

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH-II**

(IB) 369 (ND)/2019

**IN THE MATTER OF:**

**DEVYOG SOLUTIONS PRIVATE LIMITED**  
**204-206, SIDDHARTH CHAMBERS,**  
**HAUZ KHAS,**  
**NEW DELHI-110016**

...FINANCIAL CREDITOR

**VERSUS**

**DWARKADHIS PROJECTS PRIVATE LIMITED**  
**PD-4A, PITAMPURA**  
**NEW DELHI- 110088**

.....CORPORATE DEBTOR

**SECTION: U/S 7 OF IBC, 2016**

**Order Delivered on: 06.06.2022**

**CORAM:**

**MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**  
**MR. L. N. GUPTA, MEMBER (TECHNICAL)**

**PRESENT:-**

**For the Financial Creditor :** Adv. Prashant Sivarajan,  
Adv. Upasana Chandrashekarani,  
Adv. Ankur Das

**For the Corporate Debtor :** Adv. Devashish Chauhan

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**ORDER**

**AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

The present petition has been filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on grounds of its inability to liquidate its financial debt.

2. The facts mentioned in the application in brief are as follows: -
- i. That the present application is filed for a debt of Rs. 1,62,20,065/- owed by the Corporate Debtor to the Financial Creditor as per the Agreement dated 28.04.2017 and 17.10.2017.
  - ii. That the parties entered into an Agreement dated 28.04.2017 for the purchase of 11 apartments in a group housing project named 'Casa Romana' and as per the terms of the said agreement, the Financial Creditor had made an investment of Rs 2,75,00,000/- and the Corporate Debtor agreed to and undertook to make payments of the assured returns at the rate of 24% per annum payable quarterly starting from April 2017 till April, 2019 with a buy-back option granted to the Financial Creditor to sale the said apartments in its discretion to the Corporate Debtor in the month of April, 2019.
  - iii. That, again, the parties had entered into an Agreement dated 17.10.2017 for the purchase of 16 more apartments and as per the terms of the said Agreement, the Financial Creditor made an investment of Rs 4,50,000,000/- and the Corporate Debtor agreed to and undertook to make payments of the assured returns at the rate of 22% per annum payable quarterly starting from October 2018 till October, 2019 with

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buy-back option granted to the Financial Creditor to sale the said apartments in its discretion to the Corporate Debtor in the month of October, 2019.

- iv. That the Corporate Debtor issued various post-dated cheques and honored the payment of the said assured returns till January 2018. However, from April 2018 onwards, the Corporate Debtor began to make defaults in its payment obligations towards the Financial Creditor and cheques for the quarter ending April 2018, July 2018, October 2018 and December 2018 were dishonored.
- v. That the Financial Creditor had issued demand notices dated 15.06.2018, 24.07.2018, 28.08.2018, 31.10.2018 and 29.01.2019 to the Corporate Debtor for the payment of the amounts due and the Corporate Debtor, vide reply dated 18.08.2018, 21.11.2018 and 12.01.2019, admitted its liability but denied to pay the same.

3. In response to notice, the Corporate Debtor has appeared and filed the reply and submitted the following:-

- i. That there is no default on part of the Corporate Debtor as no debt is due and payable. The parties herein were bound by two flat buyer agreements dated 28.04.2017 and 17.10.2017 wherein a clause for assured returns to the Financial Creditor on payment of an upfront amount was assured. A buy back option was also given to the Financial Creditor. The Corporate Debtor paid assured returns until April-May, 2018. However, later the parties agreed to do away with the assured returns and the buyback clause and the Financial Creditor agreed to purchase the apartments unconditionally. It was further agreed in the said meeting that the Corporate Debtor will make one last payment of assured return cheque, which got due on 28th April, 2018 and the Financial Creditor will pay the



balance amount due and payable of the 27 apartments and return the security cheques amounting to Rs.2,75,00,000/- and Rs.4,50,00,000/- to the Corporate Debtor as per Clause 1 of the Agreements. Thereafter, the Corporate Debtor made the payment on 22 May, 2018 and intimated the Financial Creditor that the demanded amount of those 27 flats were Rs.11,37,97,425/- out of which; the latter had paid only Rs.7,25,00,000/- and thus the balance amount of Rs.4,12,97,425/- was due and payable.

