

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 155 of 2018**

(Arising out of Order dated 12<sup>th</sup> March, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi, in CP (IB)-608(ND)/2017)

**IN THE MATTER OF:**

**Mrs. Mamatha**

**...Appellant**

**Vs**

**AMB Infrabuild Pvt. Ltd. & Ors.**

**....Respondents**

**Present:**

**For Appellant: Mr. Chayan Sarkar, Advocate.**

**For Respondents: Mr. Neeraj Jain, Mr. Gautam Singh, Mr. Anupam Mishra and Mr. Sunil Rawat, Advocates for R-1.**

**Mr. Joel and Mr. Prateek Yadav, Advocates for R-2.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant, allottee of Real Estate, filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) for initiation of 'Corporate Insolvency Resolution Process' jointly against 1<sup>st</sup> and 2<sup>nd</sup> Respondents- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi, rejected the application by impugned order dated 12<sup>th</sup> March, 2018 on the ground that the application under Section 7 of the 'I&B Code' cannot be filed jointly against the two 'Corporate Debtors', with following observations:

*“9. Submissions made by the Ld. Counsel appearing for Corporate Debtor No.1 merit consideration. The present petition suffers from several infirmities. The payment is alleged to be made to Corporate Debtor No.2 while Insolvency Resolution Process is sought to initiated against Corporate Debtor No.1 and 2. There is no provision under the Code where a petition for Insolvency Resolution Process can be initiated against two Corporate Debtors who have collaborated for a Joint Venture. Even otherwise, it is seen that this petition does not adhere to the format required under the Code. The financial creditor is bound to name the Insolvency Resolution Professional which they have not done in the present petition. This is a clear infirmity of the requirements of Clause 3 of Sub Section 3 of Section 7 of the Code.”*

2. The question arises for consideration in this appeal is whether the application under Section 9 is jointly maintainable against 1<sup>st</sup> and 2<sup>nd</sup> Respondents (‘Corporate Debtors’) or not?

3. While according to the Appellant, it is maintainable in the facts and circumstances of the case, according to the Respondents, it is not maintainable as no joint petition can be filed against two ‘Corporate Debtors’ and as per Memorandum of Understanding dated 20<sup>th</sup> June, 2014

relied upon by the Appellant, one of them the 'Corporate Debtor' (No.1) is not a party.

4. For determination of the issue, it is desirable to notice the relevant fact as discussed below:

5. 'AMB Infrabuild Pvt. Ltd.'- (1<sup>st</sup> Respondent), a Company registered under the Companies Act, 1956 and 'Earth Galleria Pvt. Ltd.'- (2<sup>nd</sup> Respondent), another Company registered under the Companies Act, 1956, entered into 'Collaboration Agreement' on 3<sup>rd</sup> May, 2013, for development of a piece of land as mentioned therein, 'AMB Infrabuild Pvt. Ltd.'- (1<sup>st</sup> Respondent) herein called as 'Owner' of the land and Earth Galleria Pvt. Ltd.'- (2<sup>nd</sup> Respondent) as 'Developer', relevant portion of which reads as follows:

***"COLLABORATION AGREEMENT"***

*THIS AGREEMENT OF COLLABORATION is executed at  
Gurgaon on this 03<sup>rd</sup> day of May, 2013*

*BETWEEN*

*AMB Infrabuild Pvt. Ltd., having its office at D-62, Defence  
Colony, Ground Floor, New Delhi through its Director Mr.  
Manoj Sethi duly empowered to enter into and execute this  
agreement vide resolution dated 30-04-2013 passed by  
Board of Directors of the said company (hereinafter called  
the "OWNER" which expression unless repugnant or  
opposed to the context thereof includes its successors,*

*representatives, nominees and permitted assigns etc.) the party of the FIRST PART.*

*AND*

*Earth Galleria Private Limited., a company incorporated under the Companies Act, 1956 having its office at 26, First Floor, Pusa Road, New Delhi- 110005 through its Director Shri Avdesh Kumar Goel who has been empowered to execute this agreement vide Board Resolution dated 23-03-2013 (hereinafter called the "DEVELOPER" which expression unless repugnant or opposed in the context thereof includes its successors, representatives, nominees and permitted assigns etc.) the party of the SECOND PART.*

*Both the OWNER and the DEVELOPER are collectively referred to as the "Parties" and individually referred to as the "Party".*

