



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

C.A. NO. 891/2019 and C.A. NO. 253/2019

IN

Company Petition No. (IB)- 456(ND)/2018

IN THE MATTER OF:

Pallavi Joshi Bakhru

**... Petitioner/
Financial Creditor**

Versus

Universal Buildwell Private Limited.

... Respondent

AND IN THE MATTER OF C.A. NO. 891/2019:

Mr. Atul Kumar Kansal

... Resolution Professional

Versus

1. Samyak Projects Private Limited

111, 1st Floor, Antariksh Bhawan,
22, KG Marg, New Delhi-110001

... Respondent No. 1

2. Raman Puri,

59-B, C-5 Lane, Sainik Farms,
New Delhi-110062

... Respondent No. 2

3. Universal Buildwell Private Limited

102, Antriksh Bhawan, 22 KG Marg,
New Delhi-110001

... Respondent No. 3

4. Varun Puri

59-B, C-5 Lane, Sainik Farms,
New Delhi-110062

... Respondent No. 4

5. Vikram Puri

Holding DIN '00048662'
59-B, C-5 Lane, Sainik Farms,
New Delhi-110062

... Respondent No. 5

6. Mehar Ram

Holding DIN '08082893'
House No.-114, Bahadur Pur,
Tigaon (94), Faridabad,
Haryana-121101

... Respondent No. 6



7. Amit Kumar Singh

Holding Din '08099496'
S/o Hans Nath Singh,
Sonia, Saran, Bihar-841205

... Respondent No. 7

Under Section: Section 45 r/w Section 49 of IBC 2016

AND IN THE MATTER OF C.A. NO. 253/ND/2019:

Mr. Atul Kumar Kansal

Resolution Professional

... Applicant

Versus

Samyak Projects Private Limited

111, 1st Floor, Antariksh Bhawan,
22, KG Marg, New Delhi-110001

... Respondent

Under Section: Section 66 r/w Section 60(5) of IBC 2016

Order Delivered on: 12.09.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

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

PRESENT:

For the Applicant : Mr. Harshal Kumar for SRA in CA-891/2019, Sr. Adv. Vivek Kohli, Adv. Sandeep Bhuraria, Adv. Nalin Talwar, Adv. Monish Surenderan, Adv. Juvas Rawal in CA-253/2019

For the Kotak Bank : Adv. Sanjay Bhatt, Adv. Apoorva Choudhary

For the RP : Adv. Swapnil Gupta, Adv. Sadiq Noor with Mr. Atul Kansal, RP



ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

CA-891/2019 and CA-253/2019

The CD viz. Universal Buildwell Pvt. Ltd. was admitted to CIRP in terms of the order dated 03.07.2018 passed in IB-456(ND)/2018. Subsequently, the RP filed IA-1550/2019, seeking approval of the plan for Resolution of the Insolvency of the CD, approved by CoC in its meeting dated 11.11.2019 with 70.44% voting in favour of the plan. Considering the application, this Adjudicating Authority passed the order dated 11.06.2021 remitting the Resolution Plan to CoC for modification in terms of the payments to the objectors, namely, DHFL, Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited. The ground perceived by this Adjudicating Authority to take such a view was that the two NBFCs/bank (ibid) could not be kept attached to the Corporate Debtor till completion of project and they were entitled to get the payment of Rs.3 Crores within a specified period.

2. Assailing the aforementioned order, the Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited preferred Company Appeal (AT) (Insolvency) No.661 of 2021 before the Hon'ble National Company Law Appellate Tribunal. The appeal was dismissed in terms of the order dated 11.04.2023, with the view that the directions contained in para 49 of the order dated 11.06.2021 were to be affirmed while those contained in para 50 thereof were to be deleted.



3. Nevertheless, as the appeal was dismissed, the order passed by this Adjudicating Authority remitting the Resolution Plan to CoC for modification in terms of the payment as specified in the order viz., DHFL, Kotak Mahindra Bank and Kotak Mahindra Prime Limited were to be paid cash and could not be made attached to the plan/project till execution/completion of the same attained finality. Para 49 of the order passed by this Adjudicating Authority on 11.06.2021, as affirmed by the Appellate Authority in terms of the order dated 11.04.2023 reads thus: -

“49. Now, in the light of position of law settled by the Hon’ble Supreme Court (Supra), we consider the contention of Mr. Sumant Batra, Advocate and we notice that the amount proposed to be paid in the Resolution Plan is approved by the CoC. Under Section 30(2)(b) of IBC read with Section 53 of IBC, 2016, it is duty of the Resolution Professional to examine the Resolution Plan, whether the distribution to the Creditors is made in terms of the provisions of law and Regulations, thereafter the Resolution Professional shall place the same before the Committee of the Creditors u/s 30(3) IBC 2016 for its approval. The CoC proposed, may approve the Plan by not less than 66% of voting share u/s 30(4) of the IBC 2016. It is the commercial wisdom of the Coc to determine what amounts are to be paid to different classes and sub classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder. It is seen that while deciding the amounts in the instant case, the Coc has considered the liquidation value placed by the Resolution Professional as well as the Resolution Applicant as mentioned in aforementioned paragraphs. Since the units, that have already been sold, are no longer an asset of the Corporate Debtor and consequently cannot be liquidated, their liquidation value has been provided as NIL. The Coc after considering the same, approved the amounts proposed to be paid to Kotak Mahindra Bank Limited, Kotak Mahindra Prime Limited and similarly, to DHFL. Hence, we find, no force



