NATIONAL COMPANY LAW APPEALLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 452 of 2020

(Arising out of Order dated 17th March, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-II in (IB)-2584/ND/2019)

IN THE MATTER OF:

Sh. Sushil Ansal ....Appellant

Versus

1. Ashok Tripathi
A-9/2, Patrakar Colony,
Near Patrakar Park,
Allahabad-211002

2. Saurabh Tripathi
A-9/2, Patrakar Colony,
Near Patrakar Park,
Allahabad-211002

3. Mr. Amarpal
Resolution Professional
M/s. Ansal Properties and Infrastructure Ltd.
IBBI Registration No. IBBI-/IPA-001/IP-P01584/2018-19/12411
115, Ansal Bhawan
16, K.G Marg, New Delhi-110001 .....Respondents

Present:

For Appellant: **Mr. Arun Kathpalia, Senior Advocate with Ms. Neeha Nagpal and Mr. Malak Bhatt, Advocates.**

For Respondents: **Ms. Devanshi Singh, Advocate for R1 & R2.**
Mr. Shobit Chaudhry, Advocate for R3.
Ms. A. Saha, Advocate.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant- Mr. Sushil Ansal, Former Director and Shareholder of 'M/s. Ansal Properties and Infrastructure Limited'- (Corporate Debtor) has preferred the instant appeal against the order of admission of application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) filed by Mr. Ashok Tripathi and Mr. Saurabh Tripathi claiming to be the Financial Creditors. The order of admission passed on 17th March, 2020 by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-II, with consequential directions in the nature of slapping of Moratorium and appointment of Interim Resolution Professional has been assailed through the medium of instant appeal on grounds adumbrated in the Memo of Appeal to which we shall advert to at a later stage.

2. The dispute underlying the triggering of Corporate Insolvency Resolution Process at the instance of Respondents- Mr. Ashok Tripathi and Mr. Saurabh Tripathi owes its genesis to booking of dwelling units under a Real Estate Project namely 'Sushant Golf City' developed at 'High Tech Township', Sector-P, Sultanpur Road, Lucknow. The case set up by the Respondent Nos. 1 & 2 before the Adjudicating Authority is that they have jointly booked a unit bearing no. 0073 admeasuring 3746 sq. ft. with the Corporate Debtor for total consideration of

Rs.1,62,43,133/- on 5th August, 2014 and paid an amount of Rs. 8,37,300 as booking advance. Besides Respondent No.2 Mr. Saurabh Tripathi had booked a separate unit bearing No. B7/GF/01 admeasuring 1229 sq. fts. on 16th July, 2014 with the Corporate Debtor in the same project and paid an amount of Rs.1,63,994/- as booking advance. A joint "Built Up Agreement/ Builder Buyer Agreement" dated 12th September, 2014 in respect of the first unit and Flat Buyer Agreement dated 28th September, 2014 for the second unit came to be executed *inter se* the respective parties. Allotment letters came to be issued by the Corporate Debtor in favour of the allottees. Corporate Debtor undertook to complete the construction and to deliver possession of the units to allottees within two years from the date of commencement of construction on receipt of sanctioned plans from the Authority. The project start date notified on the website of 'Real Estate Regulatory Authority' ("RERA" for short) was 22nd September, 2015 and reckoned from such date Corporate Debtor had to deliver possession of the first unit to the Respondent Nos. 1 & 2 latest by 22nd September, 2017 and the second unit within 36 months from the date of sanctioning of building plans. The allottees Respondent Nos. 1 & 2 alleged that the Corporate Debtor had failed to complete the construction of units within the given time frame and abandoned the project midway. Even after lapse of five years, Corporate Debtor neither completed the construction of these units nor refunded the amount to the allottees.

