

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI**

C.P.No.IB-355/ND/2017

Section: Section 7 of the Insolvency and Bankruptcy Code, 2016 read with the Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

**Ajay Kumar Gupta & Anr.
S/o Sh. Ramniwas Gupta,
D-206, 3rd Floor, Ashok Vihar,
Phase-I, Delhi-110052**

**Mrs.Poonam Gupta,
W/o Mr. Ajay Kumar Gupta,
D-206, 3rd Floor, Ashok Vihar,
Phase-I, Delhi-110052**

... Financial Creditor

Vs.

**IERO Fiveriver Pvt. Ltd.
305, 3rd Floor,
Kanchan House,
Karampura Commercial Complex,
New Delhi-110015.**



Also at:

**SCO No.6-8,1st and 2nd Floor,
Sector 9D,
Chandigarh-160009.**

..... Corporate Debtor

Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Counsel for the Petitioners: : Mr.Sachin Jain, Advocate
Ms.Isha Aggarwal, Advocate**

Counsel for the Respondents : Mr.Krishna Kumar Singh, PCS

Order delivered On: 13.11.2017

ORDER

This is an application which has been filed by the Applicants under the provisions of Insolvency and Bankruptcy Code, 2016 who claim to be the Financial Creditors of the Respondent company which has been termed as the Corporate Debtor. The transaction leading to filing of the present



Application as reflected in the list of dates and events is stated to be as under:-

- (i) On 16.8.2010 based on the representation of the Corporate Debtor it is claimed by the Financial Creditors that they have initially invested a sum of Rs.10.00 lakhs towards provisional registration in relation to the project promoted by the Corporate Debtor named as "IERO FIVERIVER" Consequent to the above booking, on 18.5.2011 a provisional plot allotment letter for Type C, Plot No. P-62, measuring 502.32 sq. yard was issued to the Financial Creditors and the Financial Creditors paid a further sum of Rs.15,11,600/- on being allotted the said plot. On 27.6.2011, upon payment of 25% of the basic sale price, Plot Buyers' Agreement was entered into between the Financial Creditor and the Corporate Debtor. Further payment, it is claimed by the Financial Creditor, was made on 18.5.2015 in a sum of Rs.21,19,627/-, on 13.9.2015 in a sum of Rs.21,75,674/- and further on 31.3.2016 a payment of Rs.21,97,649/- was made. Despite the above payments made towards the plot allotted, since the Corporate Debtor had failed to fulfill its obligations under the agreement entered into between the parties, the Financial Creditor through letter dated 10.11.2016 sought for the repayment of the Principal amount



along with penal interest at the rate of 15% in view of the non-fulfillment of obligations on the part of the Corporate Debtor.

- (ii) Subsequent to the above letter dated 10.11.2016, a Settlement Deed dated 15.2.2017, it is claimed had been executed by the Corporate Debtor and the Financial creditor wherein the Corporate Debtor agreed to repay a sum of Rs.1,16,05,751/- along with interest at the rate of 9% per annum with effect from the date of respective deposits till actual payments in full and final settlement of the claims and in relation to the repayment it is averred by the Financial Creditor that cheques were issued including post dated cheques. Even though in relation to cheque dated 14.2.2017 drawn on Kotak Mahindra Bank Ltd. for Rs.13,80,977/- issued in favour of the Financial Creditor was honored by the Corporate Debtor but the subsequent cheques bearing No.003591 and 003592 both dated 13.8.2017 drawn on Kotak Mahindra Bank Ltd. for Rs.14,36,162/- and Rs.14,36,161/- in favour of the Financial Creditors was not honored and the same was returned by the bankers for the reason "insufficient funds". The above dishonor of cheque it is averred by the Financial Creditors was duly communicated to the Corporate Debtor vide email sent on 18.8.2017 and even though the said email was acknowledged, the Corporate Debtor



had failed to discharge amounts in default and in the circumstances this Petition.

2. After due service of notice it is seen from the records of this Tribunal that the Corporate Debtor had entered appearance on 10.10.2017 on which date an opportunity was given by this Tribunal to the Corporate Debtor to file its reply to the Application as filed by the Financial Creditor.