in the contention raised by the Ld. Counsel for the Objectors that the amounts which are proposed to be paid to the DHFL, Kotak Mahindra Bank Limited and Kotak Mahindra Prime Limited are contrary to the provision of Section 30(2)(b) of the IBC read with Section 53(1) of the IBC, 2016.

4. After the order dated 11.06.2021 passed by this Adjudicating Authority, the CoC circulated notice and Agenda for the 16th meeting of CoC scheduled to be held on 25th June, 2021. The Financial Creditors, AR and Suspended Directors were apprised of the agenda.

5. As can be seen from paras 54, 59 and 60 of the IA-5003/2021, the Resolution Professional calculated the liquidation value for Financial Creditors on the basis of unsold area available in the project which they had financed. However, the secured Financial Creditor did not concur with the view of the Resolution Professional. The aforementioned paras of the application read thus: -

“54. In the meeting, CoC deliberated on the issue of re-examination of liquidation value and length. Legal Opinion of Mr. Jayant Metha, Senior Advocate was also placed before CoC for its consideration. Following are the excerpts from the legal opinion of Mr. Jayant Mehta: -

“21.1.5. Therefore the calculation of liquidation value must exclude the value of such number of units, which are already subject to ATSSs/BBAs and it is only any balance consideration payable in respect thereof and the unsold units that can be taken as the asset of the corporate debtor that can be realized by way of sale thereof.”

“21.2.2. Therefore, only the units which are unsold should be treated as the realizable asset of the corporate debtor. For the sold units, the value to the corporate debtor can only be the difference is any between the receivable from the unsold units and the cost of construction as any



purchaser of the corporate debtor, even in liquidation, would not be able to purchase the property free of rights created by the existing ATSSs/BBAs.”

CoC also noted that there is no need to have fresh valuation as the valuation itself is not the subject matter of dispute. The only issue is to re-examine the liquidation value attributable to secured creditors in view of the fact that there was no unsold inventory or limited unsold inventory available with the Corporate Debtor in event of liquidation. Further, other issues like overselling of area, non-obtaining of NOC from secured creditors etc. Were also discussed in the meeting.

After the discussions, it appeared that both Kotak Mahindra Bank Limited and DHFL require some time for internal discussions and this issue of re-examining of liquidation value is going to take some more time, Resolution Professional proposed that an application for extension of CIRP period by another 60 days should be made to Hon’ble NCLT and sought opinion from participants on this issue.

Further, resolution applicant also proposed to make some arithmetical changes in their resolution plan and proposed that they will re-submit the same to resolution professional within couple of days.

After discussions, matter of extension of CIRP Period by 60 days was put to voting. This resolution was approved by 93.36% voting in favour of resolution.

Copies of Minutes of 17th meeting of CoC along with voting results are attached herewith and marked as Annexure E.

XXX

59. For the above, resolution professional has calculated the liquidation value for financial creditors on the basis the unsold area available in the project which they have financed. Secured financial creditors have not concurred with this view of resolution professional. Resolution Professional hereby seeks directions of this Hon’ble over this issue.



XXX

60. Liquidation value attributable to the secured financial creditors after taking into consideration the unsold area in the respective projects is as under:

S No.	Name of the Project	Liquidation Value (Rs. Crores) on the basis of unsold area	Name of Secured Creditor to whom charged	Mode of payment
1.	Universal Aura	23.21	Dewan Housing Finance Corporation Limited	Cash in 180 days, INR 44.81 Crores after deducting pro-rata CIRP cost.
2.	Universal Greens	21.37	Dewan Housing Finance Corporation Limited	
3.	Universal Business Park	-	Kotak Mahindra Bank / Kotak Mahindra Prime Limited	Cash in 180 days (INR 3 Crores)
4.	The Pavillion	24.98	Kotak Mahindra Bank / Kotak Mahindra Prime Limited	Release of security in favour of lender or from proceeds of sale in manner as provided in the Plan
5.	Universal Prime	1.47	SIDBI	Release of security in favour of lender or from proceeds of sale in the manner as provided in the Plan

6. The prayer in the captioned CA reads thus: -

- "A. Pass appropriate orders/directions under Section 45 read with Section 49 of the Insolvency and Bankruptcy Code, 2016 declaring the Settlement Agreement dated 18.01.2019 to void; and
- B. Pass appropriate orders/directions under Section 45 read with Section 49 of the Insolvency and Bankruptcy Code, 2016 reversing the effect of the transaction under the Settlement Agreement dated 18.01.2019 and restoring the rights of the Corporate Debtor to the



Market Square Project as prior to the Settlement Agreement dated 18.01.2019; and

C. *Pass any such other order and further orders that the Hon'ble Tribunal may consider necessary in the facts and circumstances of the present case."*

7. The captioned application raises the issue of the undervalued transaction conducted in terms of the settlement agreement dated 18.02.2018, in terms of which the Corporate Debtor transferred the development rights qua the super area measuring 66,702 square feet in a project as also the amount of INR 9.42 crores in lieu of development rights qua the area measuring 22,706 square feet in the project and INR 3.50 crores.

