THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
AT NEW DELHI

Company Petition No. (IB)-385(ND)/2017

Under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

1. Pawan Dubey
2. Pushpa Dubey ....Petitioners

Versus

J.B. K. Developers Pvt. Ltd. ....Respondent

CORAM:
MS. INA MALHOTRA, MEMBER (JUDICIAL)
MR. S.K. MOHAPATRA, MEMBER (TECHNICAL)

For Financial Creditor: Mr. Biswajit Das, Advocate
Mr. Tarun Khanna, Advocate
Mr. Pawan Dubey, Applicant
For Corporate Debtor: Mr. Praveen Mahajan, Advocate
Ms. Nivedita Jain, Advocate

Judgment delivered on: 16.02.2018

ORDER

S. K. Mohapatra, Member

1. Mr. Pawan Dubey and Mrs. Pushpa Dubey have jointly filed the present 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 J.B.K. Developers Private Limited claimed to be the corporate debtor.

2. The Respondent J.B.K Developers Private Limited, against whom initiation of Corporate Insolvency Resolution Process has been prayed for, is a company incorporated on 23.03.2003 under the companies Act, 1956 and has its registered office at 99 Patparganj, Delhi-110091. Since the registered office of the respondent company 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 the applicants that applicant No. 1 and his mother applicant No. 2, booked a commercial shop no. F-4 having a super area of 283 sq. ft. with assured return plan @ 14% per annum till 6 years and 16% in the seventh year in the Green Avenue project. The applicants have paid a total sum of Rs.25,77,565/- (Rupees Twenty Five lakhs Seventy Seven thousand Five Hundred Sixty Five only), on which the Corporate debtor Company issued an allotment letter dated 23.07.2013 containing terms and conditions of the said allotment. Copy of the allotment letter dated 23.07.2013 stated to be the builder buyers agreement, has been placed on record. It is submitted that as per terms of the agreement executed on 23.07.2013, the corporate debtor was to handover the possession of the shop positively within 3 years from the aforesaid date i.e. from 23.07.2013.

4. It is further submitted that since no substantial construction was being carried out by the respondent and huge consequential delay in delivery of possession have been made, the applicant No. 1 has sent lots of emails, messages and visited the office of respondent on numerous occasions. Applicant no. 1 also met respondent's officials from time to time including its Managing Director and other senior officials of the corporate debtor company *inter alia on* 16.07.2016. It is stated that in the meeting held on 16.07.2016, it was admitted by the Corporate debtor

Company's representatives including its Managing Director that construction has not been commenced and that there is huge amount of delay in handing over of possession to the Petitioner, corporate debtor company readily agreed to cancel the allotment and refund the Petitioner's principal amount of Rs.25,77,565/- (Rupees Twenty Five lakhs Seventy Seven thousand Five Hundred Sixty Five only) along with interest @ 18% per annum for the delay period as per the Builder Buyer Agreement.

5. It is also the case of the applicants that as discussed and confirmed in the meeting dated 16.07.2016, the Petitioners opted the option of cancellation of the commercial shop after 2-3 months from the date of the aforesaid meeting.

6. It is further contended that thereafter the applicants served cancellation letter dated 09.08.2017 and by the said letter, the applicants called upon the respondent company to pay the outstanding principal sum of Rs.25, 77,565/- (Rupees Twenty Five lakhs Seventy Seven thousand Five Hundred Sixty Five only) along with interest @ 18% per annum for delay period as per the agreement, within 7 days from the receipt of the said cancellation letter. It is submitted that cancellation letter was duly served on the corporate debtor on 09.08.2017 over the email and on 11.08.2017 through the speed post. But the corporate

debtor neither responded to the said letter nor paid the refund amount with interest. Copies of the letter, postal receipt and proof of service have been placed on record.

7. It is submitted that the applicants are entitled to the principal sum of Rs.25,77,565/- (Rupees Twenty Five lakhs Seventy Seven thousand Five Hundred Sixty Five only) along with interest @ 18% thereon for the delayed period. Copies of the acknowledgment receipts issued by the corporate debtor towards payment of Rs.25,77,565/- (Rupees Twenty Five lakhs Seventy Seven thousand Five Hundred Sixty Five only) have also been placed on record.

