

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 918 of 2022

(Arising out of Order dated 06.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in IA 2026/2021 and IA 2378/2021 in Company Petition No. (IB) No.197(PB)/2021)

IN THE MATTER OF:

Wave Megacity Centre Private Limited

.... Appellant

Vs

Rakesh Taneja & Ors.

.... Respondents

Present:

For Appellant:

Mr. ANS Nadkarni, Sr. Advocate, Mr. Hardeep Sachdeva, Mr. Sameer Sodhi, Mr. Abhyudai Singh, Ms. Kanika Singhal, Mr. Mukund, Mr. Dhruv Wadhwa, Ms. Deepty Arya, Mr. S S Rebello, Ms. Arzu Paul, Ms. Manisha Gupta, Mr. Rahul Singh, Mr. Nishant Shokeen, Ms. Sumita Singh and Mr. Altamash Rashid, Advocates

For Respondents:

Mr. Sanjiv Sen, Sr. Advocate with Mr. Sourav Roy, Mr. Kaushal Sharma, Mr. Prabudh Singh, Advocates for Noida Authority.

Mr. Ratnesh Sharma, Mr. Rahul Raman, Advocates for R-16,31,32.

Mr. ML Lahoty, Sr. Advocate with Dania Nayyar and Mr. Bhanu Tejaswi, Advocates for Homebuyer Association.

Mr. Krishna Mohan K, Mr. Dania Nayyar, Advocates for Wave Homebuyers Association.

Mr. Rakesh Taneja, Advocate

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Corporate Debtor - Wave Megacity Centre Private Limited ("**Wave Megacity**") has been filed challenging the order dated 06.06.2022 passed by National Company Law Tribunal, New Delhi, Principal Bench allowing IA No.2026 of 2021 and IA No.2378 of 2021 filed under Section 65 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") and dismissing Company Petition No. (IB) No.197(PB)/2021 filed by Appellant under Section 10 of the Code.

2. Brief facts of the case necessary to be noted for deciding this Appeal are:

- (i) A Lease Deed dated 02.09.2011 was signed between Noida Authority and Wave Megacity Ltd. in respect of Plot No.CC-001, admeasuring 618,952.75 sq. mtrs. situated at Sector 25A and Sector 32, NOIDA for a period of 90 years. Wave Megacity paid payment of 10% of the total consideration, i.e., Rs.662.29 Crores. Wave Megacity was to pay the balance premium of 90% in staggered manner as indicated in the Lease Deed. Wave Megacity could not complete the construction of the Project and failed to repay the remaining 90% of the premium amount.
- (ii) After the allotment, the Appellant launched multiple Residential and commercial Projects on the Project land in 2011-12 in the parent name "Wave Mega City Centre"

including various residential/ commercial Projects like Amore (Land Parcel 2B); Eminence (Land Parcel 2C); Trucia, Irenia & Vasilia (Land Parcel 2D). Commercial Projects included High Street Shopping Complex (Land Parcel 3D, 3F & 3H); Livork Studios (Land Parcel 3E); Elegantia (Land Parcel 3G); Edenia (Land Parcel 3J) and Metromart (Land Parcel 3L).

- (iii) The possession of the Units in the above mentioned Residential Project was promised to be handed over to the Homebuyers by 2016, for which Appellant had taken 90% consideration from majority of Homebuyers before 2016 itself. The Appellant did not complete the construction nor handed over the possession. From 2017 onwards, the Appellant stopped constructing the Project altogether.
- (iv) The State Government of Uttar Pradesh announced the Project Settlement Policy (“**PSP**”) in the year 2016 vide Government Order dated 15.12.2016 allowing developers/ builders to return Project land if it was unable to construct upon. Wave Megacity approached Noida Authority to take relief under Project Settlement Policy. Under the said Project Settlement Policy, Wave Megacity surrendered the area of 454,131.62 sq. mtrs. The remaining area of 164,821.13 sq. mtrs was allotted to Wave Megacity under certain terms and conditions. The Area of 56,400 sq. mtrs was allotted to the Wave Megacity in consideration of the various payments made until the year

2017 and the same was considered as fully paid up for premium amount by both the parties. The Area of 1,08,421.13 sq. mtrs was allotted to Wave Megacity at the prevailing rate of year 2017, i.e., Rs.1,60,000/- per sq. mtrs.