- ii. That day onwards, on mutual consent basis, the Corporate Debtor stopped making any payments of Assured Returns to the Financial Creditor and requested the Financial Creditor to not to present the post dated cheques it had issued. However, the Financial Creditor, based on mala fide, presented those cheques for clearance before the bank and the same were dishonoured as the Corporate Debtor had already asked the bank to stop payments.
- iii. That the present application has not been filed in consonance with 'Form 1' as laid down in the Code.
- iv. That the Financial Creditor has concealed the fact that it is a homebuyer and has attempted to portray itself in order to recover its assured returns amounting to Rs.1,62,20,065/-. A homebuyer can initiate CIRP when there is a default in completion of construction on time and/or delivery of possession. However, the Corporate Debtor herein has already completed 70% of the construction and is well in a position to hand over the possession on a near future date.
- v. That the Financial Creditor is a Speculative Investor and is treating this forum as a court of recovery.



- vi. That the Corporate Debtor had invoked arbitration under clause 16 of the Terms and Conditions of the Allotment Letter dated 28.04.2017 and 17.10.2019 vide Notice of appointment of Arbitrator dated 09.08.2019. However, the Financial Creditor did not accept the appointment of the Sole Arbitrator vide reply dated 11.09.2019 stating that no Agreement to sell has ever been signed or executed by it.
4. That in response to the Reply, the Financial Creditor has filed a Rejoinder and submitted the following:-
- i. That no such informal agreement was entered into between the parties in the month of April-May 2018 whereby the Financial Creditor agreed to forego the assured returns , waive the buyback option and purchase the apartments unconditionally. That there is no record of any written evidence or corroborating documents regarding such agreement.
  - ii. That it is denied that the Company Petition is not in consonance with 'Form 1'. It is submitted that the Authorised Representative, Mr. Raju Nigam, is empowered by a Board Resolution which duly and sufficiently empowers him to file the present Company Petition.
  - iii. That it is denied that the Allotment Letter was handed over or made available to the Financial and the said Allotment Letters have not been signed by the Financial Creditor as has also been observed, inter alia, in order dated 25.11.2021 in Arb. P. No. 663/2019 passed by the Hon'ble High Court of Delhi dismissing the Section 11 Arbitration & Conciliation Act, 1996 application moved by the Corporate Debtor.
  - iv. The agreements binding the parties categorically provides for assured returns and a buyback option which can be exercised at the will of the Financial Creditor; thus, the agreements are not merely concerned a sale simpliciter of the flats. The sole



and primary issue is that the non-payment of assured returns amounts to debt under IBC. In this regard, multiple judgments of this Hon'ble Tribunal and the Hon'ble NCLAT are placed reliance upon; namely, Nikhil Mehta & Sons v. AMR Infrastructure Limited 2017 SCC OnLine NCLAT 859, Eternity Investment Services Private Limited v. Blue Coast Infrastructure Development Private Limited, 2018 SCC OnLine NCLT 4128, Neelam Singh v. Mega Soft Infrastructure Pvt. Ltd., 2017 SCC OnLine NCLT 10612 (reaffirmed in Mahesh Kumar Panwar v. Neelam Singh, 2018 SCC 12 OnLine NCLAT 596), Anubhuti Aggarwal v. DPL Builders Pvt. Ltd., 2017 SCC OnLine NCLT 12672 et al.

