NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 83 of 2020

IN THE MATTER OF:

Shubha Sharma,
Suspended Board of Director,
KB-97, Kabir Nagar,
Ghaziabad, Uttar Pradesh,
201001 **...Appellant**

Versus

1. **Mansi Brar Fernandes,**
   A-178, LGF, Defence Colony,
   New Delhi – 110024. **... Respondent No. 1**
2. **Gayathri Infraplanner Pvt. Ltd.**
   Through IRP,
   Mr. Manish Sukhani,
   B-213-214, Orchard Road Mall,
   Royal Palms, Aarey Colony,
   Survey No. 169, Goregaon East.
   Mumbai 400 065 **...Respondent No. 2**

Present:

For Appellant: Mr. ArunKathpalia, Mr. Manmeet Singh, Mr. Anuragh Robin Frey and Mr. Abhilasha Khanna, Advocates

For Respondent: Mr. Manish Sukhani and Mr. Zeeshan Diwan, Advocate for IRP.
Mr. Sunil Fernandes, Advocate for R-1(FinancialCreditor)
Mr. Prastut Dalvi, Advocate.

JUDGMENT

Jarat Kumar Jain. J.

The Appellant Mr. Shubha Sharma, Former Director of Gayatri Infra Planer Pvt. Ltd. (Corporate Debtor) has preferred the instant Appeal under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (In Short I&B Code) against the order of admission of Application under Section 7 of the I&B Code, filed by Mrs. Mansi Brar Fernandes claiming to be the Financial Creditor. The order of admission passed on 02.01.2020 by the Adjudicating Authority (National Company Law Tribunal) New Delhi, Principal Bench with consequences of imposing the memorandum and appointment of Interim Resolution Professional (IRP) has been assailed in the instant Appeal.

2. Gayatri Infra Planner Pvt. Ltd. Company is engaged in the business of real Estate development and allied activities. Gayatri Infra Planner Pvt. Ltd. (Respondent No. 2/Corporate Debtor) and Mrs. Mansi Brar Fernandes (Respondent No. 1/Financial Creditor) entered into an Agreement/MOU on 06.04.2016. A provisional allotment of an under construction located in Sector 16, Noida Extension, UP having 4 apartments area of 6,740 Sq. Ft. (Approx.) in a project named “Gayatri Life” was made infavour of the Financial Creditor at an agreed consideration of Rs. 1,03,78,521/-and as part payment an amount of Rs. 35 lacs was paid at the time of the signing of the Agreement. The construction likely to complete within a period of 12 months from the date of execution of the agreement i.e. by April, 2017. There was a compulsory buyback provision in the agreement which stipulates that upon the expiry of 12 months, the Corporate

Debtor was to return Rs. 35 lacs paid by the Financial Creditor and also an additional payment of Rs. 65 lacs as premium. For the same, the Corporate Debtor issued two postdated cheques in favour of the Financial Creditor. In the Agreement, there was a condition that on the expiry of the period contained in the said Agreement, the Financial Creditor inquired from the Corporate Debtor whether it intends to allot the said apartments to the Financial Creditor or he intends to exercise the compulsory buyback. The Corporate Debtor exclaimed his interest to buyback the said apartments from the Financial Creditor. Accordingly, in view buy back the said cheques were deposited for encashment but both the cheques were dishonored. Thereafter, another MOU dated 07.04.2017 was entered between the parties for seeking extension of 6 months of the original MOU. However, even after expiry of 6 months no money was repaid. Thereafter, another extension letter dated 07.10.2017 was entered between the parties wherein extension of MOU till 06.10.2018 was sought. However, despite second extension the Corporate Debtor, neither paid the amount nor given the possession of the apartments. Therefore, the Financial Creditor has filed the Application under Section 7 of the I&B Code, for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

3. The Corporate Debtor in its reply has mainly raised two objections in regard to the Application under Section 7 of I&B Code, first objection is that Financial Creditor does not come under the definition of the Financial Creditor and second objection is that the Corporate Debtor has not committed default in payment of Financial Debt and the Financial Creditor has paid only Rs. 35 lacs

to the Corporate Debtor, whereas, the Financial Creditor is claiming Rs. 1,02,50,000/-.

