

**THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH-IV  
COMPANY PETITION NO. (IB)-05(ND)/2021**

**Under Section 7 of the Insolvency and Bankruptcy Code, 2016**

**IN THE MATTER OF:**

**DEEPAK GUPTA**

APPLICANT/FINANCIAL CREDITOR

**Vs.**

**M/S ELIXIR BUILDCON (P) LTD.**

RESPONDENT/CORPORATE DEBTOR

**Order delivered on: 04.05.2022**

**CORAM:**

**SH. DHARMINDER SINGH, HON'BLE MEMBER (J)**

**MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (T)**

**ORDER**

**PER: SMT. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)**

1. The Mr. Deepak Gupta has filed the instant application 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') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Company M/s. Elixir Buildcon (P) Ltd., referred to as the corporate debtor.

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2. It is appropriate to mention that the applicant Mr. Deepak Gupta is a financial creditor R/o D-9, Sector-55, Noida, District -G.B.Nagar-201301
3. The Respondent Company M/s. Elixir Buildcon (P) Ltd. (CIN No. U45400DL2010PTC207568) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 26.08.2010 having its registered office situated at 323, Aggarwal Plaza, Plot No 3, DDA Community Centre, Sector-14, Rohini, Delhi-110085. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
4. The case of the applicant precisely is that the corporate debtor by virtue of Memorandum of Understanding dated 25.01.2013 both the parties had agreed to sell and purchase about 21 flats/units situated in different towers in the project "Elixir Windz" and to issue proper allotment letters in respect of the consideration paid by the Financial Creditor for the purchase of flats/units.
5. It is the case of the applicant that the corporate debtor has agreed to repay the amount but the corporate debtor has defaulted to launch the scheme within 180 days from the signing of the MoU. Therefore, as per part IV of the application it is claimed that as on 28.01.2013 a sum of Rs. 10,91,97,937 /- (Indian Rupees ten crores ninety-one lakhs ninety-seven thousand nine hundred thirty-seven only) is due and payable by the respondent company.

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6. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mrs. Reshma Mittal, for appointment as Interim Resolution Professional having registration number IBBI/IPA-001/IP00297/20107-18/10541 resident of C-51, RDC, Raj Nagar, Ghaziabad-201002 with email - id . Mrs. Reshma Mittal has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mrs. Reshma Mittal as per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.
7. The applicant has placed following documents on record to prove its claim:
- i. Copy of Memorandum of Understanding dated 25.01.2013.
  - ii. Copy of statement of accounts of the financial creditor reflecting the total outstanding amount of debt towards the corporate debtor.
  - iii. Copy of the email dated 07.03.2020 wherein, applicant requested the Corporate Debtor to refund the entire amount along with interest and compensation as per agreed rates specified under Clause 11 of the MoU.
  - iv. Copy of reply filed by the Corporate Debtor vide Email dated 15.04.2020 denying any liability towards the Applicant.

8. Notice by this Adjudicating Authority was issued to the Corporate Debtor. The Corporate Debtor has filed its reply and has raised objection against the petition stating averments, which are listed here:

- i. The present application filed by the Financial Creditor is barred by law of limitation and the same is not maintainable.
- ii. In the present petition, the financial creditor is not a 'Financial Creditor' within the meaning of and as defined under Section 5(7) of the Code as the amount claimed by the financial creditor do not qualify as financial debt within the meaning of the code and the financial creditor is not entitled to file the present petition.
- iii. There has been no breach as per the obligations under MoU, as the Corporate Debtor had launched the scheme as required under clause 10 of the MoU within 180 days from the date of the MoU. Hence, there is no debt due and payable to the Applicant herein.

9. The applicant has filed rejoinder to reply filed by the corporate debtor. It is submitted by the applicant in its rejoinder, that the Corporate Debtor herein failed to launch the scheme within 180 days from the date of signing of the agreement and thus, as per Clause 10 of the MoU, the Corporate Debtor is liable for default and breach of the MoU, which entitles the Applicant herein to invoke its right under Clause 11 of the MoU making the entire transaction voidable at the option of the Applicant and the Corporate Debtor has failed to refund the entire amount paid by the Applicant together in violation of Clause 11 of the MoU. Therefore, a default has occurred on 22.03.2020. the Applicant herein also relied upon the recent judgment of the ***Hon'ble NCLAT in 'Mohanlal Dhakad vs. BNG Global India Limited'***

**[2021 SCC OnLine NCLAT 84]** wherein it was held that the essence of any debt to be mentioned as 'financial debt' is 'time value of money, as borrowing money is for monetary transaction. In the said case, the Corporate Debtor under Investment Plan had assured to provide appellants/Investors interest on their investment sum along with investment amount, for time value of money and it failed in its commitment to offer allotment/possession of Plot of Land as promised by it or repay sums collected by it along with interest on the maturity of schemes, etc. As a result, the Appellant's position was held to be that of a 'financial creditor' as per Section 5(7) read with Section 5(8) there being default in payment of accepted amounts by Corporate Debtor and, therefore, CIRP application filed against the Corporate Debtor was to be admitted.