- (v) On 26.02.2020, Noida Authority called upon the Wave Megacity to make payment of Rs.2717,53,65,192/-, which included balance premium, ground rent etc. Noida Authority vide letter dated 18.03.2020 shared the calculation sheet with the Wave Megacity providing the breakup of the total amount. The Noida Authority on 17.07.2020 requested Wave Megacity to pay different sums, which included demand of Rs.32,47,09,936/- towards ground rent for 56,000 sq. mtrs of land.
- (vi) Wave Megacity challenged the notices before Principal Secretary, Infrastructure and Industrial Development, Government of Uttar Pradesh vide Appeal, dated 31.07.2020. The State Government issued an order dated 17.11.2020 directing the Noida Authority to take a decision regarding its dues. Pursuant to the letter dated 17.11.2020, fresh demand notice dated 24.12.2020 was issued, demanding an amount of Rs.2519,33,47,546/-. The demand made by Noida Authority was also challenged by means of writ petition before Allahabad High Court by Wave Megacity Centre Homebuyers Association, which petition is claimed to be still pending.

- (vii) The Corporate Debtor filed an Application under Section 10 of the Code dated 25.03.2021 praying for initiation of Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor on the ground of default on the part of the Corporate Debtor.
- (viii) On 05.04.2021, the Adjudicating Authority passed following order:

“Mr. Chaudhary, Ld. Sr. Counsel undertakes to serve the copy to the financial creditor, the association of the home buyers and other creditors and also to ROC and Income Tax Department.

List on 03.05.2021.”

- (ix) In the CP (IB) No.197(PB)/2021 filed by the Corporate Debtor, several Intervention Applications were filed including the Homebuyers and the Noida Authority, raising objection to the main Company Petition. The Adjudicating Authority vide order dated 03.05.2021 granted liberty to Intervenors to file their objections to the main Company Petition within three weeks.
- (x) An IA No.2026 of 2021 was filed by Rakesh Taneja & 32 Ors. Applicants under Section 65 of the Code praying to reject the Application filed under Section 10 of the Code. In the Application the Applicants, who were allottees of the residential/ commercial units in the Project pleaded that Petition under Section 10 has been filed fraudulently and with

malicious intent for the purpose other than for resolution of insolvency.

- (xi) Another IA No.2378 of 2021 was filed by Anshu Saran & 6 Ors., which Application was filed in pursuant to liberty granted by Adjudicating Authority by order dated 03.05.2021. The Applicants pleaded that Petition under Section 10 has been filed fraudulently and with malicious intent for the purpose other than resolution of insolvency.
- (xii) It was alleged in the above Applications that Petitioner is a big time defaulter in terms of not completing the construction of the Project and handing over possession of the same in terms of arrangement entered into with various buyers. About 90% of the amount from 2300 Homebuyers has been siphoned off by the builder and the Application has been filed to save from several different liabilities and the Application deserves to be rejected. The Corporate Debtor filed reply to the IAs to which rejoinders were also filed.
- (xiii) The Adjudicating Authority heard both the IA Nos.2026 and 2378 of 2021 and after hearing all the parties passed an order on 06.06.2021 allowing the Applications filed under Section 65 and dismissing the Company Petition No. (IB) No.197(PB)/2021.
- (xiv) The Appellant aggrieved by the impugned order has filed this Appeal.

3. We have heard Shri ANS Nadkarni, learned Senior Counsel for the Appellant; Shri Sanjiv Sen, learned Senior Counsel appearing for Noida Authority; Shri M.L. Lahoti, learned Senior Counsel appearing for Homebuyers Association. We have also heard Mr. Ratnesh Sharma, Rahul Raman, Shri Krishna Mohan and other learned Counsel for Homebuyers Association.