*xxx*

*xxx*

*xxx*

*AND WHEREAS the DEVELOPER after due diligence and verifying the Documents/ revenue records including the above letter of intent dated 01.12.2012. The owner has transfer their rights to Developer, to undertake planning, designing, construction, development, selling and marketing of the Project on the said Land with its own resources and to collect and receive sales consideration as per the terms of this agreement and utilize the same in manner stated in this contract. The DEVELOPER has further agreed to underyake*

*the development of the Said Land on the terms and conditions mentioned in this contract. Accordingly, the instant contract has been executed between the parties in respect of said Land. The DEVELOPER has received to undertake the development of a Commercial Complex on collaboration basis on the said land at DEVELOPER'S expense and to share the saleable area as mentioned hereunder amongst themselves (hereinafter referred to as "said Colony/Complex/Project").*

*NOW THEREFORE, THESE PRESENTS WITNESS and it is hereby referred declared and covenanted and recorded by and between the parties as under:-*

- 1. That the subject matter of this collaboration agreement between the OWNER and the DEVELOPER is the said land admeasuring 83 Kanals 10 Marlas (10.4375 acres) situated in revenue estate of Hayatpur, Tehsil & District Gurgaon for utilizing the same for construction and development of the same as a Commercial Complex by the DEVELOPER. The aforesaid letter of intent has been granted by Town And Country Planning Department, Haryana, Chandigarh pertaining to land measuring 83 Kanals 10 Marlas referred to above.*

xxx

xxx

xxx

9. That the OWNER through this agreement shall devolve all necessary rights and entitlements on the Developer to build upon the said land proposed Commercial Complex in accordance with the terms of this agreement and to own as property belonging to the DEVELOPER or dispose of the whole of its share of the built up area of the said Commercial Complex as provided herein with proportionate share in the land underneath the said Commercial Complex as also the right to use the common areas and common facilities (hereinafter called the DEVELOPER'S ALLOCATION). The Owner hereby agrees and acknowledges that such power of attorneys has been granted for consideration, the receipt and sufficiency of which is acknowledged hereby, and for all intents and purposes shall be irrevocable so long as DEVELOPER abides by covenants incorporated in this contract and fulfill its obligations, it is further admitted by the OWNER that the attorney referred to above has been executed/registered in

*accordance with Section 202 of the Indian Contract Act, 1872. That the irrevocable registered general power of attorney given to the DEVELOPER for obtaining sanction of site plans and for obtaining all such approvals as may be required to be obtained from any authority for the purpose of raising construction and sale of areas forming part of its allocation, including right to execute application form, Space- Buyer Agreement, sale deed/ conveyance deed as other document as enumerated in this agreement. The Power of Attorney shall also authorize the DEVELOPER to discharge its part of the obligations under this collaboration agreement and to let out/ sell the constructed/ unconstructed and/or developed/ undeveloped portions of the Project. The Power of Attorney shall also authorize, the DEVELOPER to exercise all rights under this Collaboration Agreement.-*

*10. That it has been mutually agreed between the parties that the DEVELOPER deed(s) in respect of area forming part of the project in phases and shall deliver*

*physical possession thereof in favour of prospective purchasers only after offering/ delivering physical possession of the allocation of the OWNER. It has further been agreed between the parties that in case the DEVELOPER proceeds to undertake the implementation of the project in phases, in that event the DEVELOPER shall be entitled to deliver physical possession and/or to execute and register sale deed(s) of the executed portions of the project after offering/ delivering physical possession of the proportionate allocation of the OWNER in the executed portion of the project.*

*xxx*

*xxx*

*xxx*

*55. Developer shall be entitled to advertise the said Project in electronic and printed media as well as by distributing pamphlets, brochures, publishing advertisement in newspapers, magazines etc. by putting sign-boards, neon-signs on the said Project, and other places, in any manner as Developer may deem fit and proper and thus it shall be entitled to create*



*awareness about the Commercial Project and to invite buyers, customers and brokers to the site. The marketing/advertisement costs shall be borne by the Developer. It is further agreed that all the advertisements got published by the DEVELOPER for the project specifically state that the project is being developed by the DEVELOPER as a joint venture project within the OWNER. The name of the OWNER shall be displayed in the advertisement by a font not less than half the size of the name of DEVELOPER mentioned in the advertisement referred to above. The OWNER shall not be entitled to undertake advertisements in any form for example printed or electronic or mobile media. The DEVELOPER shall be bound to ensure it shall not proceed to infringe the conditions of licence or any rule, bye law or directive of any statutory authority.”*

