IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 310 of 2018

[arising out of Order dated 13th June 2018 by NCLT, Principal Bench, New Delhi in C.P. No. (IB)-75(PB)/2018]

IN THE MATTER OF :

Gaurav Manav **Appellant**

Vs.

Rachel L.Chand & Anr. **Respondent**

Present:

For Appellant: **Mr. Virender Ganda, Sr. Advocate with Mr. Vivek Malik and Mr. Dhawal Jain, Advocates**

For Respondents: **Mr. Anmol Stephe, Advocate for R-1**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant, a shareholder of Bhasin Infotech & Infrastructure Pvt. Ltd. (Corporate Debtor), has challenged the judgement dated 13th June 2018 passed by the Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi in C.P.No. IB-75(PB)/2018 whereby and whereunder application preferred by 1st Respondent, Rachel L.Chand under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code") has been admitted, order of moratorium has been passed and Interim Resolution Professional has been appointed with certain

directions. The appellant has challenged the order on the following grounds :-

i) Respondent (Rachel L.Chand) is not a "financial creditor" and therefore, application under Section 7 was not maintainable.

ii) There was no debt or default therefore the application under Section 7 was not maintainable.

2. It is also informed that after initiation of corporate insolvency resolution process, the parties have settled the claim.

3. The brief facts of the case are as follows:-

3.1 The respondent applied for purchase of a 'commercial unit' in the shopping mall 'Grand Venesia' now called 'The Grand Venice Mall' and paid the Corporate Debtor a sum of Rs. 8,54,835/- in advance. The 'Corporate Debtor' vide letter dated 27th April 2016 allotted the respondent a commercial space having an approximate super area of 569.89 sq. feet bearing No. 47 on the lower ground floor of the mall. The cost of the commercial space allotted was Rs. 85,48,340/- apart from other additional and supplementary charges.

3.2 According to appellant, the 1st Respondent made payment of Rs. 55.56,411/-, including the initial payment of Rs. 8,54,835/- to the 'Corporate Debtor' as part payment of the sale consideration but thereafter the 1st Respondent defaulted in making balance payments which was due payments.

3.3 Further case of the appellant is that the 'Corporate Debtor', after completion of mall received completion certificate from Competent Authority

on 16th April 2015. Thereafter by letter dated 15th July 2015 offered the 1st Respondent possession of the unit and raised a demand of Rs.36,52,448 towards balance consideration amount. However, despite the receipt of the intimation letter, no payment was made by the 1st Respondent, nor he had taken possession.

3.4 Subsequently the 1st Respondent by email dated 24th July 2015 while he had shown interest in taking possession intimated the 'Corporate Debtor' that he was not in a position to take possession until December 2015 and requested the 'Corporate Debtor' not to charge any interest for delayed payment.

3.5 Subsequently, without paying the balance amount, the 1st Respondent sent a legal notice on 11th September 2017 to the 'Corporate Debtor' alleging that the shop has not been constructed and fraudulently cancelled the allotment by letter dated 19th September, 2015. At that stage, the 1st Respondent demanded refund of the amount he had deposited along with 9% interest per annum.

4. At this stage, it is desirable to notice clauses 19 and 25(g) of the letter of allotment dated 27th April, 2016, which reads as follows:-

> *"19. Timely payment of instalments and other allied charges indicated herein is essence of the allotment. It shall be incumbent on the intending allotee (s) has agreed that the company is under no obligation to send reminders for*

payments. If payment is not received by the company within the stipulated time or if there is any other breach of the terms of this letter, then this provisional allotment may be cancelled."

"25(g) notwithstanding anything contained elsewhere/anywhere, the company shall be well within its right to cancel the allotment of the intending allottee at any time before the execution of the final deed of title and return to him all amounts deposited by the intending allottee together with interest @ 9% p.a. and the intending allottee agrees not to question/challenge such cancellation before any authority"

5. In view of the aforesaid clause of agreement, learned Senior Counsel for the appellant rightly contended that the 1st Respondent cannot be treated to be a 'Financial Creditor" within the meaning of Section 5(7) & (8).

6. The 1st Respondent has not disputed the fact that the completion certificate was granted on 16th April 2015 and the company by letter dated 15th July 2015 offered the 1st Respondent to take possession of the unit and raised demand of Rs. 36,52,448/- towards outstanding dues. The 1st Respondent has also not disputed the fact that by email dated 24th July 2015 while showing interest of taking possession, he intimated that he was not in a position to take possession until December 2015 and requested the "Corporate Debtor" not to charge any interest for delayed payment. The subsequent letter issued by "Corporate Debtor" on 19th August 2015 asking him to take possession of the property has also not been disputed.

7. In view of the aforesaid facts, it cannot be held that the "Corporate Debtor" violated the terms and conditions of the letter of allotment or defaulted to make payment.

8. As per Clause 19, if the payment is not received by the "Corporate Debtor" within stipulated time, it was open to the "Corporate Debtor" to cancel the provisional allotment which has been done.

9. However, in view of Clause 25(g), after the cancellation the "Corporate Debtor" was required to return the amount deposited by 1st Respondent together with interest @ 9% per annum.

10. In view of the aforesaid agreement, on cancellation of the allotment order the 1st Respondent cannot be treated to be a "Financial Creditor".

11. On a perusal of definition of expression "Financial Creditor" (Section 5(7)) it would be clear that it refers to "A person to whom a "Financial debt" is owed and includes a person whom such debt has been legally assigned or transferred. The expression "Financial Creditor" can be understood on reading the expression of "Financial Debt" (Section 5(8)) which have to be satisfied in terms of definition. The definition clause of "Financial Debt" would indicate that a "Financial debt" which is ***"disbursed against the consideration for time value of money"*** and it may include any of the events enumerated in sub-clause (a) to (i). Therefore, the first essential requirement of the "Financial Debt" has to be met viz. that the debt is ***"disbursed against the consideration for time value of money"*** which may include events enumerated in sub-clause (a) to (i).

12. Admittedly, it is not in dispute that the 1st Respondent made advance payment and get a provisional order of allotment of a shop. The terms and conditions mentioned therein shows that payment made by 1st respondent cannot be treated to be disbursement of amount for time value of money.

13. Learned Counsel appearing on behalf of 1st Respondent while not raised any dispute with regard to the facts as alleged and noticed above, submitted that the 1st Respondent having received the amount has no objection if the matter is closed.

14. In the present case we find that 1st Respondent do not come within the meaning of "Financial Creditor" the application preferred by him under Section 7 was not maintainable. For the reasons aforesaid, we set aside the impugned order dated 13th June 2018 passed by the Adjudicating Authority in C.P. No. IB-75 (PB)/2018.

15. In effect, order (s), passed by the Adjudicating Authority appointing any 'Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the 'Resolution Professional', including the advertisement, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 7 of the I&B Code, 2016 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.

16 . The Adjudicating Authority will fix the fee of 'Resolution Professional' and the 'Corporate Debtor' will pay the fees for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J.Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

New Delhi

17th July, 2018

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