3. On consideration of the material placed before it in the form of orders dated 16th November, 2017 and 13th December, 2018 coupled with the Recovery Certificate dated 10th August, 2019 issued by the 'Uttar Pradesh Real Estate Regulatory Authority' ("UP RERA" for short) to establish existence of financial debt and liability of Corporate Debtor to the tune of Rs.73,35,686.43/-, the Adjudicating Authority observed that the claim of allottees having arisen out of the Orders and Recovery Certificate issued by the "UP RERA" determining an 'adjudicated debt', Ordinance dated 28th December, 2019 prescribing a threshold limit for initiation of Corporate Insolvency Resolution Process at the instance of allottees of a Real Estate Project was not attracted. The Adjudicating Authority also taken note of the fact that the Corporate Debtor had agreed to refund the amount as emanating from order dated 16th November, 2017 of the "UP RERA" and that the part payment of the decretal amount had already been made by the Corporate Debtor. It also noticed that the allottees had approached the Adjudicating Authority in the capacity of decree-holder against the default of the financial debt committed by the Corporate Debtor on account of the non-payment of the principal amount alongwith penalty as decreed by the "UP RERA" vide orders dated 16th November, 2017 and 13th December, 2018 besides Recovery Certificate dated 10th August, 2019. The Adjudicating Authority has also taken note of Judgment of this Appellate Tribunal rendered in "***M/s. Ugro Capital Limited v.***

Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 984 of 2019" wherein this Appellate Tribunal observed that the definition of word 'creditor' in 'I&B Code' includes decree-holder and a petition filed for realisation of decretal amount could not be dismissed on the ground that the creditor should have taken steps for filing execution case in Civil Court. The Adjudicating Authority, accordingly, proceeded to pass the impugned order admitting the joint application of Respondent Nos. 1 & 2 which has been assailed in this appeal.

4. The impugned order has been primarily assailed on the ground that the application filed by Respondent Nos. 1 & 2 under Section 7 of the 'I&B Code' was not maintainable in light of the 'Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019' promulgated on 28th December, 2019 (for short 'Ordinance') as Respondent Nos. 1 & 2 did not meet the required criteria viz constituting either one hundred allottees or ten percent of the total allottees. According to Appellant, the Ordinance was promulgated and enforced during the pendency of the applications before the Adjudicating Authority and the Adjudicating Authority had to insist upon compliance of the mandate of Ordinance regarding threshold limit before proceeding to pass impugned order. It is further urged that the Ordinance was followed by passing of 'Insolvency and Bankruptcy Code (Amendment) Act, 2020' ("Amending Act" for short) incorporating the clauses of the Ordinance and in view of

the legal position the application under Section 7 was not maintainable. It is further urged that no classification of allottees-Financial Creditors was permissible and merely because Respondent Nos.1 & 2 obtained RERA decree in their favour did not alter their status. 'Allottees under the Real Estate Project' continue to be the allottees without any distinction between them and no further classification or demarcation has been made. Therefore, the finding recorded by the Adjudicating Authority that the allottees who have obtained a decree in their favour would not be hit by the requirement of threshold limit under the Ordinance followed by Amending Act is flawed. According to Appellant, Respondent Nos. 1 & 2 were speculative buyers and had initiated Corporate Insolvency Resolution Process only to harass the Corporate Debtor and cripple its functioning in order to extort money.

5. Learned counsel for the Appellant submits that the impugned order being in conflict with the Amendment to 'I&B Code' prescribing the threshold limit renders the application of Respondent Nos.1 & 2 under Section 7 non-maintainable. It is further submitted that the impugned order wrongly treats the Respondent Nos. 1 & 2 as being decree-holders but even in such capacity they cannot be permitted to execute the decree under the 'I&B Code' mechanism. It is further submitted that the dispute stands settled between the Corporate Debtor and Respondent Nos. 1 & 2 in terms of amicable settlement and they have filed a joint application for withdrawal and termination of

Corporate Insolvency Resolution Process of the Corporate Debtor while the Committee of Creditors has not been constituted till date in terms of order dated 20th March, 2020. As regards application filed by Interim Resolution Professional, it is submitted on behalf of the Appellant that most of the claims have been received by the Interim Resolution Professional from various creditors and allottees prior to 17th April, 2020 i.e. the date when Interim Resolution Professional published the second revised advertisement. The Corporate Debtor, which is developing about 100 number of projects, has arrived at settlement with five lenders during last financial year with total amount repaid slightly over Rs.487.3 Crores. Therefore, the Corporate Debtor could be allowed to complete the project as also maintain control of the projects in the interest of allottees to ensure completion of its project and deliver the same to the allottees.

