

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 329 of 2017

IN THE MATTER OF:

Kamal Dutta

...Appellant

Versus

Anubhuti Aggarwal & anr.

...Respondents

Present:

For Appellant : **Shri Simran Jyot Singh Khandpur, Advocate**

For 1st Respondent: **Shri Mayank Goel and Shri Monamshel Maring,
Advocates**

For Respondent : **Ms. Lalrinchhani, Advocate for I.R.P.**

O R D E R

11.01.2018 Ms. Anubhuti Aggarwal claimed herself to be a 'Financial Creditor' and filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') seeking to set in motion Corporate Insolvency Resolution Process against DPL Builders Pvt. Ltd. (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Bench-III, New Delhi by the impugned order dated 8th December, 2017 having admitted the application and passed order of moratorium and having appointed Interim Resolution Professional, the appellant, Director of the DPL Builders Pvt. Ltd. (Corporate Debtor) has preferred this appeal.

2. Learned counsel for the appellant submits that the Corporate Debtor had taken a specific plea that Ms. Anubhuti Aggarwal (the applicant) do not come within the meaning of 'Financial Creditor'. An agreement was reached for selling the flats in favour of the said respondent for a sum of Rs. 25,00,000/- and the same cannot be treated as an investment or borrowing by the Corporate Debtor for the purpose of sub-section (7) read with sub-section (8) of Section 5 of the I & B Code.

The Adjudicating Authority referred to clause 9 of the agreement, which reads as follows and admitted the application :

“The project is already sanctioned and the possession of the flats will be handed over to the Second Party within 24 months from the date of this Agreement. However, in case, the Flat/premises is not ready to be given possession of, then the second party shall be at liberty to encash the cheque No. 792973 for Rs. 25.00 lacs, mentioned in clause 6 of this agreement.”

3. Learned counsel appearing on behalf of the appellant submits that much prior to passing of the impugned order dated 8th December, 2017 an agreement had been reached between the Corporate Debtor and Ms. Anubhuti Aggarwal on 5th December, 2017 in terms of which it was agreed that the payment would be made to the respondent by 12th December, 2017.

Such agreement having reached on 5th December, 2017, prior to the expiry of such date, the application under Section 7 was not maintainable.

4. Learned counsel appearing on behalf of Ms. Anubhuti Aggarwal accepts that an agreement reached on 5th December, 2017 and submits that the amount has already been paid as per settlement. It is submitted that the application was not withdrawn by the respondent as the amount was payable on 12th December, 2017.

5. We have heard the learned counsel for the parties including the Insolvency Resolution Professional.

6. From the impugned order, we find that the Adjudicating Authority though relied on the decision of this Appellate Tribunal in "*Nikhil Mehta and Sons vs. AMR Infrastructure Ltd.*" but has not discussed whether Rs. 25,00,000/- was given by Ms. Anubhuti Aggarwal as the consideration against the time value of money, which is the essential requirement under sub-section (8) of Section 5. Further, there being a subsequent agreement reached between the parties on 5th December, 2017, we are of the view that the petition under Section 7 was not maintainable prior to 12th December, 2017.

7. For the reasons aforesaid, we set aside the impugned order dated 8th December, 2017 passed by the Adjudicating Authority, New Delhi Bench in C.P. No. IB-307/(ND)/2017.

8. In effect, order(s) passed by the Adjudicating Authority appointing any 'Interim Resolution Professional', order declaring moratorium and all other

order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Interim 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 is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

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

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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