

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH-III

IB-28/ (ND)/2018

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/S Aaj Finance & Credit Limited

..PETITIONER

VS.

M/S Keltech Infrastructures Ltd.

..RESPONDNET

MEMO OF PARTIES:

Aaj Finance & Credit Limited
803, Shakuntala Apartments,
59 Nehru Place, New Delhi

...Financial Creditor

VERSUS

Keltech Infrastructures Limited
7, I.P. Building, U.G.F. 2& 3,
E-109, Pandav Nagar
Patparganj
NEW DELHI - 110092

...RESPONDNET

Coram:

**R.VARADHARAJAN,
Hon'ble Member (Judicial)**

**K.K. VOHRA
Hon'ble Member (Technical)**

Aaj Finance & Credit Limited
IB-28/ND/18



Counsel for the Applicant: Mr. Arun Saxena and
Mr. Saral Sharma (ADVOCATES)
Counsel for the Respondent: Ms. Krishna Mohan K. Menon,
Ms. Parul Sachdeva (ADVOCATES)

ORDER

Date: 13.09.2019

1. This is an application which has been filed by the Applicant under the provisions of Insolvency and Bankruptcy Code, 2016 who claim to be the Financial Creditor ^{against} of the Respondent Company which has been termed as the Corporate Debtor. The transaction leading to filing of the present Application as reflected in the application is stated to be as under:

a. On 30.05.2013 a Memorandum of Understanding (MOU) was executed between the parties for the grant of loan of Rs 50,00,000/- by Financial Creditor to the Corporate Debtor at 2% interest per month along with the mortgage of two flats by the Corporate Debtor to the Financial Creditor wherein the charge in relation to which was never created in favor of the Financial Creditor.

- b. On 01.06.2013 after the approval from the board of Financial Creditor, payment of loan to Keltech Infrastructure Limited was made through cheque for amount of Rs 50 lakhs and the same was acknowledged by the Corporate Debtor.
- c. On 03.06.2013, upon the persuasion of the Financial Creditor, an agreement of Buyer/Seller was executed between the parties for the above stated properties which were kept as security to the loan. It is pertinent to note that no charge was ever created on these properties.
- d. On 01.06.2014 a fresh MOU was executed between the parties on the terms of the previous MOU, except the details of cheques for payment of interest and some change of dates of the cheques. The said MOU also provided for the mortgage of same two flats by the Corporate Debtor to the Financial Creditor wherein the charge was never created in favor of the Financial Creditor.
- e. On 01.06.2015 a fresh MOU was entered between the parties on the terms of the previous MOU's except the cheque numbers and dates for the payment of interest, the said MOU also provided for the mortgage of same two flats by the Corporate Debtor to the Financial Creditor wherein the charge was never created in favor of the financial creditor.
- f. Again on 01.06.2016, a fresh MOU was entered into between the parties on the terms of the previous MOU's except the cheque numbers and dates for the payment of interest, the said MOU also provided for the mortgage of same two flats by the Corporate



Debtor to the Financial Creditor wherein the charge was never created in favor of the financial creditor.

- g. On July 2016, all the cheques of interest payments were honored except three cheques, which were dishonored. Since, then no other cheques were deposited in the bank.
 - h. On 02.05.2017, Financial Creditor issued a letter seeking repayment of dues but this letter was returned unserved.
 - i. On 05.06.2017 another letter demanding for the repayment of the entire dues was issued by the Financial Creditor but was never replied by the Corporate Debtor.
 - j. On 27.10.2017 a demand notice was issued by the Financial Creditor which was never replied.
 - k. From December 2017, neither of the letters were replied nor any payment was made by the Corporate debtor.
2. Consequent to the issue of notice by this Tribunal, the Corporate Debtor filed a reply in which the following contentions have been taken:
- a. Corporate Debtor states that debt stands discharged, the Creditor has suppressed the fact of entering into Builder Buyer Agreement to sell dated 01.10.2016 with the Debtor. The said agreement to sell was entered for sale of a flat, the said flat was allotted to the Creditor as repayment of the principal payment made by cheques bearing No. 378105 dated 31.05.2013.



- b. The existence of BBA Agreement, the Financial Creditor in their demand letters dated 2.5.2017 and 5.6.17 sent to the respondent demanding repayment of dues, willfully concealed it.
 - c. As per the BBA/ Agreement to sell dated 1.10.16, both the parties agreed to the arrangement of sale of flat to the financial creditor in lieu of principal payment of Rs 50,00,000/- received from the Creditor.
 - d. Corporate Debtor stated that there is no default as loan stands repaid by virtue of agreement dated 1.10.16, the Financial Creditor has placed reliance on several MOUs entered between the parties which were renewed from time to time. However, Creditor has concealed the crucial agreement dated 1.10.2016 wherein the Creditor had agreed to purchase the flat offered by the Debtor towards repayment of loan.
 - e. Corporate Debtor states that earlier MOUs are different from BBA dated 01.10.16.
3. The Petitioner has also filed a detailed rejoinder to the observations of the respondent, vide diary no. 9042 dated 19.11.2018 which are as follows:-
- a. Despite signing the memorandum of understanding, no security was created by the Corporate Debtor in favour of Financial Creditor and now the Corporate Debtor is challenging the existence of Memorandum of Understanding itself.



