NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH (COURT-I)

CP (IB) 70/CHD/HRY/2022 & IA No. 81/2024

IN THE MATTER OF:

Through its Authorised Representative

NIKHIL KHANNA (and 87 Ors.)
S/o Sh. Nawal Kishore Khanna,
R/o Flat No. 1001 Tower-3 Malibu Town,
Sohna Road, Gurgaon, Haryana-122001

...Applicants/Financial Creditors

Versus

SPAZE TOWERS PRIVATE LIMITED
Tower C, SPAZEDGE Sector-47,
Gurugram-Sohna Road Gurugram-122002

...Respondent

SECTION: Section 7 of IBC 2016

AND

In the matter of IA No. 81/2024

Mr. Rajiv Gupta
S/o Shri Dharam Pal Gupta
R/o E-154, First Floor,
Ashok Vihar Phase-I,
Delhi-110052

...Applicant/ Intervenor

Versus

Spaze Towers LTD.
Tower C, SPAZEDGE Sector-47,
Gurugram-Sohna Road Gurugram-122002

...Respondent

SECTION: Section: 60 (5) of IBC 2016

Order Delivered on: 11.06.2024

CORAM:

SH. HARNAM SINGH THAKUR, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Mr. Sahej Mahajan, Advocate
For the Respondent : Mr. Sumesh Dhawan, Ms. Vatsala Kak & Mr. Shaurya Shyam, Advocates

ORDER

PER: SH. L. N. GUPTA, M(T) & SH. HARNAM SINGH THAKUR, M(J)

Nikhil Khanna and 87 Ors. (for brevity, the **"Applicants"**) have filed the present application 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 with a prayer to initiate the Corporate Insolvency process against Spaze Towers Private Limited (for brevity, the **"Respondent"**).

2. The Respondent namely, Spaze Towers Private Limited is a Company incorporated on 27.01.2006 under the provisions of the Companies Act, 1956 with CIN U45201HR2006PTC096709 having its registered office at Tower C, SPAZEDGE Sector-47, Gurugram-Sohna Road Gurugram-122002, which is situated within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs. 25,00,00,000/-, and the Paid-up Share Capital is Rs.19,80,00,000/-, as per the data mentioned in the application.

3. It is averred by the Applicant that the application is filed by a total of 88 Applicants, who had, individually/jointly, booked a total of 80 (eighty) commercial office space in the Project of the Corporate Debtor namely, "Spaze Corporate Parkk" situated at Sector 69,70, Gurgaon, Haryana ("**Project**"). As per the details available on the website of Haryana Real Estate Regulatory Authority, there are 561 office spaces in the Project and therefore, the present Application complies the provisions of the Insolvency and Bankruptcy Code, (Amendment) Act, 2020 which provides that a Section 7 application for a real estate project must be filed either by 10% or 100 allottees of the same project, whichever is less.

3.1 The Applicants had considered and agreed to purchase the office spaces since the Respondent had guaranteed an investment return scheme to the Applicants against each office space. Based on this scheme and the assurances given by the Respondent, the Applicants purchased a total of 80 (eighty) units in the Project. The Applicants were allotted different office spaces in Tower A and Tower B of the Project of the Respondent and separate Memorandum of Understanding(s) **("MoUs")** were executed with respect to each office space. The terms of all the MoUs entered were identical with certain variations in relation to the sale consideration of each office space (Clause 1 and 2), the details of the payments made to the Respondent (Clause 3), the rate at and the formula as per which the assured return were payable (Clause 2 read with Clause 9) etc.

3.2 The present application has been filed by the Applicants on account of the default committed by the Respondent in payment of the investment return

as stated under the MOU(s). Clause 2 of the MoUs is reproduced below for ready reference:

> *"...That the First Party will give an investment return @ Rs. 55/- per sq. ft. per month w.e.f. 01.04.2011, of the super area till such time the office space is leased out (but subject to clause 7 & 9) on behalf of the Second Party by the First Party."*

Clause 9 of the MoUs provided the way the investment returns agreed between the Applicants and the Respondent were payable after the office spaces are leased out. Each office space was to be leased out either at the rate of Rs. 55/- per sq. ft. per month or at Rs. 65/- per sq. ft. per month as agreed under each MoU and specified the formula to calculate the investment returns towards each office space.

3.3 The Respondent executed a lease deed with M/s OFCSPC Worldwide Private Limited ("**Lessee**") in terms of Lease Deed dated 30.09.2019 ("**Lease Deed**") without prior consultation with the Applicants for a rent-free period of 6 (six) months.

3.4 Vide letter dated 17.10.2020, it was informed by the Respondent to the Applicants that the Lessee has terminated the Lease Deed against which the Respondent and the Lessee have also invoked the arbitration clause as mentioned in the Lease Deed. Since there is no valid lease deed and no lessee, the Respondent ought to have continued to pay assured investment returns to the Applicants, however, the Respondent stopped making payment towards the monthly investment returns since 30.09.2019. As from the conduct of the Respondent, it is apparent that in order to absolve its liabilities under the

MoUs, it had entered into a bogus Lease Deed with a sham company and thereby, stopped making payments towards the assured investment returns.

4. The particulars of the unpaid Financial Debt including the total amount of default and the date of default as claimed by the applicants in Part IV of the application read thus:

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)	Total amount due as : Rs. 8,30,34,600/- (Rupees Eight Crore Thirty Lakh Thirty Four Thousand Six Hundred Only) **Date of default** – 30.09.2019 Copy of the calculation sheets of each Financial Creditor for the amount of default [Annexure P-8 (Colly)]

5. Thus, as per Part IV of the application (ibid), the Applicants have claimed an outstanding financial debt of Rs. 8,30,34,600/- and relied on 30.09.2019, as the "date of default".