8. Stating succinctly, the facts as canvassed in the captioned CA are that the Suspended Directors of the Corporate Debtor are untraceable and are absconding since 15.07.2018 i.e., from a date just after 12 days from the commencement of CIRP. Neither they appeared before this Adjudicating Authority nor they extended any support to the RP in conducting the CIRP. Even the warrants, both theailable and non-ailable, issued by this Adjudicating Authority to secure their attendance could also not bring the desired results. Thus, the RP had to manage the CIRP qua the CD with little or no aid from the management and staff of the Corporate Debtor. Resultantly, he had to face considerable difficulty in ascertaining details of transactions conducted qua the CD during the period preceding the commencement of CIRP. Nevertheless, Mr. Sunil Kumar Janghu (Deputy Manager Projects) and Mr. Saurabh Kashyap (IT Executive) extended support to RP to ascertain and understand the facts regarding the business of the Corporate Debtor.



9. The RP deputed a team of professionals to ascertain the status of each project of CD. In the process, the RP came across with certain documents pertaining to, Market Square – a Commercial Project. According to RP, the Settlement Agreement dated 18.01.2018, executed in relation to the project by the ex-directors of CD and Samyak Project Private Ltd ('SPPL') was not only undervalued but also amounted to defrauding the creditors/real estate allottees of the Corporate Debtor.

10. As has been averred in para 5 of the application, the RP/Applicant could file CA-253/2019 seeking status quo qua the project viz. Market Square-Commercial Project. In terms of the order dated 07.03.2019, this Adjudicating Authority directed status quo to be maintained in respect of the land and other assets of the company which could fall within the look-back period. The order dated 07.03.2019 reads thus: -

“Notice to the Corporate Debtor as well as to Shamyak Projects Pvt. Limited Mr. Sandeep Bansal accepts notice on behalf of Shamyak Project Pvt. Ltd. Let reply be filed.

List this application for arguments and disposal on 12th March, 2019; Till then status quo shall be maintained in respect of the land and other assets of the company which fall within the look back period. The Director of the Corporate Debtor are directed to be present in Court on next date.

Mr. Vikash Bhardawaj, Vice President of Kotak Mahindra Bank is present and submits that they are in the process of making payment towards to interim CIR costs. Compliance be made for next date of hearing.



Mr. Saurabh Bansal from Shri laxmi, a NBFC is present and he has also directed to share the cost appropriate to their claim towards the Interim CIR process or alternatively withdraw the claim.

To come up on 12.03.2019.”

11. To obtain a true and accurate understanding of the transactions made by the Corporate Debtor during the, ‘look back period’ of two years prior to the commencement of CIRP, in terms of the engagement letter dated 13.02.2019, the RP/Applicant appointed Ms BDO India, LLP (‘BDO’) to conduct a transaction audit. The transaction audit was meant to examine the transactions entered into on behalf of the Corporate Debtor on the anvil of PUFEE.

12. The LLP, BDO submitted its report (Transaction Audit Report) to Applicant (RP), concluding that the various transactions conducted by and on behalf of the Corporate Debtor (Suspended Board of Directors) violated the provisions of the Code. Qua the, Market Square-Commercial Project, the report revealed that the UBPL (CD) transferred its right qua super area of 66,702 Sq. Ft., the value of which was assessed as INR 9.42 Crores (INR 7.35 Crores given as non-refundable security deposit and INR 2.07 Crores spent on the project development) for a consideration of INR 3.50 Crores and rights qua super area of 22,700 Sq. Ft. in Market Square-Commercial Project. In the Report of Transaction Audit, it could be found that the undervalued transaction caused a potential loss of INR 5.92 Crores as also that of super area of 44,0002 Sq. Ft. Thus, the transaction was undervalued. The report also revealed that when the CD had already committed a super area of 39,662



Sq. Ft. to the buyers, in agreeing to take 22,700 Sq. Ft. area in lieu of 66,702 Sq. Ft. area, it deceived the buyers. A copy of Transaction Audit Report has been placed on record as Annexure-2 to the CA. The relevant excerpt of the Transaction Audit Report as reproduced in para 8 of the applications reads thus:

“8. *The said Transaction Audit Report has noted reached the following finding in relation to the ‘Market-Square Commercial’ Project:*

“From the above facts it appears that UBPL transferred their right of super area of 66,702 Sq. Ft. which was of INR 9.42 crores (7.35 crores given as non-refundable security deposit and INR 2.07 crores spent on the project development) for a consideration of INR 3.50 crores and right of super area of 22,700 Sq. Ft. in Market Square project”.

