



IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

C.P.(IB)-42(ND)/2024

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

IN THE MATTER OF:

Mr. Amit Kumar Singh

Having its Registered Office at:

G-12 A, Sector 39, Noida,

Uttar Pradesh - 201303

..... Applicant/ Financial Creditor

VERSUS

M/s. Apex Heights Private Limited

Having Its Registered Office at:

S-672 Ground Floor, School Block,

Shakarapur, East Delhi, Delhi -110092

..... Respondent/Corporate Debtor

Order Pronounced On: 10.07.2024

CORAM:

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

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Financial Creditor : Mr. Ashutosh Kumar, Mr. Pulkit Agrawal,
Mr. Raghav Sehgal Advs.

For the Corporate Debtor : Mr. Akshay Sharma Adv.

(IB) - 42(ND)/2024

Date of Order: 10.07.2024



ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application has been filed by Mr. Amit Kumar Singh, the Financial Creditor (for brevity 'Applicant') before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking an Order to initiate Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s. Apex Heights, the Respondent/Corporate Debtor. The Corporate Debtor is registered with Registrar of Companies, Delhi & Haryana and is therefore within the jurisdiction of this Adjudicating Authority.

2. Brief Background of the Case

- i. The Financial Creditor was the founder and was holding 99% shares in M/s. Shadbolt Buildworld Private Limited which was exclusively entitled to develop a housing project on Plot bearing address: SP-04, Sector-4, Sidharth Vihar, Ghaziabad; admeasuring 19,735 square metres (hereinafter referred to as the 'PROJECT SITE') with all the necessary permissions and clearances for carrying out the said construction.
- ii. The Corporate Debtor was involved in the business of real estate and project development in the Delhi NCR area and desirous of launching its own residential project on the project land, approached the Applicant to take over the entire shareholding of M/s. Shadbolt Buildworld Private Limited. Accordingly, the Financial Creditor extended financial assistance to the Corporate Debtor by transferring his entire 99% shareholding in M/s. Shadbolt Buildworld Private Limited vide Memorandum of Understanding ("**MoU**") dated 24.03.2021.
- iii. As per the terms of the aforementioned MoU dated 24.03.2021, the total consideration amount payable by the Corporate Debtor M/s. Apex Height Private Limited to the Applicant was agreed at Rs. 18,70,00,000/- (Rupees Eighteen Crores Seventy Lacs Only) along with interest @ 24% per annum to be paid in case of any delay and default. The Corporate Debtor had further agreed to clear its dues as per the terms mentioned in the MoU.

(IB) – 42(ND)/2024

Date of Order: 10.07.2024



- iv. After taking over of M/s. Shadbolt Buildworld Pvt Ltd, the Corporate Debtor raised loan in excess of Rs. 30 Crores by mortgaging the project land. Thereafter, the Corporate Debtor got the necessary approval and registration of project with UP-RERA and the necessary title & permission to carry on construction was solely in the name of M/s. Shadbolt Buildworld Pvt. Ltd.
- v. The Corporate Debtor then launched its own project on the 'Project Site' in the name of 'Apex Quebec' and raised funding from the homebuyers through booking in its project. The Corporate Debtor failed to clear the outstanding dues of the Applicant.
- vi. On 12.12.2022, the Applicant sent a legal Demand Notice to the Corporate Debtor demanding the entire outstanding dues amounting to Rs.18,00,00,000/- (Rupees Eighteen Crore Only). However, on 20.12.2022, instead of replying to the legal notice, the Corporate Debtor deposited Rs. 25,00,000/- (Rupees Twenty Five Lakhs Only) in the Bank Account of the Applicant.
- vii. On 02.05.2023, A new MoU was entered into between the Mr Amit Kumar Singh and the Corporate Debtor after reconciliation of accounts and the Corporate Debtor admitted its liability in the MoU to the tune of Rs 4,84,00,000/- {Rupees Four Crores Eighty Four Lacs only} towards the Financial Creditor for the transfer of company M/s Shadbolt Buildworld Pvt. Ltd. to the Corporate Debtor. The MoU made a specific mention of the penal interest @18% p.a. to be levied upon delayed payment in case of default by the corporate debtor to make payment of financial debt to Mr Amit Kumar Singh. The MoU also provides that the Corporate Debtor had given 4 Builder Buyer Agreements for its four commercials shops as mortgage to the Financial Creditor till the amount of financial debt is repaid to Mr Amit Kumar Singh. Additionally, the Corporate Debtor had also given cheques as security to the financial creditor. The MoU signified the intention of the parties that Amit Kumar Singh is a financial creditor of the Corporate Debtor.
- viii. The corporate debtor started defaulting with the terms of payment as agreed in the MoU dated 02.05.2023. Even after meeting with the officials of the corporate debtor company on the various occasion and repeatedly requesting them to make good the defaults and take corrective actions, the corporate debtor failed to perform their part of obligation.



