

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH,
AT NEW DELHI**

Company Petition No. (IB)-448(PB)/2017

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Rajendra Kumar Saxena

....Applicant

Versus

M/s Earth GraciaBuildconPrivate Limited

.....Respondent

05.03.2018
Judgment delivered on: ~~28.02.2018~~

CORAM:

CHIEF JUSTICE (Rtd.) M.M. KUMAR, Hon'ble President

S. K. MOHAPATRA, Hon'ble Member (T)

Present:

For Applicant: Mr. Rakesh Kr. Singh, Advocate

For Respondent: Mr. Prateek Yadav, Advocate

ORDER

S. K. Mohapatra, Member

1. Mr. Rajendra Kumar Saxena, claiming to be the financial creditor, has filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, M/s Earth Gracia Buildcon Private Limited, referred as the corporate debtor.
2. The Respondent M/s Earth Gracia Buildcon Private Limited, against whom initiation of Corporate Insolvency Resolution Process has been prayed for, is a private limited company incorporated on 28.08.2012 under the provisions of Companies Act, 1956 having its registered office at B-100, Second Floor, Nariana Industrial Area, Phase -1, Delhi -110028. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal having territorial jurisdiction over the place is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.



3. It is the case of applicant that around early 2013 the respondent company launched a residential project by the name of "Earth Gracia" situated at the plot no. 12A-1, Greater Noida, Uttar Pradesh. Applicant for his personal residential requirement booked a 2BHK flat bearing no. A-101 in the said project of the respondent company by the name of "Earth Gracia". Copy of Flat Booking Application Form has been placed on record.
4. It is stated that the applicant made payment of the first installment of Rs. 4,41,400/- in April 2013, on the assurance that the project will be completed by 2015 and possession will be handed over by 2016. However, shortly thereafter, it was conveyed to the applicant that Tower-A, for which the applicant had exercised preference, was highly delayed and the applicant was pressurized to accept a flat in Tower-F. Subsequently applicant made payment of another installment of Rs 419200 on 31.05.2013 and also Rs 475258 towards registration amount as detailed in the application. It is thus submitted that the applicant made a total payment of Rs. 13,08,858/- (Rupees Thirteen Lakhs Eight Thousand Eight Hundred Fifty Eight Only) to the Respondent Company.
5. A copy of the Allotment letter dated 21st October, 2013 has been placed on record which *interalia* reveals that the applicant booked a 2



BHK flat in the project of respondent company by name of “Earth Gracia” bearing no. A-101, situated at plot no. 12 A-1, Greater Noida, Uttar Pradesh. It is submitted that since the terms of allotment letter was totally one sided the applicant had raised his concern and grievances to the Respondent company vide his letters dated 01.08.2013, 19.12.2013, 21.12.2013 and 24.11.2014. Thereafter the applicant further submitted his objections to the respondent vide letter dated 15.11.2014, which has gone un-responded.

6. Subsequently the applicant cancelled the booking and demanded refund of the amount paid with interest vide his letters dated 09.04.2015 and 15.05.2015, to which again there has been no response by the respondent company. Copies of said letters dated 09.04.2015 and 15.05.2015 have been placed on record.
7. It is further submitted that while ignoring all the communications of the applicant, the respondent company issued reminders for payments and even telephone calls were made by the respondent. Thereafter, a legal notice dated 11.06.2016 was received by the applicant on 27, June 2016, issued by the respondent company. It is stated that in the said legal notice the basic fact of amount deposited had been misrepresented as Rs. 13,04,058/-, whereas the correct figure

is Rs. 13,08,858/-. Copy of legal notice dated 11.06.2016 sent by respondent has been placed on record.