5. That the Applicant/Financial Creditor, vide IA/4791(ND)2021 dt. 18.10.2021, filed the amended Part IV of the application and the amount of default was amended to Rs. 14,55,00,955/-. The details regarding the dates, amounts and days of default are as under:

I. Prior To Filing Of Present Application

Default Date	Amount	No. of Days
16.04.2018	22,27,500/-	1264
28.04.2018	14,85,000/-	1252
16.07.2018	22,27,500/-	1173
28.07.2018	14,85,000/-	1161
16.10.2018	22,27,500/-	1081
28.10.2018	14,85,000/-	1069
16.01.2019	22,27,500/-	989
28.01.2019	14,85,000/-	977

II. After Filing Of The Present Application

Default Date	Amount	No. of Days
16.04.2019	22,27,500/-	899
28.04.2019	14,85,000/-	887
28.04.2019	2,75,00,000/-	887
16.07.2019	22,27,500/-	808
16.10.2019	22,27,500/-	716
16.10.2019	50,00,000/-	716
16.10.2019	2,00,00,000/-	716
16.10.2019	2,00,00,000/-	716

6. That the Corporate Debtor has filed written submissions and the scanned copy is reproduced below:



## WRITTEN SUBMISSIONS ON BEHALF OF THE CORPORATE DEBTOR

**ON LAW** : Whether the Petitioner is FC? Whether Sec. 7 Petition is maintainable

- i. Not a case of Sec. 5 (8) (a) IBC : Money borrowed against payment of interest. Advance Law Lexicon (4th Edition): defines 'Borrow' as under:  
"to take or receive from another as a loan or on trust money or other article of value, with the intention of returning or giving an equivalent" (emphasis supplied)  
Thus, in order to qualify 'loan' parties must be *ad-idem* to return the same amount which is borrowed (but never the value less than what is borrowed). Such an understanding of money being 'borrowed' is conspicuously absent in facts of present case. Agreements dated 28.04.2017 and 17.10.2017 stipulates: return of 70% value (see clause 5), so in absence of clause for return of 100% value, this cannot be a case of Borrowing. It is trite law that the Courts cannot re-write the contract for parties. Bargain is already done and recorded. Buy-Back @70% value cannot be a loan from any stretch of Imagination.
- ii. If it is a case of 5 (8) (f) i.e. *allottee in real estate project*, then the threshold of 10% as required by proviso to Sec. 7 is not met and the petition is not maintainable. Project has 715 allottees, while petitioner holds 27 bookings in his hands, thus, petition deserves to be rejected.
- ii. Cheque Bouncing per-se, is not enough to maintain a case u/s 7 IBC. For which jurisdiction u/s 138 NI Act is provided to the court of Magistrate. Petitioner is misreading Clause Cl. 1 & Cl. 3 of the Agreement(s), which mandated that apart from the initial payment for booking, additional amount under various heads were to be paid by the Petitioner and it is only after that interest @ 24% be given to it. Payments as sought under Cl. 1 are not paid by the Petitioner, despite demand (@ pg180-206 of reply). Project is 80% ready as on date and work is in progress.  
Breach of Contract, If any, has a remedy in 'Civil Court' and not under IBC.
- III. **"SPECULATIVE INVESTOR" or BONAFIDE PURCHASER OF 21 FLATS**  
The Hon'ble SC devised a concept of "Speculative Investor" as an exception to the phrase "financial creditor"/ "allottee" in the landmark judgment of "*Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India*" (2019) 8 SCC 416". In context of allottees to a real estate project the court was pleased to observe as follows-  
"*...This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment...*"  
The above judgment without giving an exclusive definition of "Speculative Investor" points out an instance where an allottee could be a speculative investor i.e. **where a person is not genuinely interested in purchasing the flat/ apartment.**  
Petitioner is involved in sabotaging the project by not paying his dues and taking developer to NCLT, thus is not genuinely interested in purchasing the flats/ units.  
Exit (buy-back) option is invoked on 30.04.2019 to claim 70% value of the property, which is not the subject matter of the Sec. 7 Petition. (As this court never permitted petitioner to put Exit/Buy-Back in FORM-I).
- IV **LIABILITY OF PAYMENT OF INTEREST UNDER 'LUCRATIVE AGREEMENT' IS NOT FINANCIAL DEBT**
  - i. Supreme Court, NCLAT and various benches of NCLT have thrown light on concept of "lucrative agreement" in Builder-buyer contracts and have held that once it is established that an agreement is a lucrative agreement, any amount arising out of such an agreement would not constitute "Financial Debt". It is only a breach of contract.
  - ii. In "*Ankit Goyat Vs. Sunita Agarwal & Anr., CA(AT/I) No. 1020/2019*" the Hon'ble NCLAT while placing reliance on Pioneer case (supra) examined the clauses of MOU entered into between the FC and CD in order to find out whether the allottee is a Speculative Investor. The Hon'ble NCLAT while examining the clauses observed as follows:  
"*...Hence, in the instant case, we need to see if the allottee has entered into any 'lucrative Agreement' based on the facts of this case. The clauses of the Agreement clearly stipulate that there is a buy-back Agreement, there is an assured return of 25% per annum at the end of 24 months or at the issuance of the final LTC by the Competent Authority (whichever is*