6. To buttress their plea, the Applicants have relied on the following documents:

(i) Copy of Form A-H filed by the Respondent with HRERA.

(ii) Copy of details of each of the Applicant and the amounts.

(iii) Copies of few MOU(s) entered between Respondent & Applicants.

(iv) Letters dated 11.10.2019 sent by Respondent to the Applicants.

(v) Copy of the Lease Deed dated 30.09.2019 executed between the Respondent and the Lessee for the project.

(vi) Copy of the letter dated 17.10.2020 sent by the Respondent to the Applicants.

(vii) Copy of the order dated 28.10.2021 passed by Tribunal in the matter of Vandana Raheja & Ors vs Spaze Towers Private Limited (C.P No. (IB) 889/2020).

(viii) Copy of the calculation sheets of each Applicant for default.

7. Based on the facts mentioned and the documents above, the Applicants have prayed for the initiation of CIR Proceedings against the Respondent.

8. On issuance of the notice, the Respondent filed its Reply dated 19.12.2022, Written Submissions dated 19.12.2023 followed by a Note of Arguments dated 31.05.2024 stating mainly the following:

8.1 There are 561 office spaces **("units")** in the Project of the Respondent namely, "Spaze Corporate Park" situated at Sector 69, 70, Gurugram, Haryana ("Project"), out of which the Applicants claim to have jointly/individually booked 81 units as stated in the "MoU" dated 08.04.2011 (only annexed for Petitioner No. 16 and Petitioner No. 80). In terms of Clause 2 of the MoU, each office space was to be leased out at an investment return either @ Rs 55/- per sq. ft. or Rs. 65/- per sq. ft. per month of the super area w.e.f. the specific date varying in each MoU of the Applicants till such time the office space is leased out, payable by the Respondent and in terms of the same. Admittedly, the Respondent duly paid the assured returns for a period of 08 years i.e., from 2011 till 2019 to the Applicants. Further, as per Clause 17 of the MoU, the Respondent shall stand completely discharged the assured investment returns, once the office spaces are leased out.

8.2 The Respondent duly received the Occupancy Certificate on 28.01.2020 and post which even the Completion Certificate was issued by the Directorate of Town and Country Planning (DTCP), Haryana on 25.06.2021. Therefore, as on the date of the filing of the captioned Application, the entire Project of the Respondent is complete in all aspects and even various units have already been sold to a number of third parties and are currently up and running as on date. It is also submitted that the Respondent executed a Registered Lease deed dated 30.09.2019 ("Lease Deed") with M/s OFCSPC Worldwide Private Limited ("Lessee") in respect of all the units for a rent-free period of six months. Pertinently, there was no requirement under the MoU for the Respondent to seek any approval of the Applicants before leasing the Units of the Project in favour of the Lessee and as such once the Lease Deed was executed, the Respondent was discharged of its obligation of making payments of assured returns to the Applicants in terms of Clause 17 of the MoU and as such no alleged default in payments of assured returns to the Applicants, post 30.09.2019 can be attributed upon the Respondent. Subsequently, Respondent vide letter dated 17.10.2020 informed Applicant No. 54 that the Lessee had terminated the Lease Deed and thereafter, offered the possession of the Units to the Applicants, however, the Applicants are deliberately not willing to take the possession of the Units.

8.3 The Hon'ble Supreme Court in **Pioneer Urban Land & Infrastructure Ltd. Vs. Union of India (UOI) and Ors., (2019) SCC OnLine SC 1005** has also observed that there can be situations when an allottee who has knocked at the doors of the National Company Law Tribunal is a speculative investor and not a person who is genuinely interested in purchasing a unit. In such a

situation it is the duty of the developer to point out and showcase that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the unit under RERA but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Hence, in such situation, recourse is provided under Section 65 of the Code, wherein the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency.

8.4 Without prejudice, it is stated that Applicants have invested in the Project of the Respondent in the capacity of speculative investors and therefore, cannot enjoy the status of Financial Creditor. Speculative investor is not a person who is genuinely interested in possessing units instead is keen to the benefits offered from any such lucrative agreement and hence, cannot be termed as allottee as per explanation attached to clause (f) of Section 5(8) of the Code. In the case of **Mrs. Nidhi Rekhan v. M/s. Samyak Projects Private Limited, Company Appeal (AT)(Ins) No. 1035 of 2020** has observed that speculative investor cannot claim the status and benefits as a Financial Creditor by virtue of being an allottee under Section 5(8)(f) of the Code. In the present case, since the Applicants are speculative investors in the Project, they cannot be regarded as Financial Creditor and therefore, the captioned Application is liable to be dismissed with heavy costs.

8.5 The Applicants are relying upon their respective MoUs for the purpose of arm twisting the Respondent into paying the aforesaid alleged commercial dues, only on account of departmental delays, a delay which is explicitly

excluded in the MoU under 'Force Majeure' of Clause 8 and as such cannot be recovered from Respondent. In **Navin Raheja v. Shilpa Jain and Others, Company Appeal (AT) (Ins) No. 864 of 2019**, Hon'ble Appellate Authority held that when there is immense Departmental delay in grant of completion/ occupation certificate by the competent authority that is beyond the control of the Respondent then there is no default on part of Respondent and Section 7 application is not maintainable as amount cannot be construed as 'Financial Debt. Further stated that the process of obtaining necessary certifications like Occupation and Completion Certificate were under the control of respective concerned Government/Competent Authority and any delay on account of the actions/ inactions and omissions on part of Government/Authority was beyond reasonable control of Respondent.

