

In the National Company Law Tribunal  
Mumbai Bench.

**MA 999/2018** in C.P.(IB)-1726/(MB)/2017

Under Section 9 of Insolvency & Bankruptcy Code, 2016

In the matter of

Amish Jaysukhlal Sanghrajka & Anr. : Petitioner/ Operational Creditor

V/s

Alshar Shanti Realtors Pvt. Ltd. : Respondent/ Corporate Debtor

Order delivered on: 25.02.2019

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s): : 1. Mr. Tejas K. Sangharjka, Advocate;  
2. Mr. Kayval P. Shah, Advocate.

For the Respondent(s): : 1. Mr. Nikhil Rajani, i/b. M/s. V. Deshpande  
& Co.

*Per M.K. Shrawat, Member (Judicial).*

**ORDER**

1. This Miscellaneous Application is submitted by the Applicants on 16.07.2018 who have also filed a Petition on Form No.5 on 11.12.2017 in the capacity of Operational Creditor in respect of an Operational Debt of ₹66,28,000/- (Principal amount) and interest thereon of ₹21,74,792/- against M/s. Akshar Shanti Realtors Pvt. Ltd., Mumbai, alleged Corporate Debtor.

1.1. During the pendency of the said Petition which was admitted filed u/s.9 of the Insolvency Code, an attempt was made to mutually settle the dispute. However, went in vain. During the pendency of the said Petition the Petitioner had submitted that although the Petition was filed u/s. 9 of The Code but in view of the amendment in Insolvency Code the claim of outstanding debt falls within the provisions of section 7 of the Insolvency Code, therefore, seeking for an amendment. As a consequence, a legal question was raised that whether a Petition filed u/s.9 can be amended to the extent that it may be treated as a Petition u/s. 7 of the Insolvency Code ? On this legal issue

parties have filed reply and counter-reply, duly perused in the light of the case laws relied upon.

2. Brief facts of the case is as follows:-

2.1. The Petitioners had been allotted Flat bearing No. 1601 (i.e. Flat No.1) and Flat bearing No. 1604 (i.e. Flat No. 2) on the 16<sup>th</sup> Floor in Wing 'E' of the Project called 'Imperial Heights' situated at Behind Royal College, Shanti Garden, Mira Road (East), District Thane.

2.2. Pursuant to terms of the Letter of Allotment for Flat No.1 and Flat No.2, Petitioner made the total payment of ₹71,03,000/- (Rupees Seventy One Lakhs Three Thousand Only) against the allotment of Flat No.1 and Flat No.2 and the receipts were also issued by the Respondent Company. The Petitioners have decided to purchase a new home at Andheri, Mumbai, therefore, demanded the refund of the money deposited with the Respondent Company. After several request a cheque was issued of a sum of ₹4,75,000/- dated 15.07.2017 in the name of Petitioner No.2 viz. Mrs. Aparna A. Sanghrajka. The said payment was cleared by the Bank. On 29.07.2017 the Respondent Company had registered its project "Imperial Heights" under Real Estate (Regulation & Development) Act, 2016 and obtained a Registration Certificate. On examination of the details as reflected in the official website of Maharashtra Real Estate Regulatory Authority it was noticed that the permission was sought to construct Wing E which was not in the Project when the Applicant had deposited the money. To claim the said amount, the Petitioner has submitted the impugned Petition u/s.9 of the Insolvency Code.

2.3. Now the question is that in the light of the above background whether the Petitioner be allowed to amend the Petition filed u/s.9 of The Code to the extent that the same be treated as an Application u/s.7 of The Code. The argument is that the said amendment is required due changes in the Petition. The Learned Counsel of the Petitioner has informed that through an Ordinance pronounced as The Insolvency and

Bankruptcy Code (Amendment) Ordinance, 2018, No.6 of 2018 dated 06.06.2018 an 'Explanation' is inserted u/s.5(8) Sub-clause (f) which states as below:-

"[Explanation.—For the purpose of this sub-clause, --

(i) any amount raised from an allottee under a real estate project shall be deemed to an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (z/n) of section 2 of the Real Estate (Regulation and Development) Act, 2016;]".

2.4. The said amendment in the Code was declared as "it shall come into force at once" vide IBC (Amendment) Ordinance No.6 of 2018 dated 06.06.2018. On account of the said amendment in the Statute the Petitioner has pleaded that the **classification of the Debt amount had changed from "Operational Debt" to "Financial Debt"** due to which an amendment is required in the impugned Petition which was filed u/s. 9, undisputedly within the ambits of the existing provisions of The Code. Along with this Application the proposed amendment has also been annexed, which is nothing but Form No.1 required to be submitted by a Financial Creditor to initiate CIRP against a Corporate Debtor.

