

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 40 of 2017

(arising out of Order dated 31.03.2017 passed by the National Company Law Tribunal, New Delhi in C.P.No. (IB)-19(PB)/2017)

IN THE MATTER OF:

Pawan Dubey & Anr.Appellants

Vs.

J.B.K. Developers Private Limited. ...Respondents

**Present: For Appellants: - Mr. Pawan Dubey and Mr. Bishwajit Das,
Advocates**

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA,J.

The appellants claimed to be 'Financial Creditors' and jointly preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code') with the prayer to initiate an insolvency process against the respondent company, namely, J.B.K. Developers Pvt. Ltd., the application having dismissed the present appeal has been preferred.

2. The applicants are son and father. They booked a residential Flat No. IRIS-102 having super area of 1295 sq.ft. with construction linked plan in the Green Avenue project. According to appellants, they paid a total sum of Rs. 25,97,940/- to the respondent. On deposit of the amount made by the appellants, the respondent issued allotment letter on 1st November 2012 allotment of a flat, containing terms and conditions of allotment. It was alleged that the respondents were to hand over the possession of the residential flat positively within 30 months from the date of allotment letter which expired on 30th April 2015.

3. On account of the delay in raising the construction, the appellants sent a number of e-mail messages and visited the office of the respondent company, held meeting on different dates and the respondents had agreed to cancel the allotment and refund the amount of Rs. 25,97,940/- along with the interest @ 19% per annum for the delay period in accordance with the builder-buyer agreement dated 1st November 2012. Having not paid back the amount, the appellant preferred the application under section 9 of the 'I & B Code'.

4. Learned Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi having noticed the arguments and the facts that the appellants have already served statutory notice under Section 433 of the Companies Act 1956, before a notice as per performa under Section 8 of 'I & B Code' on 23rd January 2017 followed by another notice under 'I & B Code' issued on 10th February 2017 calling upon the respondent to pay outstanding principal sum with interest @ 18% per annum, rejected the claim by impugned order dated 31st March 2017 in C.P.No. (IB)-19(PB)/2017.

5. The Tribunal held that the appellants do not come within the meaning of 'Operational Creditor'. Reliance has been placed on a decision of Learned Adjudicating Authority rendered in another case of "**Col. Vinod Awasthy Vs. A.M.R. Infrastructure Ltd.**"

6. The question arises for consideration in this appeal is whether appellants are 'Operational Creditor' and are entitled to initiate Corporate Insolvency Resolution Process against Respondents - 'Corporate Debtor' under Section 8 and 9 of the 'I & B Code'?

7. Learned Counsel for the appellants' highlighted the introduction of 'I & B Code' 2016 by repealing Presidency Towns Insolvency Act, 1909 & Provincial Insolvency Act 1920. According to him it was introduced by amending 11 special statutes including Section 272(1)(b) of Companies Act, 2013 with clear objectives for such collective changes in 13 existing laws. It was submitted that 'I & B Code' is a complete code for insolvency resolution, liquidation and bankruptcy process which can be preferred by different category of people including Company, LLP, other body corporate, partnership firms and individuals as enumerated under Section 2 thereof. It was further contended that the 'I & B Code' is a new layer of remedy to provide a commercial resolution, as against judicial resolution which is better and an additional layer of new remedy in place of old law.

8. It was also contended that all kinds of Creditors except contingent and prospective creditors, who were eligible under Section 272(1)(b) to initiate winding up proceeding are rearranged under 2 classes, namely, 'Financial Creditor' and 'Operational Creditor' for the purpose of 'I & B code'. Only exception to the eligibility to trigger Corporate Insolvency Resolution Process is Section 11 which talks of 'ineligibility'. Referring a Committee Report, learned counsel for the appellants submitted that this is a fit case for adjudication. However, it is not necessary to notice any Report, all the aforesaid reports having noticed and taken into consideration by Legislators while enacting 'I & B Code'.

9. The stand of the appellants is that legislator having not used expression, 'All Creditors' other than the 'Financial Creditor' to define 'Operational Creditor' in Section 5(20) or Section 5(21) therefore, the intention of legislator is that all Creditors entitled to claim the debt amount and can prefer the application on

default. However, we are not inclined to accept such submission that all creditors can take resort to Section 9 of the 'I & B Code'. The 'Operational Creditor' and 'Operational Debt' having defined in Section 5(20) and Section 5(21), except those who come within the meaning of Operational Creditor no other creditor, whether secured or unsecured creditor are entitled to file an application under Section 9 though they are entitled to file claim before the Interim Resolution Professional, once Insolvency Resolution Process starts against a 'Corporate Debtor', either under Section 7 or Section 9 or Section 10 of the 'I & B Code'.