...

“Therefore, due to the said settlement agreement it prima facie appears that UBPL incurred a potential loss of INR 5.92 crores of funds and also the right of super area of 44,002 Sq. Ft. in Market Square project. Therefore the said transaction appear to be an undervalued transaction.”

...

*“Additionally, it should also be noted that in the said settlement agreement, UBPL accepted the less superarea i.e. 22,700 Sq. Ft. despite of the fact that UBPL already committed a super area of 39,662** Sq. Ft. to the buyer. Therefore, it indicate that that said settlement agreement was entered for keeping the assets (right in Market Square Project) beyond the reach of Financial creditors.”*

13. The Applicant/RP has saliently espoused for restoration of the Settlement Agreement in relation to the Market Square-Commercial Project as it existed prior to 18.01.2018. To refer to the position qua the project, as it



existed anterior to 18.01.2018, the Applicant/RP narrated that the Market Square-Commercial Project was a project undertaken to be carried/developed in terms of the Collaboration Agreement dated 27.12.2010, executed between SPPL and CD. A copy of the agreement dated 27.12.2010 has been enclosed as Annexure-3 to the CA.

14. On 10.03.2010, the Director of Town and Country Planning, Gurgaon, Haryana ('DTCP') granted license No. 18/2010 to Ansal Properties & Infrastructure Limited ('APIL'), Ansal Townships Infrastructure Limited ('ATIL') and others to develop a residential colony on the area measuring 111.594 Acres falling in the revenue estate of village Badshahpur in Sector-67, Gurgaon. Out of the above, an area of 1.75 acres ('Subject Land') was marked for developing a commercial complex having a total FSI of 1,33,403 Sq. Ft. On 01.12.2010, APIL and ATIL entered into an agreement to sell, with SPPL (Respondent No.1) to sell the Subject Land for consideration of Rs.41,55,50,345/-. On 27.12.2010, SPPL entered into a Collaboration Agreement with the Corporate Debtor. The terms and conditions of the agreement dated 27.12.2010 as reproduced in para 10(c) of the application reads thus: -

"c. On 27.12.2010 SPPL entered into a collaboration agreement with the Corporate Debtor herein. The terms and conditions of the said agreement included:

- i. The Corporate Debtor shall develop and construct a commercial building on the subject land with its own investments and in lieu of the same, the Corporate Debtor shall be entitled to own 50% of the entire saleable/super built areas including proportionate undivided rights in the project land, open parking*



spaces and covered car parking of the project to be developed/ constructed by the Developer under terms of the Collaboration Agreement and the balance 50% shall go to SPPL. Further, the Corporate Debtor and SPPL shall also be entitled to all permissible future vertical and horizontal exploitation of the land whether by way of additional construction or otherwise in the proportion of 50% and 50% respectively, subject to approvals.

- ii. Additionally, the Corporate Debtor shall pay Rs. 8 crores as non-refundable consideration on or before 31.12.2010.*
- iii. The Corporate Debtor shall obtain all necessary approvals required for the project and complete the construction of buildings within a period of 30 months from the date of approval of building plans, with a 6 month grace period.*
- iv. Both the parties, i.e. SPPL and the Corporate Debtor were to be entitled to book/sell the respective areas allocated to their respective 50% share and receive advance payments at their own risk and cost without liberty to the others.*
- v. All necessary documents/agreements, conveyance deeds to bookings/sales/leasing shall be prepared by the Corporate Debtor to maintain uniformity of general terms including of maintenance of the buildings.”*

15. Before the expiry of the period of three years (construction period of 30 months + 6-months grace period) i.e., on 17.04.2013, the SPPL (Respondent No.1) and the Director of the CD, since suspended, entered into a compromise qua the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, pending in the court of Ld. Additional District Judge Gurgaon. They filed a joint application under Order 23 Rule 3 read with Section 151 of CPC



in this regard. Taking note of the compromise enshrined in para 3 (3.1 to 3.35) of the application, the Ld. Additional District Judge passed an order dated 17.04.2023 disposing of the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996. The salient terms of compromise, mentioned in the application, as reproduced in para 11 of the application reads thus: -

*“11. Before the expiry of a period of 3 years (construction period of 30 months+ 6- month grace period), i.c. on 17.04.2013, and order was obtained by SPPL and the ex-directors of the Corporate Debtor herein from the Court of Ld. Additional District Judge, Gurgaon by filing 'compromise' between the Corporate Debtor herein and SPPL in relation to the Project. A copy of the order of the Ld. Additional District Judge dated 17.04.2013 is annexed hereto and marked as **Annexure-4**. The said compromise Order dated 17.04.2013, inter alia, provides:*