- b. It is submitted that Builder Buyer Agreement was only entered for the security as the said charge was never created in compliance of the provisions of Companies Act 2013. The Builder Buyer Agreement was signed by the Financial Creditor as a part of document required for the purpose of creation of charge in favour of Financial Creditor, the Corporate Debtor did not complete other document such as filing of CHG-1 in compliance with the provision of Section 78 of the Companies Act 2013. The Corporate Debtor is portraying wrong picture of said BBA as satisfaction of the debt, which infact was never intended between the parties which is evident from signing of MOUs already on record.
- c. It is admitted fact that Financial creditor has reminded the Corporate Debtor about the due of the loan and interest vide its notice dated 2.5.2017 and 5.6.2017, it is to be noted that after receipt of these notices, the Corporate Debtor did not whisper even a single word about the discharge of debt by execution of so called BBA on 1.10.2016, and as to why the Corporate Debtor did not respond to the notices of the Financial Creditor and make it clear the debt has also been discharged, then why Corporate Debtor has taken more than 8 months to file the reply to the petition if the reply was so simple that debt was discharged. Infact it is an afterthought of the Corporate Debtor related to BBA with the alleged discharge of debt.



4. Oral arguments were also heard and order was reserved on 31.07.2019. Written submissions were also filed by both the parties on 5.08.2019. We have gone through the documents filed by both the parties and heard the arguments and perused written submissions made by both the Counsels. Tribunal observed that various MOUs had been entered by the Corporate Debtor and the security was created in the form of mortgage of flats but there was no charge created in the records of Registrar of Companies. The interest on the loan was admittedly paid by the Corporate Debtor till June 2016 but after that the interest was also not paid by the Corporate Debtor.

5. The reply as filed by the Corporate Debtor and documents annexed therewith^{shows} that an agreement dated 1 October 2016 has been entered into between Corporate Debtor and Financial Creditor from which the following facts have been recited

“And whereas the promoter is allowed to construct residents flats etc and the same are allowed to be sold or transferred to any person by the Promoter under the terms and conditions of the sale of the said plot by the CIPL and the Allottee/ Buyer has examined the relevant papers. And whereas the promoter to construct on the aforesaid plot a multi-storeyed building to be called “Kumar Golf Vista” with a number of flats got prepared building has been undertaken in accordance therewith. And Whereas the allottee/Buyer has examined the building plans, designs and specifications of the proposed residential complex being available for inspection at 7, I.P. Building, UGF-2&3, E-109, Pandav Nagar, NH-24, Delhi-110092. And Whereas the promoter is also entering into separate agreements with several other persons regarding other flats in the said complex under construction by the Promoter”

6. From the recitals above, it is evident that the Financial Creditor has chosen to enter into an agreement, for whatever reasons best known to it, in the project, "Kumar Golf Vistas" for a flat. Thereby virtually, making the Financial Creditor as a Home Buyer taking into consideration Sec 5(8) (f) IBC,2016 read with explanation provided there^{under} and enabling it to maintain petition under IBC,2016 as a 'Home Buyer' ⁴ in case of default on the part of the Corporate Debtor named as the promoter therein.
7. In terms of clause 5(i) of the agreement the promoter was required to complete the building within 12 months from the date of signing the agreement and also providing under clause 5(ii) a grace period of 180 days. The price of the flat namely K-708, under clause 3(a) is fixed as Rs 49,59,375/-. However, it is important to note from clause 5(ii) the following words which are material for the purpose of the case in hand and which read as follows-
- "However, all the payments/ demands have been received by the builder within the scheduled time"
8. The above wordings in clause 5(ii) clearly evidences that the parties have virtually agreed to appropriate the loan amount granted earlier as the consideration for the flat purchase as otherwise the wordings as extracted above is an anomaly. It is pertinent to note that the execution of the agreement dated 1 October 2016 is not denied by the parties. Hence, considering the said agreement to be the fresh bargain as entered into between the parties thereby giving a go by to the earlier MOUs as well as the loan transaction of Rs 50 Lakhs.



9. Still, the Financial Creditor will be entitled to maintain a petition under Section 7 IBC,2016 in case of a default in handing over possession of the flat, being the subject matter of the agreement within the time schedule and for the refund of the money made available under the agreement along with compensation if any contemplated.

10. From the records, it is seen that the letter of offer of possession is enclosed dated 7 March 2018 by the Corporate Debtor in its reply. From the terms of the agreement and as given in paragraph supra in relation to time limit for possession to be given, taking into consideration the grace period of 6 months and well as contracted period of 12 months,

the possession of flat booked should be given on 1.4.18.(as the agreement dated 1/10/16 stipulated that the possession will be given within 18 months i.e. 12 months plus grace period of 6 months) it is also required to note that the petition was filed on 4.1.2018 well before the period fixed under the agreement dated 1.10.2016.

12. From the dates it is quite evident that there is subsequent agreement dated 1.10.2016 wherein the parties seem to have entered into a fresh bargain as narrated in the earlier portion of order.

13. It is evident from above that the Petitioner had given advance for purchase of a flat for which formal agreement was signed on 1.10.16.

14. We find that on the date of filing of petition as a (Home Buyer) no default stands established, more so, when the possession also seems to

be offered before the completion of the date of possession as given in the agreement namely 1.4.18.

15. In the circumstances this petition had been filed premature and the Tribunal dismiss it on the said count.

16. However, this will not curtail the right of Financial Creditor to approach other Judicial forums or even this forum in terms of judgement in Writ Petition (CIVIL) No. 43 of 2019 "Pioneer Urban Land and Infrastructure Limited & Anr. Vs Union of India & Ors."

-sd-

(K.K. VOHRA)
MEMBER (TECHNICAL)

-sd-

13/09/2019
R.VARADHARAJAN
MEMBER (JUDICIAL)

U.D. Mehta/D