10. Learned Tribunal has referred to the judgement passed in the case of **Col. Vinod Awasthi Vs. A.M.R. Infrastructure Ltd.**, relevant portion of which reads as under: -

"7. A perusal of section 9 of the code would show that in order to maintain an application as an 'Operational Creditor' the Petitioner has to satisfy the requirements of section 5(20) and (21) of the Code. According to section 9(1) a petition like the one in hand could be maintained only by an 'Operational Creditor' against the 'Corporate Debtor. The aforesaid expression has been defined in section 5(20) & (21) which would also be attracted and applicable. Section 5 (20) & (21) of the code read thus:

"5. In this Part, unless the context otherwise requires,—

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;'

8. *It is evident from the perusal of the aforesaid definition of 'Operational Debt' that it is a claim in respect of provision of*

goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Centre or State Government or local authority. It is thus clear that debt may arise out of provision of goods or services or dues arising out of employment or dues arising under any law for time being in force and payable to the Centre/State Government. The framer of the Code have also defined the expression 'Financial Debt' in section 5(8) to mean a debt which is disbursed against the consideration of time value of money. However the framer of the Code has not included in the expression 'Operation Debt' as any debt other than the 'Financial Debt'. It is thus confined to aforesaid four categories like goods, services, employment and Government dues. In the present case the debt has not arisen out of the provisions of goods or services. The debt has also not arisen out of employment or the dues which are payable under the statute to the Centre/State Government or local body. The refund sought to be recovered is necessarily associated with the delivery of the possession of immovable property which has been delayed.

9. The next question is whether the Petitioner could be regarded as an 'Operational Creditor' within the meaning of section 5(20). The Operational Creditors' are those persons to whom the 'Corporate Debt' is owed and whose liability from the entity comes from a transaction on operations. The final report of the Committee in para 5.2.1 defines 'Operational Creditor' like the wholesale vendor of spare parts whose spark plugs are kept in inventory by Car Mechanic and who gets paid only after spark plugs are sold to acquire the status of 'Operational Creditor' so and so forth. The Petitioner in the present case has neither supplied any goods nor has rendered any service to acquire the status of an 'Operational Creditor'.

10. We are further of the view that given the time line in the code it is not possible to construe section 9 read with section 5(20) & (21) of the Code so widely to include within its scope even the cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company like the Respondent in the present case especially when the Petitioner has remedy available under the Consumer Protection Act and the General Law of the land. Therefore we are not inclined to admit the petition.

11. Like wise we have decided the case of *Sajive Kanwar v. AMR Infrastructure CP. No. (ISB)-03(PB)/2017 on 16.22017*

which has also discussed the possibility of treating a person like the petitioner as an "Operational Creditor.....".

11. Similar question as to who can claim to be an 'Operational Creditor', and whether a person who has entered into agreement for purchase of a 'flat' or 'shop' or 'any immovable property' is Operational Creditor or not fell for consideration before this Appellate Tribunal. This has been held in the case of **Nikhil Mehta Vs. A.M.R. Infrastructure Ltd.** Taking into consideration the terms and condition of agreement/sale deed, the Appellate Tribunal held the appellant of the said case, as "Financial Creditor".

12. The appellants have filed a Letter of Allotment dated 1st November 2012 wherein certain terms and conditions have been mentioned. As paragraph 3(b) of the Letter of Allotment, it is mentioned that the allottee(s) shall be entitled to refund of money paid by him subject to deduction of 15% of the total cost of the unit only after the expiry of a period of six months from the date on which the Company receives the notice of the Allottee's for cancellation of agreement.

13. First of all, the letter of allotment is not an agreement to sell and the terms condition aforesaid is conditional as the question of default will arise, once 'Corporate Debtor' receives the notice of cancellation from the allottee(s) and if the amount is not paid.

14. Apart from the fact that the appellants are merely an allottee of a flat and does not come within the meaning of 'Operational Creditor,' as held by the Learned Adjudicating Authority, there appears to be a variation in their claim amount, though the notice under Section 8 and 9 or application under Section 9 has not been filed.

15. The appellants initially claimed that they are entitled for refund of total amount deposited by them after one year, the flat having not completed within time along with 19% interest. But before the Tribunal the appellants claimed total amount along with 18% interest. On the other hand, as per the Allotment Letter at paragraph 3(b), the allottee is entitled to get refund of amount, subject to deduction of 15% of the total cost on receipt of allottees(s) application for cancellation. At paragraph 3(d) of the letter of allotment has further mentioned that if the amount paid by the allottee(s) is less than the amount deducted under (a) above, the allottee shall pay to the Company, deficient amount to the extent of 15% as mentioned therein. Thus we find there is a variation of claim amount i.e. the amount of debt alleged to have been defaulted by the respondent.

17. For the reason aforesaid, while we hold that the appellants are not 'Operational Creditor', we also hold that there is confusion about the actual amount of default of debt and the date of notice for cancellation forwarded by appellant, the petition under Section 9 is fit to be rejected.

18. For the reasons aforesaid we are not inclined to interfere with the impugned judgement.

19. In absence of any merit, the appeal is dismissed.

(Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
3rd August, 2017

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