earlier). Right from the date of receipt of the booking amount from the Applicant, the word "investment" is consistently used..."

The court then went ahead and held as follows:

"...We are of the considered view that the facts and circumstances peculiar to the attendant case indicate that the Allottee sought benefit from a 'lucrative Agreement' as he is 'securing' his money by way of this Agreement which gives him a lien over the flat. In Clauses 2(f) & (g) of the Agreement, the Home Buyer herein is given a choice to retain the apartment or to sell the earmarked unit. In a regular Builder Buyer Agreement, the Home Buyer does not have this option of exercising his choice of taking or not taking the possession of the subject unit. In a normal Builder Buyer Agreement if the Buyer does not accept the possession, the EMD is forfeited. In this case, the Buyer gets his money plus 25% assured return even if he chooses not to retain the apartment. This Agreement is only a camouflage of actually financing the construction of the flat. Hence, we hold that the Home Buyer sought to benefit from this 'lucrative Agreement' and is squarely covered by the ratio of the Hon'ble Supreme Court in 'Pioneer Urban Land and Infrastructure Ltd.' (Supra)..."

That the ratio laid down in the above-mentioned case is squarely applicable to the present case as in the present case as well there is a buy-back clause which has been exercised by the FC, there is a clause for assured returns @ 24% and 22%.

iii. The Hon'ble NCLAT in "**Subha Sharma' Vs. Mansi Brar Fernandes & Ors. CA (AT) (I) No. 83 of 2020**" decided on 17.11.2020 while dealing with the similar issue, as is raised in the present case, examined the terms of the MoU and observed that at the end of 12 months period, the 'Corporate Debtor' would buy-back the apartments and refund the amount paid together with premium and held that it was a 'lucrative Agreement' for the investor and therefore the Allottee is a 'speculative investor' and set aside the Admission Order of the Adjudicating Authority.

iv. The Hon'ble NCLAT in another case of Builder-buyer titled as "**Mrs. Nidhi Rekhan Vs. Samyak Projects Pvt. Ltd., CA (AT) (I) No. 1035/2020**" while placing reliance on Pioneer case (supra) and Subha Sharma case (supra) examined the clause of Agreement between FC and CD and observed as follows:

"...The above-mentioned clauses 3, 4, 5 and 6 of the Agreement are primarily concerned with the "Down Payment" and an assured rate of return of 24% p.a. and the right of the First Party/Mrs. Nidhi Rekhan, to assign the flat to any of her nominees. Clause 7 is about the right of the allottee to cancel the booking after the specified period of one year. There is no clause in the agreement which relates to the construction/completion of the flats, the time stipulated for completion of construction, any penalty to be imposed on the developer/builder for delaying construction and other such provisions that are pertinent and germane to a housing development project and which are necessary for protecting the interest of the allottee. All such provisions are usual and necessary elements of a Builder-Buyer Agreement. We find from the said agreement that there is a "Down Payment" of Rs. 1 Crore with remaining balance of Rs. 11,90,000/- (Rupees Eleven Lakhs Ninety Thousand only) and an assured rate of return @ 24% per annum. In addition, the allottee is given the right, in its absolute discretion, to cancel or rescind the allotment of the flats/units booked through the agreement. The assured rate of return of 24% per annum is a very high rate of interest that a builder would not offer to an allottee even when she is making down payment. The Agreement in this case does not, therefore, have the necessary elements of a Builder-Buyer agreement. On the contrary, it is an agreement which is more in the nature of detailing and protecting an investment made by Mrs. Nidhi Rekhan, who is coming in the garb of an allottee...."