4. Shri Nandkarani, learned Senior Counsel for the Appellant challenging the impugned order submits that Adjudicating Authority committed error in rejecting Section 10 Application filed by the Corporate Debtor, which was filed on the ground of default of the Corporate Debtor in paying the dues of Noida Authority and the pre-conditions as mentioned in Section 10 of the Code, having been fulfilled, Section 10 Application ought to have been admitted. It is submitted that debts of the Noida Authority have been reflected in the Books of account of the Appellant and is also proved by the demand notices dated 26.02.2022 and notices issued thereafter. The Adjudicating Authority has nowhere examined the very existence of debt and default in the impugned order. The pendency of any criminal investigation against the Corporate Debtor has no bearing on Section 10 petition. Further, pendency of litigations against the Corporate Debtor in different Forums do not have any adverse effect on maintainability of Section 10 Application. The very purpose of Code is to protect and preserve the valuation/ assets of the Corporate Debtor. Only few handful of the allottees had filed objections opposing the Application,

whereas majority of the Homebuyers would have benefited from the initiation of the CIRP. Even if, any dispute is pending with regard to quantum of debt, the same is not bar for filing Section 10 Application. Under Section 10, the Adjudicating Authority is only required to examine the existence of subsisting debt and default and Application being complete, it was required to be admitted. The impugned order fails to protect the interest of the Homebuyers. Delaying the commencement of the CIRP only leads to erosion of the assets/ valuation of the Appellant. The Homebuyers interests can only be protected under the CIRP, through an appropriate Resolution Plan under the Code. It is submitted that apart from receiving amounts from the Homebuyers, the Appellant has utilized its own huge funds for carrying out the construction. From the allottees an amount of Rs.1398 crores were received, whereas the amount spent is more than Rs.3000 crores. The Corporate Debtor being unable to pay the dues of the Noida Authority has rightly approached the Adjudicating Authority for admitting Section 10 Application. The Appellant business has come to complete halt, as it is neither able to deliver possession of the units and receive funds upon delivery of possession, nor can it complete construction of the remaining unit. The Appellant having no other recourse but to seek commencement of the CIRP, has filed Section 10 Application. It is submitted that allegation of the Applicants, who had filed Application under Section 65 that initiation of Section 10 Application was with malafide intention is incorrect and false. The Application under Section 10 was filed on genuine grounds and Adjudicating Authority committed error in

rejecting the Section 10 Application. The Adjudicating Authority has come to an erroneous conclusion. The resignation of Directors of the Corporate Debtor is of no consequence to commencement of the CIRP under Section 10 of the Code. The directions issued under Section 210(2) of the Companies Act for investigation is without following due process. The Application was not barred by Section 10A of the Code, since demand notices were issued prior to 25.03.2020.

5. Shri Sanjiv Sen, learned Senior Counsel appearing for the Noida Authority refuting the submissions of the Counsel for the Appellant submits that the Application under Section 10 filed by the Appellant was barred by Section 10A of the Code. It is submitted that after order passed by the State Government under Section 41 of the Uttar Pradesh Urban Planning and Development Act, 1973 vide order dated 17.11.2020, the Noida Authority revised the payment and final demand notice was issued on 24.12.2020. The final demand notice being dated 24.12.2020, which is during the prohibited period as per Section 10A, no Application under Section 10 could have been filed by the Appellant. The proceedings under Section 10 being proceeding in rem, both Financial Creditor and Operational Creditor can object to the very admission of the Application. The Noida Authority has filed detailed objection before the Adjudicating Authority, opposing admission of Section 10 Application. Section 10 Application was filed by the Appellant prematurely since the Appellant had not exhausted the remedy available to it under Section 41 of the Uttar Pradesh Urban Planning and Development Act, 1973 and Section 12 of the

Uttar Pradesh Industrial Development Act, 1976. Default alleged by the Wave Megacity was not genuine and the same is motivated by fraud. Noida Authority is proper and necessary party to the proceeding. Noida Authority vide IA No.4270 of 2021 has raised objection to the maintainability of the Section 10 Application. Noida Authority has also filed its written submissions stating that default leading to filing of Section 10 Application, occurred during period 24.12.2020 to 11.02.2021, i.e. after issuance of the final demand notices dated 24.12.2020 and subsequent cancellation of the allotment of an area of land admeasuring 1,08,421.13 sq. mtrs. vide letter dated 11.02.2021.