4. Ld. Adjudicating Authority after elaborate discussion held that Clause (f)(8) of Section 5 of the I&B Code has been amended by the I&B (Second Amendment) Act, 2018 w.e.f. 06.06.2018. In view of the explanation inserted in the revised definition it has been made clear 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 and thus, it will come within the definition of 'Financial Debt' under the I&B Code. As per Amendment Act, the allottee is 'Financial Creditor' in terms of explanation to Section 5 (8) (f) of the I&B Code. Therefore, allottee can initiate CIRP against the defaulter builder or developer. The Corporate Debtor upon expiry of 12 month period contained in the MOU and even upon expiry of extended period i.e. (06.10.2018) has not returned the amount collected from the Financial Creditor (allottee) and has not given the possession of the apartments. Thus, the Corporate Debtor has committed default in repayment of Financial Debt. Therefore, admitted the Application preferred under Section 7 of I&B Code, and declared moratorium. Being aggrieved with this order, the Appellant Former Director of Corporate Debtor filed this Appeal.

5. Learned Senior Counsel for the Appellant raised a question of law and submitted 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 28.12.2019 added proviso to Section 7, sub-Section 1 before the explanation providing a threshold limit for initiation of CIRP at the instance of allottees under a Real

Estate Project providing that an Application shall be filed jointly by not less than 100 allottees or not less than 10% of total number of such allottees under the same Real Estate Project, whichever is less. In the light of this Amendment, the Application by only one allottee i.e. Respondent No. 1 (Financial Creditor) is not maintainable. It is further submitted that this Appellate Tribunal in its recent Judgment in Sh. Sushil Ansal Vs. Ashok Tripathi & Ors. in Company Appeal (AT) (Ins) No. 452 of 2020 held that an Application at the instance of a single allottee or by a group of allottees failing short of the prescribed threshold limit would not be maintainable. The Ordinance was introduced because allottees were filing the Application for CIRP with malicious intent and to abuse the process. This fact has been observed by this Appellate Tribunal in the case of Navin Raheja Vs. Shilpa Jain & Ors. in Company Appeal (AT) (Ins) No. 864 of 2019. In this case also the Application is filed to abuse the process.

6. Learned Senior Counsel for the Appellant further submitted that Undisputedly, on 28.12.2019 when the Ordinance was promulgated, the Application was pending, therefore, provisions of Ordinance certainly applicable to the case in hand. Since the order was reserved on 04.12.2019 and the order was passed on 02.01.2020. Meanwhile, on 28.12.2019 the Ordinance was promulgated. Therefore, there was no occasion for the Adjudicating Authority to consider the provisions of Ordinance, such argument is not tenable. Even if the order was reserved the matter should have been listed by the Adjudicating Authority for hearing, taking note of the Ordinance.

7. Learned Senior Counsel for the Appellant further submitted that in the Ordinance the provision has been made in respect of pending Application filed by the allottee, where same has not been admitted to Insolvency Resolution to meet the threshold limit. Such Application shall be modified to comply with the requirements of the first or second proviso within 30 days of the commencement of the said Act, failing which the Application shall be deemed to be withdrawn before its admission. In the present case, the Respondent No. 1 (Financial Creditor) for meeting the requirements of Section 7 of the I&B Code (As Amended by the Ordinance) is purportedly rectified by way of short Reply Affidavit dated 01.02.2020 before this Appellate Tribunal. Such Affidavits are patently defective and not in accordance with the applicable law, as well as, the Affidavits are in contravention of the Notaries Act, 1952. Therefore, these Affidavits are not admissible in law. It is further urged that the Affidavits are expressly made for filing before the Adjudicating Authority and not before this Appellate Tribunal. Thus, the Respondent No. 1 (Financial Creditor) failed to modify the Application to comply with the requirements of the first or second proviso within 30 days of the commencement of the Ordinance. Therefore, the Application shall be deemed to be withdrawn.

8. Learned Senior Counsel for the Appellant also submitted that the Respondent No. 1 (Financial Creditor) in her Application under Section 7 of the I& B Code mentioned that the total debt disbursed is Rs. 1,02,50,000/- whereas, admittedly only Rs. 35 lacs were paid to the Corporate Debtor. Thus, the

Application itself defective. Therefore, the impugned order is liable to be set aside.

