

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)**

Company Petition No. IB 3085/ND/2019

*[Under Section 7 of the Insolvency and Bankruptcy Code, 2016
Read with Rule 6 of the Insolvency and Bankruptcy (Application
to Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

MR. PRABUDDHA SARKAR

...APPLICANT/FINANCIAL CREDITOR

VERSUS

M/S ASCENT BUILDTECH PVT. LTD.

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 31.05.2021

CORAM:

**DR. DEEPTI MUKESH
HON'BLE MEMBER (Judicial)**

**MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (Technical)**

MEMO OF PARTIES

IN THE MATTER OF:

MR. PRABUDDHA SARKAR

Having registered office at:

Flat No. 3A, 3rd Floor,
Animikha Housing Corp,
AL-1/C/11, Street No. 26
Water Tank no.3
Kolkata, West Bengal-700156

...APPLICANT/FINANCIAL CREDITOR

VERSUS

M/s Ascent Buildtech Private Limited

Having registered office at:

G-39, Pocket A-1,
Mayur Vihar, Phase- III
New Delhi – 110096

...RESPONDENT/ CORPORATE DEBTOR

FOR THE APPLICANT :Ms Asmita Chaudhary, Adv.

FOR THE RESPONDENT :Mr. Neeraj Kumar, Adv.

ORDER**Per-Dr. Deepti Mukesh, Member (Judicial)**

1. The present application is filed 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') by Mr. PrabhudhaSarkar (for brevity 'Applicant') with a prayer to trigger Corporate Insolvency Resolution Process against M/s Ascent Buildtech Pvt. Ltd. (for brevity 'Corporate Debtor').
2. The Applicant, is a citizen of India, residing at Flat No. 3A, 3rd Floor, Animikha Housing Coop, AL-1/C/11, Street No.26, water Tank no.3, Kolkata, West Bengal-700156.
3. The corporate Debtor is private limited company incorporated on 17.03.2008 under the provisions of Companies Act, 1956 bearing CIN No. U74120DL20008PTC175481 having registered office at G-39, Pocket A-1, Mayur Vihar, Phase- III, New Delhi - 110096 and email info@ascentlimited.com. The corporate debtor is a company involved in the business of construction of deluxe residential flat, commercial complexes and independent sites in Delhi NCR.
4. The applicant states that applicant booked an apartment having No. B1-1402, 13thFloor, Tower-B, admeasuring 985 sq. mt. in the project 'SAVVY VILLE DE', being developed at Ghaziabad, Uttar Pradesh. In pursuance of the booking by the applicant, the applicant and corporate Debtor executed a flat buyer's agreement 31.05.2014, detailing the terms and conditions therein. The total sale consideration for the said apartment was Rs. 29,00,000/-

5. The applicant states that he had availed a loan for Rs. 23,20,000/- (Rupees Twenty-Three Lakhs Twenty Thousand only) from State Bank of India for the purpose of payment of sale consideration, for the said apartment and executed a tripartite agreement dated 10.07.2014. Further submits that he had opted for construction linked plan whereby payment was to be made according to the stages of construction of the apartment. The applicant overall made a payment of Rs. 28,53,987/- (Rupees Twenty-Eight Lakhs Fifty-Three Thousand Nine Hundred and Eighty-Seven only) which is 95% of the total payment, for the said apartment.
6. It is stated that in terms of Clause 3 of the Flat buyer's agreement the corporate debtor had to handover the possession of the apartment by November 2015 including grace period of 6 months. The applicant states that despite making timely remittances to the demands of the corporate debtor, the corporate debtor failed to hand over the possession by the committed date.
7. Thereafter, the applicant made several reminders via email and telephonically, however, the corporate debtor gave only assurances and failed to hand over the possession. The applicant left with no other option, approached the Uttar Pradesh Real Estate Authority, Lucknow (hereinafter referred to as 'UP-RERA') Bench and filed a complaint u/s 31 of Real Estate (Regulation & Development) Act, 2016 against the corporate debtor for possession of the above stated unit vide complaint No. 82017619/2017. Pursuant to the said complaint, vide order dated 29.06.2018 the UP-RERA, Lucknow directed the corporate debtor to refund the principal amount paid by the applicant along with delayed penalty interest @ 9.70% per annum, within 15 days from the date of the order.