- a. That the Corporate Debtor shall develop and construct 'A' class commercial building on the Subject Land with its own sources incurring not less than Rs. 36 crores thereon.*
- b. That a non-refundable deposit of Rs. 8 crores as mentioned in the Collaboration Agreement shall stand reduced to Rs. 7.35 crores, which had already been paid in full.*
- c. That SPPL shall be entitled to 76,040 square feet area, i.e. 57% of the developed area (as against 50% in the Collaboration Agreement) while the Corporate Debtor shall be entitled to 43% of the developed area.*
- d. That the Corporate Debtor shall obtain sanction of layout plans, necessary clearances, NoCs, approvals and sanctions etc. for construction and completion of building.*



- e. *That the Corporate Debtor herein shall complete the construction of the building within a period of 30 months from the date of approval of building plans or the handing over of the possession of land, whichever is later, with a grace period of 90 days.*
- f. *That, if the Corporate Debtor herein does not complete the construction within the said period, it shall pay a penalty of Rs. 20 per square feet per month to SPPL on 57% of the FSI falling to the share of SPPL for the first 12 months, and Rs. 25 per square feet per month thereafter.*
- g. *Both the parties, i.e. the Corporate Debtor and SPPL shall be entitled to sell the built up areas/units of their respective shares independently. However, all the proceeds received by the Corporate Debtor from time to time from the booking/allotment shall first be utilised towards the construction, development and completion of the project.*

16. Upon the invitation of claim qua the CIRP process, the RP received claims from 35 allottees qua the 'Market Square' Commercial Project amounting to approximately Rs.4.44 Crores. Further, as per the Management Information System (MIS) - the records maintained at the office of the Corporate Debtor and as ascertained in the Transaction Audit Report, the Corporate Debtor has sold 75 units in the project to 62 buyers, totalling to a super area of approximately 39,664 sq. ft. for a total consideration of Rs.25 crores.

17. It is the case of the Applicant/RP that the Suspended Directors of the Corporate Debtor, in collusion and cahoots with SPPL, extinguished the development rights of the CD qua the 'Market Square' Commercial Project vide



Settlement Agreement dated 18.01.2018 and also defeated the claims of the allottees in the project. The area of 22,700 Sq. Ft. assigned to the CD is definitely not adequate since the Corporate Debtor has already sold/allotted an area of 33,664 Sq. Ft. in the project. Besides, owing to the Settlement Agreement, the CD has incurred a loss of Rs.5.95 Crores already invested in the project.

18. No other Respondent except the Respondent No.1 filed any reply qua the Company Application. The reply filed on behalf of the Respondent No.1 is dated 25.03.2021. The salient contentions put forth on behalf of the Respondent No.1 are: - (i) the transaction between the CD and Respondent No.1 i.e., SPPL is not covered by Section 45 read with Section 49 of the IBC, 2016. The transaction was undertaken in ordinary course of business and is a pure financial transaction; (ii) the answering Respondent extended full cooperation with the Resolution Professional and made all the details/particulars and documents qua the transaction to the RP; (iii) the RP is unable to show that the CD could take bookings qua 39,664 Sq. Ft. of the project land; (iv) in the Settlement Agreement dated 18.01.2018, the Corporate Debtor could categorically represent that it had not booked/sold/allotted any area qua the project and had not created any third party interest in respect of the same.

19. We heard the counsels for the parties and perused the record. One of the contentions raised by the CD is that the Settlement Agreement dated 18.01.2018 was a transaction entered into between the parties in the 'Ordinary Course of Business', thus the same cannot be described as



undervalued transaction in any manner. To deal with the plea, we may decipher the expression 'Ordinary Course of Business'. The general meaning of the expression is the regular or customary condition of course. Many dictionaries defined the term as part of doing regular business. According to Black's Law dictionary, it means the normal routine in managing a trade or business. Though, the expression 'Ordinary Course of Business' used in Sections 67(3)(a), 117(3)(g), 179(3), 180(1)(c), 185(3)(b), 186(11)(a), 188(1) fourth proviso, 189(5)(b), 329 and 336(1)(a) of the Companies Act, 2013, but the term has not been defined in the Act. We could also not find the definition of the expression in the IBC, 2016. In the wake, the Board of Directors of Companies are left to have their own different understanding and interpretations of the term, thus creating confusion. The lack of definition or framework could reserve discretion to the Board and Audit Committees to use the expression as per their subjective understanding. Regulation 23 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, provides that the listed entities shall formulate a policy on materiality of related party transactions including clear threshold limits duly approved by the Board of Directors and such policies shall be reviewed by the Board of Directors at least once in every three years. The provision makes it advisable for the company to define the term 'Ordinary Course of Business'. Thus, we need to understand the expressions, 'Ordinary', 'Course', and 'Business' independently. The term 'Ordinary' means normal, natural and something what happens in routine either everyday or in general or traditionally. The term 'Course' means procedure, series, chain, link or string. The term 'Business' refers to an organisation or enterprising entity engaged in



