



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI, COURT-III  
(IB) – 1200(ND)/2019**

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**IN THE MATTER OF:**

**M/s. PAAM EATABLES LIMITED**

*Having Its Registered Office at:*

108, 1<sup>st</sup> Floor, Mukand House, Plot No. A-1/2,  
Azadpur Commercial Complex, Naniwala Bagh,  
Azadpur, Delhi-110033.

**..... Applicant/ Financial Creditor**

**VERSUS**

**M/s. RUDRA BUILDWELL CONSTRUCTIONS PRIVATE LIMITED**

*Having Its Registered Office at:*

314, F/F, Pocket-D, Mayur Vihar, Phase-II,  
East Delhi, Delhi-110091.

**..... Respondent/ Corporate Debtor**

**Order Pronounced On: 08.01.2024**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER  
(JUDICIAL)**

**SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCES:**

For the Applicant : Mr. Rahul Malhotra, Adv.


For the Respondent : Mr. P. Nagesh, Sr. Adv. and Mr. Gourav Joshi,  
Company Secretary

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**




1. This Application has been filed by M/s. Paam Eatables Limited, the Financial Creditor (FC)/Applicant on 13.05.2019, before this Adjudicating Authority, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC” or “the Code”) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (“Adjudicating Authority Rules”), for initiating the Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against the Corporate Debtor (CD)/Respondent viz., M/s. Rudra Buildwell Constructions Private Limited on the ground that the Corporate Debtor has defaulted to make a payment of an outstanding principal sum of Rs. 2,00,00,000/- (Rupees Two Crore Only) and Rs. 54,00,000/- (Rupees Fifty Four Lakh Only) as interest @ 12% p.a. w.e.f. 18.01.2017 upto 17.04.2019 totaling to Rs. 2,54,00,000/- (Rupees Two Crore Fifty Four Lakh Only). As per the Form-5, Part-IV, the date of default in the present matter is 01.04.2018 when the cheque issued for repayment of the money advanced to the Corporate Debtor was dishonoured.
2. It is the case of the Applicant that on 14.06.2016, the Financial Creditor and Corporate Debtor entered into a Buyer Builder Agreement (BBA) to purchase 8 Flats. The Financial Creditor made payment of the entire sale consideration inclusive of all taxes and regulatory charges to the tune of Rs. 2,00,00,000/- vide cheque no. 637044 dated 18.01.2017 drawn on Yes Bank, Kamla Nagar Branch, New Delhi to the Corporate Debtor. The receipt of the entire sale consideration was acknowledged by the Corporate Debtor vide receipt dated 17.01.2017. The said cheque issued by the Financial Creditor was duly honoured to the Corporate Debtor.
3. The Applicant submitted that it was promised by the Corporate Debtor that possession of the flats would be delivered by 01.05.2017. However, the Corporate Debtor failed to fulfill the commitment. A time extension to deliver the possession was sought



by the Corporate Debtor and in good faith, the same was granted by the Financial Creditor till 31.12.2017.

4. Upon failure to honour its commitment of handing over the possession, the Corporate Debtor issued cheques dated 05.01.2018 and 11.01.2018 for sum of Rs. 25,00,000/- and Rs. 2,00,00,000/- respectively towards repayment of the entire sale consideration along with interest thereon. However, the said cheques were dishonoured dated 08.01.2018 and 25.01.2018 upon presentation.
5. Thereafter, upon dishonour of the cheques issued by the Corporate Debtor, the Corporate Debtor handed another cheque bearing No. 034898 dated 31.03.2018 for the sum of Rs. 2,00,00,000/- drawn on the Bank of Maharashtra, Vaishali. It was assured that the said cheque shall be honoured upon presentation.
6. A Memorandum of Understanding dated 03.02.2018 was executed between the Financial Creditor and the Corporate Debtor, wherein it was assured by the Corporate Debtor that the abovementioned cheque bearing No. 034898 dated 31.03.2018 for the sum of Rs. 2,00,00,000/- shall be honoured upon its presentation.
7. However, the cheque bearing No. 034898 dated 31.03.2018 for the sum of Rs. 2,00,00,000/- drawn on Bank of Maharashtra, Vaishali issued by the Corporate Debtor, was dishonoured and returned with the remark "Funds Insufficient" vide return memo dated 03.04.2018. The Financial Debtor, through its counsel, issued a legal notice dated 28.04.2018 to the Corporate Debtor demanding it to make the payment of Rs. 2,00,00,000/- against the dishonoured cheque within a period of 15 days. However, the same was of no avail.
8. It is submitted that the Financial Creditor has filed proceedings under Section 138 of the Negotiable Instruments Act, 1881 against the Corporate Debtor and its Directors upon dishonour of the abovementioned cheque issued by the Corporate Debtor. The Financial Creditor has also filed a civil suit before the Court Civil Judge, Senior Division, Gautam Budh Nagar, Uttar Pradesh to



