

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P(IB) No. 82/BB/2018  
U/s 9 of the I&B Code, 2016  
R/w Rule 6 of I&B (AAA) Rules, 2016 & Rule 20 of NCLT Rules, 2016

**In the matter of:**

**Mr. Swaraj Kumar,**  
Represented by Power of Attorney holder

**Mr. Anshul Swarup,**  
B-102, Sona Kiran,  
L.M. Road, Dahisar West,  
Mumbai - 400068.

- Petitioner/Operational Creditor

**Versus**

**M/s. Expat Projects Bangalore Holding Private Limited,**  
2<sup>nd</sup> Floor, Sobha Pearl, No. 1,  
Commissariat Road,  
Bangalore-560 025

- Respondent /Corporate Debtor

**Date of Order: 07<sup>th</sup> August, 2019**

**Coram:** 1) Hon'ble Shri Rajeswara Rao Vittanala, Member (J)  
2) Hon'ble Dr. Ashok Kumar Mishra, Member (T)

**Counsel/Parties Present:**

For the Petitioner : Ms. Bhargavi Dev K, Advocate  
Mr. I.S. Devaiah, Advocate  
MD&T Partners, Advocates

For the Respondent: Mr. Uday Shankar R.M, Advocate  
Ms. Asmita Deshpande, Advocate  
Ms. Juhi Chandel, Advocate  
M/s. Uday Shankar Associates

**Per:** Dr. Ashok Kumar Mishra, Member (Technical)

**ORDER**

1. C.P(IB)No. 82/BB/2018 is filed by **Mr. Swaraj Kumar,**  
**(Petitioner/Operational Creditor),** U/s 9 of the Insolvency and  
Bankruptcy Code, 2016, R/w Rule 6 of the Insolvency and

Bankruptcy (AAA) Rules, 2016 and Rule 20 of the National Company Law Tribunal Rules, 2016, by inter alia seeking to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of **M/s. Expat Projects Bangalore Holding Private Limited, (Respondent/Corporate Debtor)**, on the ground that Corporate Debtor failed to refund an amount of Rs. 11,48,91,082/- (Rupees Eleven Crore Forty Eight Lakh Ninety One Thousand and Eighty Two Only). The default originally arose on 24.11.2016 and again on September, 2017, when the Corporate Debtor failed to make payment in terms of the payment schedule.

2. Brief facts of the case as mentioned in the Company Petition are as follows:

- a. M/s. Expat Projects Bangalore Holding Private Limited, (Respondent Company) was incorporated on 28.11.2007 bearing CIN No. U45200KA2007PTC044503. Its authorized nominal share capital is Rs. 10,00,00,000 (Rupees Ten Crore Only) and paid up share capital Rs. 5,14,80,000 (Rupees Five Crore Fourteen Lakhs Eighty Thousand Only). The registered office of the Respondent Company is situated at 2<sup>nd</sup> Floor, Sobha Pearl, No. 1, Commissariat Road, Bangalore – 560025.
- b. The debt of the Corporate Debtor has arisen in terms of booking confirmation dated 10.04.2014 and the addendum dated 05.02.2015. The amount constituting the debt was paid by the Applicant to the Corporate Debtor towards the booking of a total of 56 apartments proposed to be developed by the Corporate Debtor.
- c. The Corporate Debtor has admittedly received a sum of Rs. 8,81,96,500 as on 17.08.2015 as evidenced from the consolidated receipt issued to the Corporate Debtor.
- d. In terms of understanding between the Applicant and the Corporate Debtor, in the event of delay beyond June 2015 by the Corporate Debtor, the Applicant would have the

option to exit and seek refund of all amounts paid. Notice of exit from the project was issued by the Applicant on 24.10.2016.

- e. The principal liability to pay the amounts along with interest originally arose on 24.11.2016 i.e. within 30 days of the notice of exit. Subsequently, in pursuance of mutual discussions, it was agreed that a total amount of Rs. 11,72,29,534 would be repaid by the Corporate Debtor to the Applicant in installments between January and August 2017. This payment schedule was extended to no later than September, 2017.
  - f. A sum of Rs. 1,50,00,000 was repaid by the Corporate Debtor on 24.04.2017.
  - g. That the Applicant/Operational Creditor served a Demand Notice dated 17.01.2018 under Section 8 of the Code demanding payment on an unpaid operational debt.
3. The Corporate Debtor has filed a Statement of Objection dated 26.07.2018, inter alia, contending that:
- a. The Petitioner has issued an evasive Demand Notice as an alleged Operational Creditor. The Petitioner has addressed similar Demand Notice dated 17.08.2018 also to another Company viz. Expat Projects and Developments Pvt. Ltd. That in light of two different Demand Notices sent to two different companies there is a dispute.
  - b. The Claim of Petitioner is based on alleged Agreement/s dated 10.04.2014 and 05.02.2015. That there are similar letters dated 10.04.2015 and 05.02.2015 executed between M/s. Maritime & Management Services Co WLL and the Expat Properties Indian Pvt. Ltd. And Expat Projects and Development Pvt. Ltd. As compared to claims being made by the Petitioner is the origin of dispute between the parties. The Applicant has produced a letter