8. It is further stated that the corporate debtor company has within the period of 7 days from the receipt of cancellation letter or even thereafter failed and neglected to pay the principal sum of Rs.25,77,565/- (Rupees Twenty Five Lakhs Seventy Seven Thousand Five Hundred Sixty Five only) along with the interest @ 18% per annum to the petitioners and therefore the corporate debtor company clearly defaulted to pay its debts despite receiving cancellation letter.

9. Further it has been submitted that the applicants apprehend that the corporate debtor will dispose of its assets with a view to defeat the claims of its creditors including the applicant. In view of the default in payment of the claim/debt by the respondent company, applicants have

prayed for triggering Corporate Insolvency Resolution Process in respect of respondent corporate debtor.

10. Respondent company has filed its reply on 18/12/2017 in which various objections, as discussed below, have been raised.

11. One of the grounds raised by the respondent is that applicants have preferred two consumer complaints bearing CC/1505/2017 and CC/1506/2017 before learned Delhi State Consumer Commission which are still *sub-judice* before the Consumer Court. It is accordingly alleged that the applicants herein are engaged in forum shopping. It is argued that once the Consumer Court is deciding the merit of the dispute and is seized of the matter, successive petition under the Code on the selfsame issue is not maintainable. In this regard it is no longer *res-integra* that where two remedies are available under law, one of them should not be taken as operating in derogation of the other. It is also a settled law that in view of the overriding effect given to the provisions of Section 238 of the Code, initiation and pendency of proceeding under the Consumer Protection Act is no bar for initiation of resolution and insolvency proceedings under the Code. In that view of the matter the allegation of forum shopping neither is based on sound legal principles nor can sustain on the face of the overriding provisions of the Code.

12. It is further argued that earlier the applicants had filed petition under Section 9 of the Code before the Tribunal which was dismissed and an appeal preferred against such dismissal was not interfered with by the Hon'ble NCLAT. Therefore, it is contended that the present application is liable to be dismissed on the basis of principle of *res-judicata*. In this regard it is pertinent to note that the subject matter of the present case is different which pertains to shop no. F4, whereas the earlier application was in respect of Flat no. 1002. Besides it is seen that the earlier application was moved under Section 9 of the Code, whereas the present application is under Section 7 of the Code, which is clearly a distinguishable and different case having dissimilar cause of action. Therefore, there is no doubt that the principle of *res-judicata* is not applicable to the present case.

13. Another objection taken by the respondent is that as consumer cases between the parties are admittedly pending in a court of law, *a clear dispute exists* and consequently the provisions of IBC shall not be applicable. Ld. Counsel for respondent has also pointed out that the applicants have claimed interest differently in the present application and that in the complaints filed before the consumer commission. In this regard it is to be seen that the present case has been filed under Section 7 and not under Section 9 of the Code so as to attract the claim of

existence of dispute. In the present application filed under Section 7 of the Code, it is no matter that the debt is disputed so long as the debt is due and payable. Similarly variance in the claim of interest itself may not be significant and once the default is more than Rs. 1 lac as required under Section 4 of the Code the application can be entertained *if otherwise found in order and if the applicant is not ineligible.*

14. Be that as it may the main contention of the respondent is that the applicants do 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 after *suo-moto* cancellation seeking refund of the booking amount with interest as compensation or damages does not qualify the petitioner as "Financial Creditor", particularly when there is no default in payment of the assured returns.

16. On the contrary the case of the applicants is that they come within the definition of "Financial Creditor" as the principal amount was clearly disbursed against the consideration for time value of money. It is placed that there are documents in support of such disbursement, which

has not been denied. Applicants 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 applicants have to satisfy that they come 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 aborrowing;

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.

Very precisely "Financial debt" is a debt along with interest, if any, which is disbursed against consideration for time value of money.

22. In the present case the applicants booked a commercial shop no. F-4 having a super area of 283 sq. ft in the Green Avenue project of the respondent and have paid a total sum of Rs.25,77,565/- (Rupees Twenty Five lakhs Seventy Seven thousand Five Hundred Sixty Five only). The allotment letter dated 23.07.2013 containing terms and conditions of the said allotment provides vide clause 1 (A) as follows:

"1(A) The assured return will be given to the Allottee 14 % till 6 years and 16% in seventh years after the whole payment."