8.6 The Applicants have placed reliance on the Order dated 28.10.2021 passed by the Ld. Adjudicating Authority, New Delhi in Company Petition (IB) 889 of 2020 titled as 'Vandana Raheja & Ors. v. Spaze Towers Private Limited' wherein the Adjudicating Authority admitted the Corporate Debtor into CIR Process, however, pertinently, the said reliance is completely misplaced, and the Applicants are only trying to mislead this Adjudicating Authority. The Ld. Adjudicating Authority, New Delhi reserved its Orders in the said Company Petition on 05.03.2021, whereas the Completion Certificate for the Project was granted to the Respondent only on 25.06.2021 and therefore, the fact that the Project is duly completed and Respondent has obtained the Completion Certificate was never placed before the Adjudicating Authority, New Delhi and as such the same could never be considered before passing the Admission Order. Admittedly, as on today, the Respondent has obtained the Completion

Certificate for the Project and the Project is completed in all respects, with majority Units being already up and running by various Unit Holders. Thus, no insolvency can be initiated against the Respondent with respect to the Project, which is already completed.

8.7 As per the calculation sheets annexed by the Applicants themselves, various alleged dues with respect to the assured returns claimed by the Respondent fall within the period envisaged under Section 10A of the Code i.e., between 25.03.2020 to 24.03.2021. Furthermore, Section 10A of the Code prescribes that no Application under Section 7 shall ever be filed for an defaults which arose within the period prescribed under Section 10A and as such the captioned Application being inclusive of the alleged dues falling within such period, is liable to dismissed on this ground alone.

8.8 The captioned Application has been filed as a recovery suit for assured returns in form of commercial borrowings and not for possession of the commercial units. The Project was already complete and possession of units was already transferred and various businesses were already running at time of filing captioned Petition. Applicants' agenda is only to extort money in manner of alleged assured returns which is not the purview of the Code and therefore is liable to be dismissed with costs as envisaged under Section 65 of Code. Further stated that Adjudicating Authority in many judgments has rejected Petitions filed under Section 7 of Code on grounds that CIRP cannot be initiated for recovery of dues as the Tribunal is not a recovery forum. In the case of **M/s Design Worx Infrastructure India Pot. Ltd. v. Premier Restaurant Pot. Ltd.**, it was held that Insolvency Proceedings cannot be used as a debt recovery tool.

9. In rebuttal, the applicant has filed a Rejoinder dated 18.01.2023 to the reply filed by the Respondent, short written submissions dated 04.05.22 and written submissions dated 28.05.2024 stating mainly the following:

9.1 The present case of the Applicants is squarely covered by the Judgment dated 28.10.2021 of the Coordinate Bench i.e., National Company Law Tribunal, Bench-IV, New Delhi. (NCLT) in the matter of CP(IB) NO. 889 of 2020 titled as "**Vandana Raheja & Ors. vs. Spaze Towers Private Limited",** which was for the same project, against the same Corporate Debtor, for the same duration of the pending assured return. All the defenses taken by the Corporate Debtor in the present Petition are the same which were taken in that matter.

9.2 The proceedings initiated by the Financial Creditors under the Code have been given an overriding effect and further, as per the decision of the **Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Limited v. Union of India & Ors.,** it has been held that remedies that are given to allottees are concurrent remedies and such allottees would be in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

9.3 Therefore, by virtue of Section 2(d) of the RERA Act 2016, it becomes crystal clear that the Financial Creditors squarely falls within the definition of an allottee, and the amount paid by the Financial Creditors to Corporate Debtor falls within the definition of 'Financial Debt as defined under Section 5(8)(f) of the Code and the Financial Creditors herein fall within the definition of 'Financial Creditor' as defined under Section 5(7) of the Code. Moreover, the

claim made by the Financial Creditors have been duly upheld by the Hon'ble NCLAT in the matter of Nikhil Mehta and Sons v. AMR Infrastructure Ltd. wherein it was held that 'Assured Return' is covered within the meaning of 'Financial Debt' under Section 5(8)(f) of the Code and the creditors to whom the assured returns was due are covered within the meaning of 'Financial Creditors'. It will not be out of the place to highlight that the law laid down by the Hon'ble NCLAT was validated by the Hon'ble Supreme Court in **Pioneer Urban Land and Infrastructure Limited & Anr. V. Union of India & Ors**.

9.4 The claim of the Respondent that the Occupancy certificate is obtained and the units are complete is false and wrong. In this regard, it is submitted that a Writ Petition bearing No. WP (C) No. 8523/2020 titled as "Vandana Raheja vs. Union of India & Ors." was filed before the Hon'ble Delhi High Court with respect to the aforesaid project of the Corporate Debtor. The Hon'ble Delhi High Court vide its order dated 09.02.2021 appointed a local commissioner to inspect the construction of the project and identify whether the project is completed or not. The Local Commissioner report dated 22.02.2021 which contains the photographs of the unit clearly reveals that the project is still far from completion even after receiving the Occupation Certificate as on 28.10.2022. However, later the parties to the said Writ Petition settled the matter with the Corporate Debtor pursuant to which the Writ Petition was withdrawn. The Respondent merely to absolve itself from its obligation to pay the due investment returns to the Applicants has raised the frivolous defense that the construction of the Project is complete, despite the same being far away from completion. Further, the Respondent, solely to create a false impression that the Applicants are not willing to accept the possession, had

falsely submitted before this Tribunal that the Project is complete. It is hereby reiterated that the Applicants are willing to accept possession but only the bare-shell structure is present & the Project is not in habitable state.