9. Learned Senior Counsel for the Appellant further submitted that the MOU dated 06.04.2016 between the Respondent No. 1 and 2 an is irrevocable contract that they shall compulsorily buy back the apartments at the end of the term of MOU and Respondent No. 1 is duty bound for execution of this buyback and Respondent No. 2 shall refund the amount plus premium of Rs. 1,00,00,000/- to Respondent No. 1. Therefore, the Respondent No. 1 cannot be considered as a Financial Creditor for alleged claim of Rs. 1,02,50,000/- as a Financial Debt against the Respondent No. 2 (Corporate Debtor). Thus, there is no relationship between the Respondent No. 1 and 2 as a Financial Creditor and Corporate Debtor. Therefore, the Application itself under Section 7 of the I&B Code, is not maintainable. However, Learned Adjudicating Authority erroneously admitted the Application.

10. It is also submitted on behalf of the Appellant that the Respondent No. 1 (Financial Creditor) is a speculative home buyer and did not have requisite locus to file the Application under Section 7 of the I&B Code, speculative home buyer has no locus to file an Application under Section 7 of the I&B Code, as held by the Hon'ble Supreme Court in Pioneer Urban Land & Infrastructure Ltd. & Anr. Vs. Union of India & Ors. (2019) SCC Online SC 1005. Hence, the Appeal be allowed and the impugned order be set aside.

11. Per Contra it is submitted on behalf of the Respondent No. 1 that on 04.12.2019 the Adjudicating Authority heard the arguments on the Application

under Section 7 of the I&B Code, and matter was reserved for order and order of admission was passed on 02.01.2020. Meanwhile on 28.12.2019 the Ordinance was promulgated. The Adjudicating Authority has not taken cognizance of the Ordinance and the Tribunal was closed for winter vacation. Therefore, the Respondent No. 1 (Financial Creditor) has no opportunity to modify the Petition to comply with the requirements of the first or second proviso within 30 days of the commencement of the said Act. The present Appeal was filed on 13.01.2020. The Respondent No. 1 (Financial Creditor) after receiving the notice of Appeal within 30 days filed Affidavits of allottees of 89 units for meeting the threshold limit prescribed in the Amendment Act. The IRP has conveyed that a total proposed unit in Gayatri Life is 829. and till date, 525 units were allotted, 10% of the allotted units is 53. However, Affidavits of allottees of 89 units i.e. more than 10% of the allottees are filed. Thus, the Respondent No. 1 has substantially complied the requirement of the Amendment Act. The Hon'ble Supreme Court in the case of Chandrakant Uttam Chodankar vs. Dayanand Rayu Mandrakar & Ors. MANU/SC/1059/2004 held that every minor variation would not considered but only vital defect in substance which can lead to a finding of non-compliance, be considered. Hon'ble Supreme Court in the case of Uday Shankar Triyar vs Ram Kalewar Prasad Singh & Anr. Manu/SC/2173/2005 held that procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. It is also contended that the Appellate proceedings are a continuation of original proceedings. Therefore, Application under Section 7 of the I&B Code can be modified at appellate stage

also. for this proposition of law cited the Judgment of the Hon'ble Supreme Court in the case of Darshan Singh Vs. Rampal Singh, 1992 Suppl. (1) SCC 191.There will be no prejudice caused to the Respondent No. 2 (Corporate Debtor) when the Application is modified at appellate stage.

12. Learned Counsel for the Respondent No. 1 submitted that the buyback agreement is similar to the standard home buyers agreement except buyback clause which ensures to the benefit of the Builder/Corporate Debtor. If the builder exercises the buyback right and makes payment thereunder then right of allottee to possession/transfer of flats extinguishes. In the instant case neither possession of flats have been delivered nor payment made by the Respondent No. 2 (Corporate Debtor) and postdated cheques were dishonored. Learned Adjudicating Authority has rightly held that as per the amended definition of Section 5 (8) (f) amount raised from an allottee under a Real Estate Project shall be deemed to be a Financial Debt. Therefore, the Respondent No. 1 is Financial Creditor and Respondent No. 2 is Corporate Debtor.

13. After hearing Learned Counsel for the parties, following issues arise for our consideration: -

i. Whether in view of the I&B Code (Amendment)Ordinance 2019/Amendment Act, 2020, the Application under Section 7 of the I&B Code by one allottee is not maintainable?

ii. Whether MOU dated 06.04.2016 is an agreement for sale the apartments or an agreement for buyback the apartments?

iii. Whether the Respondent No. 1 is a genuine allottee or a speculative investor?