- signed off by Swaraj Kumar and the Respondent Company, the existence and execution of which is denied.
- c. The Petition is filed by a Power of Attorney holder and a 'power of attorney holder' cannot file any application under sections 7,9 and 10 of the IBC.
  - d. The Power of Attorney is defective and not executed as laid down in the Power of Attorney Act, 1882 and hence cannot be acted upon.
  - e. The Corporate Debtor has another set of similar documents which shows Maritime & Management Services Co WLL and Expat Properties India and Expat Projects and Development Pvt. Ltd. As executants.
  - f. The Petitioner has not brought out before this Tribunal the details of the transactions as to how was the booking for the flats made and in whose names were the purchases made etc. That the number of flats alleged to be brought is 56 but in whose favour the same are bought is not disclosed and it is apprehended that the same is being purchased for benami purposes.
  - g. The Petition is not maintainable since the Petitioner even for arguments sake, has paid money for purchase of flats, as alleged and thus does not fall within the definition of Operational Creditor under Insolvency and Bankruptcy Code, 2016. That the Applicant is not an "Operational Creditor" in purview of Section 5(20) of the Code. That in addition the amount due from the Respondent is not an operational debt as defined under Section 5(21) of the IBC.
  - h. The Petitioner would not fall within the definition of home buyer since he has bought the flats on bulk and for commercial purposes and cannot be termed as home buyer buying a flat for his own use.
  - i. The Petitioner claims to be an Operational Creditor by virtue of letters exchanged between him and Expat

properties India Ltd. This letter does not constitute a sale agreement or an agreement to sell.

- j. As per the alleged Agreement made on 10.04.2014, it was made between Maritime and Management Services Co. WLL and Expat properties India Limited, not between Mr. Swaraj Kumar and Expat properties India Limited. That in fact the amount of Rs. 11,72,29,534 paid to the respondent has been paid by M/s. Maritime and Management Services Co. WLL which executed signed off a letter for booking of the 40 flats and is signed by Mr. Swaraj kumar as a Director.
  - k. The Petition is not maintainable in law and fact as the letter dated 10.04.2014 on the basis of which the Petitioner has claimed reliefs is unregistered and unstamped and not enforceable in law and in fact is totally denied by the Respondent.
  - l. The subject matter of the Petition prima facie cannot fall within the ambit of the IBC and the Petitioner is using this court as a money recovery court.
  - m. There is a fair amount of confusion on the dispute and therefore it would be appropriate to refer the parties to a civil court for evidence to be led and claims can be adjudicated between the parties actually owed moneys, since this being a summary proceeding these would not be able to be led in evidence before this court.
  - n. Since the Petitioner claims to be a Flat Buyer, RERA is an Specialized Authority established by the legislature to resolve the complaints.
4. The Operational Creditor has filed a Rejoinder dated 20.08.2018, inter alia, contending that:
- a. The Second Demand Notice was issued as Expat Projects and Development Private Limited agreed to be the Guarantor for the Corporate Debtor for repayment of the

amounts to the Petitioner, in the event of there being delay in development of the project, as per the terms of the booking confirmation.

- b. The Corporate Debtor took the booking in the name of the Petitioner and assigned customer number C – 1320642 to the Petitioner. However, initially, the Corporate Debtor had issued booking notes in the name of Maritime & Management Services Co. WLL, Bahrain. It is clearly evidenced from the booking note submitted by the Respondent along with the objections that the note was issued on the letter head of Expat Projects & Development Pvt. Ltd., and was signed by one Mr. Diwakar Ramamurty on behalf of another company Expat Properties India Limited and was stamped with the seal of Expat Projects & Development Pvt. Ltd., whereas the offer was for a project to be developed by a third company, which is the Corporate Debtor Expat Projects Bangalore Holding Pvt. Ltd. This is itself indicative of the conduct of the Corporate Debtor of avoiding its obligations.
- c. The issuance of booking note in the name of Maritime & Management Services Co. WLL, Bahrain was erroneous (and possibly malicious) as the amounts were paid by the Petitioner in his personal capacity and not the foreign entity of which he is the Promoter and Major Shareholder. The understanding was always that the booking was to be in the name of the Petitioner.
- d. The issue of the discrepancy/inconsistency in documentation (fact that the booking was in the name of the Company as against the Petitioner) was brought up by the Petitioner with the Corporate Debtor in terms of the email dated 19.04.2016.
- e. The Corporate Debtor is denying the execution of the documents solely with the intention of escaping its

liability. Further, if the Corporate Debtor has not executed the document herein, the Corporate Debtor would not have repaid the amount of Rs. 1,50,00,000/- as of 24.04.2017.