enforce its rights under the abovementioned Memorandum of Understanding.

9. It is submitted that the Financial Creditor earlier filed an application under Section 7 of the Code which was numbered as Company Petition (IB) No. 1137/2018. Notice was issued by this Adjudicating Authority in the said application and the Corporate Debtor appeared in the said proceedings. Thereafter, the Corporate Debtor approached the Financial Creditor and proposed to settle the matter amicably. Accordingly, the settlement was recorded in the settlement agreement dated 04.02.2019 wherein the Corporate Debtor admitted that there was a default on its part and agreed to pay a sum of Rs. 2,25,00,000/- by 31.03.2019. The Corporate Debtor paid the upfront payment of Rs. 25,00,000/- to the Financial Creditor. But, the Corporate Debtor failed to make payment for the sum of Rs. 2,00,00,000/- by 31.03.2019. It was a term of the settlement agreement that if the Corporate Debtor breaches the said settlement agreement dated 04.02.2019, the Financial Creditor shall be entitled to revive its original claim against the Corporate Debtor. An application for revival of the said application was filed, however, this Adjudicating Authority vide order dated 26.04.2019, disposed of the same with liberty to the Financial Creditor to initiate fresh proceedings against the Corporate Debtor.

Hence the present application.

10. The Respondent/Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant and stated that the Applicant is not a Financial Creditor after the promulgation of the Ordinance dated 28.12.2019 whereby a proviso has been added before the Explanation attached to Section 7(1) of IBC which inter-alia, require that not less than one hundred of such creditors in the same class or not less than ten percent of the total number of such creditors in the same class, whichever is less.
11. It is the case of the Respondent that the Applicant paid a sum of Rs. 2.00 crores vide cheque No. 637044 dated 18.01.2017 and the flats



were allotted to the Applicant by the Respondent. It was agreed between the parties that the possession will start from 01.05.2017 onward as per the Agreement dated 14.6.2016 and continue to December, 2017 subject to force majeure conditions. It was agreed and decided between the parties as per MoU and Agreement, in case, the Respondent fails to hand over the possession of flats by 31.12.2017, it was further provided therein that in the event of non-payment of Rs. 15 lacs on or before 28.02.2018, the Applicant shall get the land, (clear from all encumbrances) having commercial value of Rs. 5 crores, owned by the Respondent transferred in the name of Applicant or its nominee.

12. It is submitted that the Respondent was always ready and willing to transfer the land equivalent to the value of more than Rs. 5 crores out of the land situated at Village Thappal Tehsil Kher, Dist. Aligarh, U.P. Further, the Original land documents are in Hindi Language and therefore compiled details of the land of the Respondent Company are filed along with the application.
13. It is also submitted that before filing of the present application before this Adjudicating Authority, the Applicant had also filed a Civil Suit bearing No. O.S. No.228 of 2018 titled as M/s. Paam Eatables Limited Vs. M/s. Rudra Buildwell Construction pending in the Court of Civil Judge (Senior Division), Gautam Budh Nagar, U.P., a certified copy of the Civil Suit is filed along with the application.
14. It is submitted that the Applicant has previously filed an application u/s 7 of IBC relying upon the Agreement dated 14.06.2016 under which eight flats were allotted by the Respondent to the Applicant in a project known as KBNOWS on a Plot No.5(B), Sector-16, Greater Noida (West), Noida Extension, U.P. claiming themselves as "Financial Creditor" on the basis of allotment of flats. The possession was to be given by 31.12.2017.
15. It is the case of the Respondent that the Applicant is not a "Financial Creditor" as the flats in question are ready for occupation and hence,