Issue No. 1

14. We have considered the effect of the I&B Code, Amendment Ordinance 2019 dated 28.12.2019. On the present Application under Section 7 of the I&B Code.

15. Admittedly, on 18.03.2019 the Application under Section 7 of the I&B Code filed by the Respondent No. 1 against the Respondent No. 2. On 04.12.2019 after hearing the arguments the matter was reserved for orders and on 02.01.2020 the impugned order of admitting the Application was passed by the Adjudicating Authority. The Tribunal was closed for winter vacation from 21.12.2019 to 01.01.2020. Meanwhile, on 28.12.2019 the I&B Code (Amendment)Ordinance 2019was promulgated and the Ordinance, subsequently replaced by the I&B Code (Amendment) Act, 2020 incorporating the Amendment introduced in Section 7 of the I&B Code. There is expressed provision in the aforesaid Ordinance that it shall be deemed to have come into force w.e.f 28.12.2019. Section 3 of the Amending Act is extracted herein below: -

> "*3. In Section 7 of the principal Act, in sub-section 91), 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 percent. 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. After this Amendment, an Application for initiating CIRP against the Corporate Debtor by the allottees under a Real Estate Project is required to be filed jointly by not less than 100 of such allottees or not less than 10% of the total number of such allottees under the same Real Estate Project. Provision has been made in respect of pending Application filed by the allottees, where same has not been admitted to Insolvency Resolution, for garnering support of the requisite majority to meet the threshold limit within 30 days of the commencement of the Amending Act, failing which such Application(s) shall be deemed to be withdrawn before admission.

17. Admittedly on 28.12.2019 when the Ordinance Promulgated the Application was pending before the Adjudicating Authority. The Adjudicating Authority passed the impugned order on 02.01.2020 without considering the

effect of Ordinance and the Tribunal was closed for winter vacation. Therefore, the Respondent No. 1 had no occasion to modify the Application under Section 7 of the I&B Code, as per requirement of the Ordinance.

18. Learned Senior Counsel drew our attention to the Judgment of coordinate Bench of this Appellate Tribunal in the case of Sushil Ansal (Supra). In this case, it is held that

> "16.....
> .....
> *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 allottees 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."*

19. With the aforesaid observation of the coordinate bench of this Tribunal, we are of the view that provision of Section 7 of the I&B Code, as is obtained prior to the date of Amendment occupies the field as of now. Thus, we hold that there is no effect of the I&B Code, Amendment Ordinance 2019 which was replaced by the I&B Code Amendment Act, 2020, on the present Application under Section 7 of the I&B Code. Therefore, it is not required to be considered whether in the light of the aforesaid Amendment whether the Respondent No. 1 has modified the Application under Section 7 of the I& B Code, or not.

Issue No. 2.

A. Incorrect Particulars mentioned in the Application

20. The Respondent No. 1 has filed the Application which is in Form 1 (Sub Rule I of Rule IV) for appreciating the argument of the parties, the extract of the Application is as under:-

Part-IV

"Particulars of Financial Debt

<table>
<tr><td>1.</td><td>Total amount of debt granted dates(s) of disbursement:</td><td>Total Debt: Rs. 1,02,50,000/-
<table>
<tr><td>S. No.</td><td>Cheque No.</td><td>Dated</td><td>Amount</td></tr>
<tr><td colspan="4">1. Cheques issued by Corporate Debtor in favour of Mrs. Mansi BrarFernandes (Financial Creditor)</td></tr>
<tr><td>1.</td><td>016173 OBC Bank</td><td>06.04.2017</td><td>Rs. 65,00,000/-</td></tr>
<tr><td>2.</td><td>016174 OBC Bank</td><td>06.04.2017</td><td>Rs. 35,00,000/-</td></tr>
<tr><td colspan="3">Total Amount to be paid</td><td>Rs. 1,00,00,000/-</td></tr>
<tr><td colspan="3">Interest Component @28%</td><td>Rs. 2,50,000/-</td></tr>
<tr><td colspan="3">Total Debt amount to be paid by the Respondent/ Corporate Debtor</td><td>1,02,50,000/-</td></tr>
</table></td></tr>
<tr><td>2.</td><td>Amount claimed to be in default and the date on</td><td>
<table>
<tr><td>S. No.</td><td>Cheque No.</td><td>Dated</td><td>Amount</td></tr>
<tr><td colspan="4">1. Cheques issued by Corporate Debtor in favour of Mrs. Mansi BrarFernandes (Financial Creditor)</td></tr>
</table></td></tr>
</table>