8. It is contended that after exhausting all the efforts as the amount was not refunded and in light of the inordinate delay in completion of the Project, a statutory winding up notice was issued on 02.09.2016 wherein demand of Rs. 13,08,858/- with 24% interest was claimed by the applicant, which was duly received by the Respondent on 03.09.2016. Copy of the said legal notice along with proof of service and tracking record has been placed on record.
9. The respondent company has filed its reply, wherein it is mainly contended that in the present case there was no agreement between the parties for assured return or guaranteed return and respondent has never offered to the applicant any committed return or monthly return. Accordingly it is argued that the applicant is not a financial creditor and no financial debt is owed to the applicant by the respondent company and therefore the present application is not maintainable.
10. In addition respondent has contended that the contract in question is purely for sale and purchase of the immovable property and that the applicant itself has committed breach by not paying the entire sale consideration amount despite several reminders.

11. The other objection raised in the reply is on the allegation of *forum shopping*. It is contended that the agreement executed between the parties has arbitration and jurisdiction clause in which it is mentioned that any dispute between the parties shall be referred to the conciliation of consumer redressal forum of the CREDAI (NCR) and therefore the present application before the tribunal is not maintainable.
12. We have heard the parties and perused the case records.
13. One of the grounds raised by respondent is that in the presence of a categorical arbitration clause, the matter has to be referred to arbitration and therefore the present application before the tribunal is not maintainable. In this regard Hon'ble NCLAT in the case of International Road Dynamics South Asia Pvt. Ltd. Vs. Reliance Infrastrucure Ltd. in Company Appeal (AT) (Insolvency) No. 72 of 2017 while dealing with Section 9 application has *interala* held that, '*alternative remedy of arbitration*' cannot be a ground to reject an application under Section 9. Moreover in view of the overriding effect given to the provisions of Section 238 of the Code, merely on the ground of existence of arbitration clause, application preferred under the Code cannot be rejected, if otherwise complete. In the case of M/s Ksheeraabd Corporation Pvt. Ltd. (Company Appeal (AT)

(Insolvency) No. 167 of 2017) Hon'ble NCLAT has observed that, *the 'I&B Code' being a complete Code will prevail over all other Acts including Arbitration and Conciliation Act, 1996 and that pendency of arbitration proceedings cannot stall Corporate Insolvency Resolution Process under the Code.* Ordinarily where two remedies are available under law, one of them should not be taken as operating in derogation of the other. In view of the aforesaid discussion the allegation of forum shopping is not based on sound legal principle nor can sustain on the face of the overriding provisions of the Code.

14. The main contention of the respondent is that the applicant does not come within the definition of "Financial Creditor" and the claimed amount is not a "financial debt" as defined under the Code, and therefore the present application filed under Section 7 of the Code is not maintainable.
15. It is the precise case of the respondent that the contract in question is purely for sale and purchase of the immovable property and that the applicant itself has committed breach by not paying the entire sale consideration amount despite several reminders. It is contended that in the present case there was no agreement between the parties for assured return or guaranteed return and respondent has never offered to the applicant any committed return or monthly return. Accordingly it is

argued that the applicant is not a financial creditor and no financial debt is owed to the applicant by the respondent company and therefore the present application is not maintainable.

16. On the contrary applicant in its rejoinder has contended that the amount paid to respondent has been admitted and that the default committed qua the amount by respondent is also not in dispute. It is placed that there are documents in support of such disbursement, which has not been denied. It is argued that under Section 7 (4) of the Code, Adjudicating Authority is to ascertain only one factor i.e. default and no beyond. Applicants have also emphasised as to how thousands of home buyers are defrauded and harassed by builders.
17. Neither handing over of the possession nor refund of the investments of the home buyers, no doubt, causes great prejudice and hardship to them. It is, however, pertinent to note here that the Insolvency and Bankruptcy Code, 2016 is a complete Code in itself. The provisions of the Code are to be mandatorily followed. Tribunal cannot exercise the power as enshrined in Article 142 of the Constitution of India. Adherence to the requirements of Section 7 of the Code by the Tribunal has to be in toto. When the language of the Code is clear and explicit, whatever may be the consequences the Adjudicating Authority must give effect to it.

18. The scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

- a) Financial creditor
- b) Operational creditor, and
- c) Corporate debtor itself.

19. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the “Financial Creditor” is delineated under Section 7 of the Code, wherein only “Financial Creditor” / “Financial Creditors” can file an application. As per Section 7(1) of the Code an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors. Section 7 of the Code thus mandates that only the applicant “Financial Creditor” has to prove the default. In other words even if there is a clear default, the application under Section 7 of the Code is not maintainable in case the applicant is not a financial creditor. Therefore, in order to maintain the present application filed under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor, the present applicant has to satisfy that it comes within the definition of “Financial Creditor”.

20. The expressions “Financial Creditor” and “Financial debt” have been defined in Section 5 (7) and 5 (8) of the Code, which are reproduced below.

“ 5. In this part, unless the context otherwise requires, -

.....

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- a) money borrowed against the payment of interest;
- b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian



Accounting Standards or such other accounting standards as may be prescribed;

- e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
- f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the effect of a borrowing;*
- g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account; any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution; the amount of any liability in respect of any of the guarantee or indemnity.”*

21. A creditor in order to come within the meaning of “Financial Creditor” has to fulfil the following essential criteria:

- i. A person to whom a ‘financial debt’ is owned and includes a person whom such debt has been legally assigned or transferred;
- ii. The debt alongwith interest, if any, is disbursed against the consideration for time value of money and includes any one or more mode of disbursed as mentioned in clause (a) to Clause (i) of sub-section (8) of Section 5.

22. Precisely “Financial debt” is a debt along with interest, if any, *which is disbursed against consideration for time value of money.*

23. In the present case the applicant for his personal residential requirement booked a flat in the project of the respondent company by the name of “Earth Gracia”. Therefore the contract in question is purely for sale and purchase of the immovable property. It is not disputed that in the present case there was no agreement between the parties for assured return or guaranteed return on the investment made by the applicant. Admittedly there was no provision for committed return or monthly return to be paid to the applicant on its investment. Therefore the disbursement made in the present case was not against consideration for time value of money.



24. On the contrary it is a case where allotment/contract was cancelled with a claim for return of the disbursed amount with interest. There is an allegation that the applicant itself has committed breach by not paying the entire sale consideration amount despite several reminders. The present claim made after cancellation of allotment will naturally face the resistance of contractual obligations. The present claim falls within the purview of contractual debt and raises complex interpretation of contractual agreements requiring investigation and not a simplicitor "financial debt". The claim in question cannot be equated as a simple claim of principal sum/ investment plus assured return. It is pertinent to note here that Claims of home buyers and claims arising out of complex financial instruments preferred before IRP under the Regulations are treated as different category claims distinct and separate from claims of financial and operational creditors.

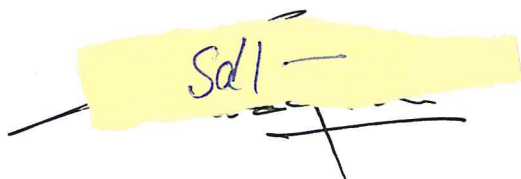
25. It is also pertinent to note here that the present case is clearly distinguishable from the case of Nikhil Mehta & Sons Vs. AMR Infrastructure Ltd. passed in Company Appeal (AT) (Insolvency) No. 07 of 2017. In that case there was clear provision for payment of assured returns and there was default in making payment of the assured return. Where as in the present case admittedly there was no provision for payment of assured return. Besides in the present claim there is no

whisper of inclusion of any unpaid assured return amount. In the absence of any provision of assured return, it can be said that the investment was not made against the consideration for time value of money and therefore neither the present claim can be termed to be a 'financial debt' nor does the applicant come within the meaning of 'financial creditor'. Once the applicant does not come within the meaning of 'financial creditor', he becomes ineligible to file the application under Section 7 of the Code.

26. For the reasons stated above this petition fails and the same stands dismissed as not maintainable.

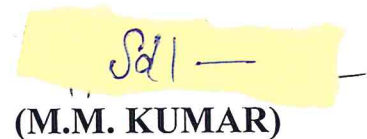
27. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.

Let the copy of the order be served to the parties.



(S. K. MOHAPATRA)

Member (T)



(M.M. KUMAR)

President

05.03.2018