9.5 The letter dated 11.10.2019 was issued by the Respondent wherein they had informed about the fictitious lease to the allottees and raised and additional illegal demand to the allotees (though 100% payment was made in MOU). In the same letter, the Respondent had admitted the default in the payment of the assured return till April and sought to adjust the default assured return in the illegal demand.

10. We heard the submissions of both the parties and perused the documents placed on record by both the parties, including the Written Submissions. The Respondent has objected towards the admission of the Application, inter alia, on the grounds that the Petition is not maintainable since the Applicants are Speculative Investors, seeking recovery of assured returns, which are outside the ambit of Financial Creditor as defined in IBC. Further, it has been argued that a portion of the alleged claims of the Applicants fall under Section 10A period, for which no application can ever be filed. It has also been brought to the notice of this Bench that the Project in question is complete and Project Completion Certificate issued by Directorate of Town and Country Planning (DTCP), Haryana on 25.06.2021 has been placed on record and even various units have already been sold to a number of third parties.

11. Per Contra, the applicants have contended that the Respondent had guaranteed an investment return scheme to the Applicants against each office

space and accordingly, executed MOUs individually. The present application has been filed by the Applicants on account of the default committed by the Respondent in payment of the investment return as stated under the MOU(s). The Financial Creditors/ Allottees were supposed to get the assured return till the units are leased out at the assured rate, which never happened. The Respondent stopped paying the assured return to the Applicants from October 2019 and the lease agreement was entered without the consent of the Applicants with M/s OFCSPC Worldwide Pvt. Ltd. only in September 2019, wherein 6 months lease free period was given to the lessee without the consent of the applicants and the said lessee never paid a single penny of the lease to the Applicants but walked out of the lease agreement. Further, the Applicants have stated in their Written Submissions that they are covered by the Judgment dated 28.10.2021 of the Hon'ble Coordinate Bench i.e., National Company Law Tribunal, Bench-IV, New Delhi. (NCLT) in the matter of CP(IB) NO. 889 of 2020 titled as "Vandana Raheja & Ors. vs. Spaze Towers Private Limited", which was for the same project against the same Corporate Debtor.

12. In this backdrop, we would like to examine the contention of both the parties. In order to determine the nature of transaction entered between the parties, we consider it necessary to visit one of the MOUs executed between the Applicants Mr. Apoorv Gulati S/o Mr. Manohar Lal Gulati and Mr. Manohar Lal Gulati S/o Late Sh. Hukam Chand Gulati and the Respondent herein, and placed on record by the Applicants in Volume III of the Application from Page No. 357 to 363, the relevant extracts of which are reproduced overleaf:

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is made at Gurgaon on this 8th day of **April,2011.**

BETWEEN

M/s Spaze Towers Pvt. Ltd., a company incorporated under the Companies Act, 1956, having its registered office at 18, Community Centre, Mayapuri, Phase-I, New Delhi-110064, through its Authorised Signatory Mr. Raj K. Kaushik or Mr. Arvinder Dhingra and Mr. Sanjeev Sharma or Mr. Vivek Jain (who have been empowered to execute this Agreement vide board resolution dated 25th November 2010) [hereinafter referred to as the **"FIRST PARTY"**, which expression unless it be repugnant to the context or meaning thereof, be deemed to include its successors, representatives, nominees and permitted assigns] of the FIRST PART.

AND

Mr. Apoorv Gulati S/o Mr. Manohar Lal Gulati **and Mr. Manohar Lal Gulati** S/o Late Sh. Hukam Chand Gulati, presently both having address at H.No-75, 1st Floor, Residency Greens, Greenwood City, Gurgaon-122001, hereinafter jointly referred to as the **"SECOND PARTY"** (which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to include his/her legal heirs, administrators, executors, successors and permitted assigns) of the **SECOND PART.**

Parties of the First Part and the Second Part are individually referred to as the **'FIRST PARTY'** and the **'SECOND PARTY'** and collectively being referred to as the PARTIES.

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WHEREAS:

A. The Second Party has seen the payment plans for sale of office space in the proposed project "Spaze Corporate Parkk" at Sector 69 & 70, Gurgaon, Haryana and have specifically opted for the investment return plan, after fully understanding all the terms and conditions thereof.

B. The parties hereto have broadly reached an understanding regarding the sale of office space in the commercial project "Spaze Corporate Parkk" at Sector 69 & 70, Gurgaon, Haryana and are desirous of recording the same in writing.

C. The Second Party is interested in allotment of Office Space **No.806** admeasuring **527 sq. ft.**, located on **Eighth** Floor in **Tower-B** of the said Commercial Complex. The Second Party acknowledges that the First Party has readily provided all information and clarifications as required by it but that it has not unduly relied upon them and is not influenced by any architect's plans, sales plans, sales brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral made by the First Party, its selling agents / brokers or otherwise including but not limited to any representation relating to description or physical condition of the property, the Building or the Office space or the size or dimensions of the Office space or of the rooms therein or any other physical characteristics thereof, the services to be provided to the Second Party, the facilities / amenities to be made available to the Second Party or any other data except as specifically represented in the MOU and that the Second Party has relied solely on his / her own judgement and investigation in deciding to enter into this MOU and to purchase the said Office space. No oral or written representations or statements shall be considered to be part of this MOU and that this MOU is self contained and complete in itself in all respects.

The Second Party has perused the title documents and noted the effective steps being taken by the First Party for getting plans sanctioned and has satisfied itself about the title and the authority of the First Party to construct the said complex and to allot / sell / lease or transfer the ownership rights in the said complex, in full or in parts, on such terms as they deem fit and receive its consideration for such transfers. The Second Party has confirmed to the First Party that it has full knowledge of all the laws, rules, regulations, notifications etc. in general and applicable to the said complex/ said Building in particular and the terms and conditions contained in this MOU and that it has clearly understood its rights, duties, responsibilities obligations under each and all the clauses of this MOU.

