

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

C.P.No.IB-307/(ND)/2017

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

**ANUBHUTI AGGARWAL
D/O SHRI ANIL SHARAN,
R/O G-349,PREET VIHAR,
DELHI-110092.**

... FINANCIAL CREDITOR

**DPL BUILDERS PVT.LTD.
46, SOUTH GANESH NAGAR,
PATPARGANJ, DELHI-110092.**

...CORPORATE DEBTOR



Coram:

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

**Counsel for the Petitioners: :Mr.Mayank Goel, Advocate
Mr.Monamshel Maring, Advocate**

Counsel for the Respondents :Ms. Varsha Banerjee, Advocate

Order delivered On: 8.12.2017

ORDER

DPL Builders Pvt. Ltd. is the Corporate Debtor in the above Petition and Ms.Anubhuti Aggarwal claiming herself to be a Financial Creditor has filed this Petition under Section 7 of Insolvency & Bankruptcy Code, 2016 (IBC,2016) seeking to set in motion Corporate Insolvency Resolution Process (CIRP) as envisaged under IBC,2016 as well as Attendant Rules/ Regulations framed thereunder against the Corporate Debtor. The claim giving rise to the above



Petition from the facts narrated in the Application/Petition are as follows:-.

That on 18.6.2015 the Financial Creditor had invested a sum of Rs.25,00,000/- vide cheque No. 048631 drawn on Punjab National Bank with the Corporate Debtor in relation to the development of project PDL Flora Heritage at 16B,Sector-1, Greater Noida (West). It was assured by the Corporate Debtor of repayment and that as a collateral security flat No.B-1, 904 to the extent of 1292 sq.ft. was also given. An unconditional guarantee was also given for the buy back of the said flat at a pre-settled and determined sum of Rs.31,00,000/- in relation to which post dated cheques were also given commencing from 22.09.2016.Based on the specific request of the Corporate Debtor it is averred by the Financial Creditor that the said post dated cheques were not encashed. However, on 10.04.2017, the oral understanding based on which the investments were made was formalised and reduced into writing and signed by both parties and post dated cheques No. 792979 for Rs.1,50,000/- dated 22.03.2017 as well as cheque bearing No. 792978 dated 22.06.2017 for a like amount issued in relation to agreement dated 10.04.2017 were dishonored for want of sufficient funds. Again, cheque No. 792973 for Rs.25,00,000/-also suffered the same fate. Consequent to the dishonor of cheques, a notice was sent to the



Corporate Debtor on 08.07.2017. However, there has been no response to the said notice even though it was sent to the registered office of the Corporate Debtor which has forced the Financial Creditor, in view of default, to approach this Tribunal by way of this Application filed on 24.08.2017. In part III of the Application, Financial Creditor has named one Mr. Kanwal Chaudhary as the Interim Resolution Professional (IRP) who is registered with registration No. IBBI/IPA-002/IP-N00207/2017-18/10661 with Insolvency and Bankruptcy Board of India and having his address at EA-413, Maya Enclave, New Delhi-110 064. In support of Application, the Petitioner has annexed mutual agreement dated 10.04.2017 as Annexure-B, cheques which had been dishonored by the Corporate Debtor along with return memos as Annexure-C, a copy of the bank statement of the Financial Creditor as Annexure-D, a copy of the Demand Notice dated 08.07.2017 alongwith postal receipts as Annexure-E and finally a written communication by the proposed IRP in Form 2 of Insolvency and Bankruptcy(Application to the Adjudicating Authority)Rules, 2016 for brevity 'AAA' Rules, as Annexure-F. Further, master data of the Corporate Debtor, as reflected in the Ministry of Corporate Affairs website has also been filed as Annexure-A to the typed set filed along with the Application.



2. Upon notice to the Corporate Debtor, Corporate Debtor has entered its appearance and filed its reply by way of counter affidavit to which the Petitioner has also filed a rejoinder affidavit. On completion of the pleadings, the matter was taken up for final disposal by this Tribunal on 21.11.2017.

3. At the time of oral submissions, Ld. Counsel for the Petitioner took this Tribunal through the mutual agreement annexed as Annexure-B dated 10.04.2017 and strenuously contended that taking into consideration the provisions of the said agreement, the Petitioner can be classified as a Financial Creditor and the debt which is claimed as due from the Corporate Debtor as a financial debt. In this connection, attention of this Tribunal was more particularly drawn to clause 4 of the said agreement.