	which the default occurred (Attach the workings for computation of amount and days of default in tabular form)	*3.*	*016173 OBC Bank*	*06.04.2017*	*Rs. 65,00,000/-*
		4.	*016174 OBC Bank*	*06.04.2017*	*Rs. 35,00,000/-*
		Total Amount to be paid			*Rs. 1,00,00,000/-*
		Interest Component @28%			*Rs. 2,50,000/-*
		Total Debt amount to be paid by the Respondent/Corporate Debtor			*1,02,50,000/-*
		A True copy of the cheques issued by Corporate Debtor and cheque returning Memos is annexed herewith as ***Annexure-D***			

Part V

Particulars of the Financial Debt (Document, Record and Evidence of Default)

1.	*Particulars of security held, if any, the date of the its creation, its estimated value as per the creditor – Not Applicable.*
2.	***……."***

21. The Respondent No. 1 (Financial Creditor) in Part IV in serial No. 1 of the Application is required to mention particulars of Financial Debt i.e. total amount of debt granted and dates of the disbursement. The Respondent No. 1 has actually granted debt Rs. 35,00,000/-to the Respondent No. 2. Which is not mentioned. However, erroneously the amount of postdated cheques and interest shown. In serial No. 2 the Respondent No. 1 is required to mention the date on which the default occurred. However, no such date is mentioned. (Please see above extract of the Application)

22. In Part V in Serial No. 1 the Respondent No. 1 mentioned 'not applicable" instead of she should have been mentioned the particulars of security i.e. postdated cheques which were handed over by the Respondent No. 2 at the time

of signing of MOU. Thus, incorrect particulars are mentioned in the Application. Date of default, is crucial date for calculating the period of limitation.

23. We have considered overall facts of this case and of the firm view that the Respondent No. 1 has deliberately mentioned the incorrect particulars and not disclosed the date of default in the Application.

B. Whether MOU is an agreement for sale the apartments or an agreement to buy back the apartments?

24. For ascertaining the nature of MOU dated 06.04.2016 we have to consider what are the special feature of an agreement for sale/purchase the apartments in Real Estate Project. Such purchaser is called allottee. Any amount paid by allottee under a Real Estate Project shall be deemed to be a Financial Debt as per explanation attached to clause (f) of Section 5 (8) of the I&B Code and expressions 'allottee' and Real Estate Project shall have the same meaning as assigned to them in Clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016. The rights and duties of the allottees are mentioned in Section 19 of the RERA, 2016. In Pioneer Urban Land & Infrastructure Ltd and Anr. (Supra), The Hon'ble Supreme Court noticed that the relevant provisions of the RERA including rights and duties of allottees as mentioned in Section 19 as follows:-

> *19. Rights and duties of allottees.— (1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.*

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.
(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.
(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.
(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.
(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).
(8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.
(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an

association or society or cooperative society of the allottees, or a federation of the same.
(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.
(11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act."

25. As per Section 19(4) of the RERA, the allottee is entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of the Act.

26. As per sub-section (6) of Section 19 of the RERA, every allottee, who has entered into an agreement or sale to take an apartment, plot or building, as the case may be, under Section 13, is responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and is also required to pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

27. In terms of sub-section (7) of Section 19 of the RERA, the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in making payment towards any amount or charges to be paid under sub-section (6).

28. In the present case, Rights and duties of the allottee and builder i.e. Respondent No. 1 & 2 are governed by MOU dated 06.04.2016. Therefore, we have minutely examined the terms and conditions of the MOU.

29. As per Clause 3 of the MOU, four apartments are provisionally allotted to the Respondent No. 1 for total a consideration of Rs. 1,03,78,521/- against the Respondent No. 1 paid total amount Rs. 35 lacs to the Respondent No. 2. There is no provision in the MOU that how the Respondent No. 1 shall pay remaining amount i.e. Rs. 68,78,500/-. No payment schedule has been mentioned. On the other hand, the Respondent No. 2 has delivered to the Respondent No. 1 (allottee) at the time of execution of the MOU two postdated cheques for Rs. 1,00,00,000/-

30. The Respondent No. 2 has not placed any document of demanding remaining cost of the apartments from the Respondent No. 1. Though, as per the Sub-Section 6 of Section 19 of the RERA, every allottee who has entered into an agreement for sale to take an apartment, plot or building, as the case may be, under Section 13, is responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale.