8. The applicant submitted that the corporate debtor failed to comply with the order passed by the UP-RERA. Therefore, the applicant filed an application under Section 40 of the RERA Act, for execution of final order dated 29.06.2018. Accordingly, a recovery certificate for Rs. 41,70,857 was issued on 18.06.2019 by the UP-RERA, Lucknow Bench. Further, it is stated that the said recovery certificate was challenged by the corporate debtor before the Hon'ble Allahabad High Court by way of Writ petition. An interim order directing the corporate debtor to pay the principal amount in terms of the agreement within two weeks of receiving the certified copy of the said order was passed by the Hon'ble Allahabad High Court. The corporate debtor till date has failed to comply with the said order and which is still pending.

9. Consequently, the applicant filed an application under Section 7 of the I&B code, 2016 and as per Form I, Part IV the total amount of Rs. 43,17,126/- (Rupees Forty-Three Lakhs Seventeen Thousand One Hundred and Twenty-Six only), is due and payable by the corporate debtor.

10. The corporate debtor filed reply to the application under Section 7 of the I&B Code 2016 and raised the following objections:
 - a) That the present application is not maintainable as the applicant does not fall under the purview of Section 5(7) of the I & B code and the debt due and payable by corporate debtor is not a financial debt within the meaning of the Section 3 (11) of the code. Further, also stated that the applicant is not a decree holder in terms of Section 3(10) of the I& B code. The corporate debtor submits that since the recovery certificate of UP-RERA Lucknow is challenged by Corporate debtor before Hon'ble Allahabad High Court which is pending for deciding quantum of interest hence this application is premature. In

view of the Recovery Certificate not reaching finality, this application is liable to be rejected.

- b) That Corporate debtor submits that there is no default. Further, the Hon'ble Allahabad High Court has given interim direction that no coercive action shall be taken pursuant to the recovery certificate dated 18.06.2019, which is still in operation and this fact is concealed by the applicant. The applicant is involved in forum shopping.
- c) The corporate debtor states that as per tripartite agreement the Corporate Debtor is required to make payment of loan amount take by the applicant to the bank in case of failure of the applicant making payment to the bank. Further states that an amount of Rs. 9,54,910/- is deposited with Recovery officer in pursuance of the payment towards recovery certificate. Since it is found that the applicant has failed in making payment of the that loan amount to SBI the applicant is not entitled to claim any amount form the corporate debtor.
- d) It is stated that in view of pendency of the issue of finality of recovery certificate passed by the UP-RERA, Lucknow present proceeding could not have been initiated and is liable to be dismissed.
- e) That the corporate debtor has not complied with condition as envisaged under the proviso of Section 7(1) of the I&B code. Further there is a pre-existing dispute regarding the actual liability/dues of the financial creditor and against the applicant.

11. The applicant filed rejoinder and submitted following:

- a) That the default of corporate debtor is evident from the final order dated 29.06.2018 and recovery certificate dated 18.06.2019. Further in absence of any stay and clear directions of the Hon'ble Allahabad High Court to pay principal amount of Rs.28,53,987/- within stipulated period which is not received yet, the applicant needs to be admitted.

b) The applicant has relied on following citations in support of the application:

- ❖ *Innoventive Industries Vs. ICICI Bank & Anr.* for defining the scope and requirement of admission of Section 7 application and necessity of proving the financial debt, due and payable by the corporate debtor.
- ❖ *Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghvan* (2019) 5 SCC, 725 of Hon'ble Supreme Court declaring to prove the transaction between the parties falling in the category of financial debt as per section 5(8)(f), with default if proved application under Section 7 is maintainable.
- ❖ *V.R. Hemantraj Vs. Stanbic Bank Ghana Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 213 of 2018*, of Hon'ble NCLAT observing that for admitting application under Section 7 or 9 or 10 of I & B Code, only the existence of debt and occurrence of default needs to be satisfied.

c) That the applicant is not covered under the definition of the allottee, as per the decree passed by the Hon'ble RERA, wherein it was declared the applicant ceased to be a homebuyer/allottee of the corporate debtor as refund has been ordered in favour of the applicant nullifying the flat buyer agreement between them. The relation between the applicant and the corporate debtor is that of a decree holder. Further the corporate debtor has deposited Rs9,54,910/- with the recovery office in compliance of the order of Allahabad HC out of total amount of Rs. 28,53,987/- this establishes the fact of existence of debt.

d) The applicant has denied that the corporate debtor has challenged the order passed by UP-RERA Authority Lucknow by way of writ petition since the appropriate forum for challenging the order of UP-RERA RERA is UP-RERA Appellate Authority, Lucknow. Further, the order dated 08.08.2019 passed by Hon'ble Allahabad High Court referred by the corporate Debtor stands vacated as the corporate debtor has failed

to refund the principal amount to the applicant within the stipulated time. Thus, in view of the same as there is no stay from the Hon'ble Allahabad High Court over the recovery certificate the corporate debtor has defaulted in payment of debt.

- e) That the applicants have not approached this tribunal for the recovery of its money, but rather for the resolution of the corporate debtor who is unable to pay its debt to the creditors which is well within the purview of & B code. Further stated that the present application is not barred by the ordinance dated 28.12.2019, as applicant has filed the present case in the capacity of decree holder, who is also considered as a creditor of the corporate debtor.

12. The applicant has filed written submissions and stated the following:

- a) That applicant has again relied upon the case of *Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan* (2019) 5 SCC 725.
- b) That applicant states that by depositing sum of Rs.9,54,910/- the corporate debtor has admitted the financial debt.
- c) That that a judgment passed by Hon'ble National Company Law Appellate Tribunal in the case of *Sushil Ansal Vs. Ashok Tripathi & Ors.*, with respect to the question of decree holder being a creditor, the Hon'ble Appellate Authority has neither questioned nor put a stay on the definition of creditor under Section 3 (10) of the code, which still include a decree holder can approach this Hon'ble Tribunal for the default of its debt. Thereafter, the Hon'ble Supreme Court of India in the appeal [*Dinesh Kumar & Ors. Vs. Sushil Ansal & Ors.*, Civil Appeal No. 3403 of 2020] considering the issue of decree holder as a relevant question law issued notice, which is pending adjudication. Hence, the said judgment is still valid and binding.
- d) That the reliance is further made in *V.R. Hemantraj Vs. Stanbic Bank Ghana Ltd & Anr.* (Company Appeal (AT) (Insolvency) and *M/s. Urgo*

Capital Limited Vs. Bangalore Dehydration and Dying Equipment Company Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 984 of 2019, wherein the National Company Law Appellate Tribunal has admitted and accepted the applications of the decree holders against the debt due as per the decree.

13. The corporate debtor filed written submissions and stated the following:

a) That the present application is not maintainable in terms of the judgment dated 14.08.2020, passed by the Hon'ble NCLAT in Company Appeal (AT)(Insolvency) No. 452 of 2020, titled *Sushil Ansal Vs. Ashok Tripathi & Ors.*, wherein the NCLAT, has held that:

“Respondent Nos. 1 and 2 can no more claim to be an allottee of the Real Estate Project after issuance of Recovery Certificate.

...On their own showing they are the decree holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the 'I & B code'. Clearly, their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.”

b) That the Hon'ble NCLAT, in *“G. Eswaa Rao Vs. Stressed Assets Stabilization Funds and Ors.*, has laid down that an application under Section 7 of I & B code cannot be filed for execution of a decree as the amount claimed is an adjudicated amount and not a debt. Hence do not fall under definition of Section 5(8) of the code.