4. In addition, attention was drawn to clause 6 of the agreement wherein repayment schedule in tabular form has also been given and to also clause 14 of the said agreement dated 10.4.2017. Based on the above clauses as already stated, it was vehemently contended by the Petitioner that the Corporate Debtor had recognized a sum of Rs.25,00,000/- paid by the Petitioner as an investment and also contended that the Corporate Debtor had given unconditional guarantee to buy back the allotted flat at pre-settled and determined amount of Rs.31,00,000/- and also to pay interest @24% per annum



with effect from 22.06.2016. Hence it is the submission of the Ld. Counsel for the Petitioner that as per agreement the same is to be considered and treated as amounts made available for time value for money as given in the definition of financial debt in Section 5(8) of IBC, 2016. The issue of post dated cheques, it is contended even though stands dishonored subsequently, points out to the special understanding between the parties to treat the money as investment as well as to payback the said investment with assured return and it is contended by the Ld. Counsel for the Petitioner that it is squarely covered by the judgement as passed by the Hon'ble NCLAT in Nikhil Mehta and Sons vs. AMR Infrastructure Ltd. in CA(AT)(Insolvency) No.07 of 2017 dated 21.07.2017. Taking into consideration the ratio laid in the above judgement as well as provisions of IBC, 2016, Ld. Counsel for the Petitioner represents that this Petition is maintainable under the provisions of IBC, 2016 and in view of the default committed by the Corporate Debtor the Insolvency Resolution Process is bound to be put in motion.

5. Per contra, Ld. Counsel for the Respondent submits that the sum of Rs.25,00,000/- cannot be treated as an investment and for which assured returns were promised but on the other hand is only an advance received by the Corporate Debtor towards the purchase



of immovable property by the Petitioner from the Corporate Debtor. It is also contended by the Ld. Counsel for the Corporate Debtor that it is evident that description of the property is specific which discloses that the subject matter of the agreement on which reliance has also been placed by the petitioner, is clear and in order to buffer the said line of argument, clause (1) and clause (9) of the mutual agreement is pointed out by the Learned Counsel for the Corporate Debtor and upon a joint reading of the said clauses it is contended that the relationship between the Petitioner and the Corporate Debtor is that of only a purchaser and seller and not as contended by the Petitioner. Ld. Counsel for the Respondent/Corporate Debtor also refers to clause (4) of the agreement and represents that the sum of Rs.25,00,000/- has been received towards the booking amount in respect of the flat and thus taking into consideration Section 5(7) read with Section 5(8) of IBC,2016 that the claim arising out of transaction between the Petitioner and Respondent is not a financial debt and hence the Petitioner cannot be categorized as a Financial Creditor and in the circumstances the Petition is not maintainable. It is also pointed out by Ld. Counsel for the Respondent that one of the essential conditions which is required to be satisfied for the maintainability of the Petition is that there should be default on the part of the Corporate Debtor giving rise to filing of the Petition by



the Petitioner and in support of this, Ld. Counsel for Respondent draws attention of this Tribunal to clause 9 of the said agreement which reads as follows:

"The project is already sanctioned and the possession of the flats will be handed over to the Second Party within 24 months from the date of this Agreement. However, in case, the Flat/premises is not ready to be given possession of, then the second party shall be at liberty to encash the cheque No.792973 for Rs.25.00 lacs, mentioned in clause 6 of this agreement."

6. In light of the above clause, it is contended by Ld. Counsel for the Corporate Debtor that the time period for handing over possession of the flat is available to the Corporate Debtor till April,2019 and if at all there can be any default, it cannot be prior to the said period and can be only after it and in the circumstances since there has been no occurrence of default and in the absence of it the Petition as filed is not maintainable. In addition, technical objections relating to the Application being not complete, that the proposed IRP is not qualified and eligible and in this regard it is also pointed out that issue of demand notice dated 18.7.2017 annexed



as Annexure E(colly) filed along with the Application by the Petitioner is also not relevant.

7. By way of rebuttal Learned Counsel for Petitioner points out the rejoinder which has been filed by the Petitioner wherein the Petitioner has sought to rely on the decision of the Hon'ble NCLAT already referred to and has also reiterated its contention as contained in the Petition and also points out efforts made to rectify certain mistakes which have been pointed out by the Corporate Debtor in relation to the communication as given by the proposed IRP and that the same are not fatal and presently also stands rectified.

8. We have considered in detail the submissions of the respective Counsels and documents filed in relation to the averments contained in the pleadings. It is seen from the agreement which has been annexed as Annexure-B given the nomenclature of mutual agreement as entered into between the parties on 10.4.2017, the amount of Rs.25,00,000/- is sought to be treated as an investment and further interest at 24% per annum w.e.f. 22.06.2016 has also been stated. In clause (7) of the mutual agreement, it is stated that Ist Party i.e. the Corporate Debtor has also issued post dated cheques for the buy back amount as mentioned in clause (6) above where the payment details, amount wise, alongwith interest