commercial, industrial, or professional activities. The term 'Business' also refers to efforts and activities undertaken by individuals to produce and sell goods and services for profit. The real estate business is one of the examples of industry. In this industry, the builder provides construction service. Thus, the business of the CD is to provide construction service. Therefore, apparently, the 'Ordinary Course of Business' is supply of goods or providing service by an organisation or an individual as part of its/his effort to earn profit in a routine manner. Supply of goods or service should be an ordinary/routine affair as part of efforts/activities undertaken by the concerned. In the wake, neither the compromise scheme filed by the CD and the Respondent No.1 before Additional District Judge (ibid) nor the Settlement dated 18.01.2018 can be treated as the act or activity performed in 'Ordinary Course of Business'. The Settlement Agreement in fact is enumeration of terms and conditions qua the Collaboration entered into between two investors who had agreed to invest in 'Market Square Project'. The Agreement between two investors to invest into a project cannot be treated as an act done by them in an 'Ordinary Course of Business'. As could be ruled by High Court of Australia in **Downs Distributing Co Pty Ltd vs. Associated Blue Star Stores Pty Ltd (in liq)** : (1948) 76 CLR 463, noted by Hon'ble Supreme Court in **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited Etc. Etc.** (Civil Appeal Nos. 8512-8527 of 2019), 'Ordinary Course of Business' supposes the ordinary and common flow of transactions in affairs of business and does not refer to any special or particular situation. In the present case, the Settlement Agreement dated 18.01.2018 is not the ordinary and common flow of transaction but is a



particular situation regarding the share of the CD and Respondent No.1 in a particular project. The division of shares in a project cannot be called 'Ordinary Course of Business'. For convenient reference, the relevant excerpt of the judgement of Hon'ble Supreme Court (Supra) is reproduced below: -

"As regards the meaning and essence of the expression 'ordinary course of business', reference made by the appellants to the decision of the High Court of Australia in Downs Disturbing Co (supra), could be usefully recounted as under: -

*"As was pointed out in Burns v. McFarlane the issues in Sub-s. 2(b) of s. 95 of the Bankruptcy Act 1924-1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said, "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor." It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. **It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation.**"*



In the backdrop, the contention put forth by the Respondent No.1 that the Settlement Agreement dated 18.01.2018 providing for payment of an amount of Rs.3.50 Crores in lieu of 9.42 Crores and 22,700 Sq. Ft. land in lieu of 66,702 Sq. Ft. of land by the Respondent No.1 to CD is in 'Ordinary Course of Business' is nixed.

20. As far as the issue of the transaction, being undervalued transaction or not, as can be seen from Section 45(2) of IBC, 2016, a transaction shall be considered as undervalued where the Corporate Debtors transfer one or more of its assets for a consideration the value of which is significantly less than the value of the consideration provided by the Corporate Debtor and such transaction has not taken place in the ordinary course of business. In the present case, indubitably, in terms of the compromise filed before the Ld. District Judge Gurgaon, in which he took note of in his order dated 17.04.2013, the CD was liable to deposit Rs.7.35 Crores as non-refundable security i.e., the amount which the CD had deposited with Respondent No.1. Additionally, the CD had spent Rs.2.07 Crores on the project. The total liability which the CD had borne qua the project was to the extent of Rs.9.42 Cr. The Applicant has tried to put the matter in a simple way i.e., the transaction entered into in terms of the Settlement Agreement dated 18.01.2018 was undervalued, as the agreement could cause a loss of 44,002 Sq. Ft. of land and 5.92 Crores of money to the CD. Things are not so simple as the Applicant has tried to project. The facts not in dispute are:- (i) Director of Town Planning and Country Planning, Gurgaon, Haryana (DTCP) granted license No. 18/2010 to APIL, ATIL and others to develop a residential colony



on the area measuring 111.594 Acres; (ii) on 01.12.2012, APIL and ATIL entered into an agreement to sell 1.75 Acres of land having total FSI of 1,33,403 Sq. Ft. to SPPL (Respondent No.1) for Rs.41,55,50,345/-; (iii) in terms of Collaboration Agreement dated 27.12.2010, CD was to develop and construct a commercial building on the aforementioned i.e. 1.75 Acres; (iv) in terms of the agreement, the super built-up area was to be owned by the CD and the Respondent No.1 in the ratio of 50% each; (v) the Corporate Debtor was to invest Rs.36 Crores in the project; (vi) Additionally, it was to pay Rs.7.35 Crores to Respondent No.1 as non-refundable security; (vii) in terms of the compromise filed in the court of Ld. Additional District Judge, Gurgaon, the share of the CD qua the project was to be 43%; (viii) in the event of non-completion of construction within the prescribed period of 30 months with grace period of 90 days, the CD was to pay penalty to Respondent No.1 qua 57% area @ Rs.20 Sq. Ft. per month for the period of delay for first 12 months, and 25% per Sq. Ft. per month thereafter; (ix) in terms of Settlement Deed dated 18.01.2018, the CD was to get Rs.3.50 Crores and 22,700 Sq. Ft. of super built area qua the project.