- f. The Petitioner is not a financial creditor but an operational creditor and Section 7 is not applicable. Nothing in Section 9 or 10 bars the institution of the application by a power of attorney holder. The present Power of Attorney was executed in Bangalore, Karnataka and is valid in law.
- g. The Petitioner is an NRI and the attorney holder is the son of the Appellant and the allegation that he does not have personal knowledge merely because it is specifically so averred does not hold stand.
- h. The Agreement was in the nature of availing services, wherein the Petitioner agreed to pay amounts to the Corporate Debtor, which was to be treated as booking amount for the service of development of properties.
- i. It is not the Petitioner's contention that the letters constitute a sale agreement, however, it is an agreement between the parties, where under the Petitioner had agreed to pay amounts to avail the services of the Corporate Debtor, who would in turn develop building/flats on a later date, if the development is completed within the agreed timeline, enter into agreement/s to sell, alternatively, repay the amounts with interest in the event of failure to develop within the agreed timelines.
- j. The fact that the Corporate Debtor failed to repay, is clear evidence of the Company approaching insolvency. It is reiterated that the amount due is an operational debt and that the application is for insolvency resolution.
- k. The Corporate Debtor has averred that the application is not compliant with Section 9(3)(c) of the Code, which

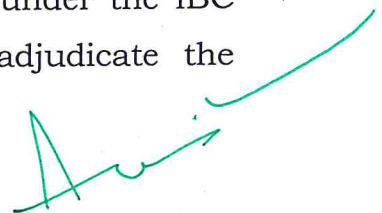
mandates that the Petitioner furnished a certificate from financial institution and is liable to be rejected in terms of Section 9(5) of the Code. It is submitted that the Statement of Accounts of the Petitioner dated 15.03.2018 have been produced, which confirms that there is no payment of an unpaid operational debt by a Corporate Debtor and the same is produced in compliance with Section 9(3)(c) of the Code as at para 5 of the Verifying Affidavit clearly states that the Petitioner has issued/served a Demand Notice in Form 3 of the I&B (AAA) Rules, 2016 on the Corporate Debtor and that no notice is given by Corporate Debtor relating to a dispute of unpaid operational debt.

5. The Operational Creditor has filed synopsis of arguments dated 17.06.2019 succinctly summarizing his arguments, inter alia, as follows:

- a. The total debt as on the date of filing the petition was Rs. 11,48,91,082 along with interest at 18% per annum being incurred since April 01, 2018.
- b. The project has admittedly not been launched till date, and resultantly, the Applicant gave the Corporate Debtor a notice of exit from the project on 24.10.2016 and a receipt has been acknowledged by the said Corporate Debtor. The Corporate Debtor does not dispute the fact that the project has not been launched and also does not dispute receipt of the notice of exit from the Applicant. As a result, the default is admitted by the Corporate Debtor.
- c. The Corporate Debtor has admitted execution of the letter in favour of Maritime and Management Services Co. WLL and has denied the execution of the letters in favour of the Applicant. However, the Corporate Debtor had not explained the various admissions of debt in favour of the Applicant and has also not explained the repayment of

money in favour of the Petitioner in the face of this defense. Further, the Applicant has produced documents along with the rejoinder to demonstrate that issuance of the booking note in the name of Maritime and Management Services Co. WLL was erroneous as the amounts were paid by the Petitioner in his personal capacity and not by the foreign entity of which he is the Promoter and Major Shareholder.

- d. Even by assuming without admitting that all the contentions raised by the Corporate Debtor are even examined, it is clearly evidenced that the Corporate Debtor having admitted receipt of funds and its liability to pay the money, no other issues survives for consideration.
  - e. The Applicant has been sending monthly accounting statements to the Respondent for several months, none of which has been disputed. The trail of emails containing the communication in term so f which the monthly accounting statements were issued by the Petitioner to the respondent for the months of November 2017 to march 2018 clearly demonstrate that amount of Rs. 11,48,91,082 which has been admitted is due and payable by the respondent as of 31.03.2018.
6. The Corporate Debtor has filed Written Arguments dated 24.06.2019, inter alia, contending as follows:
- a. The Petition filed by the Petitioner under Section 9 of the I&B Code is not maintainable since the claim does not constitute Operational Debt under Section 5(21) and the Applicant is hence not an "Operational Creditor" under the code.
  - b. Since the letters re-contradict the claim of the Petitioner, the Petitioner's claim is not maintainable under the IBC and needs appreciation of evidence to adjudicate the same.