6. Per contra, it is submitted on behalf of Respondent Nos. 1 & 2 that the Appellant and Respondent Nos. 1 & 2 have settled all their disputes in relation to Unit bearing no. 0073 and the allottees do not have any pending claims against Corporate Debtor qua the same. These Respondents accordingly prayed for invoking Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 ("NCLAT Rules") to set aside the order of admission and terminate Corporate Insolvency Resolution Process against the Corporate Debtor. It is further submitted that the dispute has been settled prior to constitution of Committee of

Creditors and there is no legal impediment in allowing such settlement and permit withdrawal and termination of Corporate Insolvency Resolution Process'. In so far as claims of other Homebuyers/ creditors are concerned, it is submitted that they can pursue their claims independently on their own merits through any remedy as may be available under law. As regards instant appeal, it is submitted that the Respondent Nos. 1 & 2 do not wish to contest the issue raised by the Appellant qua maintainability of application under Section 7 filed by them and, therefore, agree and subscribe to the arguments advanced by learned counsel for the Appellants- Mr. Arun Kathpalia, Senior Advocate.

7. Upon noticing the arguments advanced by learned counsel for the Appellant and Respondent Nos. 1 & 2, we find that they are on the same page as regards invoking of powers by this Appellate Tribunal under Rule 11 for allowing settlement/consent terms to be brought on record and termination of Corporate Insolvency Resolution Process. Even on the issue of maintainability of application of Respondent Nos. 1 & 2 under Section 7 of the 'I&B Code' before the Adjudicating Authority, Respondent Nos. 1 & 2 have not joined issue with the Appellant which eloquently substantiates satisfaction of their claim in terms of the amicable settlement reached between the Respondent Nos. 1 & 2 and the Corporate Debtor.

8. Issues arising for consideration are:

(i) Whether this is a fit case for invoking Rule 11 of the NCLAT Rules to allow the parties to settle the dispute?

(ii) Whether application filed by Respondent Nos. 1 & 2 under Section 7 of the 'I&B Code' was not maintainable?

9. We propose to deal with the issues in the light of respective stand taken by the parties, submissions made on their behalf and the insolvency jurisprudence evolved till date.

Issue No.1

10. It is not in controversy that the Real Estate Project styled 'Sushant Golf City, Hi-Tech Township, Lucknow' has largely been completed. It is also not in dispute that the Corporate Debtor had entered into Builder-Buyer Agreement dated 12th September, 2014 with the Respondent Nos.1 and 2 in regard to Unit No.0073 of 'M/s. Ansal Properties and Infrastructure Private Limited', Sector-P/ Pocket-1 while another Builder-Buyer Agreement dated 29th September, 2014 was reached between the Corporate Debtor and Respondent No.2 in regard to Unit bearing No. B7/GF/01. Respondent No.1 appears to have lodged a complaint with 'UP RERA' for refund of money as the Corporate Debtor did not complete Unit No.0073 within the stipulated time. On consideration thereof, 'UP RERA' directed the Corporate Debtor to

deposit the amount payable to the Respondent Nos. 1 & 2 in six instalments spanning a period of nine months. This happened on 16th November, 2017. First instalment was due on 1st December, 2017. Respondent No.2 also appears to have filed a complaint with 'UP RERA' seeking refund of deposited amount. 'UP RERA' directed the Corporate Debtor to refund the amount deposited by Respondent No.2 in 10 monthly instalments along with interest determined by 'UP RERA'. It happened on 13th December, 2018. 'UP RERA' directed that in the event of orders passed qua both Respondents i.e Respondent Nos.1 & 2 not being complied with by the Corporate Debtor, they can seek implementation of such order through 'UP RERA'. The record further unfolds that Respondent Nos.1 & 2 approached the 'UP RERA' for initiating recovery proceedings within the ambit of Section 40 of the 'Real Estate (Regulation and Development) Act, 2016'. Order dated 10th August, 2019 came to be passed directing recovery of amount as an arrear of land revenue from the Corporate Debtor. A Recovery Certificate was issued in this regard and forwarded to the concerned Authority for effecting recovery to the tune of Rs.73,35,686.43/- from Corporate Debtor favouring 'UP RERA'. It further emerges from the record that the Respondent Nos.1 & 2 who are entitled to seek disbursement of such amount from 'UP RERA' upon its recovery, instead filed the application under Section 7 of the 'I&B Code' for initiation of Corporate Insolvency Resolution Process which was contested by the Corporate Debtor on the ground that the same was not maintainable as Respondent Nos.1 & 2

did not fall within the ambit of 'Financial Creditors' as allottees of Real Estate and in the case of their status being recognised as allottees, the application was not maintainable as the same did not meet the threshold limit criteria. It would be appropriate to notice that a development took place during the pendency of the instant appeal. The parties filed joint application before this Appellate Tribunal for withdrawal of the application under Section 7 on the basis of a Settlement Deed having been executed between them on 1st June, 2020. Prayer was made for exercise of power under Rule 11 of the NCLAT Rules to give effect to the Settlement Terms reached between the parties prior to constitution of Committee of Creditors and permitting the withdrawal of application under Section 7.