21. Nevertheless, there are certain facts, which are in dispute. Such facts are:-

- (i) whether the total amount invested by the CD in the project is 3.85 Cr. or more;
- (ii) whether the amount referred to Respondent No.1 in para vii (page 13) of the reply filed by the Respondent No.1 is 3.85 Cr. or more;



- (iii) whether the amount of Rs.3.85 Cr. referred to by the Respondent No.1 (ibid) includes the amount of INR 2.07 Cr. mentioned as spent on project development in the Transaction Audit Report;
- (iv) how much out of the agreed amount of Rs.36 Crores, the CD could actually spend qua the project;
- (v) whether the CD had allotted/sold 75 units covering a super area of approximately 39,664 Sq. Ft. for a total consideration of Rs.25 Crores.

22. Besides, the aforementioned, there are several other factors qua which in-depth analysis needs to be made before arriving at the conclusion regarding the actual area required to be vested in CD as also qua the amount to be paid/reimbursed by Respondent No.1 to CD. A conclusion also needs to be arrived at regarding the amount of Rs. 25 Cr. allegedly paid by the allottees of 75 units to the ex-management. It needs to be checked as to whether the said amount of Rs. 25 Cr. was credited to the accounts of CD or not.

23. The Transaction Audit Report is general regarding the affairs of the CD and does not deal with the 'Market Square Project' in detail. The brief details mentioned about the said project, in the Transaction Audit Report reads thus:-



DETAILED OBSERVATIONS

Undervalued Transactions u/s 45 and Transaction Defrauding Creditors u/s 49 (1/2)

1. Waiving of development rights in Market Square Project

- ▶ Basis review of unaudited books of account of UPBL, it was noted that UBPL entered into a collaboration agreement dated 27 December 2010 with Samyak Projects Private Limited ("SPPL") for development and construction of commercial project named Market Square.
- ▶ As per the agreement, land was provided by SPPL and UBPL agreed to develop the said land. In lieu of the said development, UPBL was entitled to receive 50% of super area i.e. "66,702 Square Feet ("Sq. Ft.") in the Market Square project.
- ▶ Also, as per the terms of collaboration agreement, UBPL deposited non-refundable security deposit of INR 7.35 crores and initially spent INR 2.07 crores for development of Market Square project.
- ▶ During the development of Market Square project, UBPL sold** 75 units to 62 buyers, total super area of approximately 39,662** Sq. Ft. in Market Square project for a total consideration of INR 25 crores.
- ▶ Subsequently, dispute arose between UBPL and SPPL due to which a settlement agreement dated 18 January 2018 was entered between UBPL and SPPL. As per terms of the settlement agreement, UBPL waived all its rights in the Market Square project and in lieu of which UBPL received refund of the non-refundable deposit amounting INR 3.50 crores along with an super area of 22,700 Sq. Ft. in Project Market Square. (Refer Exhibit 1 for extract of settlement agreement)
- ▶ From the above facts it appears that UPBL transferred their right of super area of 66,702 Sq. ft. which was of INR 9.42 crores (7.35 crores given as non refundable security deposit and INR 2.07 crores spent on the project development) for a consideration of INR 3.50 crores and right of super area of 22,700 Sq. Ft. in Market Square project.
- ▶ It should be noted that, as per clause 43(2) of IBC, 2016 "A transaction shall be considered undervalued where the corporate debtor enters into a transaction which involves the transfer of assets by the corporate debtor for a consideration which is significantly less than the value of the consideration provided to the corporate debtor".

*Total saleable area under Market Square project was 1,33,403 Sq. Ft.
**Sold area was calculated as per NIS provided by the RP team of UBPL.

DETAILED OBSERVATIONS

Undervalued Transactions u/s 45 and Transaction Defrauding Creditors u/s 49 (2/2)

1. Waiving of development rights in Market Square Project

- ▶ Therefore, due to the said settlement agreement it prima facie appears that UBPL incurred a potential loss of INR 5.92 crores of funds and also the right of super area of 44,002 Sq. Ft. in Market Square project. Therefore the said transaction appear to be an undervalued transaction
- ▶ Further, as per Section 49 of the IBC 2016, a transaction shall be considered as Transaction Defrauding Creditors, "where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor"
- ▶ Additionally, it should also be noted that in the said settlement agreement, UPBL accepted the less super area i.e. 22,700 Sq. Ft. despite of the fact that UBPL already committed a super area of 39,662** Sq. Ft. to the buyer. Therefore, it indicate that that said settlement agreement was entered for keeping the assets (right in Market Square Project) beyond the reach of Financial creditors.



24. As can be seen from the aforementioned, the Transaction Audit Report has not dealt with the terms of the Compromise/Settlement Agreement while taking the view that the Settlement Agreement dated 18.01.2018 entered into by the Suspended Board of Directors of CD with Respondent No.1 amounted to an undervalued transaction. It is observed that both the application and the Transaction Audit Report are quite sketchy.