3. Perusal of the reply shows that the Corporate Debtor has taken the contention that the applicants are not Financial Creditors in the first place and the debt cannot be categorized as a financial debt as defined under the provisions of Insolvency and Bankruptcy Code, 2016 (for brevity IBC,2016) and in the circumstances, the Application itself is not maintainable and it is further contended that in order to maintain the Application under Section 7 of IBC,2016, the Applicants are required to establish or qualify under Section 5(7) of IBC,2016 as a Financial Creditor and that the requirement of expression 'financial debt' as defined under Section 5(8) of IBC,2016 is required to be satisfied. It is also contended that the deduction of tax deducted at source under Section 194A of the Income Tax Act,1961 in relation to interest paid by the Corporate Debtor does not in any way change the status of the Applicants/Financial Creditors from a Flat Buyer to a Financial Creditor. It is also pointed out



that deduction of TDS is a statutory obligation and that the Income Tax Act, 1961 does not make a classification as to the payment of interest, namely, as interest on borrowed capital, interest on refund etc. and to rely on the deduction of income tax in relation to the interest payment by the Financial Creditors in order to establish that the debt owed is a financial debt, is not given. Reliance is also placed on the Settlement Deed dated 15.2.2017 by the Corporate debtor to state that no where has the Applicants herein have been classified as Financial Creditors and the Respondent herein as the Corporate Debtor and that the parties did not have any intention to classify themselves as such. It is also contended that proper notice has not been served upon the Corporate Debtor, as mandated under the provisions of IBC,2016 and the Attendant Rules. Taking into consideration all the above, it is the submission of the Corporate debtor that this Application is liable to be dismissed with costs.

4. We have carefully considered the rival pleas as submitted by the Ld. Counsels at the time of hearing as well as the documents annexed with their respective pleadings. Perusal of the Agreement dated 27.6.2011 termed as 'Plot Buyers' Agreement' annexed as Annexure-A-4 to the Petition discloses that the same has been entered into between the Financial Creditors and the Corporate Debtor for the purchase of plot bearing Type C, Plot No.P-62, measuring 502.32 sq. yards at Sector 3-4 and 4A Pinjore-Kalka Urban Complex, Distt. Panchkula, Haryana



promoted by the Corporate Debtor under the project titled as "IREO FIVERIVER". The total consideration as agreed to be paid for the plot and the mode of payment have been detailed in the payment plan annexed as Annexure-I to the Plot Buyer's Agreement dated 27.6.2011. Clause 11.3 of the said Agreement dated 27.6.2011 reads as under:

"Subject to Clause 11.1, in the event of delay by the Company in handing over the possession of the said Plot beyond a period of 12 months from the end of the Grace Period (such 12 month period hereinafter referred to as the "Extended Delay Period"), then the Allottee shall become entitled to opt for termination of the Allotment/Agreement and refund of the actual paid up installments made against the said Plot after adjusting the interest/penalty on delayed payments along with Delay Compensation for 12 months. Such refund shall be made by the Company within 90 days of receipt of intimation to this effect from the Allottee, without any interest thereon. For removal of doubt, it is clarified that Delay Compensation payable to the Allottee who is validly opting for termination, shall be limited to and calculated for the fixed period of 12 months only irrespective of the date on which the Allottee actually exercised the option for termination. This option of termination may be exercised by the Allottee only up till dispatch of the Notice of Possession by the Company to the Allottee whereupon the said option shall be deemed to have irrevocably lapsed. No other claim, whatsoever, monetary or otherwise shall lie against the Company nor be raised otherwise or in any other manner by the Allottee."