6. The learned Counsel appearing for Homebuyers Association have also strenuously opposed the admission of Section 10 Application. The Learned Counsel for Homebuyers Association submit that Appellant, who had launched multiple residential/ commercial project in the year 2012 for which possession were to be handed over by 2016, failed to handover the possession. The 90% of the consideration from majority of the Homebuyers were received even before 2016. The Appellant siphoned off huge amount from the Homebuyers and utilized the monies received from the Homebuyers for other purposes. The wrongful malpractices were adopted by the Appellant. Several Projects launched by the Appellant are incomplete. Securing the interest of the allottees was the least of the priorities of the Appellant. The Application under Section 10 was filed with fraudulent intent and the purpose for filing the Application was to save the Appellant from liabilities and prosecution. The Appellant did not challenge

the final demand notice issued by Noida Authority, nor challenged the cancellation of plot by Noida Authority, which indicate their lack of interest in contesting the demand of Noida Authority, whereas the Homebuyers, who have filed writ petition in Allahabad High Court being Writ Petition No.13358 of 2021 disputing Noida Authority's exorbitant demand and cancellation of allotments and refusal to execute sub-lease with the Respondent Association. It is submitted that Application under Section 10 is barred by Section 10A. It is further submitted that malicious intent of the Appellant is evident from the fact that the Directors of the Appellant Manpreet Singh Chadha and Charanjeet Singh, who were continuing from the very inception of the Corporate Debtor, have suddenly resigned before filing Section 10 Application. It is further submitted that Manpreet Singh Chaddha, Director has been transposed as Financial Creditor, which indicate the malicious intent of the Corporate Debtor. The Section 10 Application has not been filed for any genuine resolution of the insolvency of the Corporate Debtor, rather the same was filed with intent to save the Appellant from its responsibilities, liabilities and prosecution. The Adjudicating Authority has rightly allowed the Applications filed under Section 65 of the Code by the Homebuyers and rejected the Section 10 Application, which does not warrant any interference by this Appellate Tribunal.

7. We have considered the submission of the Learned Counsel for the parties and have perused the records.

8. The challenge in the present Appeal is the order passed by the Adjudicating Authority allowing Applications filed under Section 65 and consequently rejecting Section 10 Application. The subject matter of the Appeal is thus, challenge to order allowing Section 65 Applications. We, thus, need to consider as to whether there were sufficient ground for allowing Section 65 Applications by the Adjudicating Authority.

9. As noted above, two Section 65 Applications were filed by the Homebuyers. First by Rakesh Taneja and Ors. and second by Anshu Saran and Ors. Before we come to the respective submission of the Counsel for the parties raised in this Appeal, we need to notice the pleadings made in the Applications, which have been filed under Section 65 by the Homebuyers. Pleadings in both the IAs being 2026 of 2021 and 2378 of 2021 are on the identical lines and there is specific averments in the Applications that Section 10 Application have been filed fraudulently with malicious intent for the purpose other than for resolution of insolvency or liquidation as defined in Section 65 of the Code. We may refer to the Applications filed by both the Homebuyers. Both the Homebuyers have mentioned that Homebuyers are already before various judicial fora and law enforcement authorities for redressal of their grievances and the intention of the Corporate Debtor is to escape the liability to pay and/ or face prosecution. Reference to FIR No.63 of 2021 registered by the Economic Offence Wing of Delhi Police on 13.04.2021 has also been made. Reference to orders passed by National Consumer Disputes Redressal Commission dated 20.09.2019 has also been made, which was affirmed by

the Hon'ble Supreme Court on 29.11.2019. Reference to several other complaints filed before RERA and other Forums like NCDRC have also been mentioned, which were in detail captured by the Adjudicating Authority in the impugned order. In paragraph 5.e of the IA No.2378 of 2021, several averments have been made showing misrepresentation and concealment of material by Appellant. It is useful to extract 5.e. (vii), (viii), (ix), (x), (xi) and (xii) of the IA No.2378 of 2021, which is as follows:

“vii) That the CD has the intention of attempting to escape the liability of satisfying the orders, decrees and awards against it by invoking the powers of this Hon'ble Tribunal on false, misconceived and mischievous grounds.

viii) That three of the main Directors of the CD being Manpreet Singh Chadha (DIN 00032276); Charanjeet Singh (DIN 01028271); Rinkal (DIN BRQPR739H) since 2011, 2020 and 2019 respectively have been fraudulently changed just before the filing of the instant petition u/s 10 of the IBC as would be revealed from the two copies of the MCA Company Master Data obtained (downloaded from the MCA website) in August 2020 and April 2021 respectively and enclosed herewith as Annexure I-6.

