# IN THE NATIONAL COMPANY LAW TRIBUNAL
## ALLAHABAD BENCH

**Company Petition (IB)No.381/ALD/2018**

*(Under Section 7 of Insolvency and Bankruptcy Code,2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule,2016)*

**IN THE MATTER OF**

**PANKAJ SINGH & ORS.**

**............Petitioners/Financial Creditors**

**VERSUS**

**AFTEK INFRASTRUCTURE PVT.LTD**

**........................Respondent/Corporate Debtor.**

**ORDER RESERVED ON:18.09.2019**

**ORDER DELIVERED ON :23.10.2019**

**CORAM :**
Hon'ble Mr. Abni Ranjan Kumar Sinha(Judicial)

For the Petitioner: Sh. Anuj Kumar, Adv.
For the Corporate Debtor: None

**AS PER:** Sh.Abni Ranjan Kumar Sinha(Judicial)

**Order**

1. The present petition is filed under Section 7 of Insolvency and Bankruptcy Code,2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule,2016 by the petitioner/financial creditors ***i.ePankaj Singh & Ors.*** for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate debtor company ***Aftek Infrastructure Pvt. Ltd.***

2. The Applicant **"*Pankaj Singh , Bharat Kalra and Vikas Agarwal*"** having Date of Incorporation as 24.04.1983,03.06.1977 and 19.10.1976 repectively having Identification No as AZXPS4757N, AGPPK2058K, ADSPA3485E respectively and the application is filed jointly by three financial creditors/ homebuyers and in view of

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Sec 7 of IBC a joint petition can be filed. **Mr. Pawan Kumar,** has been authorised to file this application on behalf of Financial Creditors. ***(The copy of the special power of attorney dated 24.09.2018 authorising the person is annexed as Pages 19-29 of the application)***

**3.** The Respondent "***Aftek Infrastructure Pvt.Ltd***" incorporated on 04.10.2013*(Having its Registered Office at M-57, Sanjay Gandhipuram, FaizaRoad, Lucknow, Uttarpradesh, CIN U70102UP2013PTC059884)*. The authorised share capital of respondent is Rs. 1,00,00,000/- (Rupee One Crores Only) and Paid- Up share Capital is Rs.1,36,000/-(Rupees One Lakh Thirty Six Thousand).

4. Brief facts related to petition are as follows:

**i.** The learned counsel for the petitioner submitted that the financial creditors were allotted their respective flats in Aftek infrastructure Pvt. Ltd's proposed project called "Amaatra Aftek Residency" vide their respective Allotment letters and demand letters and subsequently, permission to mortgage the respective flats of the financial creditors was also given to the financial creditor for their respective flats and agreement to Sale was executed between the Corporate debtor and financial creditors.

**ii.** Further submitted that the entire loan amount was disbursed to the corporate debtor at once and the EMI of the loan amount is being deducted from the account of the financial creditor regularly as per the repayment schedule, despite the failure of corporate Debtor to render the peaceful possession of the residential premises within the designated time.

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**iii.** Further stated that it came to the knowledge of the financial creditors in November 2016 that the Corporate debtor signed a joint venture dated 31.07.2015 with one Yazdan Constructions to continue with the proposed project and the name of the proposed project was changed from "AftekAmaaatra" to "AllayahAftek" as a subsequence. Further stated that at the time of booking/ allotment of the flats to the financial creditors to the project "Aftek Amaatra" was not in existence as the construction rights were transferred to Yazdan Constructions and the project name was subsequently changed to " Allayah Aftek".

iv. Further submitted that the legal notice pertaining to the demand of their respective amounts along with statutory interest @ 24% p.a and damages amounting to Rs 15,00,000/- each was duly served upon the Corporate Debtor on 15.06.2018. Further the letter dated 06.07.2018 was issued by the Corporate debtor addressing the financial creditors individually, fraudulently claiming to give the peaceful possession of the properties to their respective allottees within 90 days from the date of issuing the letter. Hence, prayed for the application to be admitted.

v. Further the amount claimed to be in default is Rs. 5,57,67,500/-(Rupees Five Crores Fifty-Seven Lakhs Sixty-Seven Thousand and Five Hundred Only) and the date of default is 26.07.2017 when the default by the Corporate Debtor occurred, since, the construction of the aforesaid project was on hold as per the letter dated 26.07.2017, when the corporate debtor, in spite of admitting the dues, failed to deliver the peaceful possession of the residential premises.

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5. The Learned Counsel for the Financial Creditor submitted that in order to prove the Existence of the Financial Debt; they have annexed following documents:

   *i.* The copy of allotment letters and demand letters are annexed as ***Annexure-1 (Colly) of the Application.***

   *ii.* The copy of permission to mortgage of the financial creditors and tripartite agreements executed between the financial creditors and Corporate debtor are annexed as ***Annexure 2 and Annexure 3 of the Application.***

   ***iii.*** *The copy of letter dated 26.07.2017 sent by the Vijaya Bank towards the Corporate Debtor regarding non completion of the project is annexed as* ***Annexure-5 of the application*** *and the copy of the information rendered as a repercussion of the RTI filed regarding the status of the project is annexure as* ***Annexure-7 of the application.***

   *iv.* The copy of the agreement to sale executed between the financial creditors and Corporate debtor is annexed as ***Annexure-9 of the Application.***

   *v.* The Copy of the legal notice sent to the Corporate Debtor dated 15.06.2018 sent to the Corporate Debtor is annexed as ***Annexure 6 of the Application.***

   *vi.* The applicant on 12.04.2019 filed an additional affidavit annexing the documents evidencing the payment of the money by the financial creditors to the corporate Debtor and transfer of money from the banker to the respondent.