5. As per Clause 11.1 of the Agreement dated 27.6.2011, the plot was required to be handed over to the allottee namely the Financial Creditors



within a period of 24 months from the date of execution of the Agreement and a grace period of 6 months has also been provided under the said clause to the Corporate Debtor to abide by the Agreement, all subject to force majeure. Perusal of clause 11.3 as extracted above, discloses that in addition to the commitment period of 2 years along with a grace period of 6 months as provided in clause 11.1, an additional period of 12 months from the end of the grace period referred to as 'Extended Delay Period' has also been provided to the Corporate Debtor to comply with the Agreement prior to the Financial Creditor can exercise the option of terminating the Agreement and for refund of the amounts paid up as instalments made against the purchase of plot. It is also provided therein that the refund shall be made by the company, namely, Corporate Debtor within a period of 90 days of receipt of intimation to the said effect from the allottee namely Financial Creditors herein without any interest. Option to terminate it is provided in the Agreement should be exercised by the Financial Creditor before the dispatch of notice of possession. It is seen from the email dated 10.11.2016 as sent by the Financial Creditors to the Corporate Debtor annexed as Annexure A-5 to the Petition that more than five years had elapsed but possession had not been granted of the plot allotted by the Corporate Debtor though a sum of Rs.90.00 lakhs had been remitted to the account of the Corporate Debtor on account of allotment of plot and that the delay in possession has also been brought to the notice of the Corporate



Debtor and hence demand has been made to repay the entire principal amount along with penal interest at the rate of 15%, the same percentage as charged by the Corporate Debtor vis-a-vis customers for late payments. It is pertinent to note that no evidence has been placed before this Tribunal by the Corporate Debtor to negate the plea of the Financial Creditors regarding delay in possession of the plot or its delivery nor in relation to the amounts received by the Corporate Debtor in relation to allotment of plot as claimed by the Operational Creditors. On the other hand, from the records it is seen that the Corporate debtor in acknowledgement of the receipt of amounts and also in relation to the delay in possession of the plot as agreed to between the Corporate Debtor and the Financial Creditor in the year 2011, order the 'Plot Buyer's Agreement' has entered into an agreement in abrogation of the earlier agreement and entered into an agreement titled as 'Settlement Deed' dated 15.2.2017 under which the Corporate Debtor by virtue of clause 1 of the Settlement Deed has agreed as follows:

"That the First Party shall pay to the Second Party the refund of the aforesaid amount Rs.1,16,05,751.00 along with interest @ 9% per annum with effect from the date of their respective deposits till actual payment, in full and final settlement of all the claims, rights, title and/or interest of the Second Party, of any nature whatsoever, arising out of the Plot Buyer's Agreement and the allotment of the said Plot (hereinafter referred to as the "Settlement Amount")."



Thus in effect the 'Plot Buyer's Agreement' entered into earlier stands fully abrogated. In relation to the amounts payable a repayment schedule has also been given in a tabular form under clause 2 of the said Settlement Deed. Perusal of the said tabulation shows that the first instalment became payable on 14.2.2017 and the end date for the said payment is also reflected as the same date and the amount stated in relation to first instalment payment is stated to be in a sum of Rs.27,61,994.75 rounded off to Rs.27,61,995/-. The Financial Creditors represent that the said payments have been received as stated in the earlier paragraph. However, the installments which became payable with the start date of 31.3.2017 and with an end date of 13.8.2017 in a sum of Rs.27,61,994.75 as detailed in clause 3(b) of the Settlement Deed dated 15.2.2017 has not been paid. Thus, it is seen that the parties who are before this Tribunal had virtually given a go by to the earlier agreement dated 27.6.2011, being the 'Plot Buyer's Agreement' entered into for the transaction in relation to the purchase of immovable property and thereafter in view of non-performance of the terms and conditions contained in the said agreement by the Corporate Debtor, subsequently had entered into an agreement termed as Settlement Deed whereby the focus became the repayment of the money received by the Corporate debtor from the Operational Creditor along with agreed interest at the rate of 9%per annum. Pursuant to the said Settlement Deed dated 15.2.2017 the Corporate Debtor has also acted in consonance



with it by paying not only part of the principal amount but also interest agreed to be paid at the rate of 9% per annum for which tax has also been deducted at source. Hence the plea of the Ld. Counsel for the Corporate Debtor that Settlement Deed must be virtually ignored and that the transaction must relate back to the 'Plot Buyer's Agreement' dated 27.6.2011 in order to negate the plea of the financial debt and Financial Creditor is not legally tenable and cannot be accepted.