2.5. The argument of the Ld. Counsel is that the facts of the case are that:-

- a. The Petitioner booked Flat No.1601 and 1604 in 'E' Wing of project called as Imperial Heights' being constructed by the Respondent. Accordingly, vide Letter dated 31.07.2015, the Respondent booked Flat No.1601, 1604 on 16<sup>th</sup> Floor of "E" Wing in the Project. However, it is alleged that a formal Agreement for Purchase was not executed in favour of the Petitioner.
- b. The Petitioner, however, wanted to cancel the said booking and therefore pursued the matter with the Respondent for cancellation of the booking for the said flats and the refund of money initially paid against the allotment. The Respondent was not at all interested in any such cancellation, however just to facilitate the Petitioners in their purchasing flat at Andheri the Respondent agreed for such cancellation. However, it is alleged that, all along the Respondent had made it very clear to the Petitioner that as per the terms in allotment letter as well as

terms of registered Agreement with other flat purchasers on the project and even conventional practice, if any party desirous to cancel the booking the amount till then paid would be refunded after deducting 25% of the total consideration paid and after deducting the amount of service tax paid if any and thus the balance payment only will be refunded against signing of the letter of cancellation.

- c. The Petitioner had agreed, therefore, the Respondent had issued Two Cheques of ₹4,75,000/- each. The issuance of Cheques were claimed as acceptance of Debt.

3. From the side of the Respondent it is pleaded that the Petitioner had tried to abruptly change the terms and also demanded for refund. Moreover, the Petition filed u/s.9 of The Code is not maintainable because of the change in the provisions in IB Code. The change came into effect from 06.06.2018 onwards, hence the Petition filed u/s.9 of IBC is not maintainable. The said amendment is not retrospective in nature, therefore, the Petition already filed u/s.9 must not be considered as Petition u/s.7 of the Insolvency Code. The Petition filed u/s.9 is otherwise not maintainable because the Petitioner ha backed out from the contract.

4. Heard the arguments of both the sides. Mainly revolving around the issue that whether a Petition filed u/s.9 in respect of booking of Flats can be allowed to be amended so as to be treated as a Petition under section 7 of the Insolvency Code, now required due to the Ordinance of 06.06.2018.

4.1. As far as the protection of rights of the home buyers is concerned, the decision of Chitra Sharma & Ors. Vs. Union of India (Writ Petition Civil No.744 of 2007 Order dated 09.08.2018) is a landmark decision of the Hon'ble Supreme Court wherein vide Para 27, an observation has been made that the originally enacted Code had not given adequate recognition of interest of home buyers in real estate projects, hence the concerns of the home buyer were sought to be assuaged which resulted into an amendment/ Ordinance of 06.06.2018. The home buyers thus brought within the purview of "Financial Creditors". In the said decision the Hon'ble Supreme Court has

thus directed by exercising powers vested under Article 142 of the Constitution directing to constitute a fresh CoC so that the home buyers can also participate.

4.2. Respectfully following the decision of the Hon'ble Supreme Court, this Bench is of the view that the grievance of the home buyers in the case of Chitra Sharma (*supra*) was cured by invoking the Special Power enshrined to the Hon'ble Court, however, a direction is conveyed to be followed by rest of the Judicial Authorities, needless to mention inclusive NCLT, so that the home buyers may get fair chance of recovery of their outstanding amount or the Flat, as the case may be.

4.3. The letter and spirit of the Ordinance as well as the view expressed by the Hon'ble Supreme Court is that the rights of the home buyers be not suffered. Keeping this message in mind, this Bench is of the conscientious view that the amendment has become mandatory due to change in law. It is not the case that the Petitioner himself is seeking amendment on his own to overcome any of his mistake by carry out rectification/ amendment. But the situation is that due to "operation of law" the amendment in question is mandatorily required. Therefore, a conclusion can be drawn that a litigant be permitted to carry out the amendment if required under changed provisions of a law, then such request be allowed for legal dispensation of a case. The amendment is thus a requirement of law and not own volition of the Petitioner.

4.4. As far as the objection of applicability of the Ordinance is concerned, it is true that the Ordinance is effective from the date it was pronounced, but undisputedly apply on those cases pending for disposal. Therefore, there should not be any ambiguity that on pronouncement of the Ordinance the cases falling under the said category are to be disposed of as per the "Explanation" inserted, but for that, a procedure is to be adopted, i.e. submission of requisite Form/ Petition. Under the same C.P. number already registered by the Registry, a new Form No.1 is to be entertained by this Bench, needless to mention, subject to payment of differential filing Fees, if any. The Petitioner has already submitted the requisite Form No.1, however, directed to contact the Registry for payment of additional filing fees.

4.5. This Application is allowed. The Petitioner/ Applicant is permitted to place on record Form No.1, stated to be annexed with the Miscellaneous Application, subject to payment of filing fees. On the basis of thee amended Application, rest of the proceedings under Insolvency Code shall commence henceforth.

5. Listed for hearing on the Petition on **26.03.2019**.

Sd/-  
**(M.K. SHRAWAT)**  
Member (Judicial)

Date : 25.02.2019

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