NOW THEREFORE IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That the First Party hereby agrees to allot to the Second Party office space admeasuring in aggregate tentatively, a super area of **527 sq. ft., Office Space No.806, Tower-B**, in the commercial project "Spaze Corporate Parkk" at Sector 69 & 70, Gurgaon, Haryana @ **Rs. 3000/-** per sq. ft. amounting to a total consideration of **Rs.1581000/-(Rupees Fifteen Lakhs Eighty One Thousand Only)**. The above mentioned total consideration is not inclusive of service tax, which shall be payable by the Second Party as and when levied by the Central / State government.

2. That the Second Party shall pay to the First Party **Rs.1581000/-(Rupees Fifteen Lakhs Eighty One Thousand Only)** towards the entire sales consideration of the super area purchased at the time of booking of the above said office space, thereafter the parties shall enter into a Buyers Agreement after taking necessary statutory approvals for the proposed building. The Second Party shall fully co-operate with the First Party in this regard. That the First Party shall give an investment return **@Rs.55/-** per sq. ft. per month **w.e.f. 1st May, 2011**, of the super area till such time the office space is leased out (but subject to clause 7 & 9) on behalf of Second Party by the First Party.

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defaults or refuses to sign the necessary documents of lease after it has been finalised by the First Party then the First Party shall have the right to purchase the proposed office space from the Second Party at the price the proposed office space was sold to the Second Party.

8. That if the performance of the First Party is prevented, in whole or in part, by causes beyond the control of the First Party which it could not avert in spite of best endeavour and due diligence, the causes being but not confined to acts of god, storm, tempest, floods, earth quake, strike or bundh or lockout, riot, insurrection, war (undeclared or declared), embargoes or blockages, explosions, fire or industrial disturbance or inevitable accidents, non availability of material / aggregates / material inputs / labour / machinery, change in law/ Government Policy etc. in such an eventuality, the First Party shall be excused from performing during the subsistence of the force majeure provided that the occurrence of such an event and the resultant prevention is communicated to the other party as soon as practicable with sufficient details to facilitate a verification. The First Party will be obliged to:

   (a) Carry on its best endeavour to overcome the force Majeure and perform its obligations and
   (b) Inform the second party as soon as practicable about cessation of the force majeure and commencement of performance by the First Party.

9. That since the First Party has guaranteed the Second Party an investment return of **Rs.55/-** per sq. ft. per month towards the proposed office space (super area basis). Upon completion of the project, the said space would be let–out by the First Party to a bonafiede lessee at minimum rental of **Rs.55/-** per sq. ft per month less Tax Deduction at source. In the event of the first party being unable to finalise the leasing arrangements, it shall pay the minimum return at **Rs.55/-** per sq. ft. per month to the second party as minimum Guaranteed Return for the First 36 months from the date of completion of the project or till the date the said unit / space is put on lease, whichever is earlier. The First Party in fulfilment of its above referred guarantee, hereby covenants with the Second Party that in the event the proposed office space is leased at a gross monthly rental of less than the investment return of **Rs.55/-** per sq. ft. per month, then the First Party agrees that the sale consideration for the proposed office space shall stand reduced by the amount calculated by the formula given below (Assured monthly return of **Rs.55/-**per sq. ft. – (less) Actual monthly rental (if less than **Rs.55/-** per sq. ft. per month) = Rs A multiplied by **Rs.120/-** per sq. ft.), towards and by way of compensation to the Second Party for the lower rental than guaranteed. In case the proposed office space is leased out by the First Party so as to give a monthly rental in excess of the investment return of **Rs.55/-** per sq. ft. of super area, the agreed sale consideration of the proposed office space shall stand increased by the amount calculated by the formula given below (Actual monthly rental -(less) Assured monthly return of **Rs.55/-**per sq. ft. = Rs A/2 and multiplied by **Rs.120/-** per sq. ft.). The increased sale consideration would be payable forthwith by the Second Party to the First Party. In the event of failure of the Second Party to pay the aforesaid increased consideration, the Second Party shall not be entitled to any investment return from the First Party or lease rent from the lessees of the office space and the First Party shall appropriate the lease rent till such time the Second Party makes payment of the increased sale consideration. The right, title and interest of the Second Party in the proposed office space shall remain suspended till the time of payment of increased sale consideration. It is further agreed between the parties that the rent received by the First Party shall not be adjusted towards increased sale consideration and the receipt of rent by the First Party shall be his income.

10. That in case the proposed office space is leased out to any Third Party as a fully fitted office space (as a furnished area), for which the additional expenditure of fit out is to be born by the first party, it is hereby agreed between the parties hereto that the Second Party shall pay the enhanced consideration as per the formula stated in Clause 9 of this agreement. It is further agreed between the parties hereto that in case the Second Party cannot pay the enhanced consideration, the First Party shall have the

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19. This MOU shall be construed and the legal relations between the Parties hereto shall be determined and governed according to the laws of India. That the Civil Courts at Gurgaon and High Court for the States of Punjab & Haryana at Chandigarh alone shall have jurisdiction in the matters arising our of and / or concerning this MOU.

20. That all correspondence under this MOU shall be deemed to have been served on the parties ,if the same has been sent on addresses mentioned against the names of the parties in this MOU

21. That this MOU is executed in duplicate and both the copies shall be treated as original.

IN WITNESS WHREOF, the parties hereto have set their hands and seal to these presents on the day, month and year first above written.

In the presence of:
WITNESSES

1.

SPAZEDGE,
Sohna Road,
Sector-47,
Gurgaon.