31. As per clause 8 of the MOU, in the event of dishonor of any cheques the Respondent NO. 1 (Allottee) shall take possession of the apartments on the basis of this MOU. In the MOU, it is not provided when the Respondent No. 1 (allottee) shall be entitled to claim the possession of apartments and if the Respondent No. 2 (builder) fails to comply or is unable to give possession of the apartments then what is the remedy available to the Respondent No. 1.

32. As per clause 1 of the MOU, the MOU is valid only for 12 month. However, the period of 12 month of the MOU extended vide MOU dated 07.04.2017 and 07.10.2017 in these documents status of the project and reason for extension of period has not been mentioned. It means the Respondent No. 1 is unconcern with the progress of the project.

33. It is contended on behalf of the Respondent No. 1 (Financial Creditor) that on the expiry of the said agreement, the Financial Creditor (Allottee) inquired from the Corporate Debtor whether it intends to allot the said Flat to the Financial Creditor and confirms the provisional allotment or does he intend to exercise the compulsorily buy back. The Respondent No. 2 (Corporate Debtor) exclaimed his interest to buy back the said apartment from the Financial Creditor. It is very strange, there is no such provision in the MOU that on the expiry of the said agreement the Financial Creditor inquired from the Corporate Debtor whether it intends to allot the said apartments to the Financial Creditor. On the other hand, there is an irrevocable contract and compulsorily buy back agreement that at the end of term of the MOU the allottee is duty bound for execution of buy back of first party shall refund the amount paid by the allottee plus premium of Rs. 1,00,00,000/-.

34. With the aforesaid, features of the MOU, it is clear that MOU is not an agreement for sale the apartments to the Respondent No. 1.

35. Now, we have considered whether MOU is an agreement to buyback the apartments. For this, reproducing the clauses 5 (a) (b), 7, 8, 15 and 16 of MOU as under:-

"5. (a). The first party shall execute separate provisional allotment agreement in respect of the apartments in favour of the second party simultaneously with this agreement.
(b) The first party has entered into an irrevocable contract with second party that they shall compulsorily buy back the said apartments at the end of the term of this MOU and it is further confirmed that second party is duty bound for execution of this buy back and, first party shall refund the amount paid by the second party plus premium of Rs. 1,00,00,000/-.

"7. The first party has delivered to the second party, in advance, at the time of execution of this Agreement postdated cheques for Rs. 1,00,00,000/- consideration amount to execute buyback. Details of cheques given by first party to the second party is as under:-

S. No.	*Cheque No.*	*Cheque Date*	*Amount(Rs.)*	*Drawn on*
1.	*016173*	*06.04.2017*	*65,00,000/-*	*OBC Bank*
2.	*016174*	*06.04.2017*	*35,00,000/-*	*OBC Bank*

8. The cheques mentioned in para 7 above shall be encased on the date mentioned against each cheque, upon first presentation. In the event of dishonor of any cheque, the second party shall take possession of the Apartment on the basis of this MOU & no possession letter or any further act or deed would be required to be done by it for taking over possession and the second party shall be free to sell/deal with the same in any manner and no demand shall be payable by second party by way of other charges, transfer charges or balance BSP and it shall be deemed that the amount paid under this MOU is the full and final payment for the apartments. The first party also undertakes that they will not stop payment order against the above mentioned cheques in any manner, in addition, the second party shall also be entitled to take proceedings for recovery of the monies due to it hereunder as well as such other proceedings to which it is entitled in law.

15. In the event of failure of first party to complete the buyback by the end of the 12 month as aforesaid then second party shall have right to get the whole or part of the apartments transferred in its name or in the name of its nominees or to sell the same in the open market at the

prevailing market price and no demand shall be payable by second party or its nominee by way of other charges, transfer charges or balance BSP. In the event of default, it shall be deemed that the amount paid under this MOU is the full and final payment for the apartments mentioned in annexure 'A'

16. On completion of all buy back of apartments by the first party from the second party by the end of 12 month as aforesaid, the second party shall be left with no rights, claim & interest in the apartments and only thereafter the first party shall be absolutely free to deal with same in the manner it deeds fit.