14. As per Form I part IV the applicant submits that the default has first occurred on 01.11.2015, Secondly on 14.07.2018, when the corporate debtor failed to comply with the order dated 29.06.2019 passed by UP-RERA, Lucknow and is still continuing till date. The present application is

filed on 13.11.2019. Hence, the application is within in the period and is not barred by limitation.

15. The registered office of the Corporate Debtor is situated at Delhi and therefore this tribunal has jurisdiction to entertain and try this application.

16. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of IBC. This Tribunal is satisfied that a default has occurred and the application under Section 7 is complete.

17. Considering the documents on records and submissions made, it prima facie shows that the debt, which had crystalized with respect to the refund of the allotment money as ordered by the UP-RERA, Lucknow, and again confirmed by the Hon'ble Allahabad High Court, which remained unpaid leading to default of payment of the financial debt. Admittedly, the applicant is a decree holder, of a decree passed of UP-RERA Lucknow. In the present case the application under Section 7 is not filed only on the basis of the decree but the applicant has acted one step forward and executed the decree before UP-RERA Lucknow wherein execution order has been passed confirming the payment of debt due to the applicant. Further, the corporate debtor has challenged the said execution order of UP-RERA, Lucknow which is pending before the Hon'ble Allahabad High Court wherein the directions are passed against corporate debtor to pay the principal amount within 2 weeks of the receiving of the said order. Hence, the amount of debt as confirmed by the Hon'ble Allahabad High Court ordering to be pay the same has reached finality, no stay against the said order is placed before us. Thus, the amount paid by the applicant to

the corporate debtor against the allotment of apartment, which falls under the category of financial debt has remained unpaid. Though the Hon'ble Allahabad High Court is ceased of the matter, for deciding the quantum of interest to be paid, while ordering to pay the principal amount which was allotment money paid by the applicant, bringing the applicant under the umbrella of financial creditor. Thus, in our view, the present applicant though original decree holder, has not filed this application under Section 7 of the code, for execution of decree but to demand the financial debt due and failing which the insolvency resolution of the corporate debtor. The judgment passed by the Hon'ble NCLAT in Company Appeal (AT)(Insolvency) No. 452 of 2020, titled *Sushil Ansal Vs. Ashok Tripathi & Ors* will not have direct bearing on present case and the applicant qualifies as financial creditor. It also mentioned that the said order has been challenged before the Hon'ble Supreme Court for considering the issue as to whether decree holder fulfills the norms prescribed for being a part of the committee of creditors by virtue of their being financial creditors. As mentioned in its order dated 09.10.2020.

18. As a sequel to the above discussion, this application is admitted. The applicant has proposed the name of Mr. Amarpal to be appointed as IRP, who is hereby appointed as IRP of corporate debtor having registration number IBBI/IPA-01/IP-P01584/2018-19/12411 having address at 401, DDA Building -2, District Centre, Janakpuri, New Delhi - 110058 and email-id amarpal@icai.org. The IRP has filed consent in form-2 of the Insolvency & Bankruptcy Board of India (Application to Adjudicating Authority) Rule 2016 and make disclosures as required under IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016.

19. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the corporate debtor prohibiting the corporate debtor as per proviso (a) to (d) of section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come in force.
20. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Amarpal to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days for the date of receipt of this order by the applicant. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the applicant.
21. In terms of above order, the application stands admitted in terms of Section 7 of IBC, 2016. A copy of the order shall be communicated to the applicant as well as to the Corporate Debtor above named by the Registry. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of the order shall also be forwarded to IBBI for its records and to ROC for updating the master data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-
MS. SUMITA PURKAYASTHA
MEMBER (T)

Sd/-
DR. DEEPTI MUKESH
MEMBER (J)