6. Reference to the definition of financial debt and Financial Creditor as given in IBC,2016 under Section 5(8) and Section 5(7) respectively shows that there is a debt in fact owed to the financial Creditors under the Settlement Deed towards repayment of the amounts received by the Corporate Debtor along with interest at the rate of 9% per annum and the said debt hence can be classified as a 'Financial Debt' falling under Section 5(8) of IBC,2016. The Corporate Debtor it is to be seen has not denied the liability anywhere in the reply which has been filed or at the time of oral submissions made by its Ld. Counsel at the time of hearing and repeated refrain of the Corporate Debtor had been that even though monies are owed to the Financial Creditors and can be considered as a debt but cannot be considered or classified as a 'financial debt'. We do not find much force in the above arguments and in view of the Settlement Deed dated 15.2.2017 as entered into between the parties, which has given the cause of action primarily for this application and the parties on their own volition have



entered into the said Settlement Deed whereby the amounts paid by the Financial Creditors have been treated as a debt repayable alongwith interest and hence the petitioners herein can be classified as a Financial Creditor. The cheques return memo dated 16.8.2017 and 5.9.2017 annexed as Annexure A-3 to the Application clearly discloses the default in the payment of debt due to the Financial Creditors by the Corporate Debtor. The endorsement made by the bankers also clearly shows that the cheques have been returned for the reason "insufficient funds".

7. Taking into consideration all the above, this Tribunal is of the view that a default has been committed in terms of Section 3(12) of IBC,2016 of financial debt as defined under Section 5(8)of IBC,2016 and that the Financial Creditor who can be classified as falling within the definition of Section 5(7)of IBC,2016 is entitled to invoke the provisions of IBC,2016. From the Application filed it is seen that the Financial Creditors have named an Interim Resolution Profession (IRP) in part III of their Application, whose details are given hereunder:

Mr. Ashok Kumar Juneja
1302, Vijaya Building, 17, Barakhamba Road,
Connaught Place, New Delhi-110001.
Mobile No. 9810532462
Office: 011-41563467/ 43011969/23324078
Email Id: ashokjuneja@gmail.com

8. It is also seen from the typed set of documents attached that the above named IRP has given in effect a written consent in Form 2 wherein he has

agreed to accept appointment as IRP if Application is admitted. Further, it is also evident from the said Form-2 as filed by the IRP as well as the certificate as enclosed therein signed under his hand that he is not a related party to the Corporate Debtor and that he is eligible to be appointed as an independent Director on the Board of the Corporate Debtor. Certificate of registration of the IRP as issued by the Insolvency and Bankruptcy Board of India (IBBI) has also been enclosed along with the Application and taking into consideration all the above, this Tribunal finds that this is a fit case to be admitted in terms of Section 7 of IBC,2016 and thereby initiate Corporate Insolvency Resolution process as against the Corporate Debtor with the following consequences:

(a) Mr.Ashok Kumar Juneja, having registration No.IBBI/IPA-002/IP-N00117/2017-18/10286, is appointed as the Interim Resolution Professional and he shall strictly act in accordance with the provisions of IBC,2016 and other Attendant Rules as enjoined upon him;

(b) In terms of Section 14, as reproduced hereunder, the Corporate Debtor shall be under moratorium on the following terms:-



(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(1) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2) xxxx

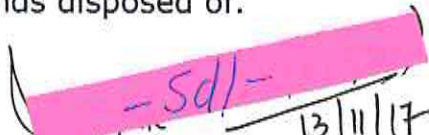
(4) The order of this moratorium shall have effect from the date of the order till the completion of the corporate insolvency resolution process subject to proviso of Section 14 of IBC,2016.

(c) The Board of Directors of the Corporate Debtor shall stand suspended on and from this day as envisaged under Section 17 of IBC,2016.



(d) In terms of Section 7(7)(a) of IBC,2016 the Registry of this Tribunal is directed to communicate the order to both the Financial Creditor and the Corporate Debtor at the earliest.

9. With the above directions, the application stands disposed of.


13/11/17
(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta
.11.2017