10. We have heard the parties and perused the case records.
11. The applicant's case is that for a consideration of 21 flats money was invested by him in the project of the corporate debtor. Therefore, the applicant has become one of the allottees of the project of the corporate debtor. Although the applicant has exercised its option for refund of the amount invested in the project but that does not change the real nature of the agreement between the parties and that is allotment of flats in lieu of payment made by the applicant.
12. It is found that as per Clause 9 of the Agreement, the Agreement shall continue till the stipulated period of 36 months from the date of signing or till the possession of the flats/ Units as provided under Schedule B, to the second party as the case may be or till transfer, the assignment of the entire super Built-up area of the flats in favour of the nominees of the second party. Thus it is apparent that this

Agreement has not been honoured as till date no transfer or allotment letter in favour of the second party or nominees of the second party have been issued.

13. As per clause 10 both the parties agreed that if the first party fails to launch the scheme within 180 days from the signing of this Agreement as assured by it to the second party, the 1st party shall be liable for default and breach of this MOU and as such provisions of clause 11 of the Agreement shall be attracted. Further clause 11 states that if the 1st party breaches any of the commitments made under this agreement, the entire transaction shall be voidable at the option of the Second party and if the second party exercises its option, the 1st party shall refund the entire amount along with interest @ 12% per annum and compensation for the liquidated damages @ 24% per annum. The 2<sup>nd</sup> Party has further preferred to exercise its option w.e.f. 22.03.2022.
14. Therefore, default has arisen from the above mentioned date. Accordingly the limitation if any, shall apply within a period of 3 years from the date of exercise of option by the 2<sup>nd</sup> party. A default within the purview of Sec.3 (12) has occurred on 22.03.2020 when the CD failed to discharge debt owed to the Applicant herein within 15 days from 07.03.2020 (i.e. within 15 days from the date of exercise of option by the Applicant of holding the entire transaction in terms of clause 11 of MOU.
15. That there has been breach of terms under the MOU is evident as till date no allotment letter or transfer letter has been issued to the second party (Applicant) by the Corporate Debtor.
16. The Hon'ble NCLAT in "*Mohanlal Dhakad Vs. BNG Global India Limited*"(2021 SCC OnLine NCLAT 84) held that the essence of any debt to be mentioned as "financial debt" is time value of money. In this case, the Corporate Debtor under investment plan had assured to provide the applicant, flats on their investment sum and it failed in its commitment

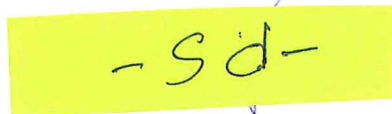
to do so. 21 flats in which the applicant invested its money were never handed over to the applicant. The monies paid to the CD by the applicant in terms of the MOU against allotment of flats in the Project of the CD amounts to a 'financial debt within the meaning of Sec.5(8) of the Code and as such, the Applicant herein is a financial creditor within the meaning of Sec.5(7) of the Code

17. Further it is pertinent to note that the monies paid by the Applicant to CD in terms of MOU were in consideration of the flats being constructed by CD in its project. The basic elements of financial debt being disbursement against the consideration of time value of money are thus satisfied. It is highlighted that the Hon'ble Supreme Court of India in a catena of judgements has clarified that the basic elements of a financial debt are that it ought to be a disbursement against the consideration for time value of money.
18. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is hereby, admitted.
19. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.
20. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs with the Interim Resolution Professional namely Mr. Sanjay Garg to meet out the expenses 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 from the date of receipt of this order by the Financial Creditor. The said amount however is subject to adjustment towards Resolution Process cost as per applicable rules.

21. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:
22. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.
23. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing a appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed

by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

24. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today and consign the file to the record room.



**(SUMITA PURKAYASTHA)**  
**MEMBER (T)**



**(DHARMINDER SINGH)**  
**MEMBER (J)**