- c. The Petitioner after December 2017 is entitled a refund of the full amount and if the Respondent fails to refund, the Petitioner can take its immovable property equivalent of its value.
  - d. Mr. Anshul Swarup has no authority to conduct this matter in view of the Defective Power of Attorney. Hence, this Petition dated 19.03.2018 and is therefore not duly verified as required under law is liable to be dismissed.
  - e. The number of flats alleged to be brought is 56 but in whose favour is not been disclosed and it is apprehended that the same is being purchased for Benami purposes.
  - f. There is no sale agreement or an agreement to sell of the 56 flats purchased by the alleged Petitioner. That Rs. 11,72,29,534 paid to the Respondent has been paid by Maritime & Management Services Co. WLL and not by Mr. Sawaraj kumar, the Petitioner.
  - g. An unregistered and unstamped document which purports to transfer rights and interest in a property cannot be relied upon for adjudication before a court under Section 33 of the Karnataka Stamp Act, 1957.
  - h. Since, the Petitioner claims to be a flat buyer; RERA is an appropriate authority to resolve the complaints in the real estate sector.
7. Heard Shri I.S. Devaiah and Ms. Bhargavi Dev K, learned counsel for Petitioner and Shri Uday Shankar R.M., Ms. Asmita Deshpande and Ms. Juhi Chandel learned Counsel for Corporate Debtor and also perused all the materials placed on record based. We have gone through the Company Petition and the submission made by both the parties and considered the extant provisions of law.
8. It is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble

Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*<sup>1</sup>, has inter alia, held that IBC, 2016 is not intended to be substitute to a recovery forum. In another latest judgment rendered in *Transmission Corporation of A.P.Ltd. Vs. Equipment Conductors and Cables Ltd.*,<sup>2</sup> Supreme Court of India, it is, inter alia held that existence of undisputed debt is sine qua non of initiating CIRP. As per para 25 of judgment in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*, it is stated that Adjudicating Authority, while examining an application filed under Section 9 of Code, will have to determine:

- i. Whether there is an 'operational debt' as defined exceeding Rs.1 Lakh?
- ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the unpaid operational debt in relation to such dispute?

If any one of aforesaid conditions is lacking, the application would have to be rejected.

9. In light of the aforementioned decisions of the Hon'ble Supreme Court we shall consider the facts and circumstance of the instant petition. The Operational Creditor claims an amount of Rs. 11,48,91,082/- as refund amount with interest for the payment made by the Operational Creditor to the Corporate Debtor towards the booking of a total of 56 apartments proposed to be developed by the Corporate Debtor.
10. Prima facie at this stage, it is vital to cite the decision of the Hon'ble Supreme Court in the case of *Chitra Sharma and Ors. v.*

<sup>1</sup>(2018) 1 SCC 353

<sup>2</sup>(CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)

*Union of India*<sup>3</sup> wherein it was held that “...amounts raised from allottees under real estate projects are deemed to be amounts “having a commercial effect of a borrowing”. Hence outstandings to allottees in real estate projects are statutorily regarded as financial debts. Such allottees are brought within the purview of the definition of ‘financial creditors’.”

**11.** Further Section 5 (8) defines Financial Debt as

*“financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–*

*(a) money borrowed against the payment of interest;*

*(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*

*(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

*(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

*(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*Explanation. -For the purposes of this sub-clause,- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

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<sup>3</sup> (2017) 143 SCL 680 (SC)

*(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016)..”*

Further, the definitions of “allottee” and “real estate project” in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 are produced herein below:

*“allottee” in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent”*

*“real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto”*

- 12.** From a reading of the above case law and the extant provisions of law, we are unable to categorise the above debt as an “Operational Debt”. It is vital to mention here that in either case of the Petitioner being categorized as a Home Buyer or an Investor it is clear that the amount disbursed by the Petitioner was against the consideration of the time value of money and did have a commercial effect of borrowing in the hands of the Corporate Debtor.



13. In the instant petition, in light of the discussion on the proposition of law entailed in the preceding paragraphs and considering the circumstances of the case; we found that the Petition filed under Section 9 of I&B Code, 2016 is incomplete and ought to be rejected.
14. In the result, C.P. (IB) No.82/BB/2018 is hereby rejected. However, this order will not come in the way of Petitioner to invoke any other remedy available under any law so as to get the grievances redressed. No order as to costs.



**(ASHOK KUMAR MISHRA)**  
**MEMBER, TECHNICAL**



**(RAJESWARA RAO VITTANALA)**  
**MEMBER, JUDICIAL**

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