the Applicant cannot be treated "Financial Creditor" by virtue of judgment of the Hon'ble Supreme court in the case of **Pioneer Construction (P) Ltd Vs. Union of India**. It is submitted that now the project comprising of 672 flats has been ready in January, 2019 for being handed over the actual and physical possession of the same.

16. The MoU dated 04.02.2019 does not envisage - (a) either payment of interest (b) return or compensation to the Applicant and hence the mandatory requirement of "Time Value of Money", as required u/s 5(8) of IBC, 2016 does not stand fulfilled. If the agreement or contract does not postulate or envisage the time value of money, then the Applicant is not a "Financial Creditor" and the company Application is liable to be dismissed.
17. It is submitted that Clause 2 of the MoU dated 04.02.2019 itself says that "no fresh proceedings" shall be initiated by the parties against each other in respect of any issue arising out of the Agreement dated 14.06.2016.
18. It is submitted that Clause 4 of the MoU dated 04.02.2019 does not provide for payment of any interest, return or compensation in the event of any default in payment of Rs. 2,25,00,000/- hence it is most respectfully submitted that the fundamental condition for filing the Application as a Financial Creditor is not satisfied as a mandatory requirement under Section 5(8) of IBC, i.e. "Time Value of Money".
19. It is the case of the Respondent that the Financial Creditor disbursed the loan amount to the Corporate Debtor and no interest rate on the disbursed loan amount was agreed at the time of such disbursement or anytime thereafter between the Applicants and the Respondent.
20. The Respondent submitted that the Memorandum of Association ("MOA") of the Applicant Company does not allow/permit it to engage in the money lending business of any kind. The act done by Applicant Company is beyond its MOA and thus not permitted. It is a trite law that any act done which are inconsistent with to object



clause stated in the MOA of a Company is ultra-vires and non-est in law therefore on this ground, the purported debt stated to be of nature of financial debt being disbursed ultra vires to the object clause stated in MOA of company, can in no stretch of imagination constitute a financial debt under Section 5(8) of the Code.

21. We have heard the Ld. Counsels appearing for both parties and also perused the records.
22. After Analysing Form- I, Part-IV of Section 7 application, it appears that 01.04.2018 is not the date of default but it is the date on which the said sum is due to the Financial Creditor. Except for this description, the date of default is not mentioned. It is important that the “date of default” ought to be mentioned in Column of Form-I, Part-IV of Section 7 application as per the NCLT Rules, 2016. It is clearly in violation of the same. Be that as it may, the “date of default” is not mentioned in the pleadings. Therefore, we hold that the date of default is omitted from the relevant column.
23. Admittedly the Financial Creditor entered into MoU on 04.02.2019 to which M/s. Paam Eatables Limited (The First Party) and M/s. Rudra Buildwell Constructions Private Limited (The Second Party). The relevant clauses of the MoU are extracted below for better understanding of the case:

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*5. By entering into this Deed of Settlement, no Party makes any admission of liability or wrongdoing and the Parties are entering into this Deed of Settlement for the sole purpose of resolving all the matters and the mutual avoidance of further costs, time and expense incident to protracted litigation.*

*6. This Deed of Settlement sets forth and constitutes the entire understanding of the Parties regarding the subject matter hereof. It cancels and replaces all written or oral statements, negotiations, and agreements of the Parties concerning the subject matter hereof.*



7. *This Deed of Settlement can only be amended by an instrument in writing signed by all Parties. The failure of a Party to insist upon strict adherence to any term of this Deed of Settlement will not be considered a waiver of any right arising there under.*

\*\*\*\*\*”