aggregating in all to Rs.31,00,000/- has been clearly stated. In the same clause the Ist Party namely the Corporate Debtor also undertakes that if it fails to buyback the flat within agreed period there is an additional grace period of maximum of 180 days to be provided for buy pack with mutual consent and in relation to additional period the Ist party has undertaken to pay interest at 6% per quarter to the IInd party, namely the Petitioner on payments due. Upon default, it has been agreed by both the parties in clause (7) of the agreement that the Petitioner shall forfeit payments received till such date for failure to buy back and in that event the Corporate Debtor will be bound to transfer the specified flat to the Petitioner. Essentially from the perusal of the agreement it is seen that it is more of an agreement in relation to a money transaction and monies being made available and the Corporate Debtor also agreeing to repay the money alongwith interest taking into consideration the time value for money as defined under Section 5(8) of IBC,2016 defining the financial debt. As clearly seen from clause (7) of the Agreement only in the event of failure to buy back the Corporate Debtor is bound to transfer the specified flat to the Petitioner. In the circumstances the agreement cannot be considered as an agreement for the purchase of a flat or immovable property and is more proximate to the one dealt with by Hon'ble NCLAT in the



case of Nikhil Mehta and Sons vs. AMR Infrastructure Ltd. in CA(AT)(Insolvency) No.07 of 2017 dated 21.07.2017 and after elaborate consideration of the provisions of IBC,2016 in relation to Financial Creditor, financial debt and triggering the process of insolvency by way of Financial Creditor by virtue of Section 7 at paragraph 20, the following has been stated and which is reproduced below:

From the aforesaid agreement/Memorandum of Understanding it is clear that appellants are "investors" and has chosen "committed return plan". The respondent in their turn agreed upon to pay monthly committed return to investors. Thus, the amount due to the appellants come within the meaning of 'debt' as defined in Section 3(11) of the 'I&B Code' which reads as follows:-

"(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

9. The fact of issue of post dated cheques for Rs.25,00,000/- being the amount invested and for a further amount of Rs.600,000/- by way of post dated cheques on quarterly basis towards interest clearly points out to the intention of the Corporate Debtor to treat the amounts received as amount invested. If the contention of the



Ld. Counsel for Corporate Debtor that a default has not occurred and cannot occur till 2019, when the possession of the flat was required to be handed over, it is quite strange as to what made the Corporate Debtor to issue cheques all dated in the year 2017. No sufficient explanation is forthcoming on the same on the part of the Corporate Debtor.

10. Further, despite an opportunity being given by this Tribunal to the Corporate Debtor to sustain its plea that the amounts which were made available by the Petitioner to the Corporate Debtor is not a loan or investment but only an advance towards the purchase of property by producing audited balance sheet dated 31.3.2017 and correlating the same with individual schedules of advance received in relation to the purchase of immovable property and such amounts being disclosed therein duly certified by the auditor in this regard vide order dated 8.11.2017, and even though the balance sheet for the year ended 31.3.2017 has been filed but the schedule annexed in relation to the advance from customers has not been certified by the Chartered Accountant / Company Auditors, as directed by this Tribunal, which goes to seriously undermine, as rightly claimed by Ld. Counsel for the Petitioner of the veracity of the figures as reflected in the financial statements furnished by the Corporate Debtor and that whether the amounts received from Financial



Creditor is recognized as an advance received for the purchase of immovable property. Thus taking into consideration the facts and circumstances of the case and the provisions of law as well and keeping in view the decision of the Hon'ble NCLAT passed in Nikhil Mehta and Sons vs. AMR Infrastructure Ltd. in CA(AT)(Insolvency) No.07 of 2017 dated 21.07.2017, this Tribunal is of the considered view that the Petitioner herein is a Financial Creditor and a financial debt is owed by the Corporate Debtor as per the provisions of IBC, 2016, the Petition is to be admitted applying the ratio contained therein and the Insolvency process be initiated in relation to the Corporate Debtor in view of the default committed by the Corporate Debtor which is evident from the dishonor of cheques issued and accordingly the Petition stands admitted. Mr. Kanwal Chaudhary is appointed as the Interim Resolution Professional having his address at EA-413, Maya Enclave, New Delhi-110 064 to take over the affairs of the Corporate Debtor as envisaged under the provisions of IBC,2016 and who is duly bound to act in consonance with the provisions of IBC,2016 and other rules and regulations framed thereunder.

11. The moratorium as envisaged under the provisions of Section 14 as extracted hereunder shall follow in relation to the Corporate



Debtor and the same is declared prohibiting all of the following, namely:—

“(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.

However, 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.

The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if this Tribunal approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”



12. The management of the Corporate Debtor, in the mean while shall stand suspended taking into consideration the provisions of Section 17 of IBC,2016 and the same shall stand vested with the IRP named herein above and all the parties are directed to co-operate with the IRP in discharging his powers and duties as enjoined under IBC,2016.

13. In terms of the above, the Application stands allowed. Let a copy of this order be communicated to both the 'Financial Creditor' as well as the 'Corporate Debtor' and to Mr. Kanwal Choudhary being the IRP by the Registry, as provided under the provisions of Section 9(5) of IBC,2016.

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Sd/-
08.12.2017
(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta
8.12.2017