25. We may also not be oblivious to the fact that the compromise filed before Additional District Judge Gurgaon entailed the counter liability of the CD to invest Rs.36 Crores in the project. The 43% of the share in the project was consideration qua the investment of Rs.36 Crores. At the cost of repetition Para 11 of the application filed by the Applicant reads thus: -

*“11. Before the expiry of a period of 3 years (construction period of 30 months+ 6- month grace period), i.c. on 17.04.2013, and order was obtained by SPPL and the ex-directors of the Corporate Debtor herein from the Court of Ld. Additional District Judge, Gurgaon by filing 'compromise' between the Corporate Debtor herein and SPPL in relation to the Project. A copy of the order of the Ld. Additional District Judge dated 17.04.2013 us annexed hereto and marked as **Annexure-4**. The said compromise Order dated 17.04.2013, inter alia, provides:*

- a. That the Corporate Debtor shall develop and construct 'A' class commercial building on the Subject Land with its own sources incurring not less that Rs. 36 crores thereon.*
- b. That a non-refundable deposit of Rs. 8 crores as mentioned in the Collaboration Agreement shall stand reduced to Rs. 7.35 crores, which had already been paid in full.*
- c. That SPPL shall be entitled to 76,040 square feet area, i.e. 57% of the developed area (as against 50% in the*



Collaboration Agreement) while the Corporate Debtor shall be entitled to 43% of the developed area.

- d. That the Corporate Debtor shall obtain sanction of layout plans, necessary clearances, NoCs, approvals and sanctions etc. for construction and completion of building.*
- e. That the Corporate Debtor herein shall complete the construction of the building within a period of 30 months from the date of approval of building plans or the handing over of the possession of land, whichever is later, with a grace period of 90 days.*
- f. That, if the Corporate Debtor herein does not complete the construction within the said period, it shall pay a penalty of Rs. 20 per square feet per month to SPPL on 57% of the FSI falling to the share of SPPL for the first 12 months, and Rs. 25 per square feet per month thereafter.*
- g. Both the parties, i.e. the Corporate Debtor and SPPL shall be entitled to sell the built up areas/units of their respective shares independently. However, all the proceeds received by the Corporate Debtor from time to time from the booking/allotment shall first be utilised towards the construction, development and completion of the project.*

26. In any case, indubitably, the terms of the compromise which formed part of the order of the Ld. Additional District Judge, Gurgaon, passed on 17.01.2013 were varied on 18.01.2018 i.e., during the look-back period. The transaction being liable to be reversed with reference to the point of time at which the same took place and the same being covered by Section 45 to 49 of IBC, 2016 are different aspects. Nevertheless, ex-facie the transaction appears to be undervalued. The facts which need to be verified inter alia, are how



much amount out of Rs.36 Crores could be invested by the CD, whether 75 units qua the project had been sold or not, whether the CD received Rs.25 Crores from the allottees qua the project and whether the amount was credited to the accounts of the CD and whether an area of 39,664 Sq. Ft. out of the project could be allotted by the CD. The RP was expected to be satisfied with such factual propositions before filing the application. We also expected the RP to arrive at the definite area qua the property/project to be restituted to the CD and the specific amount to be paid by the Respondents to the CD as a result of the transaction being found as undervalued. The expected exercise has not been done in the matter at the end of the RP. In the wake, we consider it appropriate to appoint Mrs. Rashmi Chopra (Mob. No. 9810311218) Standing Counsel for Delhi High Court as Court Commissioner to examine the entire affairs qua the 'Market Square' Commercial project since 10.03.2010, verify the records of CD in custody of RP with reference to the project including the balance sheet to check the amount spent/invested by the CD qua the 'Market Square' Commercial Project since 27.12.2010. The Court Commissioner would specifically verify and ascertain the list of the buyers/allottees qua the said project and the payment received from them by the CD in its books/account as consideration of allotment for the units allotted to them (if any). The Court Commissioner would also find out the present status of the 'Market Square' Commercial project. With reference to aforementioned examination/verification and such other steps/scrutiny which the Court Commissioner deems appropriate to take/perform, a report shall be submitted to the RP within 4 weeks from today. The RP shall extend all requisite logistic/clerical/professional/expert/ any other support needed



by the Court Commissioner to perform her duties. The Auditor, who conducted the transaction audit, is also directed to assist the Court Commissioner in this respect. The local district administration is also directed to extend all such support to the Court Commissioner, as needed by her to discharge her duties effectively.

27. In the report to be given by the Court Commissioner to this Adjudicating Authority, she will specifically indicate the area qua 'Market Square' Commercial Project required to be restituted by the Respondent No.1 to the assets of CD and the amount of money to be refunded by Respondents Nos.1 and 3 to 4 to the accounts CD maintained by RP.

28. The consolidated fees of the Court Commissioner quantified as Rs.2 lacs would be borne equally by the Applicant and the Respondent No.1 and would be paid forthwith (in advance). All other (contingent) expenditure to be incurred by the Court Commissioner shall be borne by the RP and would be treated as the cost of CIRP.

29. Till the acceptance of the report of the Court Commissioner by this Adjudicating Authority the parties shall maintain status quo qua the 'Market Square' Commercial Project.

Both the CAs 891/2019 and 253/2019 stand disposed of accordingly.

RP/Court Officer shall make a copy of this order available to the Court Commissioner (ibid) forthwith.

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

**Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)**