

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**Principal Bench, New Delhi****Comp. App. (AT) (Ins) No. 246 of 2023****IN THE MATTER OF:****Vikash Kumar Mishra & Ors.****...Appellant****Vs.****Orbis Trusteeship Service Pvt. Ltd. & Anr.****....Respondents****Present:****For Appellants : Mr. Abhijeet Sinha, Mr. Piyush Singh, Mr. Akshay Srivastava, Ms. Heena Kochar, Advocates.****For Respondent : Mr. Krishnendu Datta, Sr. Advocate, Ms. Anindita Roy Chowdhury, Mr. Sushrut Garg, Ms. Neha, Advocates for R-1.****Mr. Usman G. Khan, Advocate for R-2****O R D E R****Per: Justice Rakesh Kumar Jain (Oral)**

22.05.2023: This appeal is directed against the order dated 01.02.2023 passed by the National Company Law Tribunal, New Delhi Court -IV (hereinafter referred as to 'the Adjudicating Authority) by which an application filed by the Appellant bearing Intervention Petition No. 07 of 2023 filed in CP (IB) No. 541/ND/2022, has been dismissed.

2. In brief, M/s.Orbis Trusteeship Service Pvt. Ltd. filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as to 'The Code') for initiation of Corporate Insolvency Resolution Process (hereinafter referred as to 'CIRP') against M/s. Kindle Infraheights Pvt. Ltd on account of its failure to resolve the debt of Rs. 268 Crores approximately.

3. The Corporate Debtor/Respondent is engaged in the business of construction and development of the Real Estate Project and in the present case it is raising the project, namely, Sikka Kaamna Greens situated at Plat No. GH-3(B), Sector -143 @ FNG & Expressway, Noida (hereinafter referred to as the 'Project').

4. During the pendency of the application, four homebuyers (Appellant herein) filed an application in question for intervention, inter alia, on the ground that there is an order in their favour passed by the 'UP Real Estate Regulatory Authority, Regional Office, Gautam Buddha Nagar' dated 12.12.2022. It is alleged that by order dated 12.12.2022 the following directions have been issue:

"1. The opposite party is ordered to return the original amount allotted to the complainants. OC /CC, by March 2023 after completing all the facilities in the unit as per the contract. Also ensure to give physical possession of the unit and get the due stamp duty registered as per rule.

2. The opposite party will be liable to pay late interest on the amount deposited by the complainant from the date of handing| over the possession to the complainants as per the signed contract till the date of offer of possession or the date of receipt of OC whichever is later. Make sure to pay interest as MCLR+1 per cent."

5. Counsel for Appellant has submitted that the intervention application was thus filed to support the case of the Respondent for dismissal of the application filed under Section 7 of the Code by the Financial Creditor. It is

argued that the said application has been dismissed only on the ground that no rationale has been found by the Adjudicating Authority in filing and maintaining the said application.

6. Counsel for the Appellant has relied upon an order passed by this Tribunal in the case of 'Ashmeet Singh Bhatia Vs. Sundrm Copnsultants Pvt. Ltd. & Anr. in Company Appeal (AT) (Ins) No. 557 of 2021' to contend that in the said case, it has been held that the application under Section 65 of the Code, can be filed even before the admission of the application filed under section 7 or 9 of the Code because the word used in Section 65 is initiation of the proceedings and not the admission of the proceedings. He has also relied upon a decision of this Tribunal in the case of 'CFM Asset Reconstruction Pvt. Ltd. (acting in its capacity as trustee of CFMARC Trust-88) Vs. Saudi Basic Industries Corporation Ltd. & Anr. in Company Appeal (AT) (Ins) No. 1231 of 2022' decided on 14.11.2022 on the same analogy.

