IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 1049 OF 2015

Lakshachandi Housing and
Infrastructure Private Limited ..... Petitioner
VERSUS
Gigaplex Developers Private
Limited ..... Respondent

Mr.Kalpesh Joshi for petitioner.

Mr.Shrikant Doijode, a/w. Ms.Rashne Mulla-Feroze, i/b. Doijode Associates for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 2ND FEBRUARY 2018

P.C.

1 This petition is seeking winding up of company Gigaplex Developers Private Limited (the company) on the ground that it is indebted to petitioner, is unable to discharge its debt and is commercially insolvent.

2 On 13th February 2017, when the petition was taken up for admission, this Court was pleased to pass the following order :-

> *1 By this petition, the petitioner seeks winding up of the respondent company on the ground that the respondent is unable to pay its debts.*
>
> *2 The petitioner had entered into a Term Sheet dated 15th February,2014 with the respondent by which the petitioner had agreed and rendered financial assistance worth Rs.2,50,00,000/- in the form of 3 months Inter-Corporate Deposit to the respondent, repayable with interest at the rate of 12% per annum. The said Term Sheet was extended from time to time. It*

is the case of the petitioner that though the respondent paid interest on the part of the period, the respondent did not return the said principal amount of Rs.2,50,00,000/- and the balance payment of interest. The cheques issued by the respondent in the sum of Rs.2,50,00,000/- were dishonoured on 19th January,2015 and were returned with remarks 'funds insufficient'.

3 The petitioner vide its letter dated 21st January,2015 called upon the respondent to issue a demand draft for the said sum. There was no response to the said letter. The petitioner thereafter issued a statutory notice on 31st January, 2015 calling upon the respondent to pay the said amount of Rs.2,50,00,000/- with interest thereon. The petitioner issued another statutory notice on 10th April, 2015. Neither there was any payment pursuant to those statutory notices nor any response thereto. The petitioner filed this company petition inter alia praying for winding up of the respondent.

4 Mr.Joshi, learned counsel appearing for the petitioner invited my attention to the Term Sheet and the correspondence referred to aforesaid which are annexed to the company petition and submits that since the respondent admittedly did not return the amount payable under those Term Sheets, the respondent is unable to
pay its debts and is liable to be wound up.

5 Mr.Doijode, learned counsel appearing for the respondent on the other hand submits that the company petition is not maintainable on the ground that there is no debt payable by the respondent to the petitioner. He submits that the respondent is entitled to sell the free sale component area arising out of a slum rehabilitation scheme on the portion admeasuring 30591.30 sq.mtrs. and has obtained a loan from HDFC. He submits that an amount of Rs.174.75 crores is outstanding in respect of the said development. It is submitted by the learned counsel that the respondent has already utilized Rs.630 crores in the said project by financial construction of the rehab scheme on the property for consideration. Learned counsel tenders photographs of the ongoing construction for the perusal of this court and would submit that no sooner the construction of the rehab portion of the buildings is completed, the respondent would be able to commence the construction of the free sale component area. He invited my attention to the letter dated 18th February,2014 *addressed by the respondent to the petitioner and would submit that the respondent while taking financial assistance from the petitioner had given an authority to the petitioner to transfer/sell the residential flat bearing nos.31, 32 and 33 admeasuring about 1390 sq.ft., 1450 sq.ft. and 1700 sq.ft. respectively in Tower 'B' Wing in Kingstone, Andheri, Mumbai 400 069 and to recover the principal amount of Rs.2,50,000/- plus interest thereon by sale of those flats. He submits that since the petitioner has not sold those three flats which were liable to be sold by the petitioner, the petitioner cannot file this winding up petition.*

6 Learned counsel for the respondent also invited my attention to the letter dated 17th August,2016 addressed by the petitioner through its advocates to Havemore Realty Private Limited who is carrying on construction jointly with the respondent claiming rights in those three flats and calling upon the said Havemore Realty Private Limited to take note of the rights, claims and charge of the petitioner in respect of those three flats. He submits that the petitioner having exercised its right under the said authority letter, cannot pursue this winding up petition simultaneously. He submits that the borrowings taken from HDFC by the respondent are secured by mortgaging development rights in favour of the said bank by the respondent.

7 Mr.Joshi, learned counsel for the petitioner in rejoinder submits that admittedly those three flats are not constructed till date and thus the petitioner is not bound to wait for completion of the construction of the rehab portion first followed by completion of construction of free sale component area and thereafter to sell these flats.

