

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

IP. No. 28/2024

In

C.P.(IB)No.336/MB/C-II/2024

Application filed Under Section 60 (5) of
the Insolvency and Bankruptcy Code,
2016

Vijayalaxmi Developers,

Having their registered office at 312/A,
Ahura Centre, 82, Mahakali Caves Road,
Andheri East, Mumbai- 400093

Mr. Dilip Motilal Chordiya,

Proprietor of Vishal Associates through
his power of attorney holder Mr. Kunal
Dilip Chordiya residing at
Flat No. 12-13, Sajjan Plaza, Opp.
Hindustan Bakery, Near Chaphekar
Chowk, Chincholgaon, Pune – 411 033.

...Applicant

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In the matter of

LIC Housing Finance Limited

CIN L65922MH1989PLC052257

A public limited company incorporated
under the Companies Act, 1956 and
having it's registered office at Bombay
Life Bldg., 2nd Floor, 45/47, Veer
Nariman Road, Mumbai- 400 001.

...Operational Creditor

Versus

Ishawar Constructions Pvt. Ltd

CIN U45201PN1981PTC02525205

A Private Limited company incorporated
under the companies act 1956 and having
its registered office at C- Wing, Parmar
Trade Centre, 12 Cannought Road Sadhu
Vaswani Chowk, Pune- 411010

...Corporate Debtor

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Order Pronounced on: - 08.10.2024

Coram:

Anil Raj Chellan

Kuldip Kumar Kareer

Member (Technical)

Member (Judicial)

Appearances:

For the Applicants : Nausher Kohli a/w Rena Desai

ORDER

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

1. The present application has been filed under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 by the above named Petitioners who are the sole owners of the land admeasuring an area of 23 Hectors 10 Acres situated at village Chikhali, Taluka Haveli, District- Pune (hereinafter referred to as "Larger Land") seeking the following reliefs:-
 - a. The Petitioner be heard prior to passing of any orders in the captioned Petition.

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- b. That the Financial Creditor and the Corporate Debtor be held liable under the provisions of Section 65 of Code and requisite penalty may be imposed.
- c. That an order be passed dismissing the present Petition filed under Section 7 of the Code.
- d. That pending the hearing and final disposal of the present Application, the Petitioners be provided with a complete set of the papers and proceedings including the captioned petition and affidavit in reply if any filed by the Corporate Debtor in the captioned petition.
- e. That pending the hearing and final disposal of the present application, the hearing of the captioned Petition be stayed and the Financial Creditor be restrained from pursuing the captioned Petition.

Facts of the case:

- 2. The Petitioners, in their capacity as owners of the Larger Land, were desirous of developing this Larger Land. In 2010, the Corporate Debtor along with one Trade Centre Developers and Builders Pvt Ltd (hereinafter referred to as

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"Trade Centre") approached the Petitioners and made several representations as to their experience and expertise in the real estate industry.

3. The Corporate Debtor along with one Trade Centre Developers and Builders Pvt Ltd (hereinafter collectively referred to as "Developers") assured the Petitioners that they possessed the requisite resources, skill and financial wherewithal to develop the Petitioners' property into an exclusive commercial and residential project. In view of the Developers' representations, the Petitioners entered into Joint Venture Agreement dated 11th May 2010 with the Developers.
4. Under the Joint Venture Agreement, the Developers undertook to develop a portion of the Larger Property being part and parcel of land admeasuring about 14 hectares 40 Acres, bearing Gut No. 90 (earlier Survey Nos. 27 and 29) of Village Chikhali, Taluka Haveli, District Pune (hereinafter referred to as "Project Land") by way of a joint venture under the name and style of "River Residency".
5. The clause 4(B)(U) of the Joint Venture Agreement states: -

"...4(u). The Developers shall be entitled to raise bridge finance for the present Project by mortgaging the phase of the property under their possession for construction. However, the entire responsibility of the repayment of the said

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Project loan shall be of the Developers alone. However, the finance so raised by the Developers shall not exceed the balance refundable security deposited with the owners as on that day and if it does, then the Developers shall have a lien on the constructed portion of the developers share..."