(ix) That the CD has apparently resorted to this act to assist the said directors to attempt and escape the legal obligation of satisfying a large number of judgments passed against the Developer pending satisfaction and the application u/s 10 IBC is an

attempt to escape those Judgments and jeopardise the interests of the aggrieved homebuyers besides trying to evade/delay criminal prosecution. That one of the said erstwhile founding Directors being Manpreet Singh Chadha (DIN 00032276) since 7.6.11 has been transposed as Financial Creditor in the present petition. That the applicants most respectfully submit that the said changes in the board of the Company have been made just before the filing of the captioned petition on 11Jan21 with malafide intention in so far as all the other stakeholders are concerned including the homebuyers. Furthermore, this is a fact which has been conveniently concealed by the petitioner from this Hon'ble Tribunal and warrants immediate and urgent attention as this would reflect to the malicious intent of the petitioner.

- x) That the most mischievous and fraudulent action on the part the Company is an attempt at transposition of the said founding director of the Company Manpreet Singh Chadha (DIN 00032276) since 7.6.2011 (the day the Company was incorporated), as a Financial Creditor to whom the Company allegedly owes over Rs.530 crores, after fraudulently and with malicious intent removing himself as a Director on 11Jan2021 just before the filing of the application for Insolvency. That this is the severest, most audacious and visible demonstration of the fraudulent and malicious intent at seeking insolvency, which must be taken note of by this Hon'ble Tribunal.*

- xi) That another reason for transposing the said Manpreet Singh Chadha (DIN 00032276) as Financial Creditor is to afford him an opportunity to DOMINATE the Committee of Creditors (if at all the CIRP is allowed to be initiated by this Hon'ble Tribunal) by way of the increasing the proportionate value of his vote vis-a-vis other Financial Creditors including the thousands of aggrieved homebuyers left in lurch at the instance of the said Manpreet Singh Chadha (DIN 00032276).*
- xii) That according to the petition u/s 10 of the IBC, the CD has gone on record to state that it had assumed the dues to the NOIDA authority to the tune of over 1200 crore rupees but fell short of making a statement as to what actions were being taken in the last so many years towards repayment of the dues of NOIDA.”*

10. In Section 65 Application, Applicants have brought on record Data from MCA, which indicate that one of the Director Manpreet Singh Chadha, who was the Director right from the inception of the Company, before filing Section 10 Application had resigned. Manpreet Singh Chaddha was with the Corporate Debtor with effect from 07.06.2011 and has resigned on 11.01.2021. Another Director Charanjeet Singh also resigned. The fact which needs to be noticed is that Manpreet Singh Chaddha, who was Director and has resigned before filing Section 10 Application has been transposed as Financial Creditor in Section 10 Application. Section 10

Application filed by the Corporate Debtor in Form-6, contains details of Financial Creditor in Part-III. Part-III of the Application is as follows:

PARTICULARS OF FINANCIAL/ OPERATIONAL DEBT			
1	NAME(S) OF FINANCIAL/ OPERATIONAL CREDITORS	(i)	Yes Bank Limited;
		(ii)	Wave Infratech Pvt. Ltd.;
		(iii)	A.B. Motions Pvt. Ltd.;
		(iv)	UP Township Pvt. Ltd.;
		(v)	Sh. Manpreet Singh Chadha;
		(vi)	Sh. Rajinder Singh Chadha;
		(vii)	Flora & Fauna Housing & Land Developments Pvt. Ltd.;
		(viii)	Suncity Hitech Infrastructures Pvt. Ltd.;
		(ix)	Sh. Harmandeep Singh Khandari;
		(x)	Durga Enterprises Pvt. Ltd.;
		(xi)	Isthmus Industries Pvt. Ltd.;
		(xii)	National synthetics Ltd; and
		(xiii)	Home buyers and commercial property buyers/ allottees as per the list annexed herewith as 'Annexure 22'.