6. Thereafter, a Memorandum of Understanding was reached on 20<sup>th</sup> June, 2014 between 'Earth Infrastructure Ltd.'- (Developer) and the Appellant- Mrs. Mamtha in respect to booking of CINEPLEX (1 Screen) for which a sale consideration of Rs. 3,00,00,000/- (Rupees Three Crores Only)

and advance of Rs. 5,00,000/- (Rupees Five Lakh Only) was paid in terms of the said agreement, relevant of which reads as follows:-



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### EARTH SKYGATE MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is made at New Delhi on 20<sup>th</sup> day of JUNE 2014

BETWEEN

Earth Infrastructure Ltd., a Company registered under the Companies Act, 1956 having its Registered office at 26, First Floor, Pusa Road, Karol Bagh, New Delhi - 110005 through its Authorized Signatory, Mr. \_\_\_\_\_ (hereinafter referred to as the "Company" of the First Part).

AND

i. Mr./Mrs./Ms MAMTHA

S/D/W of MR. SUDARSHAN

R/o OLD #26, NEW #63, EAST ANJANAYA TEMPLE ROAD,  
NEXT TO YOGA APT., BASAVANA GUDI, BANGALORE, KARNATAKA -  
560004

ii. Mr./Mrs./Ms \_\_\_\_\_

S/D/W of \_\_\_\_\_

R/o \_\_\_\_\_

*Mamatha*

*N/A*



*T.C*

Regd. Office: 6, Pusa Road, 3<sup>rd</sup> Floor, Karol Bagh, New Delhi-110005  
Tel.: 011-41107050

E-mail: info@earthinfra.com | www.earthinfra.com



An Earth Infrastructure Enterprise

(hereinafter jointly/severally referred to as the "Intending Allottee (s)" of the Second Part).

The expressions Company and Intending Allottee(s) shall unless repugnant to the context or meaning thereof, be deemed to include their respective heirs, executors, administrators, legal representatives, successors and permitted assigns.

WHEREAS the Company has requisite rights of development/construction/marketing/selling of the entire project "Earth Skygate" (hereinafter referred to as the "Complex"), comprising Commercial Space/Bank Space/Restaurant Space/Anchor Store/Multiplex under arrangement with its subsidiary Company, on a piece of land measuring approximately 83 Kanals and 10 Marlas situated at sector- 88, Tehsil and District Gurgaon - Manesar Urban Complex, Haryana (Hereinafter referred to as "land").

AND WHEREAS the intending Allottee(s) is interested in booking of CINEPLEX (1 SCREEN)

(Commercial Space/Bank Space/Restaurant Space/Anchor Store/Multiplex) (Hereinafter referred to as the "Unit") in the said complex.

AND WHEREAS the Company, relying on the assurances, commitments, confirmations and representations made by the Intending Allottee(s) to faithfully abide by all the terms, conditions and stipulations as laid down hereinafter, has agreed to accept the Intending Allottee's application for provisional allotment of the Unit.

AND WHEREAS the parties are willing to enter into this MOU on terms and conditions as contained in this MOU.

Wherein the Intending Allottee(s) is a female, the expression 'he', 'him', 'himself' etc. in this MOU shall be read and construed as 'she', 'her', 'herself' etc, these expression shall be modified and read suitable whenever the Intending Allottee is a joint stock Company, Body Corporate, Firm, LLP or any.

NOW THIS MOU witnesses as follows:-

1. THE AREA

That the Intending Allottee(s) hereby applying for the provisional allotment of a Unit tentatively admeasuring 4,000 sq. ft. on the THIRD floor in the Complex "Earth Skygate", for sale consideration of

Rs. 3,00,00,000/-

Rupees THREE CRORES ONLY

All other applicable charges, service tax along with interest if any, any other taxes etc. will be paid extra over and above the above said sale consideration of the Unit.

*Mannathan*



*T.C*

## 2. UNIT SALE CONSIDERATION

That the Intending Allottee(s) has opted for the SUPER FLEXI PAYMENT PLAN and paid an amount of  
Rs. 5,00,000/-

(Rupees FIVE LAKH ONLY)

As per Annexure II attached hereto, simultaneous with the execution of this MOU, the receipt of which the Company hereby acknowledges. The Intending Allottee(s) hereby acknowledges that this MOU shall be enforceable only after realization of all the cheques issued by the Intending Allottee(s) towards booking of the Unit.

