NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 784 (ND)/2020

IN THE MATTER OF:

MS. NIDHI REKHAN,

W/O MR. NAVNEET REKHAN,

E-4/23, MODEL TOWN - I,

DELHI-110009 .... **APPLICANT/FINANCIAL CREDITOR**

VERSUS

M/S SAMYAK PROJECTS PRIVATE LIMITED,

111, FIRST FLOOR, ANTRIKSH BHAWAN,

22, KASTURBA GANDHI MARG,

NEW DELHI - 110 001 ...**RESPONDENT/CORPORATE DEBTOR**

SECTION: U/S 7 of IBC, 2016

Order delivered on: 20.10.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant/Financial Creditor: Mr. Mishal, Mr. Manish Kaushik and Mr. Mani Bhadra Jain, Advocates

For the Respondent/Corporate Debtor:

ORDER

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

1. 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. As per averments made in the petition, the Corporate Debtor is a Limited Company, engaged in construction of Residential and Commercial Complexes. The Corporate Debtor accepted Rs. 1,00,00,000/- as investment from the Financial Creditor by allotting flat to the Financial Creditor bearing no. A-1201 on 12" Floor and E-1301 on 13" Floor having a total area admeasuring 4476 sq. ft. of the Project "Ansal Heights 86", Sector - 86, Gurugram (herein referred to as the said project). It was assured that the said project will be completed in stipulated time and that Financial Creditor will be provided Assured return at 24% per annum.

ii. That the Corporate Debtor was liable to pay the Financial Creditor assured returns amount at 24% per annum from 20.07.2016 till date.

iii. That the Corporate Debtor accepted to take back the rights over the flats and return the invested amount and gave refund cheques dated 20.07.2019 for an amount of Rs. 1,00,00,000/- and also issued various cheques from time to time for assured returns however, neither paid the assured returns nor the invested amounts and the cheques either got is honoured or were replaced with fresh cheques which got dishonoured. The sum and substance is that the Financial Creditor only got cheques from time to time and no cheque was ever honoured. Certain due amount is not covered by cheques but is admittedly due.

iv. The Corporate Debtor has failed to make payment of the assured returns at 24% per annum from the date of execution of the agreement till date, hence the Corporate

Debtor is liable to pay Compound Interest at 24% per annum on the assured returns at 24% per annum to the Financial Creditor and refund of the investment amount with interest at 24% to the Financial Creditor.

v. That the Financial Creditor is no longer a Unit Buyer as the unit stands withdrawn by issuance of refund cheques.

vi. That upon the dishonour of cheques, the Financial Creditor had tried to contact the Corporate Debtor several times about the fate of the above referred cheques but the Corporate Debtor continuously kept avoiding the Financial Creditor and even till date Corporate Debtor has failed to make the due payment, which clearly show the dishonest and malafide intention of the Corporate Debtor from the very beginning.

vii. That the Corporate Debtor is liable to pay the Financial Creditor an amount of Rs. 2,19,56,000/- being the refund amount invested alongwith interest and assured returns alongwith interest on assured returns as denoted in the calculation sheet which is the unpaid admitted financial debt. The Financial Debt continues till date.

3. We have heard the Learned Counsel appearing for the petitioner and perused the averments made in the application. The Learned Counsel appearing for the Petitioner submitted that on 20th July 2016, an agreement was executed in between the Applicant as well as the Respondent / Corporate Debtor and on the basis of that agreement a list of cheques handed over to the Applicant by the Corporate Debtor, which the applicant has annexed at page 26 – 27 of the application as Annexure A-3. The said enclosure is the part of the agreement.

4. He further submitted that as per the agreement, it was agreed that the First Party decides to cancel this arrangement / allotment, it shall be at liberty to do so by refunding the money

received from the Allottee forthwith together with any outstanding amount of assured return accrued till the date of refund and upon receipt of the refund from First Party in the manner stated herein, the Allottee shall be left with no interest or claim or lien on the Allottee Flats / Units or any party thereof and First Party shall be free to deal in the same in any manner in its discretion an the Allottee undertakes to execute any documents / papers in favour of First Party or its nominee in order to surrender his or her claim.

5. He further submitted that the Corporate Debtor accepted to take back rights over the flat and return the invested amount and gave refund cheques dated 20th July 2019 for an amount of Rs. 01 Crore and also issued various cheques from time to time for assured returns, however, neither paid the assured return nor the invested amount.

6. He further submitted that the cheques were dishonored. He further submitted that the Corporate Debtor comes under the definition of the Financial Creditor and since there is default in payment of the amount so the notice may be issued against the Respondent.