The total amount of security deposit with the Petitioners was Rs.11,00,00,000/- (Rupees Eleven Crores only).

6. The Petitioners in furtherance to their obligation under Clause 28 of the JV Agreement, executed a General Power of Attorney dated 11th May 2010 in favour of the Developers' directors being Mr. Ishwar Chandulal Parmar, Ms. Darshana Ishwar Parmar and Mr. Arland Navratna Jain. The said POA granted powers to the erstwhile directors of the Developers to, inter alia, obtain necessary permissions from the statutory authorities and to raise bridge finance for the Project in line with the terms of the JV Agreement.
7. As the timelines for development of the Project Land under the JV Agreement could not be adhered to, the Petitioners and the Developers entered into a Supplementary JV Agreement wherein the parties revised the profit-sharing ratio in the manner specified therein. At the time of entering into the Supplementary JV Agreement, the Developers had completed the

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construction work and conveyance of Phase I of the Project, and the construction of Phase II of the Project.

8. There were several obligations to be complied by the Petitioner as well as the Developers. The Developers were to construct the buildings within a period of 24 months and the revenue sharing arrangement between the Petitioner as well as the Developers was also revised. It is pertinent to note that during the period of 2010 to 2016, construction of three phases of the Project were completed by the Developers and the construction of Phase IV of the Project was about to start. A Specific Power of Attorney dated 3rd August 2017 (hereinafter referred to as "2017 SPOA" was executed by the Petitioners in favour of the Developers represented through their directors/ erstwhile directors. This said SPOA was granted for the sole purposes of raising construction finance from financial institutions only in the name of the JV Entity.
9. The Directors of the Developers executed a Declaration cum Indemnity dated 4th August 2017 in favour of the Petitioners. It was further provided that the Developers could avail construction finance for development of the Project in the name of the JV Entity by creating a charge on the Project Land which, at the time, was under construction and not the entire Project

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Land/Property as well as the premises constructed/to be constructed thereon. Pertinently, as per clause 4 of the Declaration cum Indemnity, the Developers undertook to repay such loans and interest thereon solely through the project cashflows (excluding the revenue share of the Petitioners). The Developers also undertook that in the event, the said Project cashflows were insufficient for repaying and servicing the construction finance availed by the Developers, the Developers would be solely responsible and liable to pay this deficit and neither the JV Entity nor the Petitioners would be held liable for the payment of this deficit. The Developers further undertook that the construction finance availed would be solely deployed for development of the Project Land and would not be deployed for any other purpose without the express written consent of Petitioner No. 1.

10. In and around 2019, upon conducting an online search with respect to the Project Land, the Petitioners came across an Indenture of Mortgage dated 25th October 2018 which was executed and registered by one AOP River Residency Developers and the Developers and its Directors (as co-mortgagers) in favor of the Financial Creditor.
11. It is submitted that the LIC Sanction Letter dated 18th September 2018 was issued in the name of the AOP (River Residency Developers) and the

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Corporate Debtor as the co-applicants. The purpose of the loan was "Construction of project River Residency Phase IV and takeover of existing loan of not more than Rs. 45.64 Crores from L&T Housing Finance Limited and balance for construction and completion of project River Residency Phase IV". A mortgage on Phase IV Property was to be provided as security for this loan. The loan amount sanctioned was Rs. 95,00,00,000/- (Rupees Ninety-Five Crores only). Pertinently, a condition for subsequent disbursement was inspection of all original title documents.

12. It is submitted that the as per Article 3.2 of the sanction letter, a condition precedent to disbursement of loan was that the AOP, the Corporate Debtor and Trade Centre were to assure the Financial Creditor that they have an absolute, clear and marketable title to the properties to be mortgaged. However, the Petitioners state that till date, the original title documents are in the possession of the Petitioners and have never been inspected by the Financial Creditor.
13. It is submitted that a perusal of the JV Agreement and 2017 SPOA make it evident that any bridge finance for the project could only be availed in the name of the JV Entity. The fraudulent entity i.e. AOP was not the JV Entity.