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6. It is a matter of record that although several opportunities were granted but the Corporate Debtor chosen not to contest the case, hence vide order dated 22.08.2019, the case is fixed for exparte hearing.

7. I have gone through the contents of the petition , and documents annexed thereof, and on the date of hearing, as none appeared on behalf of Corporate Debtor. So, from the perusal of averments made in the Petition, I find, the mere plain reading of the provision shows that in order to make an application under Section 7 (1) the financial creditor / petitioner is required to establish:

   a. Whether there is duly established financial debt.

   b. Whether there is default in payment by the corporate debtor.

   c. Whether the documents attached with the applicant shows that there is default in payment of debt and name of resolution professional is proposed to act as IRP and no disciplinary proceedings are pending against the proposed resolution professional.



8. At this juncture, I would like to refer certain decisions:

   The Hon'ble Supreme Court in ***<u>Innoventive Industries Ltd. v. ICICI Bank ,(2017)205 Comp Cas 57(SC)</u> held :***

   ***"The scheme of Sec 7 stands in contrast with the scheme under Sec 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in sec 8(1) of the Code. Under Sec 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub Section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing –i.e., before such notice or invoice was received by the corporate debtor. The moment***

***there is existence of such a dispute, the operational creditor goes out of the clutches of the Court.***

***On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is 'due', i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some further debt. It is only when this is prove to the satisfaction of the adjudicating authority may reject an application and not otherwise".***

9. In the case ***of Ajay Agarwal vs. Central Bank of India (2018) 208 Comp Cas 402 (NCLAT)*** Hon'ble NCLAT held:

***"When in case a "Corporate Debtor" commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the "financial creditor" to satisfy itself that a default has occurred. Other considerations, such as the existence a dispute or discrepancy are irrelevant, so long it has not been disputed the same debt is due and is payable to the financial creditor and the corporate debtor has defaulted."***

10. Recently in the matter of ***Karan Goel v. M/s Pashupati Jewellers & Anr. Company Appeal (AT) (Insolvency) No. 1021 of 2019 dated 01.10.2019*** stated:

***"................ it is clear that once the Adjudicating Authority is satisfied on the basis of records that the debt is payable and there is default, the Adjudicating Authority is required to admit the application."***

11. In the light of the aforesaid decisions, now, this Adjudicating Authority shall consider the claim of the applicants. At this juncture, I

would like to refer definition of the ***"Financial Creditor"*** and ***"Financial Debt"*** and the same is quoted below: -

***Definitions.***

***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 along with 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 non-recourse basis;*

***(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;***

***[Explanation. - For the purposes of this sub-clause, -***

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***(i) Any amount raised from an allottee under a real estate project shall be deemed to be 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 (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]***

***(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;*

***(h)*** *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;*

***(i)*** *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

12. On perusal of Explaination (i) of Section 5(8)(f) IB Code, 2016, this Adjudicating Authority is of the considered view that the alottee of the flat comes under the definition of "***Financial Creditor***" and the payment made by them for the purpose of allotment of flats comes under the definition of ***"Financial Debt".***

13. This Adjudicating Authority further finds that as the default by the corpoarte debtor occurred since the construction of the project was on hold as per letter communiaction sent by the Vijaya Bank dated **26.07.2017** which is ***annexed as Annexure -5 of the application***, when the corporate debtor, inspite of admitting the dues, failed to deliver the peaceful possession of the residential premises and the Applicants/

Financial Creditors has filed this application on **23.10.2018** which is found well within limitation.

14. Hence, the application filed on behalf of financial creditor/Applicant under Section 7 of IBC is found complete and it is within limitation. It further appears that there is default in non-payment of the debt owed by the corporate debtor which is more than Rs One Lakh to trigger the CIRP against the Corporate Debtor and the applicant has annexed sufficient documentary evidence to show that there is default on behalf of the corporate debtor. Therefore, application filed U/S 7 of IBC deserves to be admitted.

15. The Financial Creditor has proposed the name of ***Mr S.K Jha, Registration Number IBBI/IPA-002/IP-N00684/2018-19/12031*** for appointment as Interim Resolution Professional(IRP). Further IRP has filed a declaration in form 2 affirming that he is registered insolvency professional and no disciplinary proceedings are pending against him. ***(Copy of Form -2 is annexed as Annexure-3 of the Application)*** and there is default in the payment of the financial debt which is more than Rs One Lakh. Therefore, as per section 7(5)(a) of the code, the present application filed U/s 7 of the IB Code is admitted.

16. ***Mr S.K Jha, Registration Number IBBI/IPA-002/IP-N00684/2018-19/12031*** is appointed as Interim Resolution Professional(IRP). Further, a moratorium under the provision of section13 & 14 of the Code is declared prohibiting the following:

*(i) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including*

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*execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*

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

*(iii) 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(54 of 2002);*

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



It is further directed that:

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

*(ii) The provision of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial sector regulator.*

17. The IRP shall comply with the Provision of Section 13(2), 15,17 &18 of the Code. Further, the Directors, Promoters or any person associated with the Management of the Corporate Debtor are directed to co-operate to the IRP as prescribed under Section 19 and for discharging his function under a provision of section 20 of the Code.

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18. The Registry is further directed to communicate the copy of this order to Financial Creditor and Corporate Debtor and IRP through email and speed post.

19. List on ***14.11.2019*** for the filing of the progress report.

**Date : 23.10.2019**

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**Abni Ranjan Kumar Sinha**

**(Member Judicial)**

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL
24/10/19

P. P. PANDEY
ASSISTANT REGISTRAR
NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD-U.P.

FREE OF COST COPY

Compared by me
24/10/19