11. It is also relevant to note that Harmandeep Singh Kandhari, who was also Director since 07.06.2011 is also shown as Financial Creditor. The financial debt of Manpreet Singh Chaddha has also been shown in Section 10 Application. The resignation of Directors few months before filing of Section 10 Application especially Manpreet Singh Chaddha, who was Director from day 1 and claiming dues as Financial Creditor in Section 10

Application fully proves the malicious intention of the Corporate Debtor. There is no doubt that 90% amount from the Homebuyers were received, which is claimed to be Rs.1400 crores and the Appellant has left most of the Project unfinished, depriving possession thereof to Homebuyers speaks for itself. The allegations made by the Homebuyers that amount has been siphoned by the Appellant finds credence by the sequence of events, which took place in the present case. In the impugned order, the Adjudicating Authority itself has noted in paragraph 26 that there are total 285 cases pending against the Corporate Debtor, involving an amount of more than Rs.253 crores. Paragraph 26 of the impugned order is as follows:

“26. It is further contended by the Applicants, that there are various litigations pending against the Corporate Debtor before different for a and to escape that liability the Corporate Debtor is seeking the shelter of its Resolution Process. That the Corporate Debtor has itself agreed and given details regarding the pending litigations in its application. The scanned copy of the same is reproduced below:

Sl.No.	Name of Court/ Authority/ Tribunal/ FIR	No. of Cases	Amount involved	Interest Amount
1	RERA Cases	211	1,70,98,32,529.54	To be calculated @ SBI MCLR+1%
2	Arbitration Cases	6	2,58,86,433.00	To be calculated @ SBI MCLR+1%
2	NCDRC Cases	20	52,75,97,742.44	To be calculated @ SBI MCLR+1%
3	SCDRC, Delhi	17	6,75,05,838.16	To be calculated @ SBI MCLR+1%

4	SCDRC, Lukcnow	6	2,06,21,280.85	To be calculated @ SBI MCLR+1%
5	Distt. Consumer Delhi & Noida	1	2,00,000.00	To be calculated @ SBI MCLR+1%
6	Distt. Court, Delhi	1	0	To be calculated @ SBI MCLR+1%
7	Criminal Matters, Delhi & Noida	6	7,77,84,416.70	To be calculated @ SBI MCLR+1%
8	NCLT Cases	17	10,99,05,622.75	To be calculated @ SBI MCLR+1%
	Total Cases	285	2,53,93,33,863.44	
	Amount in Crores		253.93	

12. The First Information Report registered by EOW being FIR No.63 of 2021 was filed in August 2020 that is much before filing of Section 10 Application, which has also been noticed by the Adjudicating Authority in paragraph 22 of the impugned order. The facts brought on record and sequence of events indicate that dominant purpose and object of filing Section 10 Application was to save the Corporate Debtor from liabilities, responsibilities and prosecution. As per the pleadings, the possession of the units to the Homebuyers were to be handed over by 2016 and 90% of the amount from all the Homebuyers were realised before 2016. Filing of the Application under Section 10 took place in March 2021, which indicate that Application was filed with malicious purpose other than resolution of the Corporate Debtor. The Adjudicating Authority has categorically returned a finding that in the garb of IBC proceedings, the Corporate Debtor has attempted to play fraud on its stakeholders. In paragraph 33, 34 and 37, following have been held:

“33. Now a question arises, whether the CD has filed the Section 10 application with a malicious and fraudulent intent. The term malicious has not been defined anywhere under IBC, 2016. Therefore, at this juncture we refer to the Judgment of Hon’ble Supreme Court, passed in the matter of **West Bengal State Electricity Board Vs Dilip Kumar Ray, Civil Appeal 5188 of 2006** dated 24.11.2006, wherein the term ‘malicious’ has been discussed. The extracts of the Judgment are reproduced below:-

*“Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious and this legal usage has etymology in its favour. The Latin militia means badness, physical or moral – wickedness in disposition or in conduct – not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent, or motive. But intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. **When we say that an act is done maliciously, we mean one of the two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive.”***

(Emphasis Supplied)

34. That in view of the aforesaid discussion, we are of considered view that in the garb of IBC Proceedings the Corporate Debtor has attempted to play fraud on its Stake Holders. The IBC Proceedings cannot be utilised to make the illegal acts as legal. Hence, we conclude that the Application under Section 10 has been filed with malicious and fraudulent intent, to cause injury to the stakeholders of the Corporate Debtor.

