code, 2016 (IBC,2016), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (Adjudicating Authority Rules), for initiating the Corporate Insolvency Resolution Process (CIRP), declaring moratorium and for appointment of Interim Resolution Professional (IRP), against the Corporate Debtor (CD) viz. M/s Orris Infrastructure Pvt. Ltd.

2. The total amount claimed to be in default as per Part-IV of the application is **Rs. 3,60,612/-** (Rupees Three Lakhs Sixty Thousand Six Hundred and Twelve).
3. The Corporate Debtor was Incorporated on **26/07/2006**, having CIN: U70109DL2006PTC151295, under the Companies Act, 1956 and is involved in Real estate activities including buying, selling, renting and operating of self-owned or leased real estate such as apartment building and dwellings, non-residential buildings, developing and sub-dividing real estate into lots etc. The registered address of the Corporate Debtor is at RZ-D-5, Mahavir Enclave, New Delhi- 110045. Therefore, this Bench has jurisdiction to deal with this application. A copy of the master data of the Corporate Debtor is attached at Page 1-2 of the application.

4. Facts of the Case and Submissions made by Ld. Counsel for the Applicant

- i. It is submitted that the Corporate Debtor M/s Orris Infrastructure Pvt. Ltd floated a scheme to develop/construct commercial building/complex at Village Kherki, Daula, Sector 83, Gurgaon known as Floreal Tower on land of M/s. Seriatim Land and Housing (P) Limited.
- ii. It is submitted that based on the representation made by the representatives of the respondent with respect to

the Assured Return, the applicants submitted the application in the prescribed form for allotment of Unit in the said commercial project.

- iii. It is submitted that the applicants vide application dated 14.04.2010 applied for the allotment of Office space/Retail Unit admeasuring 1071 Sq. ft. and paid a sum of Rs. 2,00,000/- vide cheque no. 747006 dated 14.04.2010, Rs. 5,00,000/- vide cheque no. 676398 dated 17.04.2010 and a further sum of Rs.22,98,000/- vide cheque dated 871987 dated 24.04.2010.
- iv. The applicants (M/s Rita Malhotra & Ms. Bina Chopra) entered into an Agreement with the CD (the Developer) & Land Owner (M/s Seriatim Land & Housing Private Limited) vide agreement dated 24.04.2010 and were allotted the office space admeasuring 1071 Sq. Ft. on 14th floor with Unit No.1414 @ Rs.2799.253 per Sq. Ft. of the super area for a total consideration of Rs. 29,98,000 under the Assured Investment Return Plan and for which purpose a separate Space Buyers Agreement (“SBA”) was executed between the Corporate Debtor and the Applicants on 26.04.2010.
- v. The applicants have referred to para 4 & 5 of the Agreement dated 24.04.2010 which read as under:

“4. The Developer shall pay the assured investment return @ Rs. 60/- (Rupees Sixty only) per sq.ft. per month of the super area of the proposed office space on or before 7th of every month.

5. That the Developer, upon completion of the construction of the proposed building/complex containing the said proposed office space shall cause the proposed office space to be leased out at a minimum rental of Rs. 60/per sq.ft. per month. The buyer hereby duly authorizes the

Developer unconditionally to lease out the proposed office space and only after the Developer having duly informed the Buyer about all terms and conditions of the lease as settled with the lessee. The buyer under no circumstances shall be entitled to lease the said proposed office space and/or to otherwise deal with the same directly without the consent in writing of the developer. Subject to the requirement of minimum price AND all necessary terms of the lease being informed to the buyer by the Developer AND the lease being to no detriment to the buyer's interest under this agreement or the space buyers agreement, the terms and conditions of lease negotiated by the Developer, as aforesaid, shall be final and binding upon the Buyer”

- vi. It is submitted that the Respondent vide letter dated 09.06.2017 sent two copies of addendum to the Space Buyer Agreement for the signature of the applicant with respect to unit which has been changed to Unit No. 413 on 4th floor and the super area was changed to 1113 sq.ft. and the payment for the additional super area was paid by the Buyer to the Developer, which was duly acknowledged by the Respondent.
- vii. That on 10.03.2017 Respondent issued a letter and offered temporary possession to carry out the interior work/fit out in office/retail unit no. 413 in the commercial complex. Then on 25.04.2017 the applicant replied to the letter dated 10.03.2017 stating that as per the agreement it is the obligation of the Developer to lease out the office space on its own cost and expenses and to carry out the fittings and furnishing work.