11. Corporate Debtor is permitted to seek exit from Corporate Insolvency Resolution Process at the pre-admission stage. It can also seek exit at the post admission stage before constitution of the Committee of Creditors. In ***"Swiss Ribbons Pvt. Ltd. and Ors. v. Union of India (UOI) and Ors.- MANU/SC/0079/2019"***, the Hon'ble Apex Court dealt with the issue in para 52 of the Judgment which reads as under:

> *"**52.** It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating*

Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

12. It is manifest that a party to Corporate Insolvency Resolution Process can approach the Adjudicating Authority directly for exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016 for withdrawal of the application under Section 7 of the 'I&B Code' or

disposal of such application on the basis of settlement worked out by the parties. Such power can be exercised by the Adjudicating Authority only before constitution of the Committee of Creditors. Exercise of inherent power on the part of Adjudicating Authority or even by this Appellate Tribunal in appeal would depend on consideration of all relevant factors on the peculiar facts of the case. All concerned parties will be required to be heard before allowing withdrawal or Settlement. It is also manifestly clear that the exercise of inherent powers is discretionary and invoked only to meet the ends of justice or prevent abuse of process of Court. The Adjudicating Authority or the Appellate Tribunal will have to keep in view interest of various stakeholders and claimants before allowing such withdrawal or settlement. Scuttling of Corporate Insolvency Resolution Process cannot be permitted to jeopardise the legitimate interests of other stakeholders, more particularly in a Real Estate Project where fate of innumerable allottees would be hanging in balanced. No doubt the Real Estate Developer is entitled to point out that the Corporate Insolvency Resolution Process has been invoked fraudulently or with malicious intent, or for any purpose other than the resolution of insolvency, by taking recourse to provision of Section 65 of the 'I&B Code'. The circumstances and the situations in this regard can be in the nature of the allottees being speculative investors or allottees who want to jump the ship on account of recession in the Real Estate market. Whether, in a given situation the allottee himself is a defaulter and not entitled to any relief in the nature

of compensation or refund is a matter for the Adjudicating Authority to consider in the hearing of an application under Section 7 of the 'I&B Code'. The Hon'ble Apex Court has elaborately dealt with this issue in ***"Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.- (2019) SCC OnLine SC 1005"*** held:

> *"**57...**..... allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, prima facie at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may **mention** here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that **under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who***

> ***has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it.....”***

13. Whether the allottees in the instant case are speculative investors or want to jump the ship, is for the Adjudicating Authority to determine when approached under Section 65 of the 'I&B Code'. That situation is not obtaining in the instant case as of now the joint Settlement of the Corporate Debtor with Respondent Nos.1 and 2 is confined to their claims and nothing beyond that. No issue of the nature referred to hereinabove has been raised in this appeal, therefore, the same does not require consideration.

14. Admittedly, the Interim Resolution Professional has received 283 claims from allottees of different projects, Financial Creditors, Operational Creditors, other Creditors and Employees as detailed in para 10 of the reply filed by Respondent No.3 and the Settlement Deed does not take care of the interest of Claimants other than Respondent Nos.1 & 2. Therefore, allowing of withdrawal of application on the basis of such Settlement which is not all-encompassing and being detrimental

to the interests of other Claimants including the allottees numbering around 300 would not be in consonance with the object of 'I&B Code' and purpose of invoking of Rule 11 of the NCLAT Rules. In a case where interests of the majority of stakeholders are in serious jeopardy, it would be inappropriate to allow settlement with only two creditors which may amount to perpetrating of injustice. Exercise of inherent powers in such cases would be a travesty of justice.