3. The Intending Allottee(s) shall make the balance payment as per the payment plan opted.

## 4. MISCELLANEOUS

- I. The Intending Allottee(s) shall be entitled to get the conveyance deed executed in his own name or in the name of any other person so nominated by him. All the expenses with respect to the execution of the conveyance deed, including the expenses on stamp duty, registration fees, legal/advocate fees, etc., shall be borne by the Intending Allottee(s) exclusively.
- II. The Intending Allottee(s) hereby confirms that the Intending Allottee(s) is booking the Unit after having complete reading and understanding all the terms and conditions contained in this MOU and the Application Form signed by him. The terms and conditions mentioned in the Application Form shall form an integral part of this MOU for the purpose of purchase/booking of the Unit. The Applicant acknowledges that the Intending Allottee(s) has clearly understood his rights, duties, responsibilities, obligations and limitations under each and every clause of this MOU and the Application Form.
- III. The failure of either party to insist upon strict performance of any provision of this MOU or to exercise any option, right or remedies, contained in this MOU shall not constitute a waiver or a relinquishment for the future application of such provision, option, right or remedy. No waiver by either party of any provision of this MOU shall be deemed to have been made unless expressed in writing and signed by such party.
- IV. If any provision of this MOU and the application form thereof, stands invalid or unenforceable to any extent to any person or circumstance, then the remainder of this MOU and the Application form, and application of such provision to the persons or circumstances other than those to which it is held invalid or unenforceable, shall be effective thereby and each provision of this MOU and the Application form shall be valid and enforceable to the fullest extent permitted by law. Any invalid or unenforceable

Mamatha

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T.C.



7. Details of consideration amount and payment plan has been shown in Annexure-I & II of the aforesaid.

8. The Appellant has also enclosed approval of building plans of Commercial Colony given by Directorate of Town & Country Planning, Haryana to 'AMB Infrabuild Pvt. Ltd.'- (1<sup>st</sup> Respondent) in respect to the said land on 3<sup>rd</sup> April, 2014.

9. The Appellant has also enclosed a Memorandum of Understanding reached between the Appellant and the Respondents i.e. 'M/s. Earth Galleria Pvt. Ltd.' and 'M/s. AMB Infrabuild Pvt. Ltd.' dated 6<sup>th</sup> February, 2016. In the said Memorandum of Understanding, the 'Developer' and the 'Land Owner' has been jointly referred to as the "Company", relevant portion of which reads as follows:

**"EARTH SKY GATE"** 100

**MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding (hereinafter referred to as the 'MOU') is made and executed on the Feb 06, 2016 at New Delhi.

**BY AND BETWEEN:**

M/s Earth Galleria Pvt. Ltd, a Company registered under the Companies Act, 1956 having its Registered Office at 26, First Floor, Pusa Road, Karol Bagh, New Delhi-110005 through its Authorized Signatory, Mr. Naveen Goel, duly authorized vide Board Resolution dated 12-Jan-2015 hereinafter referred to as 'Developer' of the ONE PART;

**AND**

M/s AMB Infrabuild (P) Ltd., a Company registered under the Companies Act, 1956 having its Registered Office at D-62, Ground Floor, Defence Colony, New Delhi-110024, represented through Mr. Sanjeev Khawasia authorized Signatory appointed by Developer who is duly constituted attorney by the Land Owner (hereinafter referred to as the "Land Owner")

**AND**

Name	Relationship	Relative Name	R/o / (Address)
Mrs. Mamatha	W/o	J Sudarshan	26, East Anjanaya Tempal Road, Next to Yoga Appt, Basavanagudi, Bangalore-560004, Karnataka, India

(Hereinafter severally/jointly referred to as the "Allottee") of the OTHER PART;

'Developer', 'Land Owner' and 'Allottee' are hereafter individually referred to as the 'Party' and collectively referred to as the 'Parties'. The Developer and Land Owner are jointly referred to as the "Company". The expression 'Developer', 'Land Owner' and 'Allottee' shall, unless repugnant to the meaning or context herein, be deemed to mean and include its authorized representatives, nominees, administrators, successors-in-interest, executors, permitted assigns, etc.);

Earth Galleria Pvt. Ltd.  
20/4/16  
DEVELOPER  
Authorized Signatory

For AMB Infrabuild Pvt. Ltd.  
LAND OWNER  
Signatory

Mamatha  
ALLOTTEE(S)

## 1. DETAILS OF THE COMMERCIAL UNIT:

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(A) Said Commercial Unit TYPE - MULTIPLEX  
(Hereinafter referred to as the "Unit")

(B) UNIT AREA- That the Allottee(s) has intended for the allotment of bare shell Unit, after getting duly satisfied with respect to the details of the Unit as detailed hereunder:

Unit No. AUDI -01 Unit Area 4,000.00 sq. ft. ( 371.61 sq. meter) on the 2 Floor in Block D , in the Project named "Earth Sky Gate".