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Notably, in the event the Financial Creditor had undertaken basic due diligence, this fact would have come to its notice.

14. It is submitted that Clause 8.1.1. states that the Fraudulent AOP, the Corporate Debtor and Trade Centre would utilize the loan disbursed by the Financial Creditor for the purposes of repayment of principal component of L&T Housing Finance Loan and balance towards construction and completion of the Phase IV of the Project. Schedule III to the Loan Agreement defines the land and building to mean and include all those pieces and parcels of lands admeasuring 14960.51 Sq. Mtrs with FSI of 15,00,000 Sq feet.
15. It is submitted the Developers could mortgage and/or encumber the property only for the purpose of raising bridge finance which was to be solely utilized for the construction of the Project. However, as stated hereinabove, the loan from the Financial Creditor was also towards take over L&T loan availed by the Developers for their own use.
16. It is submitted that a perusal of the said Indenture of Mortgage reveals that it was signed by the Fraudulent AOP, the Corporate Debtor, Trade Centre, Mrs. Darshana Parmar Jain and Mr. Yogesh Gavankar. However, the Petitioners herein are the owners of the said Property including the Phase IV

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Property. The said Indenture of Mortgage has not been signed on behalf of or on the authority provided to the Corporate Debtor for the actual landowners i.e. the Petitioners. The Fraudulent AOP has no nexus with the Petitioners and has no right to enter into the said Indenture of Mortgage and encumber any land belonging to the Petitioners

17. It is stated that the extent of the fraud perpetrated, inter alia, by the fraudulent AOP is further borne out from the fact that the fraudulent AOP projected itself to be the JV Entity and used the PAN Card of the JV Entity as proof of its own identity which shows the Respondents' mala fide intentions.
18. It is submitted that by conduct, the Financial Creditor was aware of the contractual arrangement between the parties, including the Supplemental JV Agreement. Despite this, the purported Indenture of Mortgage wrongfully defines the Petitioners' share as 25% of the receivables. This was incorrect as by virtue of the Supplementary JV Agreement, the Petitioners' share was revised to a range of 25% to 33% of the Phase IV receivables. It is clarified that this objection remains only academic, in view of the Petitioners' termination of the JV Agreement and Supplementary JV Agreement on 6th January 2023 and the Financial Creditor has no right as alleged or at all on the receivables from Phase IV in light of the valid termination.

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19. It is submitted that on 1st April 2022, the Petitioners constrained by the illegalities perpetrated by the Developers and their Directors preferred a Complaint dated 1st April 2022 and 26th August 2022 before the Economic Offences Wing ("EOW"), Mumbai under section 403, 406, 409, 417, 418, 420, 467, 468, 471 r/w. Section 120-B & 34 of the Indian Penal Code, 1860. Subsequently, the aforesaid complaint was transferred from EOW, Mumbai to EOW, Pimpri Chinchwad and accordingly preliminary enquiry was conducted. Pursuant to the preliminary enquiry, an FIR bearing no: 362 of 2023 dated 1st June 2023 came to be registered with Chikhali police station, Pimpri Chichwad against the directors of the Developers, Mrs. Manjusha Parmar and Mr. Naren Makhwana for the offences punishable under sections 409, 420 and 34 of the Indian Penal Code, 1860. The complainant in the aforesaid FIR is Mr. Shantilalji Mohanlal Kavar, partner of Petitioner No.1.
20. It is submitted that as a result of the Developers' illegal actions, in addition to the Petitioners, 135 bona fide allottees of the Project have been also left remediless. These allottees have also filed proceedings before the Maharashtra Real Estate Regulatory Authority in October 2022.
21. It is submitted that the Petitioners preferred a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 against the Developers Being Civil

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MA 31 of 2023 seeking certain interim and adinterim reliefs before the Hon'ble District Court, Pune. Owing to the urgency and taking note of the various breaches and illegal actions of Developers, the Hon'ble District Judge — 2 and Additional Sessions Judge, Pune vide order dated 3rd February 2023 has restrained the Developers from creating any kind of third-party interests in the said Property.