SIGNED AND DELIVERED
For and on behalf of First Party
M/s Spaze Towers Pvt. Ltd.

(Authorised Signatory)

Signed by the Second Party

2.

W-1, 125 Sohna Road
Gurgaon.

Apoorv Gulati

Manohar Lal Gulati

13. From a bare perusal of the MOU (ibid), it is observed that the Applicants were to get assured/guaranteed returns @ Rs. 55 per square feet per month, upon completion of the project, which also reflects that assured returns were not for a fixed/definite period of time, rather they were to continue till happening of certain event. Further, after completion of the project, the units were to be let out on lease with minimum rent of Rs. 55 to 65 per sq. feet. This indicates that Applicants have no intention to enjoy the possession over the units, rather they are interested in getting returns from their investment initially by way of assured returns, which had no specific due date and later, in the form of rentals. It is in this backdrop, we consider it worthwhile referring to

the Judgement of the Hon'ble NCLAT in **Company Appeal (AT) (Ins) no. 1035 of 2020** in **Mrs. Nidhi Rekhan Vs M/s. Samyak Projects Private Limited**, which has held that a Speculative Investor is not a Financial Creditor. The relevant paragraphs of the judgement read thus:

> *"12. We, therefore, now examine the various clauses of the Agreement entered between the Corporate Debtor Samyak Projects Private Limited and Mrs. Nidhi Rekhan who purports to be an allottee. The above-mentioned clauses 3, 4, 5 and 6 of the Agreement* ***are primarily concerned with the "Down Payment" and an assured rate of return of 24% p.a.*** *and the right of the First Party/Mrs. Nidhi Rekhan, to assign the flat to any of her nominees. Clause 7 is about the right of the allottee to cancel the booking after the specified period of one year. There is no clause in the agreement which relates to the construction/completion of the flats, the time stipulated for completion of construction, any penalty to be imposed on the developer/builder for delaying Case Citation: (2022) ibclaw.in 109 NCLAT construction and other such provisions that are pertinent and germane to a housing development project and which are necessary for protecting the interest of the allottee. All such provisions are usual and necessary elements of a Builder-Buyer Agreement. We find from the said agreement that there is a "Down Payment" of Rs. 1 Crore with remaining balance of Rs. 11,90,000/- (Rupees Eleven Lakhs Ninety Thousand only) and an assured rate of return @ 24% per annum. In addition, the allottee is given the right, in its absolute discretion, to cancel or rescind the allotment of the flats/units booked through the agreement. The assured rate of return of 24% per annum is a very high rate of interest*

that a builder would not offer to an allottee even when she is making down payment. The Agreement in this case does not, therefore, have the necessary elements of a Builder-Buyer agreement. ***On the contrary, it is an agreement which is more in the nature of detailing and protecting an investment made by Mrs. Nidhi Rekhan, who is coming in the garb of an allottee.*** *As has been held by this tribunal in the matter of* ***Sudha Sharma versus Mansi Brar & Anr****. [Company Appeal (AT) (INS) No. 83 of 2020] and the subsequent order of Hon"ble Supreme Court in* ***Mansi Brar Fernandes versus Sudha Sharma and Anr.*** *[Civil Appeal No. 3826/2020] which affirms the order of this Tribunal in Company Appeal (AT) (INS) No. 83 of 2020,* ***we find that the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A–1201 and E–1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a "financial creditor" as defined under explanation (i) of section 5(8)(f) of the IBC. The facts in the matter of Pioneer Urban Land and Infrastructure (supra) support the facts of this case as in this case the Appellant is not a genuine allottee but an investor who has come as allottee with no intention of possessing the flats.*** *The Ld. Counsel for Appellant has also referred to Pioneer Urban Land and Infrastructure (supra), particularly paragraph 67 wherein it is held that "…The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for*

use in construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers." It is noted by us that the Appellant in the instant case is not a genuine home buyer but someone who has invested a certain amount but is coming before us as a home buyer. We distinguish the above observation made in the Pioneer Urban Land and Infrastructure (supra) judgment as the Appellant is not a genuine home buyer and hence he cannot claim benefit as an "allottee" in a real estate project and hence will not be considered a financial creditor by taking recourse to Explanation (i) of section 5(8)(f) of the IBC."

Xxxxx

Xxxxx

"17. ***Thus, in our clear opinion, the Appellant, who is a speculative investor, cannot claim status and benefits as financial creditor under Explanation (i) of Section 5(8)(f) of the IBC, and is not interested in the financial well-being, growth and vitality of the Corporate Debtor, but is just interested in her investment and has come in the garb of an allottee.*** *In such a situation, the Appellant is certainly not a financial creditor holding financial debt, which is in default of payment by the Corporate Debtor, and consequently we conclude that the Impugned Order does not require any interference. The appeal is, therefore, dismissed. There is no order as to costs."*

(Emphasis placed)

14. The Applicants have further contended that the present case of the Applicants is squarely covered by the Judgement of NCLT Court-IV, by which CIRP was ordered against the same Corporate Debtor in the matter of CP(IB) NO. 889 of 2020 titled as "Vandana Raheja & Ors. vs. Spaze Towers Private Limited, on similar facts. The Applicants have further stated that claim of the Respondent that the Occupancy certificate is obtained and the units are complete, is false and wrong.

Per contra, it has been argued by the respondent that that New Delhi Bench had reserved the Orders in the said Company Petition on 05.03.2021, whereas the Completion Certificate for the Project was granted by the authorities to the Respondent subsequently on 25.06.2021, a fact that was not available before the NCLT Delhi while adjudicating the said matter.