23. There is thus no dispute that the amount was disbursed with assured return plan @ 14% per annum till 6 years and 16% in the seventh year. Therefore disbursement was clearly against the consideration for time value of money. Consequently on default of payment of any annual assured return the applicants could have moved as "Financial Creditor" claiming the principal sum along with unpaid assured return as "Financial debt". However in the present case respondent has claimed that "*till date there is no default in making the payment since the assured return is paid annually by the respondent as per the terms in the allotment letter itself*". Applicants have miserably failed to state specifically as to which of the annual assured returns was defaulted and not paid. There is no question of default once the annual assured return is paid annually by the respondent in terms of the allotment letter. Only in case of default in payment of annual assured return, the applicants could have claimed the principal sum and the unpaid annual assured return as "financial debt". Therefore when there is no default in payment of the annual assured return, as per the terms of the agreement the payment of assured return was supposed to have continued till seventh year.

24. On 9th February, 2018 the applicants were asked to clarify as to how in the application date of default has been shown as 17th August,

2017. Ld. Counsel for applicant submitted that the allotment/contract was cancelled on 9th August, 2017, wherein the return of the principal amount with interest was demanded giving 7 days' time from the receipt of the said cancellation letter. Accordingly it is placed that the date of default is 17th August, 2017 and since then the default continues.

25. It is thus seen that it is not a case where there has been a default in payment of annual assured return and the applicants have claimed the principal sum along with the unpaid annual assured return as "financial debt". On the contrary it is a case where allotment/contract was cancelled and consequently there is a claim of return of principal sum with interest. Such claim pursuant to suo moto cancellation requires adjudication and raises complex interpretation of provisions of contractual agreement. The claim in question cannot be equated as a simple claim of principal sum/ investment plus assured return.

26. It is argued on behalf of the applicants that the cancellation of the allotment was made pursuant to the option given to them in the meeting dated 16.07.2016. The respondent however controverted the same by pointing out the entry at serial no. 39 to show that the petitioner attended the meeting for 'IRIS 1002' which is different from 'Shop No. F/4'. Admittedly Shop No. F/4 is the subject matter of the present petition and not IRIS 1002 as shown at serial no. 39 of the minutes.

Secondly it is contended that the meeting was held long before on 16.07.2016 and respondent vide clause 5 afforded refund with interest *provided the buyer applies for refund within 10 days failing which all the terms of builder buyer agreement shall be applicable.* In the present case admittedly the applicants did not apply for cancellation within 10 days. The cancellation was made on 09.08.2017 almost one year after the date of meeting i.e. 16.07.2016. Respondent has further referred to the e-mail dated 20.07.2016 sent after four days of the meeting, where applicants did not exercise the option to take refund rather intimated to continue with the investment in the shop. Accordingly, there is force in the contention of the respondent that terms of builder buyer agreement shall be applicable in the present claim.

27. The present claim made after cancellation of allotment will naturally face the resistance of contractual obligations like clause (i), which provides that in case of cancellation *interalia* 20% of the price shall be forfeited. Moreover the rate of interest claimed is neither based on agreement nor has been admitted by the respondent. Therefore the present claim falls within the purview of contractual liability requiring investigation and not a simplicitor "financial debt". 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. Such home buyers and contractual claimants on suo moto cancellation of their respective contracts cannot come within purview of financial creditor.

28. The present case is distinguishable from the case of Nikhil Mehta & Sons Vs, AMR Infrastructure Ltd. in Company Appeal (AT) (Insolvency) No. 07 of 2017. In that case there was persistent default in making payment of the assured return, where as in the present case there is no claim that the yearly assured returns were not paid by the respondent company. In other words in the present case there is no default of payment of assured returns. Secondly, in respect of the debt claimed in the present case there is no whisper of inclusion of any unpaid assured return. In the factual background the application is not maintainable as the present claim cannot be termed as a 'financial debt' and the applicants do not come within the purview of financial creditors.

29. 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.

30. In view of the above we are of the opinion that neither the present claim can be termed as a financial debt nor do the applicants come within the meaning of financial creditor. Accordingly, the present application filed under Section 7 of the Code stands dismissed as not maintainable.

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

Sd/-

(S. K. Mohapatra)
Member Technical

Sd/-

(Ina Malhotra)
Member Judicial