22. It is submitted that the Petitioners have filed a Commercial Suit before the Hon'ble Bombay High Court seeking appropriate reliefs against the Financial Creditor, Developers, Fraudulent AOP, their directors and members respectively for cancellation of the transaction documents based on which the present proceedings appear to be instituted. Thus, the Petitioner have a right to be heard before any substance order is passed in the matter.

Analysis and Findings: -

23. We have heard the Counsel for the Applicant and gone through the record.
24. During the course of the arguments, Counsel for the Applicants has argued the creation of financial security i.e. the mortgage of property to the Financial Creditor/LIC against the loan provided to the corporate debtor is totally illegal as the applicants are the owners of the property. It has also been argued

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that the financial creditor has failed to verify the documents properly before granting the loan. The Counsel for the Petitioner has further argued that the Petition filed under section 7 is liable to be dismissed as there is collusion between the Corporate Debtor and Financial Creditor and the Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 has been filed only to defeat the valuable rights of the Petitioners/Applicants.

25. By way of this application, the Petitioners/Applicants are seeking to intervene in the Petition under Section 7 filed by LIC Housing Finance (Respondent No.1) against the Corporate Debtor i.e. Ishwar Construction Pvt. Ltd. (Respondent No. 2) on the ground that there has been collusion between the Respondents and the loan facilities were advanced by Respondent No. 1 to Respondent No. 2 along with one AOP and Trade Center to defeat the valuable rights of the Petitioners in the property owned by it which has been wrongly mortgaged to Respondent No. 1 by Respondent No. 2 along with said entity. According to the Petitioners/Applicants that the Respondent No. 2 had no right to mortgage the property belonging to the Petitioner or create any charge on the same nor the Respondent No. 1 as Financial Creditor was entitled to advance or disburse any loan to Respondent No. 2 & Others against this property.

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26. We have considered the aforesaid contentions of the Counsel for the Petitioners and have also carefully gone through the record.
27. Without going into merits of the case set up by the Petitioners/Applicants in the Intervention Application, firstly it has to be seen whether an Intervention Application can be maintained during the pendency of a Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 at pre-admission stage. In this regard, a reference can be made to the law laid in *Deb Kumar Mujumdar Vs. State Bank of India, Company Appeal (AT) (Ins.) No. 44/2018* whereby the Hon'ble NCLAT has held that at the stage of application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 no person has a right to claim for hearing except the Corporate Debtor. Similarly, in *L&T Infrastructure Finance Company Ltd. Vs. Gwalior Bypass Project Ltd, Company Appeal (AT) (Ins.) No. 676/2019* the Hon'ble NCLAT has held that a member/shareholder has no right to intervene to oppose admission of application under Section 7 of the Insolvency and Bankruptcy Code, 2016. A further reference can also be made to the law laid down in *Vekas Kumar Garg Vs DMI Finance Pvt. Ltd. & Anr., Company Appeal (AT) (Ins.) No. 113/2021* whereby the Hon'ble NCLAT has held that the Financial Creditor and the Corporate Debtor alone are the necessary parties and the Adjudicating Authority , at the pre-admission stage, is only required to satisfy itself that

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there is a financial debt in respect whereof the Corporate Debtor has committed a default warranting triggering of the CIRP and no third-party intervention is contemplated at that stage. In the light of the law laid down in the afore-cited cases, we are of the considered view that, the Intervention Application is pre-mature and cannot be entertained at the stage and the appropriate remedy available with the Petitioners/Applicants would lie only if at all, only after the Corporate Debtor is admitted into Insolvency and at that stage, the Petitioners/Applicants can approach this Authority in case any of their rights are infringed in respect of any property owned by them.

28. As a result of the above brief discussion, the **Intervention Application No. 28/2024 preferred by the Petitioners/Applicants is hereby dismissed** summarily at this stage. However, there shall be no order as to costs.

Sd/-

**ANIL RAJ CHELLAN
MEMBER TECHNICAL**

Sd/-

**KULDIP KUMAR KAREER
MEMBER JUDICIAL**