Issue No.2

15. Now we proceed to come to grips with the main contention advanced on behalf of Respondent No.3. Be it seen that Section 7 of the 'I&B Code' as amended in terms of the 'Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019' enforced w.e.f. 28th December, 2019 added provisos to Section 7, sub-section (1) before the *explanation* providing a threshold limit for initiation of Corporate Insolvency Resolution Process at the instance of allottees under a Real Estate Project providing that an application 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. It was further provided that where such an application has been filed by a Financial Creditor but has not been admitted before commencement of the Ordinance viz 28th December, 2019, such application shall be modified to comply with the aforesaid requirements in regard to threshold limit within 30 days of

the commencement of such Ordinance, failing which it shall be deemed to have been withdrawn at the pre-admission stage. This Ordinance was subsequently replaced by the 'Insolvency and Bankruptcy Code (Amendment) Act, 2020' ("Amending Act" for short) incorporating the amendment introduced in Section 7 by virtue of the aforestated Ordinance with express provision that the Amending Act shall be deemed to have come into force on 28th December, 2019. Section 3 of the Amending Act is extracted hereinbelow:

> *"**3**. In section 7 of the principal Act, in sub-section (1), before the Explanation, the following provisos shall be inserted, namely:—*
>
> *"Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:*
>
> *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 per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission."

16. The dictum of law is loud and clear. An application for initiating Corporate Insolvency Resolution Process against the Corporate Debtor by allottees under a Real Estate Project is required to be filed jointly by not less than one hundred of such allottees or not less than ten percent

of the total number of such allottees under the same Real Estate Project. It is manifestly clear that a minimum threshold limit has been laid down for taking cognizance of application under Section 7 for triggering of Corporate Insolvency Resolution Process when such application is relatable to a Real Estate Project. It is also clear that an application at the instance of a single allottee or by a group of allottes falling short of the prescribed threshold limit would not be maintainable. Provision has been made in respect of pending application filed by the allottees, where same have not been admitted to Insolvency Resolution, for garnering support of the requisite majority to meet the threshold limit within thirty days of the commencement of the Amending Act failing which such application(s) shall be deemed to be withdrawn before admission. On a plain reading of the provision, it emerges that this is a one-time opportunity provided only with respect to pending applications at pre-admission stage where the allottees have been granted thirty days' time to meet the threshold limit for initiation of Corporate Insolvency Resolution Process. It is flabbergasting to discover that such one-time opportunity is practically non-existent inasmuchas the allotees in such case are required to garner support of the requisite number of allottees for meeting the threshold limit within thirty days of the commencement of the Amending Act which in terms of Section 2 of the said Amending Act is deemed to have come in force on 28th December, 2019 though the same has been notified on 13th March, 2020. The thirty days' time granted to allottees for meeting the

threshold limit would, therefore, commence w.e.f 28th December, 2019 and not w.e.f. 13th March, 2020. This is bound to lead to absurdity. It is brought to our notice that one Mr. Manish Kumar has filed Writ Petition (Civil) No. 26/2020 before the Hon'ble Apex Court challenging the amended Section 7 with respect to allottees who has already filed applications under Section 7 prior to the date of amendment. The Hon'ble Apex Court vide order dated 13th January, 2020 issued notice to Respondents and order to maintain *status quo*. It is, therefore, clear that provision of Section 7 of the 'I&B Code' as it obtained prior to the date of amendment, occupies the field as of now. Since the issue is pending consideration before the Hon'ble Apex Court, we refrain from making any observation thereon.

17. However, the matter does not rest here. Respondent Nos. 1 and 2 admittedly approached the Adjudicating Authority not in the purported capacity of allottees of a Real Estate Project bringing them within the fold of Financial Creditors claiming to be decree-holders against the default of financial debt committed by the Corporate Debtor on account of non-payment of principal amount along with penalty as decreed by the 'UP RERA' vide orders dated 16th November, 2017 and 13th December, 2018 followed by issuance of Recovery Certificate dated 10th August, 2019 but not as allottees. Their contention of coming within the purview of 'Financial Creditors' rests on strength of definition of 'Creditor' in terms of provision of Section 3(10) of the 'I&B Code' which

includes a decree-holder within its fold. The question arising for consideration is whether a decree-holder, though covered by the definition of 'Creditor', does fall within the definition of a 'Financial Creditor' across the ambit of Section 5(7) of the 'I&B Code'. Section 5(7) defines 'Financial Creditor' as under:

> *"**5. Definitions.**- .....(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to"*