That the ratio in the above case is squarely applicable as neither of the agreements (Ist & IInd) contain a clause which relate to completion of construction, penalty to be imposed on builder for delay or usual/ necessary provisions for protecting the interest of allottee and thus, does not have the necessary elements of a builder-buyer agreement.

V. **RELIANCE ON "NIKHIL MEHTA & SONS VS. AMR INFRASTRUCTURE LTD.' CA (AT) (I) NO. 7/2017" IS MISPLACED.**

Though not argued but petitioner has relied on this judgment in written argument, which does-not apply to the case in hand. In the said case the FC/Allottee did not have identified units. It was the case of clear finance/borrowing.

Element of being speculative was absent there. Further, on facts the said case was different as the allottee in the said case did not default in making payment which is not the case here as the Allottee in the present case defaulted in making payments to the Corporate Debtor. ***Thus, present petition deserves to be dismissed.***

VI. **PRESENT APPLICATION NOT MAINTAINABLE IN VIEW OF PROVISO TO SECTION 7 IBC ADDED VIDE AMENDMENT ACT 1 OF 2020.**

DATES	PARTICULARS
28.04.2017	Agreement for purchase of 11 apartments. Clearly identified units are mentioned. <b><i>[1st Agreement, Annexure 5 @ pg. 63-73 of section 7]</i></b>
17.10.2017	Agreement for purchase of 16 apartments. <b><i>[IInd Agreement, Annexure 6 @ pg. 74-79 of section 7]</i></b>
17.10.2017	CD issued 8 post-dated cheques (security cheques) for payment of assured returns.
06.06.2018	Sec. 5 (8) (f) was amended to bring in explanation and case of 'allottees' under the ambit.
04.02.2019	Sec. 7 Filed alleging bouncing of cheques and non-payment of assured returns.
09.08.2019	<b><i>Judgment of Pioneer</i></b> delivered by SC, clearly barring the 'speculative investors', from taking developers for a ride.
28.12.2019	By an amendment in Sec. 7 IBC a proviso is added to insert the <b><i>threshold</i></b> i.e. 100 allottees or 1/10th of the allottees of the project.
19.01.2021	Judgment of Manish Kumar Vs. UOI pronounced by SC, upholding the validity of amendment made on 28.12.2019.
01.10.2021	AA found that the date of default is not mentioned in Part IV of Form-1 and directed petitioner to make necessary amendment. Next date fixed was 18.11.2021
08.10.2021	Before the next date of hearing, IA 4791/2021 filed by Petitioner to bring on record the amendment in Part -IV of Form-1 However, in garb of order dated 01.10.2021, unauthorised and fraudulent insertions were made in Part-IV of Form-1. <b><i>Compare Page 19 of Petition with Pg. 10 of application.</i></b>
25.10.2021	Before the listed dated of 18.11.2021, AA (without issuing notice) allowed the amendment treating it to be formal in nature. <b><i>Note :: unauthorised insertions amount to new case for which no reply has been called till date. However, it was orally informed by the opposite party during arguments that they would not rely on these insertions.</i></b>

In view of legal position laid down above it is clear that any person claiming to be an allottee under a real estate project need to file an application under Section 7 of IBC by fulfilling the conditions mentioned under provisos to Section 7 i.e. the application must be filed by 10% of the total strength of allottees or jointly by 100 of such creditors. In the captioned case, the total units proposed to be made is 715 and the FC herein (considering no payments are due from FC) is a joint holder of only 27 units. The FC did not amend the application to comply with the conditions mentioned under third proviso and therefore, the captioned application is not maintainable in the present form.

**CONCLUSION:** The Captioned matter is not maintainable in law and on facts.

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7. We have heard the Ld. Counsel appearing for the Applicant and the Respondent and perused the averments made in the application, reply and the written submissions filed on behalf of the Corporate Debtor.