7. On the other hand, counsel for Respondent has submitted that the application under Section 7 has been filed for the resolution of debt of Rs. 268 Crores and the application filed for intervention has been rightly dismissed by the Adjudicating Authority because the Appellant had no locus to maintain the said application at this stage when the proceedings are pending and no order of admission has been passed. In support of his contention, he has relied upon a decision of this Tribunal in the case of 'Surinder Pal Singh & Ors. Vs. Spaze Towers Pvt. Ltd. in Company Appeal (AT) (Ins) No. 354 of 2023 in IA No. 1157, 1195 of 2023 decided on 27.03.2023' and also relied upon the decision

of this Tribunal in ‘Prayag Polytech Pvt. Ltd. vs. Hind Tradex Ltd. 2019 SCC Online NCLAT 1029 decided on 16.08.2019’. He has also referred to another order of this Tribunal passed in Shrem Residency Pvt. Ltd. Vs. Shraman Estates Pvt. Ltd. 2023 SCC Online NCLAT 70 decided on 11.01.2023’.

8. We have heard counsel for the parties and perused the record with their able assistance.

9. The issue involved in this case is as to whether an application like the one in hand could have been maintained at the instance of the Appellant before the admission of the application under Section 7 of the Code?

10. There is no dispute that the Applicants/Appellants are the homebuyers who have booked their units in the said project being developed by the Corporate Debtor. However, as submitted by counsel for Respondent, the units which has been booked by the Appellants are in the Tower “Joy and Spark” which is far beyond completion. It is further the case of the Respondent that there are large number of homebuyers and if all of them keep on filing the application before the order of admission then the timeline which is provided for the purpose of pursuing the application filed under Section 7 of the Code shall be adversely affected as also the interest of the Financial Creditor who has initiated the proceedings.

11. The judgment relied upon by Counsel for Appellant in the case of Ashmeet Singh Bhatia (supra) is based upon the interpretation of Section 65 of the Code because in the said case a prayer was made by the Applicant (who was also

one of the homebuyers) that *“Dismiss the present Company Petition, under section 65 of the I& B Code, 2016 as it has been filed with malicious intent to defraud this Hon’ble Tribunal and the thousands of innocent flat buyers, including the Applicant”*. Dealing with the said prayer, before the admission of the application, this Court has held that the word which have been used in Section 65 of the Code is initiation of the insolvency process and not the admission. Similarly, in the case of CFM Asset Reconstruction Pvt. Ltd. (Supra) relied upon by the Appellant, this tribunal has taken into consideration the specific circumstances in which the application was filed because the Appellant in that case had submitted that the Appellant is having exposure to extent of 99.19% of the debt of the Corporate Debtor and thus it has the right to intervene in the proceedings which has been initiated against the Corporate Debtor by the Operational Creditor. In those circumstances, it has been held by this Tribunal that *“We make it clear that our direction to permit the Appellants to intervene in Section 9 Application has been passed on account of exceptional facts and circumstances, as noticed above and is not to be treated as any declaration of law”*.

12. On the other hand, the order passed in the case of Surinder pal Singh (supra), this court was dealing with an application which was filed by homebuyer as an Intervener in the proceedings under Section 7 of the Code and held that the Application under Section 7 is not maintainable till the application under Section 7 is admitted. However, a window was kept open for the Applicant by observing thus *“it shall be open to the Appellant to file appropriate fresh application in the event application is admitted under Section*

7 IBC.” In the case of Prayag Polytech Pvt. Ltd. (Supra) in that case it was held that *“In that view of the matter, we are of the view that there is no requirement for intervention of any Directors or shareholders of the ‘Financial Creditor’ or any other party before admission of Application under Section 7 of IBC. If the application is admitted, it would be open to any aggrieved party to move before this Appellate Tribunal.”* In the case of Shrem Residency Pvt. Ltd. (supra) this court has held that the only thing which is to be taken into consideration at the time of admission of section 7 of the Code that there is a debt and default.

13. In view of the aforesaid facts and circumstances of the present case, the reliance placed by Counsel for Appellant on the decision rendered by this Tribunal in case of Ashmeet Singh Bhatia (supra) and CFM Asset Reconstruction (supra) is totally misplaced whereas the orders relied upon by Counsel for Respondent in the case of Surinder Pal Singh (supra) and Prayag Polytech (supra) answer the questions which have been posed in the earlier part of this matter against them. No other point has been raised.

14. We do not find any merit in the present appeal and the same is hereby dismissed though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Raushan/Ravi