24. From the perusal of the abovementioned clauses, it appears that the MoU is in the nature of a settlement agreement. Further, there is no interest element has been provided. We have not come across any clause which shows that the money in question was borrowed against payment of interest and that the amount involved in the transaction is having the commercial effect of borrowing.
25. It is clear that a minimum threshold limit has been laid down for taking cognizance of an application under Section 7 of IBC, 2016 for triggering CIRP when such an application is relatable to a Real Estate Project. In the present application, it is seen from the records that no documents have been filed by the applicant to satisfy that they have the minimum threshold limit as laid down in the second proviso to Section 7(1) of IBC, 2016.
26. The present application has been filed by the Applicant who was allotted 8 flats by way of entering into a Builder Buyer agreement dated 14.06.2016. Admittedly the real estate project in question has a total 712 numbers of units. In order to maintain an application under Section 7 of the Code, the threshold would have to be 10% of the total number of allottees or 100 whichever is less. In the present matter, the threshold would be 71 number of units. The Applicant in the present matter is an allottee for 8 units only.
27. This Adjudicating Authority vide order dated 20.05.2019 passed the following:

*“Learned counsel for the petitioner is present and represents that the petitioner is a home buyer and falling under the explanation to Section 5(8)(f) of IBC, 2016 as a financial creditor. Since the explanation itself is under challenge before the Hon'ble Supreme*



Court and the Hon'ble Supreme Court has been granting stay based on writ petitions filed by Real Estate Developers in relation to the proceedings before this Tribunal and hence is of the considered view that the matter be adjourned sine die to await the out-come of the Hon'ble Supreme Court with liberty given to the petitioner to revive the petition upon disposal by Hon'ble Supreme Court.”

28. This Adjudicating Authority vide order dated 05.02.2020 passed the following:

*“Counsel for both the sides are present. The present matter pertains to home buyers. Therefore, matter stands adjourned.”*

29. This Adjudicating Authority vide order dated 15.12.2020 passed the following:

*“CA-274/2020:-*

*Counsels for both the sides are present. The matter pertains to Home Buyers with regard to which issue is pending before the Hon'ble Supreme Court. Therefore, matter stands adjourned.”*

30. It is noted that on 13.03.2020, the Government of India passed the Insolvency and Bankruptcy (Amendment) Act, 2020 (No.1 of 2018) wherein by virtue of Section 3 of Amending Act, 2020 the proviso was added to Section (7) of Code:

**Section 7: Initiation of corporate insolvency resolution process by financial creditor.**

*“7. (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred”.*

.....

The 2<sup>nd</sup> proviso to Section 7(1) states as follows:-

*“Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate*



*insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less"*

31. The constitutional validity of Section 3 of the Insolvency and Bankruptcy Code (Amendment) Act 2020 has been duly upheld by the Hon'ble Supreme Court in **Manish Kumar v. Union of India**, reported in 2021(5) SCC 1, decided on 19.01.2021. An application for initiating CIRP against the Corporate Debtor by allottees under a Real Estate Project is required to satisfy the second proviso of Section 7(1) of IBC, 2016 as held by the Hon'ble Supreme Court of India in the case of **Manish Kumar Case (supra)**.
32. On the analysis of the legal position, we are of the considered view that the applicants have not made out a case of creditors of class belonging to any specific project to achieve the threshold limit of 10% or 100 numbers whichever is less, as required by law.
33. We are of the opinion that the Applicant is not a Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor. Therefore, we are satisfied that there exists no debt and no default and the same is corroborated by the averments made within the application. It is therefore clear that the Corporate Debtor has been able to raise a plausible contention regarding that the Corporate Debtor is not in default in respect of the debts due and payable. We therefore hold that the present application is not maintainable.
34. In light of the above facts and circumstances and the foregoing discussion, we are satisfied that the present Applicant fails to fulfill the criteria under Section 7 of the Code. It is accordingly ordered as follows: -
  - i. The Application bearing **(IB)-1200(ND)/2019** filed by the Applicant under section 7 of the Code read with Rule 4 of the



Adjudicating Authority Rules for initiating CIRP against the Respondent is **dismissed**.

- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.  
No order as to costs.

Sd/-

**(ATUL CHATURVEDI)  
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)  
MEMBER (JUDICIAL)**