8. Ld. Counsel appearing for the Applicant submitted that in terms of the agreements dated 28.04.2017 and 17.10.2017, the Applicant is entitled to get the assured return at the rate of 24% and 22% per annum respectively.

9. He further submitted that the Corporate Debtor had issued various post dated cheques for the payment of assured return and when the Applicant presented the 4 cheques issued by the Corporate Debtor were dishonored.

10. He further submitted that in terms of the agreement dated 17.10.2017, the Corporate Debtor had agreed to make the payment of the assured returns at the rate of 22% per annum but the Corporate Debtor has defaulted in making payment of this amount too. The cheques were handed over to the Financial Creditor by the Corporate Debtor, the four of which were dishonored.

11. He further submitted that the Corporate Debtor after receiving the demand notice issued by the Applicant vide its reply dated 18.08.2018, 21.11.2018 and 12.01.2019 had admitted its liability under the two agreements referred to *supra* but failed to make the payment.

12. On the other hand, Ld. Counsel appearing for the Respondent/Corporate Debtor has raised all the fact and the law mentioned in the reply and the written submissions filed on its behalf.

13. The Ld. Counsel appearing for the Respondent submitted that the Applicant has concealed this fact that the Applicant is a bonafide purchaser of 21 flats therefore, the applicant is an allottee under the said project.

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14. He further submitted that Hon'ble Supreme Court and NCLAT as well as the various Benches of the NCLT has considered the "lucrative Agreement" in builder buyer contract and have held once it is established that it is "lucrative Agreement", any amount arising out of such agreement would not constitute 'Financial Debt'. It is only a breach of contract.

15. Apart, from that the Respondent has also raised all the facts and decisions referred to in the written submissions, therefore, it is needless to repeat the same.

16. On consideration of the submissions made on behalf of the parties and on the basis of averments made in the application, reply and the written submissions, we observe that by filing reply in para 3 (c) and (d) the respondent has admitted this fact that the Corporate Debtor had issued a cheque to the Financial Creditor towards the payment of assured return amounting to Rs. 14,85,000/- which was dishonored on 07.05.2018. The scanned copy of para 3(c) and (d) is reproduced below :

- c. It is relevant to mention that the Corporate Debtor had issued a cheque dated to the Financial Creditor towards payment of assured return, amounting to Rs.14,85,000/-, which was dishonoured on 07.05.2018 and the Parties herein had called for a meeting subsequently to discuss the same. As also stated in the main Petition, the Financial Creditor and the Corporate Debtor were already having several meetings between April-



May 2018, wherein negotiations were going on regarding that fact that as the Project was nearing completion and the apartments booked by the Financial Creditor were on an even advanced stage of construction, the Financial Creditor could now possibly unconditionally purchase the apartments and give up the buy back clause.

- d. Subsequent to the said dishonour of the cheque, one such meeting was conducted in Hotel Sheraton, New Delhi on 10.05.2018 between the Parties herein and the bill was paid by the Corporate Debtor and a copy of the same is annexed herewith to affirm the fact that the meeting was conducted in actual. In the meeting dated 10.05.2019, it was finally agreed and decided between the Parties herein that the apartments would now be unconditionally purchased by the Financial Creditor and the buy back clause would not be invoked. It was further agreed by the Financial Creditor to adjust the entire amount which was due as assured returns, against the installments demanded upto the stage of completion and it had further undertaken to pay the balance amounts. One last request was made by the Financial Creditor to the Corporate Debtor to pay the amount of the dishonoured cheque dated 07.05.2019 amounting to Rs.14,85,000/- through RTGS to the Financial Creditor and the same shall be the last assured return payable in terms of their meeting dated 10.05.2019. The Corporate Debtor duly honoured the request of the Financial Creditor and paid an amount of Rs.14,85,000/- through RTGS on 21.05.2018. Therefore, no further payments were due and hence there is no alleged additional debt in existence as the Financial Creditor is attempting to portray by bringing on record frivolous documents such as the Buy Back Notice.