7. Now, in the light of the submissions raised on behalf of the petitioner, we would like to consider whether the amount, which the petitioner claimed as a defaulted amount comes under the definition of Financial Debt or not?

8. At this juncture, we would like to refer Section 5(8) of the IBC and the same is quoted below: -

> *5(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;*

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(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 commercial effect of a borrowing;

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

(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.

9. Mere plain reading of the provision shows that in order to establish, the amount given by a person to another person comes under the definition of financial debt, that person is to establish that the amount is given against the payment of interest, and for the reasons mentioned in Section 5(8) clause (a) to (i).

10. At this juncture, we would like to refer Section 3(11) of the IBC and the same is quoted below: -

Section 3(11)

"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

11. Mere plain reading of the provisions shows that the debt means a liability or obligation in respect of a claim, which is due from any person and includes a financial debt and operational debt and when we shall read the definition of debt and financial debt together then we may say that of course, the debt includes the Financial Debt and Operational Debt but all the debts are not Financial Debt or Operational Debt, only debt defined under Section 5(8) of the IBC, comes under the definition of Financial Debt and debt defined under Section 5(21) of the IBC comes under the definition of Operational Debt.

12. In the light of aforesaid definition, when we shall consider the case in hand then we find that the case of the Petitioner is based upon the Settlement Agreement and we further noticed that at page 9 in Part-4(vi), the Petitioner herself admits this fact that the Petitioner is no longer a unit buyer as the unit stands withdrawn by issuance of the refund cheques, therefore, in the light of that fact, which the Petitioner has mentioned in her

application, when we shall consider the definition of Financial Debt as defined under Section 5 (8) of the IBC, 2016 then it can be said that any amount raised from the Allottee under a Real Estate Project shall be deemed to be an amount having the commercial affect of a borrowing. Since the Applicant herself admits this fact that she is no longer Allottee, therefore, in our considered view, the amount, which the Applicant has invested does not come under the definition of Section 5 (8)(f) of the IBC, 2016, and if the amount invested by the Petitioner does not come under the definition of Financial Debt then the Petitioner cannot be treated as a Financial Creditor under Section 5 (7) of IBC, 2016.

13. Now the question is whether the applicant claims herself a Financial Creditor under Section 5(8) on the basis of a Settlement Agreement or not?

14. It is the settled principle of law that the NCLT is not a recovery court rather when a default of financial debt or operational debt occurred, in that case, the financial creditor or the operational creditor may file an application for initiating the CIRP under Section 7 or Section 9 of the IBC respectively and in the light of the facts, when we shall consider the case in hand then we are of the considered view that the settlement agreement on the basis of which, the present application is filed by the applicant does not comes under the definition of Financial Debt.

15. At this juncture, we would like to refer the judgment of Stup Consultants Vs. Vardhaman Infra Developers in CP IB No. 794/2019 passed by this bench and the same is quoted below: -

"At this juncture, we would also like to refer a decision of NCLT Allahabad Bench in ***"Company Petition (IB) No. 343/ALD/2018 in the matter of M/s Delhi Control Devices (P) Limited Vs. M/s Fedders Electric and Engineering Ltd."*** decided on 14.05.2019, in which the NCLT Allahabad bench held that *"unpaid instalment as per the settlement agreement cannot be* *treated as operational debt as per Section 5 (21) of IBC. The failure or Breach of settlement agreement can't be a ground to trigger CIRP against Corporate Debtor under the provision of IBC 2016 and remedy may lie elsewhere not necessarily before the Adjudicating Authority". and similar view is followed by this Bench in* **IB No. 507/ND/2020in the matter of Nitin Gupta vs International Land Developers Private Limited."**

16. In the light of the decisions and the provisions which we have referred in the aforementioned Paras, we are of the considered view that the Applicant is not the Financial Creditor under Section 5 (7) of the IBC, 2016 and the amount, which the applicant has invested is not a Financial Debt under Section 5(8) of the IBC, 2016 and so far the default of payment of amount on the basis of Settlement Agreement is concerned in view of the aforesaid decisions, we are of the considered view that default also does not come under the definition of Financial Debt.

17. Hence, we are not inclined to issue notice upon the Respondent and admit this case rather we are of the considered view that the present application is liable to be dismissed.

18. Accordingly, the same is hereby DISMISSED

-Sd- -Sd-

20.10.2020

K. K. VOHRA
Member (T)

ABNI RANJAN KUMAR SINHA
Member (J)