## 2. UNIT SALE CONSIDERATION

(A) That the Unit Sale Consideration for the Allotted said Unit to the Allottee is Rs 33880000.00/- (Rupees: Three Crore Thirty Eight Lakh Eighty Thousand ). The breakup of the same in Basic Sale Consideration, PLC, and Other Charges, etc. is attached as per Annexure A. All governmental charges, taxes, levies, cess, service tax, VAT, TDS etc. as applicable, shall be paid extra over and above the aforesaid Sale Consideration of the Unit, by the Allottee(s) as and when demanded by the Developer.

(B) The above said Unit Sale Consideration may change if there is change in the super area or increase/decrease on the basis of variation in calculation of actual super area.

(C) That the Allottee(s) has opted for the Flexi Payment Plan (Flexi) and paid an amount of Rs. 86,78,045/- (Rupees: Eighty Six Lakh Seventy Eight Thousand Forty Five Only) towards the Basic Sales Consideration and Rs. 0/- towards some of the Other Charges as per the 'Annexure B.' attached hereto, the receipt of which the Company hereby acknowledges.

(D) The Allottee(s) has agreed to pay the balance sale consideration as per the opted and agreed schedule of balance payments as mentioned in the Annexure "C".

(E) The Allottee(s) also undertakes to pay some of the installments through Post Dated Cheques (PDCs). The Details of the PDC's are annexed in the Annexure "B".

(F) The Allottee(s) shall make the balance payment on or before its due date as per the schedule of balance payments.

For Earth Galleria Pvt. Ltd.  
DEVELOPER  
Authorised Signatory

For AMB Infrabuild Pvt. Ltd.

Authorised Signatory  
LAND OWNER

Mamatha  
ALLOTTEE(S)

10. From the aforesaid facts, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 'Developer' and the 'Land Owner' for the purpose of the project has referred to them as the "Company" and the Appellant has been shown as the "Allottee".

11. The 'Collaboration Agreement' dated 3<sup>rd</sup> May, 2013 reached between the 'Owner of the Land'- 'AMB Infrabuild Pvt. Ltd.' and the 'Developer'- 'Earth Galleria Pvt. Ltd.' shows that the 'Developer' will sell the flats to the extent of its own shares and the 'Land Owner' will sell the developed portion of its own shares. The 'Land Owner' have agreed to make it as a 'Joint Venture Project' and treated the 'Joint Venture Project' for all purpose as evident from Clause 55 of the 'Collaboration Agreement' dated 3<sup>rd</sup> May, 2013 read with Memorandum of Understanding reached between three allottees, the Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 6<sup>th</sup> February, 2016.

12. The 'Developer'- 'M/s. Earth Galleria Pvt. Ltd.' having been empowered by 'M/s. AMB Infrabuild Pvt. Ltd.'- ('Land Owner') to advertise the project and for marketing the developed property as a 'Joint Venture Project', in terms with the said 'Collaboration Agreement' on behalf of the joint venture, if the Memorandum of Understanding dated 20<sup>th</sup> June, 2014 has been reached between the 'Earth Infrastructure Ltd.' and the Appellant- Mrs. Mamtha, the 2<sup>nd</sup> Respondent cannot take a plea that it is not a signatory to the Memorandum of Understanding dated 20<sup>th</sup> June, 2014, the 2<sup>nd</sup> Respondent being represented by 'Earth Infrastructure Ltd.' pursuant to the 'Collaboration Agreement'.

13. The Adjudicating Authority has failed to take into consideration the aforesaid facts and wrongly held that the 'Corporate Insolvency Resolution Process' cannot be initiated against the two 'Corporate Debtors'.

14. If the two 'Corporate Debtors' collaborate and form an independent corporate unit entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one or other.

15. In such case, both the 'Developer' and the 'Land Owner', if they are corporate should be jointly treated to be one for the purpose of initiation of 'Corporate Insolvency Resolution Process' against them.

16. The Adjudicating Authority having failed to notice the same, we set aside the impugned order dated 12<sup>th</sup> March, 2018 and remit the case to the Adjudicating Authority, New Delhi Bench, for admission of the case if record is complete, after notice to the parties.

17. Before admission of the case, it will be open to the Respondents to settle the matter and in such case, the Appellant may withdraw the case. The Appeal is allowed with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansilal Bhat]  
Member (Judicial)

NEW DELHI

30<sup>th</sup> November, 2018

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**Company Appeal (AT) (Insolvency) No. 155 of 2018**