ix. As per the MoU dated 02.05.2023 the Corporate Debtor was supposed to clear the entire outstanding payment till the month of September 2023. The Cheques issued by the Corporate Debtor were dishonoured upon presentation on 15.06.2023. Despite repeated reminders the Corporate Debtor has failed to clear its outstanding dues. Hence, the present petition.

3. Submissions of the Applicant/Financial Creditor:

The Applicant has submitted that Corporate Insolvency Proceedings ought to be initiated against the Corporate Debtor on the following grounds: -

- i. Existence of Debt & Default: The Financial Creditor had extended financial assistance to the corporate debtor company by transferring his entire 99% shareholding in M/s. Shadbolt Buildworld Pvt. Ltd. vide MoU dated 24.03.2021. There exists a Debt as per the above-mentioned Share Purchase Transaction and the subsequent MoU dated 02.05.2023 exercised between the parties wherein the Corporate Debtor had promised to repay the due amount with interest. The Corporate Debtor has admittedly failed to adhere to its commitment and defaulted in repayment of the debt. With such default and non-payment to the Petitioner, the Respondent becomes liable to pay the money as agreed under the MoU to the Petitioner.
- ii. Applicant is a secured financial creditor: The Clause 8 of the MoU dated 02.05.2023 exercised between the parties provides for the payment of interest @18% p.a. to be levied upon delayed payment of the Corporate Debtor which represents consideration for time value of money and amplifies that the transaction falls under the domain of Section 5(8) of the Code.
- iii. Issuance of Security cheques by Corporate Debtor: Additionally, the Corporate Debtor had also issued 20 cheques to secure the repayment of the debt to the Financial Creditor. The MoU signifies the intention of the parties that Amit Kumar Singh is a Financial Creditor of the Corporate Debtor. The Corporate Debtor has not replied to any of the Notices sent by the Petitioner under Section 138 of The Negotiable Instruments Act, 1881.
- iv. Effect of commercial borrowing: The Corporate Debtor has admittedly taken over the Applicant's Company & its assets for further 'commercial purpose' by launching a residential project on the Project Site. Thereby, the amount payable to the Applicant comes within the meaning of 'Financial Debt' defined under Section 5(8) of the Code.



- v. Debt secured by way of mortgage of four commercial shops: The consideration for the amount receivable by the Petitioner from respondent was secured in terms of the Builder Buyer Agreements with respect to Four commercial shops belonging to the Corporate Debtor. The Respondent was required to pay the amount to the Petitioner within a particular period and when the Respondent failed to honour the commitment, the default has occurred.

4. **Submissions of the Respondent/Corporate Debtor:**

The Respondent in its Reply Affidavit has submitted that the present petition filed by the Financial Creditor is not maintainable and liable to be dismissed on following grounds: -

- i. Alleged Debt is a not a Financial Debt as there is no Disbursement by the alleged Financial Creditor to the Corporate Debtor which is very basic and fundamental ingredient of financial debt as mentioned under Section 5(8) of the Code.
- ii. There is a suppression of material facts by the alleged Financial Creditor as to FIR No. 140/2023 and 341/2024 being filed by the Financial Creditor against the Directors of the Corporate Debtor. The Legal Notice dated 22.03.2023 under Section 138 of Negotiable Instruments Act, 1881 sent to extort money from the Corporate Debtor by threatening Corporate Debtor of multiple proceedings in various Courts.
- iii. No specific date of default is mentioned in Part IV of the FORM 1 and Date of Default is mentioned as Month of June, 2023.
- iv. Alternatively, the alleged default is less than the threshold value of Rs. 1 Crore as mentioned under Section 4 of the Code as the cumulative value of three security cheques is only Rs. 75,00,000/-.
- v. The Petition is not filed by the Authorized Person. Entry 5 of Part I of Form 1 states Adv. Ashutosh Kumar to be authorized person to submit the present application on behalf of the alleged financial creditor. Whereas, the signatures and affidavit annexed to the petition are of the alleged financial creditor himself. Therefore, the present petition is defective and incomplete.