- viii. That the Respondent have breached the terms of the Agreement and failed to make the payment of Rs. 10,33,685/- along with interest @ 15% p.a. for which purpose a petition under section 7 of the IBC bearing no. IB-640(PB)/2018 was filed on 01.06.2018 against the Respondent Corporate Debtor.
- ix. It is submitted that the applicant withdrew the Insolvency Petition No. IB-640(PB)/2018 against the Respondent which was allowed by NCLT on 10.07.2018, in view of the settlement dated 09.07.2018 arrived at between the parties in which the Respondent Company paid the amount due from January 2017 to June 2018, after deducting the TDS and further handed over 12 post dated cheques for the period from July 2018 to June 2019. Cheques for the month of July 2018 towards Assured Return was encashed but subsequent cheques for the month of August, September and October 2018 issued in pursuance to the deed of settlement for Rs. 1,80,306 in favour of applicants were dishonoured by the bank of Respondent Company with Remarks “payment stopped by drawer”.
- x. It is submitted that subsequent to filing of this application no. CP(IB)-234(PB)/2019 u/s 7 of IBC on 23.01.2019 before NCLT, a 2nd Settlement Deed dated 06.03.2019 was executed between the applicant FC & the CD. The CD paid an amount of Rs. 4,30,714 to the FC under the settlement deed towards the full and final settlement. Further fresh cheques till June 2019 were issued by the CD and NCLT vide order dated 07.03.2019 allowed the withdrawal of petition bearing CP(IB)- 234(PB)/2019.

xi. The applicant FC on 29.11.2019 sent a notice to CD demanding payment of Rs.1,38,225/- for the period from July, 2019 to September, 2019 along with interest @ 15% and asked the CD to make payment of monthly Assured Return till the unit is leased out by the CD. Vide order dated 10.12.2019 NCLT allowed the Revival Application filed on 29.11.2019 and the CP(IB)-234(PB)/2019 for a default of Rs. 3,60,612/-was revived.

5. Submissions of the Ld. Counsel appearing for the Corporate Debtor are:

- i. That the present application was filed in the year 2019 and as per the amended section 7 of the IBC, an application for initiating corporate insolvency resolution process by financial creditor who are allottees under a real estate project shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project whichever is less.
- ii. That in the case at hand the alleged grievance of the applicant is in respect of Unit No. 413 in the Floreal Tower real estate project of the Respondent Company and in fact there are 504 no. of units in the Floreal Tower Real estate project.
- iii. The captioned petition is filed with respect to the scheme of respondent for Assured Returns in respect of the real estate unit allotments until leasing out of the said units or until 36 months after the date of completion of the building, whichever is earlier. There are 366 no. of allottees of the Respondent under the Assured Returns

scheme/class of creditors and therefore the applicants who are joint allottees of one single unit are nothing but a part of Assured Returns class of creditors of respondent and do not form either one hundred numbers of such class of creditors or more than ten percent of the total number of such class of creditors.

- iv. The applicants never modified their petition within the 30 days' time frame given under the relevant provision of amended Section 7 of IBC and have insisted on contesting their petition in its original form. The said period of 2 months expired in March, 2021.
- v. The applicants entered into Agreement dated 24.04.2010 and the Space Buyers agreement dated 26.04.2010 with the Respondent and it was mutually agreed between the parties that the respondent will pay monthly assured return to the applicants upto the first 36 months after the completion of building or till the date the office space is put on lease, whichever is earlier. The construction of the building for Floreal Tower Project was completed by December 2013 and thereafter, the occupation certificate for the Floreal Tower of the Respondent was received on 16.08.2017 and hence in terms of the agreement, the obligation of the Respondent extends maximum upto 36 months from the date of completion of the building, which comes out to be 16.07.2020. Relevant extracts of the Agreement dated 24.04.2010 read as under:

“2. Having received all consideration in relation to the afore-detailed office space equating Rs. 29,98,000/- (Rupees Twenty Nine Lacs Ninety Eight Thousand Only), as agreed under the Assured Investment Return Plan, the Developer shall give to the Buyer an investment @ Rs. 60/-

per sq.ft. per month i.e Rs. 64,260/- (Rupees Sixty Four Thousand Two Hundred Sixty Only) with effect from 1st May, 2010 on or before 7th day of every month for which it is due upto the first 36 months after completion of building or till the date the said office space is put on lease, whichever is earlier. Performance of the said obligation by the Developer (which performance is not contingent on whatsoever else contained in this Agreement and/or under the Space Buyers Agreement) is hereby wholly and unconditionally confirmed by the Land Owner, who (in case of partial or complete failure on part of the Developer) agrees to fulfill the said obligation of the Developer as a guarantor and in the same manner as detailed above:

- vi. That there is no amount due towards the Applicants from the Respondent in terms of Agreement dated 24.04.2010 and further the Applicants vide their counter affidavit have admitted that the Respondent has already paid the due amount till the period of June, 2019. Further, vide the additional affidavit dated 01.04.2021 as filed by the Respondent, it was highlighted that the Respondent has handed over demand drafts totaling to a sum of Rs. 8,03,029/- (Rupees Eight Lakhs Three Thousand Twenty-Nine Only) which is the amount payable till the month of July 2020.
- vii. That despite receiving the full amount, the applicants have unlawfully claimed that the obligation of the Respondent is continuing and the applicants have contradicted their own statement by virtue of para 3 of the counter affidavit dated 06.07.2021 filed on their behalf, wherein it has been explicitly admitted by the applicants

that the Respondent's obligation in respect of the monthly assured returns is only till 3 years after the date of completion or till leasing out of the unit, whichever is earlier.

- viii. That the Respondent has admittedly paid the applicants full and final amount towards the monthly assured returns till the month of July 2020 and the same has been accepted by the applicants also and therefore the respondent is now discharged from the obligations under the agreement and no further amount can be claimed as debt from the Respondent.
- ix. That the present petition is filed to misuse the provisions of the IBC, 2016 and to coerce the Respondent to make illegitimate payments and in fact the Respondent has paid more than the amount claimed by the Applicants in terms of agreement dated 24.04.2010.
- x. That it is a settled position in law that IBC is not a recovery legislation, but is rather a beneficial legislation intended to be invoked to ensure the continuity of business companies and not to satisfy the selfish interest of claimant.
- xi. That the Applicants had earlier also filed a company petition bearing CP(IB) No. 640 of 2018 under Section 7 of the IBC alleging default on the part of the Respondent in payment of monthly assured returns till the month of June 2018. However, a settlement deed dated 09.07.2018 was executed between the parties and the matter was settled and withdrawn before this Hon'ble Tribunal.
- xii. The present petition bearing CP(IB) No. 234/2019 was also withdrawn by the applicants upon execution of deed of settlement dated 06.03.2019. However, the petition as revived vide order dated 10.12.2019.

- xiii. That the respondent handed over demand drafts totaling an amount of more than Rs. 8 lakhs to the Applicants, which have been duly received by the Applicants. However, till date, the same have not been encashed by the Applicants to extort more money from the respondents.
- xiv. The Applicants have received more amount than what was actually claimed in the captioned petition and such conduct evidently shows that the Applicants are nothing but speculative investors as recognized by Hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited and Anr. V. Union of India (Writ Petition(C) No. 43/2019* dated 9th August, 2019.

6. Submissions made in Rejoinder by the Ld. Counsel appearing for the Financial Creditor are:

- i. It is specifically denied that the applicants are encumbered by the threshold for filing the petition, it is submitted that the present petition is maintainable de hors the allotment as the cause for the same arises due to default under agreement dated 24.04.2010 and not the terms of allotment. This issue has already been considered and set to rest by the Hon'ble NCLAT in the case of *"Nikhil Mehta and Sons v. AMR Infrastrucutre Ltd., Company Appeal (AT) (Ins) No. 07 of 2017* wherein the Hon'ble Appellate Tribunal was considering the maintainability of a petition filed by the recipient under an identical assured return investment scheme and the Hon'ble Appellate Tribunal held that the scheme was such that the debt therein qualified as a financial debt and default in view thereof permitted the applicants to present the petition under Section 7.