18. On a plain reading of this provision, it comes to fore that 'Financial Creditor' encompasses any person to whom a financial debt is due. Assignees and transferee of financial debt are also covered under the definition of 'Financial Creditor'. It would, therefore, be relevant to ascertain the nature of debt styled as 'financial debt' within the ambit of Section 5(8) of the 'I&B Code' which reads as under:-

> *"**5. Definitions.**- .....(8) "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

(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);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause"

19. Sub-clause (f) of sub-section (8) of Section 5 provides that any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing would fall within the ambit of 'financial debt' and the *explanation* added to sub-section by Act No. 26 of 2018 provides that 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. Thus, the relevant consideration for determination of 'financial debt' would be whether the debt was disbursed against the consideration for the time value of money which may include amount raised from an allottee under a Real Estate Project, the transaction deemed to be amount having the commercial effect of a borrowing. Since the initial transaction was an allotment under a Real Estate Project, there can be no doubt that such transaction has the contours of a borrowing as contemplated under Section 5(8) (f) of the 'I&B Code'. However, the case set up by the Respondent Nos. 1 and 2 before the Adjudicating Authority is not on the strength of a transaction having the commercial effect of a borrowing, thereby clothing them with the status of 'Financial Creditors' but on the strength of being 'decree-holders'. It having been noticed that before the Adjudicating Authority Respondent Nos.1 and 2 staked claim in their capacity as 'decree-holders' and they having approached 'UP RERA' with complaints for refund of money culminating in issuance of a Recovery Certificate by the 'UP RERA' in terms of order dated 10th August, 2019, it cannot lie in their mouth that they are the allottees and the amounts raised from them as allottees under the Real Estate Project deemed to be having the commercial effect of a borrowing would clothe them with the capacity of being 'Financial Creditors'. Such argument being absurd and incompatible with their plea before the Adjudicating Authority and the events following filing of complaints before the 'UP RERA' and leading to passage of Recovery Certificate needs to be rejected outright.

Respondent Nos. 1 and 2 neither asserted nor sought triggering of Corporate Insolvency Resolution Process in a purported capacity as allottees of Real Estate Project but sought initiation of Corporate Insolvency Resolution Process against the Corporate Debtor on the strength of being 'decree-holders' which owed its genesis to the Recovery Certificate issued by the 'UP RERA'. It is, therefore, required to be determined whether in their projected capacity as 'decree-holders' Respondent Nos.1 and 2 could maintain an application under Section 7 as 'Financial Creditors'.

20. A 'decree-holder' is undoubtedly covered by the definition of 'Creditor' under Section 3(10) of the 'I&B Code' but would not fall within the class of creditors classified as 'Financial Creditor' unless the debt was disbursed against the consideration for time value of money or falls within any of the clauses thereof as the definition of 'financial debt' is inclusive in character. A 'decree' is defined under Section 2(2) of the Code of Civil Procedure, 1908 ("CPC" for short) as the formal expression of an adjudication which conclusively determines the rights of the parties with regard to the matters in controversy in a *lis*. A 'decree-holder', defined under Section 2(3) of the same Code means any person in whose favour a decree has been passed or an order capable of execution has been made. Order XXI Rule 30 of the CPC lays down the mode of execution of a money decree. According to this provision, a money decree may be executed by the detention of judgment-debtor in

civil prison, or by the attachment or sale of his property, or by both. Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' lays down the mode of execution by providing that the RERA may order to recover the amount due under the Recovery Certificate by the concerned Authority as an arrear of land revenue. In the instant case, RERA has conducted the recovery proceedings at the instance of Respondent Nos.1 & 2 against the Corporate Debtor which culminated in issuance of Recovery Certificate and passing of order under Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' directing the concerned Authority to recover amount of Rs.73,35,686.43/- from the Corporate Debtor as an arrear of land revenue. As already stated elsewhere in this Judgment, Respondent Nos.1 & 2 instead of pursuing the matter before the Competent Authority sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor resulting in passing of the impugned order of admission which has been assailed in the instant appeal. The answer to the question whether a decree-holder would fall within the definition of 'Financial Creditor' has to be an emphatic 'No' as the amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5(8) of the 'I&B Code'.