5. Analysis and Findings

- i.** We have heard the Ld. Counsels appearing for both parties and perused the records.
- ii.** It is the case of the Applicant/Financial Creditor that as per the MoU dated 24.03.2021, the Applicant has transferred his entire 99% shareholding in M/s. Shadbolt Buildworld Private Limited to the Corporate Debtor for the consideration amount Rs. 18,70,00,000/- (Rupees Eighteen Crores Seventy Lacs Only) along with interest @ 24% per annum to be paid in case of any delay and default. The Corporate Debtor failed to pay the outstanding dues. A new MoU dated 02.05.2023 was exercised between the parties, wherein the Corporate Debtor admitted its liability to the tune of Rs 4,84,00,000/- (Rupees Four Crores Eighty Four Lacs only) along with penal interest @18% pa to be levied upon delayed payment in case of default. The Corporate Debtor was supposed to clear the entire outstanding payment till the month of September 2023. The Security Cheques issued by the Corporate Debtor were dishonoured upon presentation on 15.06.2023. Despite repeated reminders the Corporate Debtor has failed to clear its outstanding dues.
- iii.** The Ld. Counsel for the Corporate Debtor submitted that the present petition is not maintainable and liable to be dismissed as there is no disbursement of financial debt to the Corporate Debtor which is basic requirement to establish the existence of a financial debt under Section 5(8) of the Code. To support this contention, the reliance has been made on the judgment of Hon'ble Supreme Court in the case of **Jaypee Infratech Ltd., Interim Resolution Professional v. Axis Bank Ltd.**, reported in (2020) 8 SCC 401.
- iv.** On the contrary, the Ld. Counsel for the Applicant submits that definition of "financial debt" under Section 5(8) uses the word "includes" and thus the kind of financial debts illustrated are not exhaustive but rather expansive. The debt may be of any nature but a part of it is always required to be carrying or corresponding to or at least having some traces of disbursal against consideration for the time value of money. The time value of money need not necessarily be interest. The admitted debt in the present case arises out of share purchase transaction and the subsequent MoU as per which the Corporate Debtor had promised to repay the amount with interest. The Corporate Debtor has admittedly failed to adhere to its commitment.



The Ld. Counsel for the Applicant relied upon the judgment of Hon'ble NCLAT, Chennai Bench in the case of **Sree Bhadra Parks and Resorts Ltd. Vs Sri Ramani Resorts and Hotels Pvt. Ltd**, Company Appeal (AT) (CH) (INS) No. 95 of 2021 where in it was observed as follows: -

“71.in view of the fact that the ‘instant debt’ arises out of the ‘Share Purchase Agreement’ dated 21.11.2012, coupled with an ‘Addendum’ to the said ‘Agreement’ dated 27.11.2012, the said sum is a ‘debt’ disbursed against the consideration for ‘Advance Payment’ in terms of the ‘Agreement’ and further that in the present ‘Appeal’ before this ‘Tribunal’, it is brought forth that the ‘Appellant’ had promised to repay/refund the amount paid by the ‘Respondent’/‘Applicant’ together with interest, and therefore, this ‘Tribunal’ comes to an inevitable and inescapable cocksure conclusion that the aforesaid promise comes squarely within the ambit of definition of ‘Financial Debt’ and that the ‘Respondent’/‘Applicant’ is without any haziness is a ‘Financial Creditor’ in the eye of Law.

72. Suffice it for this ‘Tribunal’ to pertinently point out that the ‘Appellant’/‘Corporate Debtor’ had not adhered to its ‘commitment’ in respect of ‘Share Purchase Agreement’ dated 21.11.2012 and had not paid the amount admittedly, especially in the teeth of the fact that the ‘debt’ due arises out of the said ‘Share Purchase Agreement’. Viewed in that perspective, the ‘Impugned Order’ dated 30.03.2021 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Kochi Bench, Kerala) in admitting the Application IBA/13/KOB/2020 does not suffer from any material irregularity or patent illegality in the eye of law. Consequently, the ‘Appeal’ fails.”

The Ld. Counsel for the Applicant submits that the nature of transaction between the parties is covered by the judgment of Hon'ble Supreme Court in the case of **Global Credit Capital Ltd v/s Sach Marketing Pvt. Ltd.**, Civil Appeal No. 1143 of 20220 wherein it has been held that the amounts covered by security deposits under the agreements constitute financial debt.