8 A perusal of the record clearly indicates that it is not in dispute that the petitioner had given financial assistance to the respondent in the sum of Rs.2.5 crores repayable by the respondent within the time prescribed in the term-sheet with interest. Though the respondent paid interest on the said amount for some period, has failed to pay the principal amount and balance part of interest. A cheque for Rs.2.50 crores issued by the respondent towards repayment to the petitioner is dishonoured with the remarks 'funds insufficient'. The respondent does not dispute that the transaction between the parties. The main defence raised by the respondent in the present proceedings is that the petitioner ought to have exercised its right to sell those *three flats and to realize the balance amount and could not have filed the company petition.*

9 A perusal of the record clearly indicates that it is an admitted position that the respondent has borrowed about 175 crores from HDFC Limited. It is the case of the respondent itself in the affidavit in reply that the said borrowers are secured by a mortgage of the development rights and the notionally divided free sale out of the said property. A sum of Rs.174.75 crores is still outstanding in respect of the said borrowings according to the averments made in the affidavit in reply. It is also an admitted position that the said three flats are not even constructed till date. It is the case of the respondent that rehab portion of the building will be first completed and thereafter the construction of the free sale component flats would commence and thereafter the petitioner can sale those flats. In my view when the respondent had alleged to have offered those security to the petitioner, neither at that stage these flats were ready nor the said are ready till date. In my prima facie view, those three flats thus cannot be considered as sufficient security in favour of the petitioner for realization of its dues against the respondent. The respondent is heavily indebted. The development rights are already mortgaged in favour of the HDFC Bank. I am therefore of the view that the petitioner even if proposes to sell those three flats, will not be able to sell those three flats for realizing its dues against the respondent as on today.

10 Though the matter was adjourned to enable the respondent to consider whether respondent could deposit even part of amount claimed by the petitioner, the learned counsel for the respondent states that his client will not be able to deposit any amount.

11 In my prima facie view, the respondent is unable to pay its debts. There is no substance in the submission of the learned counsel for the respondent that there is no debt due nor payable by the respondent to the petitioner. I, therefore, pass the following order :-

> *(a) The company petition is admitted and shall be advertised in two local newspapers viz. (1) "Free Press Journal" (in English) and (2) "Navshakti" (in Marathi) and also in (3) "Maharashtra Government Gazette". Any delay in*

publication of the advertisement in the Maharashtra Government Gazette and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959.

(b) The service of the petition under Rule 28 of the Companies (Court) Rules, 1959 shall be deemed to have been waived.

(c) Company petition is made returnable on 10th April, 2017. The petitioner shall deposit a sum of Rs.10,000/- within two weeks towards publication charges with the Prothonotary and Senior Master under the intimation to the Company Registrar, failing which the company petition shall stand dismissed for non-prosecution without further reference to the court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

3 When the petition was listed on 25th January 2018, after the petition was heard for some time, the Court asked the counsel for respondent as to whether respondent would like to deposit the amount with the Prothonotary and Senior Master, High Court, Bombay and parties could refer their disputes to arbitration and the petition was stood over to today.

Today, Shri Doijode appearing for respondent categorically stated that the suggestion from the Court is not acceptable to respondent because respondent has already lost almost Rs.650 crores in the project and the entire project itself has been physically taken over by HDFC Ltd. after admission of the petition. If one considers Paragraph 5 of the order of admission, the stand of respondent was, once the rehab portion was completed, respondent would start constructing free sale components and in the free sale components, company would be entitled to sell and recover the amount payable to petitioner. All these points were heard and rejected by this Court while admitting the petition. It has to be noted that even the cheques given by the company were dishonoured on presentation due to insufficient funds. It is also stated that the company has already spent in excess of Rs. 630 crores and due to company's inability to pay, HDFC Ltd has taken over the entire project. Therefore, the situation as it stands is the company can neither sell those flats in free sale area nor is in a position to return the amount of Rs.2.5 crores together with interest which, admittedly, is payable to petitioner by respondent company.

4 In the circumstances, having considered the petition, documents annexed thereto and having heard both the counsel, I am also satisfied that the company is unable to discharge its debts, is commercially insolvent and requires to be wound up. Notice under Rule 28 has been waived. Petitioner has filed an affidavit of one Dipesh Ghadi affirmed on 22nd January 2018 confirming advertising the petition in Free Press Journal and Navshakti on 29th March 2017 and in the Maharashtra Government Gazette for the period April 20-16, 2017 at Sr. No. M-1719.

5 In the circumstances, petition is allowed in terms of prayer clauses (a) and (b) which read as under :

> *(a) that this Hon'ble Court be pleased to order and direct the winding up of the Respondent Company, i.e., Gigaplex Developers Private Limited under the provisions of the Companies Act, 1956.*
>
> *(b) that this Hon'ble Court be pleased to appoint Official Liquidator, Mumbai or some other fit and proper person as the Liquidator of the Respondent Company, i.e., Gigaplex Developers Private Ltd., with all powers under the provisions of Companies Act, 1956.*

6 Petitioner's advocate to forward an authenticated copy of this order to official liquidator who shall take further steps without waiting for any notification.

7 Company petition accordingly disposed.

(K.R. SHRIRAM, J.)