21. Now we proceed to determine whether execution of decree on the strength of Recovery Certificate issued by the 'UP RERA' would justify

triggering of the Corporate Insolvency Resolution Process at the instance of Respondent Nos.1 & 2. This Appellate Tribunal has considered the issue in ***"G. Eswara Rao v. Stressed Assets Stabilisation Fund and Ors.- MANU/NL/0092/2020"***. It was held that an application under Section 7 of the 'I&B Code' cannot be filed for execution of a decree. The relevant portion of the Judgment may be reproduced hereunder:

> *"26. By filing an application under Section 7 of the I&B Code, a Decree cannot be executed. In such case, it will be covered by Section 65 of the I&B Code, which stipulates that the insolvency resolution process or liquidation proceedings, if filed, fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, attracts penal action."*

22. It has already been noticed in this Judgment that the 'UP RERA', which ordered recovery of amount of Rs.73,35,686.43/- owed to Respondent Nos.1 and 2 in terms of its order dated 10th August, 2019 has forwarded the Recovery Certificate to the Competent Authority for effecting recovery in the manner and as an arrear of land revenue from the Corporate Debtor. In the backdrop of this factual situation, Respondent Nos. 1 and 2 can safely be held to have approached the

Adjudicating Authority only with a view to execute the decree in the nature of Recovery Certificate and recover the amount due thereunder. No conclusion other than the one that Respondent Nos. 1 and 2 were seeking execution of the Recovery Certificate issued by RERA and did not file the application under Section 7 of the 'I&B Code' for purposes of Insolvency Resolution, would be available in the facts and circumstances noticed hereinabove. This conclusion is further re-inforced by the fact that the Recovery Certificate issued by RERA had been forwarded to the Competent Authority for effecting recovery as arrears of land revenue and the process was underway when Respondent Nos.1 and 2 sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor. It is indisputable that the Recovery Certificate sought to be executed is the end product of an adjudicatory mechanism under the 'Real Estate (Regulation and Development) Act, 2016' and realisation of the amount due under the Recovery Certificate tantamounts to recovery effected under a money decree though mode of execution may be slightly different. In this view of the matter, we are of the considered opinion that the application of Respondent Nos.1 and 2 under Section 7 of 'I&B Code' was not maintainable. It is accordingly held that in their projected capacity as decree-holders Respondent Nos. 1 and 2 could not maintain an application under Section 7 as 'Financial Creditors'.

23. We accordingly summarise our finding as under:

(i) Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate dated 10th August, 2019 by 'UP RERA' directing recovery of Rs.73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the 'I&B Code'. Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.

(ii) Decree-holder, though included in the definition of 'Creditor', does not fall within the definition of 'Financial Creditor' and cannot seek initiation of Corporate Insolvency Resolution Process as 'Financial Creditor'.

24. In view of the conclusion reached and findings on the issues recorded hereinabove, we are of the considered view that the impugned order dated 17th March, 2020 initiating Corporate Insolvency Resolution Process against Corporate Debtor cannot be sustained. The Adjudicating Authority has landed in grave error in admitting the application of Respondent Nos.1 and 2 under Section 7 who claimed to be the 'Financial Creditors' in their capacity as 'decree-holders' against

the Corporate Debtor on account of non-payment of the amount due under the Recovery Certificate dated 10th August, 2019 issued by the 'UP RERA' while execution of decree/ recovery of amount due under Recovery Certificate would not justify triggering of Corporate Insolvency Resolution Process. We are also of the firm view that the application of Respondent Nos. 1 and 2 was moved for execution/ recovery of the amount due under the Recovery Certificate and not for insolvency resolution of the Corporate Debtor. The impugned order suffers from grave legal infirmity and cannot be supported. We accordingly set aside the impugned order dated 17th March, 2020.

25. In effect, order(s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent Nos.1 and 2 under Section 7 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

26. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' for the period he has functioned.

27. We are conscious of the fact that there are number of claimants including the allottes under the Real Estate Project who have filed claims before the Interim Resolution Professional. Setting aside of impugned order is bound to derail the entire Resolution Process. But since the very edifice is gone, the process cannot continue and has to collapse. Therefore, while allowing this appeal and setting aside the impugned order, we allow the claimants to independently seek legal remedy as may be available under law. While computing the period of limitation, the period reckoned from date of filing of each claim before the Interim Resolution Professional till date of disposal of this appeal shall stand excluded.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Anant Bijay Singh]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
14th August, 2020
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