37. That after the aforesaid discussion we have concluded that the Application filed under Section 10 of IBC, 2016 was an attempt on the part of the Corporate Debtor to play fraud on thousands of Home Buyers, Noida Authority, Government Authorities etc. Further great prejudice must have caused to them if the CIR Process was triggered. **Therefore, we are imposing Rs.1 Crore penalty on the Corporate Debtor which shall be deposited in Prime Minister's Relief fund within 15 days from today."**

13. The learned Counsel for the Appellant has strenuously contended that present is a case where default on the part of the Appellant in payment of dues of the Noida Authority has been fully proved and when debt and default is proved, Section 10 Application ought to have been admitted. The learned Counsel for the Appellant has relied on judgment of this Tribunal **2017 SCC OnLine NCLAT 566 – Unigreen Global Pvt. Ltd. vs. Punjab National Bank and Ors.** Reliance has been placed on paragraphs 20, 22 and 23 where following has been laid down:

"20. Under both Section 7 and Section 10, the two factors are common i.e. the debt is due and there is a default. Sub-section (4) of Section 7 is similar to that of sub-

section (4) of Section 10. Therefore we, hold that the law laid down by the Hon'ble Supreme Court in "Innoventive Industries Ltd. (Supra) is applicable for Section 10 also, wherein the Hon'ble Supreme Court observed as "The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority".

22. Section 10 does not empower the Adjudicating Authority to go beyond the records as prescribed under Section 10 and the informations as required to be submitted in Form 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 subject to ineligibility prescribed under Section 11. If all informations are provided by an applicant as required under Section 10 and Form 6 and if the Corporate Applicant is otherwise not ineligible under Section 11, the Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground.

23. Any fact unrelated or beyond the requirement under I & B Code or Forms prescribed under Adjudicating Authority Rules (Form 6 in the present case) are not required to be stated or pleaded. Non-disclosure of any fact, unrelated to Section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the Corporate Applicant has not come with clean hand except the application where the 'Corporate Applicant' has not disclosed disqualification, if any, under Section 11. Non-disclosure of facts, such as that the 'Corporate Debtor' is undergoing a corporate insolvency resolution process; or

that the ‘Corporate Debtor’ has completed corporate insolvency resolution process twelve months preceding the date of making of the application; or that the corporate debtor has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under the said Chapter; or that the corporate debtor is one in respect of whom a liquidation order has already been made can be a ground to reject the application under Section 10 on the ground of suppression of fact/ not come with clean hand.”

14. There can be no dispute to the proposition laid down by the Tribunal in the above case. However, present is a case where Applications filed under Section 65 have been allowed by the Adjudicating Authority. Section 65 (i) and (ii) of the Code provides as follows:

“65. Fraudulent or malicious initiation of proceedings. - (1) *If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon a such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.”

15. When finding recorded by the Adjudicating Authority is that Section 10 Application has been initiated fraudulently and maliciously, even if there is debt and default, the Adjudicating Authority is not obliged to admit Section 10 Application. Section 10 and Section 65, which are part of the same statutory scheme needs to be read together to give effect to the legislative scheme of the Code. In event CIRP is initiated by a corporate applicant fraudulently with malicious intent for any purpose other than the resolution of insolvency, holding it that it is obligatory for the Adjudicating Authority to admit Section 10 Application, will be contrary to the statutory scheme under Section 65. In event conditions under Section 65 are fulfilled, Section 10 Application can be rejected, even if debt and default is proved. Thus, Section 65 has to be read as enabling provision to reject an application even on proving of debt and default Section 10 Application is not to be obligatorily admitted. The present is a case where it has been held that Application under Section 10 has been maliciously and fraudulently initiated for the purpose other than **for the resolution of insolvency**. The Hon'ble Supreme Court in **(2010) 14 SCC 38 – Ramjas Foundation and Anr. vs. Union of India and Ors.** has held that a person is not entitled to any relief, if he has not come to the Court with clean hand, which principle is also applicable to the cases instituted in other Courts and judicial Forums. In paragraph 21, following has been laid down:

“21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the

petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case.”