- v. By following the ratio as laid down by the Hon'ble NCLAT in the case of **Sree Bhadra Parks and Resorts Ltd. Vs Sri Ramani Resorts and Hotels Pvt. Ltd.** and the judgment of Hon'ble Supreme Court in the case of **Global Credit Capital Ltd v/s Sach Marketing Pvt. Ltd.**, we are of the considered view that in the present case, the provisions in the MoU dated 02.05.2023 regarding the interest payment, mortgage of 4 commercial shops and security cheques represent consideration for time value of money which amplifies that the transaction is falling under the domain of Section 5(8) of the Code, and The Applicant also qualifies as a financial creditor in view of the role played by him which admittedly enabled the Corporate Debtor to acquire the project land and get the respective development rights to launch its own residential project in the name of 'Apex Quebec' and raise substantial funding from Banks and Homebuyers.
- vi. The Ld. Counsel for the Corporate Debtor has raised technical objections that there is suppression of material facts regarding filing of FIR and issuance of Legal Notice under Section 138 of Negotiable Instrument Act; Date of Default in Form 1 of Part IV does not mention specific date and the Affidavit and Annexures are signed by the Financial Creditor himself and not the authorized person. However, on the contrary there has been admission as to the transaction and existence of the debt and have not denied the execution of the MoU dated 24.03.2021 and 02.05.2023 and its contents. There is also no proof of repayment filed. The contention that the debt does not meet the threshold requirement of Rs.1 Crore as the value of the Security Cheques is Rs.75,00,000/- (Rupees Seventy Five Lakh Only) is also not tenable as the unpaid financial debt by the Respondent regarding which the present application is filed amounts to Rs. 4,84,00,000/- (Rupees Four Crore Eighty Four Lakh Only) which meets the threshold limit.
- vii. In the present case, the petitioner has demonstrated the existence of the debt and that the transaction in question comes under the definition of financial debt. The existence of MoU dated 24.03.2021 and 02.05.2023 exercised between the parties wherein the Corporate Debtor accepted its liability towards the Applicant, the issuance of security cheques and an Agreement to sale of the commercial properties mortgaged with the Applicant acts as an additional security provided to the Applicant by the Corporate Debtor.



viii. We are of the considered view that in the present case, there exists a financial debt as per the definition given in Section 5(8) and there is a default in its repayment. It is a settled law that the moment the Adjudicating Authority is satisfied that there is a debt and a default has occurred, the Section 7 application must be admitted unless it is incomplete. There is hardly a discretion left with the Adjudicating Authority (NCLT) to refuse admission of the application under Section 7 of the Code.

6. In light of the above facts and circumstances, it is ordered as follows: -

- i. The Application bearing **IB-42(ND)/2024** filed by the Applicants under Section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **admitted**.
- ii. We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flow from the provisions of Section 14(1)(a), (b), (c) and (d) of the Code. Thus, the following prohibitions are imposed:
 - a) *The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
 - b) *Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;*
 - c) *Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
 - d) *The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor.*

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(IB) – 42(ND)/2024
Date of Order: 10.07.2024



- iii. 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.
- iv. The Applicants have proposed the name of Mr. Vinod Kumar Chaurasia as the Interim Resolution Professional (“IRP”) having address: 756, Sector-2, Rohini, New Delhi-110085. His Email id is cavinodchaurasia@gmail.com. His registration number is IBBI/IPA-001/IP-PO00100/2017-18/10200. The Applicants filed a copy of the Consent Issued by Mr. Vinod Kumar Chaurasia in Form 2, Written Communication by proposed IRP, as per the requirement of Rule 9(1) of the Adjudicating Authority Rules along with the Certificate of Registration and Authorization for Assignment in Form B. Accordingly, **Mr. Vinod Kumar Chaurasia** is appointed as IRP.
- v. In pursuance of Section 13(2) of the Code, we direct the IRP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- vi. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.
- vii. The IRP is expected to take full charge of the Corporate Debtor’s assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.



- i. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- ix. The Financial Creditors shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakh Only) with the IRP to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditors. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by IRP and shall be paid back to the Financial Creditors.
- x. In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Financial Creditors, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today.
- xi. The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.
- xii. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India ("IBBI") for their record.
- xiii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-Sd-

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

-Sd-

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