17. At this juncture, we would also like to refer to the argument of the Ld. Counsel for the respondent, who in the course of the argument submitted that since the applicant is an allottee therefore, application must be filed by 100 of such creditors jointly in the same real estate project or 10% of the total number of the creditors in the same real estate project, whichever is less. On the other hand Ld. Counsel for the applicant submitted that the present application is not filed as an allottee, rather it has been filed for the financial debt, which comes u/s 5(8)(a) of the IBC and as such the applicant is the financial creditor.

18. As we have already referred to the relevant paragraphs of the reply, and on the basis of the averments made in the reply referred to *supra*, we observe that default in making the payment of the cheque amount is admitted by the Corporate Debtor.

19. When we consider of the submissions of the parties, in terms of the admission made by the respondent, then we are of the considered view, that the money was borrowed against the payment of interest, and there is a default in paying the interest. Therefore, the amount paid by the applicant is a financial debt u/s 5(8)(a) of the IBC and the applicant is the financial creditor.

20. At this juncture, we would also like to refer to section 7 of the IBC, 2016 and the same is reproduced below :

***“7. Initiation of corporate insolvency resolution process by financial creditor.***

*(1) A financial creditor either by itself or jointly with 2 [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

<sup>3</sup> *[Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by*



not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

*Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:*

*Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.]*

**Explanation.** - *For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor*

*(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*

*(3) The financial creditor shall, along with the application furnish –*

*(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

*(b) the name of the resolution professional proposed to act as an interim resolution professional; and*

*(c) any other information as may be specified by the Board.*

*(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information*

utility or on the basis of other evidence furnished by the financial creditor under sub-section (3)

<sup>1</sup> [Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.]

(5) Where the Adjudicating Authority is satisfied that –

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate-

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be....”

21. On perusal of Section 7(5)(a) of IBC, we observe that in order to initiate a CIRP against the Corporate , the Adjudicating Authority is required to consider, whether there is any default in making the payment, the application filed under sub-section (2) of Section 7 of the IBC is complete, and whether there is any disciplinary proceedings pending against the Resolution Professional. If these are established by the

applicant then the Adjudicating Authority have no option but to admit the application.

22. In terms of the provisions referred to *supra*, now we consider the claim of the Applicant.

23. As we have observed that the Respondent by filling reply has admitted that the cheques handed over to the Applicant by the Respondent were dishonored. So, it is the admission of the Respondent regarding the default in making the payment of the amount, which was due and payable by the Respondent to the Applicant. We also observe that the application is complete and in Part III of the application, the Applicant has proposed the name of the IRP namely, Mr. Prabhjit Singh Soni. We further observe that the IRP has also submitted his consent by filling Form 2, which is at page no. 153 of the application.

24. In sequel to the above, we are of the considered view that the Applicant has succeeded to establish that there is a default in making the payment of the amount, which is due and payable by the Corporate Debtor to the Financial Creditor. We further observe that the application is complete and there are no disciplinary proceedings against the proposed IRP.

25. **Accordingly, we hereby ADMIT the petition.** A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

- “(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.”

Further:

- (2) 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.
- (3) The provision of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulators.
- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

*Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority 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.*

26. As proposed by the Financial Creditor, this Bench appoints **Mr. Prabhjit Singh Soni** having his Office at **GG1/144/C Near PVR Vikas Puri, New Delhi – 110018**, and **IBBI Registration No. IBBI/IPA-002/IP-N00065/2017-18/10143**, subject to the condition that no disciplinary proceedings are pending against the IRP so named and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. The IRP is directed to take the steps as



mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016.

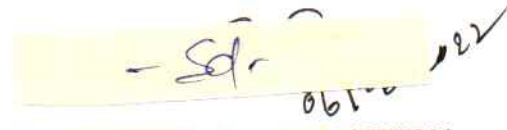
27. The Financial Creditor is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Financial Creditor to be recovered as CIR costs.

28. A copy of this Order shall be communicated to the Financial Creditor, the Corporate Debtor and the IRP mentioned above, by the Registry of this Tribunal. In addition, a copy of the Order shall also be forwarded by the Registry to IBBI for their records.



**(L. N. GUPTA)**

**Member (T)**



**(ABNI RANJAN KUMAR SINHA)**

**Member (J)**