IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ

CP (IB) No.32/ALD/2021

In the matter of:
An application under section 7 of IBC 2016 r/w Sections 14 & 33 and other Applicable Provisions of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:
Ambica Enclave Pvt. Ltd. & Ors.
Siddhant Diagnostic Pvt. Ltd.
Divya Tie-Up Pvt. Ltd.
Having Registered Office At: 23,
Jagganthpuri Colony Rath Yatra,
Mahmoorganj Road, Varanasi, U.P. *...Financial Creditors*

Versus

Shreesaibaba Infra Projects Pvt. Ltd.
Having Registered Office At: H.I.G 5,
Phase-2, Ashok Vihar Colony Pahariya,
Varanasi U.P-221007 *Corporate Debtor*

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Virendra Kumar Gupta	:	Member (Technical)

Appearances (through video conference)

For Financial Creditors	:	Sh. Alok Tripathi, Advocate
For Corporate Debtor	:	Sh. R.P. Agarwal Sr. Advocate Sh. Abhishek Tripathi, Advocate.

Order reserved on 31.05.2022

Order pronounced on 13.06.2022

Per: Virendra Kumar Gupta, Member (Technical)

ORDER

Brief facts of the case

1. This application has been filed under 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Ambica Enclave Private Limited & Ors,** (*hereinafter referred as the Financial Creditor*) seeking initiation of

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Corporate Insolvency Resolution Process in respect of the ***Shreesaibaba Infra Projects Pvt. Ltd.*** (*hereinafter referred as the Corporate Debtor*).

2. The relevant facts are that the Petitioner/Financial Creditors, herein, granted loan of Rs.16 Crores to various companies of Proplarity Home Pvt. Ltd. (PHPL) who failed to repay the loan. These Companies were run by one Mr. Saurabh Kumar Pandey. To secure the repayment and discharge their liability, these Companies entered into an arrangement to sell the properties whereby the Financial Creditors were a confirming party. A sale deed dated 01.05.2017 was executed by Proplarity Home Pvt. Ltd. (PHPL) in favour of the Corporate Debtor. As per terms of Clause 35 of the sale deed, a sum of ₹3,86,10,000/- was to be paid to the Financial Creditors. The details of cheques were also given in the sale deed but the same were never handed over by the Corporate Debtor to the Financial Creditors till date nor any payment had been made after the execution of sale deed.

3. It is also claimed that a sum of ₹20,00,000/- was also paid to the Corporate Debtor on 29.04.2017, which the Corporate Debtor agreed to pay as the sale consideration. However, the same has not been paid till date. It is also mentioned that Proplarity Home Pvt. Ltd. (PHPL) is under liquidation before this Adjudicating Authority and name of this company has been changed to Sparkspell Homes Pvt. Ltd.

4. It is claimed that the IRP of this Company also acknowledged the fact that the cheques mentioned in the sale deed were drawn in favour of the Financial Creditors. It is also mentioned that, on 1st October, 2020, the Corporate Debtor admitted and acknowledged that the amount was still due and payable, however the liability has not been discharged as yet.

<u>Contention on behalf of the Financial Creditors</u>

5. The learned counsel appearing on behalf of the Financial Creditors submitted that a sum of ₹4,06,10,000/- was due, which was not paid and the default

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occurred on 1st May, 2017. Thereafter, the learned counsel drew our attention to clause 35 of the Sale Deed dated 1st May, 2017 and contended that as per the provision of this Clause the cheques were to be handed over to the Financial Creditors, which was never done, hence, a default occurred. As regard to the relationship between the parties as of the Financial Creditors and Corporate Debtor, it was vehemently argued that Proplarity Home Pvt. Ltd. (PHPL) in fact, sold these properties to discharge their liability towards the Financial Creditors and because of this arrangement, the Financial Creditors became a confirming party, hence, there was a relationship of Financial Creditors and the Corporate Debtor between the parties herein.

6. Our attention was also drawn to the letter given to the Resolution Professional of Sparkspell Homes Pvt. Ltd. by the Corporate Debtor, wherein, it was prayed that demand notice for payment of dues in the matter was withdrawn and records were updated. On this basis, it was claimed that the claim of the Financial Creditors was established as in the said email it was clearly mentioned that the sale consideration was paid to the vendor by way of payment to/adjustment of /set off with of the amounts due by the Vendor to the confirming parties being Financial Creditors.

7. Our attention was also drawn to the letter dated 19th March, 2021 written by the legal counsel to the Corporate Debtor, wherein, a demand had been made to repay the loan along with the interest. It was also claimed that in reply thereto, the Corporate Debtor had admitted its liability.

<u>Contentions made by on behalf of the Respondents/Corporate Debtor</u>

8. The learned Sr. Counsel appearing on behalf of the Respondent/Corporate Debtor submitted that this application was liable to be dismissed as the impugned transaction could not be constituted as of the nature of the financial debt being payable by the respondent. It was also claimed that there was no relationship of Financial Creditors and Corporate Debtor between the applicants and respondent as there was no financial contract which was ever entered into

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between the petitioners and respondent. To further buttress on this aspect, it was claimed that the transaction of loan happened between the vendor and the Financial Creditor and the consideration of the loan had to be repaid by the vendor and not the Corporate Debtor.