- ii.* It is submitted the present petition has not been filed for reasons of the applicants being allottees but due to a default under an independent agreement dated 24.04.2010 guaranteeing monthly assured investment return and thus the submission that there are 366 such allottees is irrelevant and made simply to confuse the issue and therefore the agreement for monthly assured investment return is distinct from and its cause for filing of this petition is without reference to the petitioners status as allottees in terms of the Code. Therefore, the petition is maintainable without any modification.
- iii.* It is specifically denied that the Floreal Tower Project was completed by December 2013 and that the Occupation Certificate was received in 2017 are irrelevant in view of the specific letter from DCTP, Haryana dated 12.12.2019 which states that the Completion Certificate has not yet been granted, the liability in terms of Agreement dated 24.04.2010 thus continues, further the Occupation Certificate has not been placed on record.
- iv.* It is a matter of fact that no completion certificate has been issued for the Project Floreal Tower to the contrary the land holding company for the project has applied for a renewal of the license no. 260 of 2007 and which renewal has been granted vide letter dated 12.12.2019 by DTCP, Haryana.
- v.* It is submitted that the Demand Drafts as mentioned by the CD in its reply were never encashed and the respondents were specifically called upon to collect the same on multiple occasions. By handing over the DDs the respondent attempted to get out from the Agreement Dated 24.04.2010 which is not acceptable to the applicants.

7. The Financial Creditor has placed the following documents on record:

- i. Copy of Space Buyer Agreement dated 26.04.2010 at page 28-73 of application.
- ii. Copy of Agreement dated 24.04.2010 at page 74-83 of the application.
- iii. Copy of Agreement dated 10.02.2017 between Respondent, applicants and M/s Seritiam Land and Housing(P) Limited at page 84-90 of the application.
- iv. Copy of Settlement Deed dated 09.07.2018 at page 121-127 of the application.

8. The Corporate Debtor has placed the following documents on record:

- i. Copy of Settlement Deed dated 06.03.2019 at Annexure R3 of the Reply.
- ii. Copy of additional affidavit dated 01.04.2021
- iii. Copy of Occupation Certificate dated 16.08.2017 in the captioned matter for the project Floreal Tower at page 1-2 of documents as filed with this Tribunal on 24.11.2022.

9. Analysis and Findings

- i.** We have heard the Ld. Counsel for the applicants and respondent and perused the documents submitted by them. Considering the submissions made and documents placed on record, we find that the present application was filed on 23.01.2019 i.e before the coming of IBC Amendment Act of 2020 which prescribes that for financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21 and for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency

resolution process against the corporate debtor shall be filed jointly by not less than one hundred such creditors in the same class or not less than ten per cent of the total number of creditors in the same class, whichever is less. Further Hon'ble Supreme Court of India in the matter of **Manish Kumar v. Union of India (2021 SCC Online SC 30)** dated 19.01.2021 gave 2 months' time to the applicants of various pending petitions under section 7 for modifying their petition in terms of the threshold limit. The relevant extract of the judgement is extracted as under:

“398. We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India:

- i. If any of the petitioners move applications in respect of same default, as alleged in their applications, within a period of two months from today, also compliant with either first or second proviso under Section 7(1), as the case may be, then, they will be exempted from the requirement of payment of court fees, in the manner, which we have detailed in the paragraph just herein before”*
- ii. Applicants in their rejoinder have specifically denied that they are not covered by the threshold for filing the petition as the cause of default in the present case arises due to default under agreement dated 24.04.2010 and not in terms of allotment, applicants have also relied upon the judgement of Hon'ble NCLAT in the case of “*Nikhil Mehta and Sons v. AMR Infrastructure Ltd., Company Appeal (AT) (Ins) No. 07 of 2017*” to contend that in that case the Hon'ble Appellate Tribunal was considering the maintainability of a petition filed by

recipient under an identical assured return investment scheme and the Hon'ble Appellate Tribunal held that the scheme was such that the debt therein qualified as a financial debt and default and in view thereof permitted the applicants to present the petition under Section 7.

- iii. We observe that Hon'ble NCLAT in the case of "*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*" held that the amount invested by applicants in that case comes within the meaning of financial debt as defined in Section 5(8)(f) and that the applicants are financial creditors.
- iv. The judgement of Hon'ble NCLAT in the case of "*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*" was delivered on 21.07.2017 i.e. before coming of the IBC Amendment Act of 2020, further Hon'ble NCLAT in its judgement did not observe that Assured Returns class of creditors in a particular project do not come under the definition of allottees. In the present case the applicants are allotted Unit No. 413 in the Floreal Towers project.
- v. We now refer to the definitions of allottee, apartment and building from the Real Estate (Regulation and Development) Act, 2016 ("RERA") which read as under:

(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.