16. We, thus, do not find any error in rejection of Section 10 Application.

17. We may notice one submission of Learned Counsel for the Noida Authority as well as the Homebuyers is that Application under Section 10 was barred by Section 10A. Section 10A provides as follows:

“10A. Suspension of initiation of corporate insolvency resolution process. - *Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - *For the removal of doubts, it is hereby clarified that the provisions of this section shall*

not apply to any default committed under the said sections before 25th March, 2020.”

18. The Application under Section 10 itself gives the details of Demand Notices issued by NOIDA Authority in Column 8, Part III of the Application, which is to the following effect:

8.	<i>List of documents attached to this application in order to prove the existence of financial/ operational debt and the amount in default</i>	<u>Operational Creditor:</u> <i>Copies of demand notices and reminders dated 26.02.2022, 18.03.2020, 11.05.2020, 18.05.2020, 17.07.2020, 31.07.2020, 19.08.2020, 24.12.2022 and 11.02.2021 from the Noida Authority to the Corporate Debtor, along with the typed English translation are annexed as ‘Annexure 12 (Colly.)’.</i>
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19. The first demand, which has been referred to in the Application is dated 26.02.2020. The second demand notice is 18.03.2020. Both these notices were prior to 25.03.2020 as provided in Section 10A. It is, thus, clear that default was committed prior to 25.03.2020. As per the Lease Agreement, the Appellant failed to adhere to the payment schedule. It is not the case that Appellant committed default in payment of dues of Noida Authority only in the year 2020. The Noida Authority in its reply has annexed the letter dated 18.03.2020 as Annexure 15 to the reply, which contained the calculation from 30.06.2017 to 29.02.2020. Thus, we are

satisfied that default committed by the Appellant was much before 25.03.2020. The Explanation to Section 10A clearly provides that provisions of Section 10A shall not apply to any default committed under the said Section before 25.03.2020. Thus, present is a case where Section 10A was not Applicable.

20. The learned Senior Counsel for the Noida Authority Shri Sanjiv Sen submits that since final demand notice was issued on 24.12.2020, after direction of the State Government dated 17.11.2020, the date of default need to be treated as 24.12.2020, which is covered by prohibited period. The direction dated 17.11.2020 of the State Government was passed on the Appeal filed by the Appellant, directing the Noida Authority to give a revise detail. The mere fact that final demand notice was issued on 24.12.2020 does not wipe out the default, which was committed prior to 25.03.2020, rather, the final notice is reiteration of the default, which has been committed by the Appellant in terms of the Lease. We, thus, do not find the Application was barred under Section 10A. The submission of Shri Sanjiv Sen that Application under Section 10 filed by the Appellant is premature, since the Appellant has not exhausted the remedy available to it under Section 41 of the Uttar Pradesh Urban Planning and Development Act, 1973 also cannot be accepted. The remedy provided under Section 41 of the 1973 Act is for challenging a demand raised by local Authority, it cannot be said that filing of Section 10 Application was premature on the ground that Appellant had not invoked the remedy under Section 41. What

remedy is to be taken by a litigant is in the domain of the litigant. The filing of the Application under Section 10, hence, cannot be held to be premature.

21. In view of the foregoing discussion, we are satisfied that Adjudicating Authority did not commit any error in allowing Section 65 Applications and rejecting the Section 10 Application. When Applications under Section 65 were allowed holding that initiation of proceedings under Section 10 was done fraudulently and maliciously for purpose other than resolution, rejection of Section 10 Application is consequent and inescapable.

22. We do not find any merit in the Appeal. The Appeal is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

5th January, 2023

Ashwani