However, we observe that the Applicants have relied upon the Judgement of NCLT Court-IV by which CIRP of CD was ordered on 28.10.2021, whereas the Judgement of Hon'ble NCLAT in **Mrs. Nidhi Rekhan Vs M/s. Samyak Projects Private Limited** is of a subsequent date i.e., 31.01.2022, that too of a Superior Court, which is well suited on the facts of the case. Since, the Applicants are only speculative investors interested in recovery of assured returns, and not genuine allotees buying the office space/ units for actual use, in our considered view, the applicants herein cannot be treated as "Financial Creditors" under Explanation (i) of Section 5(8)(f) of the IBC, and CIRP cannot be triggered by them especially, in the factual backdrop that the project is completed and "Completion Certificate" dated 25.06.2021 issued by competent authority DTCP, Haryana has been placed by Respondent on record, which is reproduced overleaf:

Directorate of Town & Country Planning, Haryana

Nagar Yojana Bhavan, Plot No. 3, Sector 18 A, Madhya Marg, Chandigarh
Phone: 0172-2549349 e-mail:tcpharyana7@gmail.com
website:-http://tcpharyana.gov.in

Regd.

LC-IX
(See Rule 16 (2))

To

Wellworth Housing Pvt. Ltd.,
Raj Realtech Pvt. Ltd.,
C/o Spaze Towers Pvt. Ltd.
Spazedge, Sector 47, Sohna Road,
Gurugram-122002.

Memo No. LC-1843-JE (VA)-2021/ 15078 Dated: 25-06-2021

Subject: **Request for grant of completion certificate of services w.r.t. Commercial Colony over an area measuring 3.956 acres (Licence No. 134 of 2008 dated 28.06.2008) in the revenue estate of village Badshahpur, Sector-69, Gurugram- Manesar Urban Complex- Spaze Towers Pvt. Ltd.**

Spaze Towers Pvt. Ltd. has request for grant of Completion Certificate of services w.r.t. Commercial Colony over an area measuring 3.956 acres (Licence No. 134 of 2008 dated 28.06.2008) in the revenue estate of village Badshahpur, Sector-69, Gurugram. After receiving request for grant of completion certification, reports have been taken from Chief Engineer, HSVP and Senior Town Planner, Gurugram.

Chief Engineer, HSVP, Panchkula vide memo no. 82719 dated 12.06.2020 has informed that the services with respect to license no. 134 of 2008 dated 28.06.2008 granted for setting up of Commercial Colony for the land measuring 3.956 acres in the revenue estate of village Badshahpur, Sector-69, Gurugram have been got checked and reported to be laid at site and are operational/functional. The services include water supply, sewerage, SWD, roads, street lighting and Horticulture. Senior Town Planner, Gurugram vide memo no. 1837 dated 30.05.2020 has confirmed about laying of the colony as per approved plans.

In view of these reports, it is hereby certified that the required development works in the said Commercial Colony at Gurugram comprising of Licence mentioned above for 3.956 acres read with the following terms and conditions have been completed to my satisfaction. The development works are water supply, sewerage, storm water, drainage, roads, horticulture, etc. The completion certificate is granted on the following terms and conditions:-

Director
wn & Country Planning
Haryana, Chandigarh

1. The services will be laid by the colonizer upto alignment of proposed external services of the town and connection with the HSVP system will be done with the prior approval of the competent authority. In case pumping

is required, the same will be done by the colonizer at its own cost. The services will be provided as per provision in the EDC of Gurugram.

2. That the colonizer will be solely responsible for making arrangement of water supply and disposal of sewage and storm water of their colony as per requirement/guidelines of HSPCB/Environment Department till such time, the external services are provided by HSVP/State Government as per their scheme.
3. Level/Extent of the services to be provided by HSVP i.e. water supply sewerage, SWD, roads etc. will be proportionate of EDC provisions.
4. That you shall maintain a roof top rain water harvesting system properly and shall keep it operational all the time.
5. That in case some additional structures are required to be constructed and decided by HSVP at a later stage, the same will be binding upon you. Flow control valves will be installed, preferably of automatic type on water supply connection with HSVP water supply line.
6. That the NSL formation level of roads have been verified and are correct. You shall be responsible in case of any mistake in levels etc.
7. That you shall be fully responsible for operation, upkeep and maintenance of all roads, open spaces, public parks and public health services like water supply, sewerage and drainage etc. for a period as approved in the service plan estimates of your colony from the date of issuance of final completion certificate or earlier relieved of said responsibility and thereupon transfer all such roads open spaces, public parks and public health services like water supply, sewerage and drainage etc. free of cost to the Government or the Local Authority as directed.
8. That you shall neither erect nor allow the erection of any communication and transmission Tower with in colony without prior approval of competent authority.
9. That you shall use LED fittings for street lighting in the licenced colony.
10. That you shall comply with the conditions of Service Plan/Estimates approved by the Department vide memo dated 27.11.2019 and the conditions imposed by CE- HSVP, Panchkula.
11. That you shall abide by all prevailing norms/rules and regulations as fixed by HSVP.
12. That you are required to get the Bank Guarantee of 1/5th of the amount revalidated as per provision of Rule 20 of Rules 1976 and you shall be got revalidated within a period of 30 days from grant of Completion Certificate failing which the same shall become null and void.
13. That you will comply with the terms and conditions as approved from the concerned power utility.

14. That you shall submit the clearance from HVPNL regarding erection & commissioning of the Electrical Infrastructure of the colony as per the approved Electrical Infrastructure of the colony as per the approved Electrical Infrastructure Plan/estimate of the colony within 30 days from the issuance of this memo.