9. It was further claimed that loan agreement was entered into by and between the parties herein, which could prove the disbursement of any loan to the respondent nor respondent was a party to any such loan agreement.

10. It was further claimed that the cheques were duly handed over to the vendor in terms of provision of sale agreement dated 1st May, 2017 and any failure of the vendor to discharge its obligation could not be constituted as default by the respondent/corporate debtor. It was also claimed that the present petition had been filed with malicious intent and to harass the respondent, so that illegal claims made in the petition could be enforced.

11. As regard to the nature of the amount of ₹20,00,000/- given by the Applicant/Financial Creditor to the Corporate Debtor, it was claimed that the said amount was not refundable, as this amount had been given by the applicant as an assurance money on 29.04.2017 with the purpose that respondent could execute the sale deed in spite of having reservations about the credentials of the vendor and vendor's intention to fulfil its commitment/liabilities, hence, this amount was not refundable at all.

12. It was further claimed that as per the schedule of payment forming part of sale deed, the sale consideration was to be paid by the respondent to the vendor and not directly to the confirming parties (Applicant herein), by way of cheques, as per details given in the Schedule. It was also emphasised that all the cheques as per this schedule itself were acknowledged, as being received by the vendor. As regard to reliance placed by the Financial Creditor on Clause 35 of the Sale Deed, it was claimed that this Clause did not create any contractual relationship between the applicant and the respondent and no responsibility for the dues of

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the Financial Creditors being payable by the vendor could be fastened on the respondent.

13. As regard to the claim made by the Financial Creditor that the respondent admitted and acknowledged its liability on 01.10.2020 and that the amount was still due and payable. It was claimed that said contention is false as there was no such admission or acknowledgment.

14. As regard to the reply to the letter dated 19th March, 2021, it was contended that the response, thereto, had been made regarding the fact that an appropriate reply to the said legal notice would be sent only when learned Sr. Counsel, who was advising the respondent would recover from Covid-19. Hence, all claims made on the basis of such letter are baseless and remain unsubstantiated.

Findings & Conclusion

15. We have considered the submissions made by both sides and perused material on record. At the very outset, it is noted that the amount of loan has been disbursed to Sparkspell Homes Pvt. Ltd which was earlier known as Proplarity Home Pvt. Ltd. (PHPL). In this arrangement, the respondent herein is neither a party in any capacity nor any reference to the respondent appears therein. Thus, based on such loan agreement, it can safely be concluded that this arrangement does not establish privity of contract between the Financial Creditors and respondent herein. The role of respondent, herein, arises only in terms of sale deed dated 1st May, 2017, where the vendor being receiver of loan from the Financial Creditors, entered into sale agreement with the respondent and wherein Financial Creditors are a confirming party.

16. We have carefully perused the terms and conditions of Clause 35 also and we have got no hesitation in holding that even on this basis, no legal obligation can be said to have arisen on the part of the respondent to repay the loan, which was taken by the vendor from the applicants herein. In our view, this Clause simply provides that confirming party is to receive the sale consideration from the vendor and vendor has also confirmed that he has received the payment from

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the confirming party (Applicant herein) and who have also said that they had no objection as regard to this sale deed. From the perusal of other clauses and specifically schedule of payment, it is noted that the four cheques of sale consideration were handed over to the vendor who in turn was liable to give the same to the applicant. In our view, in case of any failure by the vendor to do so, also does not result into a situation whereby such liability is to be met by the respondent herein. We have also perused all other emails in correspondence between the respondent herein and the Resolution Professional of Sparkspell Homes Pvt. Ltd which was earlier known as Proplarity Home Pvt. Ltd. (PHPL) and in our view this letter also cannot be considered as creating a legal obligation to repay the loan which was taken by the vendor.

17. As regard the amount of ₹20,00,000/- being given by the Financial Creditors to the respondent herein, it is noted that it has been given on 29.04.2017 just a day prior to the execution of sale deed dated 1st May, 2017, which fact lends credence to the claims made by the respondent that such money was given to the respondent to execute the sale deed.

18. In this regard, we may further add that the Financial Creditors have not been able to controvert the claim made on behalf of the respondent that such money was given as assurance money nor any documentary evidence has been produced to show that this money was in fact a loan, which was to be returned by the respondent. Further, in the absence of any agreement to this effect as well as no recall notice or other documentary evidence, we are of the view that even the facts of the amount being due and payable, cannot be ascertained, hence, there arises no question of default.

19. In view of the above discussion, we hold that in the present case, there is no relationship of Financial Creditors and Corporate Debtor between the applicants herein and the respondent. We further hold that there is no transaction of the nature of financial debt between the parties within the meaning of provision

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Section 5(8) of IBC, 2016. Consequently, this application is liable to be rejected.

20. Accordingly, CP (IB) No.32/ALD/2021 shall stand dismissed. We also make it clear that such dismissal of application is circumscribed by the provision of law as prescribed in IBC, 2016. Therefore, any appropriate action for recovery of the said impugned sum can be taken by the applicants herein, in accordance with any other law, if so advised.

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Rajasekhar V K

Digitally signed by Rajasekhar V K
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serialNumber=f05120aee9b7978ef74f18a3ac75eb59d05e036c92d850593b5c6edc8a8c7396, cn=Rajasekhar V K
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Virendra Kumar Gupta
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

Md. Zaid
(Stenographer)