36. Bare reading of these clauses, it is apparent that MOU is an irrevocable contract and the Respondent No. 1 is duty bound for execution of buy back. There is a provision in the event of failure of the Respondent No. 2 to complete the buy back by the end of 12 month. On completion of all buy back of apartments by the Respondent No. 2, the Respondent No. 1 have no right, claim & interest in the apartments. As per clause 8 of the MOU, the Respondent No. 2 ensures the Respondent No. 1 that in the event of dishonor of any cheques (one cheque of Rs. 65 lacs and another cheque of Rs. 35 lacs), the Respondent No. 1 shall take possession of the apartments on the basis of MOU and no possession letter or any further act or deed would be required. The Respondent No. 1 shall be free to sell/deal with the same in any manner and no demand shall be payable by the Respondent No. 1. Thus, we hold that the MOU is an agreement to buyback the apartments.

Issue No. 3

Whether the Respondent No. 1 is a genuine allottee or a speculative investor.

37. Now, it is to seen whether the Respondent No. 1 is a genuine allottee or a speculative investor. Hon'ble Supreme Court in the case of Pioneer Urban Land & Infrastructure Ltd.(Supra) noticed the Rules framed by 'Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016' which includes 'interest payable by promoter and allottee' and the 'timelines for refund' and observed:

> *"57. It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, 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. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death."

38. In the light of aforesaid observation of the Hon'ble Supreme Court, we have examined the terms of the MOU. As per clause 4, 5, 7, 8, 15 and 16 of the MOU. The Respondent No. 1 has paid Rs. 35 lacs to the Respondent No. 2 whereas, after 12 month, the Respondent No. 2 shall buy back the apartments and shall refund Rs. 35 lacs plus premium of Rs. 1,00,00,000/- and for security of the amount the Respondent No. 2 has delivered two postdated cheques total of Rs. 1,00,00,000/-. It is very lucrative agreement for an investor.

39. It is also seen that the Respondent No. 2 (Corporate Debtor) handed over the two cheques of Rs. 35 lacs and 65 lacs at the signing of the first MOU. These cheques on presentation were dishonored, thereafter, at the same time of the second and third extension again the cheques for the aforesaid amount delivered to the Respondent No. 1 (allottee), these cheques on presentation were also dishonored. Thereafter, the Respondent No. 1 (allottee) has filed compliant under Section 138 of the Negotiable & Instrument Act, against the Respondent No. 2 (Corporate Debtor).

40. Thus, the allottee has made attempt to get back the amount of Rs. 1,00,00,000/- by way of this coercive measure i.e. under Section 138 of the Negotiable & Instrument Act.

41. In such circumstances, we are of the considered view that the Respondent No. 1 is a speculative investor and not a person who is genuinely interested in purchasing the apartments. Therefore, she cannot be termed as a allottee as per the explanation attached to clause (f) of Section 5(8) of the I&B Code and the light of observations of the Hon'ble Supreme Court in the case of Pioneer Urban Land & Infrastructure Ltd. (Supra). The Respondent No. 1 is not a genuine allottee, therefore, the amount of Rs. 35 lacs paid to the Respondent No. 2 is not a Financial Debt and the Respondent No. 1 is not a Financial Creditor. We are unable to subscribe of the view of the Learned Adjudicating Authority that the Respondent No. 1 is a Financial Creditor.

42. In view of the aforesaid findings, we have no other option. But to set aside the impugned order dated 02.01.2020. The Application preferred by the Respondent No. 1 under Section 7 of the I&B Code, is dismissed. The Respondent No. 2 is released from rigours of the moratorium and is allowed to function through its Board of Directors from immediate effect. The Interim Resolution Professional will provide and intimate the fees for the period he has functioned and cost of the CIRP incurred by him to the Respondent No. 2 and the amount if any, already received. The Respondent No. 2 will pay the amount to the Resolution Professional after adjusting any amount already paid by the

Respondent No. 1. The Interim Resolution Professional will hand over the assets and records to the Board of Directors.

Thus, the Appeal is allowed with aforesaid observations. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

[V.P. Singh]
Member (Technical)

New Delhi
17th November, 2020.
SC