(e) “apartment” whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified.

(j) “building” includes any structure or erection or part of a structure which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;

- vi. Conjoint reading of the above provisions depicts that even a commercial space or unit allotted to Assured Return class of creditors in a project, as in the present case, is covered in the ambit of “allottee” as they are allotted a specific unit of a building and therefore they also need to satisfy the threshold for filing a section 7 petition.
- vii. In the instant case the application is filed by 2 joint allottees of Unit No 413 in the Floreal Tower real estate project of the Corporate Debtor. In the additional affidavit dated 01.04.2021 filed by the Corporate Debtor, the total no. of allotted units in the Floreal Tower is 504 and 366 no. of allottees of the Respondent are under the Assured Returns scheme/class of creditors. Therefore, the applicants do not satisfy the threshold for filing a section 7 petition.

- viii. Further in terms of Agreement dated 24.04.2010 as entered into between the parties, the obligation of developer to pay assured investment return @ Rs. 60/- per sq.ft per month i.e. Rs. 64,260/- is to be paid with effect from 1st May, 2010 on or before 7th day of every month for which it is due upto the first 36 months after completion of the building or till date the said office space is put on lease, whichever is earlier.
- ix. The Applicants in their rejoinder has stated that no completion certificate has been issued for the project Floreal Tower, to the contrary the land holding company for the project has applied for a renewal of license no. 260 of 2007 and which renewal has been granted vide letter dated 12.12.2019 by DTCP, Haryana. However to substantiate this very fact, no document has been placed on record before us.
- x. The Respondent, Company on the other hand has attached occupation certificate dated 16.08.2017 for the project as received from Director, Town & Country Planning Department, Haryana as a part of documents filed with this tribunal on 24.11.2022. Therefore, the 3-year period for the purpose of paying assured return in terms of the occupation certificate ends on 16.08.2020. We also take note of the fact that earlier on two occasions also settlement deed had been entered into between the parties for settling the default in payment of the assured return.
- xi. Further in additional affidavit dated 01.04.2021 as filed by the respondent, the respondent has issued demand drafts bearing no. 509804 amounting to Rs. 6,15,602/- in favour of Ms. Rita Malhotra and Demand Draft bearing no. 509805 in favour of Ms. Bina Chopra amounting to Rs. 1,87,424/- in lieu of full and final payment of the assured return towards the allotted unit.

xii. We now rely upon judgement of Hon'ble NCLAT in the matter of *Bhagwandas K. Bhattad v. R.M. Bhuther and Company Ltd & Anr (Company Appeal (AT) (Insolvency) No. 494 of 2023* dated 18.05.2023 where in para 8 and 9 was held as under:

8.It is to be noted that in view of the Consent Terms between the parties, the appellant has deposited in the Court, the amount of Rs 1,71,80,263/- as noted above.

9. We are of the view that in the ends of justice be served in directing that the said amount deposited in the court is paid to the Financial Creditor. The Principal Amount + Interest having been paid, we see no purpose in continuing the CIRP against the Corporate Debtor. In so far as the submission of the Learned Counsel for the Financial Creditor that as per Consent Terms, the entire amount of Concerned Terms has not been paid, the financial creditor is at liberty to take such proceedings as permissible in law to recover the balance amount.

xiii. We are of the view that in the present case the applicants are already having demands drafts of amount exceeding the defaulted amount in this petition and moreover IBC cannot be used as a tool for recovery; the settlement has been arrived between the parties. The amount has been paid in excess of the default amount and Ld. Counsel for the applicant has also acknowledged the receipt of above stated demand drafts.

xiv. For the reasons recorded above, we are inclined to dismiss CP(IB)- 234(PB)/ 2019.

10. **Order**

In light of the above facts and circumstances, it is, **hereby ordered** as follows: -

- i. The Application bearing **C.P. (IB) – 234 (PB)/2019** filed by the **Rita Malhotra and Ors**, 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 **M/s Orris Infrastructure Pvt. Ltd.**, is hereby dismissed.
- ii. No order as to cost.
- iii. File be consigned to records
- iv. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

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RAMALINGAM SUDHAKAR
(PRESIDENT)

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AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)