15. This completion certificate shall be void ab-initio, if any of the conditions mentioned above are not complied with.

(K. Makrand Pandurang, IAS)
Director,
Town & Country Planning,
Haryana, Chandigarh

Endst. No. LC-1843-JE (VA)-2021/ Dated:

A copy is forwarded to the following for information and necessary action.

1. Chief Engineer, HSVP, Panchkula.
2. Senior Town Planner, Gurugram.
3. District Town Planner, Gurugram.
4. Chief Accounts Officer O/o Director, Town and Country Planning, Haryana, Chandigarh.
5. Nodal Officer, Website updation.

(Narender Kumar)
District Town Planner (HQ)
For Director, Town & Country Planning,
Haryana, Chandigarh

Further, to substantiate its contention, the Respondent placed on record, vide IA No. 82/2024 dated 12.01.2024 (which was allowed and taken on record vide order of this Adjudicating Authority dated 28.02.2024), a list of running and functional shops, along with the names of their respective allottees, and copy of photos of the relevant project. Furthermore, Ld. Counsel for the Respondent also screen shared those photographs during the course of hearing. Hence, the contention of the Applicants that the Respondent has not obtained Occupancy certificate and the units are not complete is found devoid of merits.

15. The Respondent has further contended that the Applicants have claimed amounts for the period specified under Section 10A of IBC, 2016. In order to examine this aspect, we visit the "Calculation Sheet" provided in Annexure C-8 by one of the (Lead) Applicants (page 455), which reads thus:

ANNEXURE C-8 (COLLY)

455

Calculation Sheet for Mr. Nikhil Khanna & Mrs. Mona Khanna (Project-Spaze Corporate Parkk; Unit No. 611, 6th Floor, Tower-B, 596 sq. ft.) - Investment/Assured Returns (Calculated at Rs. 55/- per sq. ft. * 596 sq. ft= Rs. 32,780/-)		
S. NO.	Amount of Dues (In Rs.)	Pending Assured Return Date
1	32,780	10-08-2019
2	32,780	10-09-2019
3	32,780	10-10-2019
4	32,780	10-11-2019
5	32,780	10-12-2019
6	32,780	10-01-2020
7	32,780	10-02-2020
8	32,780	10-03-2020
9	32,780	10-04-2020
10	32,780	10-05-2020
11	32,780	10-06-2020
12	32,780	10-07-2020
13	32,780	10-08-2020
14	32,780	10-09-2020
15	32,780	10-10-2020
16	32,780	10-11-2020
17	32,780	10-12-2020
18	32,780	10-01-2021
19	32,780	10-02-2021
20	32,780	10-03-2021
21	32,780	10-04-2021
22	32,780	10-05-2021
23	32,780	10-06-2021
24	32,780	10-07-2021
25	32,780	10-08-2021
26	32,780	10-09-2021
27	32,780	10-10-2021
28	32,780	10-11-2021
Total	9,17,840	

16. Thus, we find from the Calculation sheet (ibid) that the amounts claimed for the period from 10.04.2020 to 10.03.2021 by the applicants are falling within the period specified under Section 10A of IBC, 2016. Similar is the claim seen in calculation sheets filed for the other applicants. In this context, we refer to the Judgement of Hon'ble NCALT dated 31.10.2022 passed in the matter of **Plus Corporate Ventures Pvt. Ltd. Vs Transnational Growth Fund Ltd.** in Company Appeal (AT) (Insolvency) No. 1270 of 2022. The relevant extracts of the judgement are reproduced below:

> *"7. When we look into the proviso to Section 10A, the expression is "provided that no Application shall ever be filed for initiation of CIRP of a Corporate Debtor for the said default occurring during the said period" thus default which has been committed from 16.09.2020 to 28.02.2021, no Application could have ever been filed.* ***The Appellant's submission that cumulatively application can be filed taking all amounts, cannot be accepted. The said submission goes contrary to the statutory scheme delineated by Section 10A proviso as noted above****. When Appellant could not have filed the Application for the default which was committed, the Adjudicating Authority did not commit any error in rejecting the Application as barred by Section 10A of the Code. In so far as the last two default on 31st March, 2021 and 30th April, 2021 is concerned, the Adjudicating Authority has noticed that the total amount of the aforesaid two defaults is only Rs. 37,50,000/- which is below the threshold as provided under Section 4 of the Code.*
>
> (Emphasis placed)

Thus, in the judgement (ibid). the Hon'ble NCLAT held that cumulative application taking all amounts including those falling under Section 10A of IBC goes contrary to the statutory scheme delineated by Section 10A proviso, hence cannot be accepted. Hence, in terms of the judgment (supra), we find that the claims of the applicants are not valid in the eyes of law.

17. In the sequel of the abovesaid discussion, we conclude that the Applicants herein are not the "Financial Creditors" rather speculative investors seeking recovery of assured returns. It has been held in catena of judgments of Superior Courts that the Adjudicating Authority is not a recovery forum. Further, it has been found that the claims of the Applicants are contaminated with the demand pertaining to Section 10A period, which is not permissible under law. Hence, we have no other option but to dismiss the application.

18. **Accordingly, the CP(IB) No. 70/Chd/Hry/2022 is dismissed.**

IA No. 81/2024

19. The present IA 81/2024 has been filed by the Applicant Mr. Rajiv Gupta under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, praying for intervention and impleadment in CP (IB) No. 70/Chd/Hry/2022 and take the facts, circumstances and annexures on record.

20. In view of the abovementioned order in the main CP(IB) No. 70/Chd/Hry/2022, the need to go into the merits of the IA is obviated and consequently, **the IA rendered infructuous and is disposed of accordingly.**

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(HARNAM SINGH THAKUR)
MEMBER (J)