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**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**
**PRINCIPAL BENCH**

**C.P. NO. IB-1082(PB)/2018**

**IN THE MATTER OF:**
**Kiran Malhotra**
**.....Financial Creditor/Petitioner**
**v.**
**Alchemist Township India Limited**
**.....Corporate Debtor/Respondent**

**SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016**

**Judgment delivered on 25.01.2019**

**Coram:**

**CHIEF JUSTICE (RTD.) M.M. KUMAR**
**HON'BLE PRESIDENT**

**DR. DEEPTI MUKESH**
**HON'BLE MEMBER (J)**

**PRESENTS:**

For the Petitioner: Mr. Prem Kumar Chugh, Advocate
For the Respondent: Ms. Sonia Dube & Ms. Harshita Verma, Advocates

**M.M. KUMAR, PRESIDENT**

**JUDGMENT**

Ms. Kiran Malhotra claiming himself to be a 'financial creditor' has invoked the provisions of Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of



30/01/2019

respondent company, Alchemist Township India Limited, who is stated to be the corporate debtor.

2. The Respondent company-the Corporate Debtor, Alchemist Township India Limited (CIN U70100DL2006PLC263246) was incorporated on 04.07.2006 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at Flat No. 1511, Front Portion, Hemkunt Chambers, 89, Nehru Place, New Delhi-110019. Its authorized share capital is Rs. 50,000,000/- divided into 5,000,000 equity shares of Rs. 10 each and the paid up share capital is Rs. 1,00,00,000/- divided into 1,000,000 equity shares of Rs. 10 each which is based on the details given in master data obtained from the official website of Registrar of Companies (AnnexureA-6). Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal being Adjudicating Authority has territorial jurisdiction in respect of respondent corporate debtor as per the provisions of sub-section (1) of Section 60 of the Code.

3. The 'Financial Creditor'-Petitioner has proposed the name of Resolution Professional, Shri Parmod Goel, Nil 26-AB, First Floor, Malviya Nagar, New Delhi-110017, email id –

pramodgoel@yahoo.co.in. He has registration No. IBBI/IPA-001/IP-P00282/2017-18/10526. A written communication sent by him in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record (Annexure A-4). There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or ICAI. In addition, further necessary disclosures have been made by Mr. Parmod Goel, as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

4. It is the case of the petitioner that she submitted an application form dated 15.06.2013 (Annexure A-5) before the Respondent expressing her interest to purchase a plot/unit in the housing project at Park Avenue, Talwani Bhai, Tehsil Zeera, District Ferozepur, Punjab which was proposed to be constructed by the respondent company. The booking amount of Rs. 6,50,000/- was paid by the petitioner to the Respondent vide cheque No. 109633 dated 12.06.2013 drawn on Jammu and Kashmir Bank Ltd. along with the aforesaid application.

5. The Respondent issued a letter dated 06.07.2013 (Annexure A-7) while accepting the offer made by the petitioner wherein

certain commitments were made. It would be beneficial to read the aforesaid reply of the Respondent Company which is set out below verbatim:

> *"We are in receipt of your application dated 15.06.2013 expressing your interest to acquire plot/villa/apartment in our housing project at Park Avenue, Talwandi Bhai, Tehsil:Zeera, Dist: Firozpur, Punjab been allotted Customer ID No. TL00011449*
>
> *Please quote this Customer ID for all your future correspondence.*
>
> *We have also noted your request to offer you plot/villa/apartment in our other projects for a period of Four Years in the event of it being not possible to offer the plot/villa/apartment in the Project as applied for.*
>
> *In the event of your not accepting allotment of plot/villa/apartment offered to you by us, from time to time for any reason whatsoever, we shall refund the amounts received, together with compensation assessed by us, depending upon appreciation in the value of Real Estate, which in any event, shall not be less than Rs. 975000/- (Nine Lakh Seventy Five Thousand Only)*
>
> *subject to deduction of applicable taxes and administrative costs, if any. Our decision with regard to the amount of compensation will be final.*
>
> *Prior to the expiry of the period as aforesaid, you may obtain refund of such amount, as may be mutually agreed, after deduction of applicable taxes and administrative costs, if any.*

*You shall cease to receive any offer on and from 10/06/2017*

*Our decision with regard to the amount of compensation will be final and binding.*

*Yours faithfully,*
*For Alchemist Township India Limited,*

*(C.S. JOLLY)*
*Director*

A close glance on the aforesaid reply makes it patent that the respondent company highlighted its wish to accept the offer of the petitioner with further promise that if the Respondent Company failed to offer the promised plot/unit to the petitioner in the aforesaid project then petitioner would be accommodated in the other project of the respondent Company. It was also contemplated that if petitioner does not accept allotment of plot offered by the Respondent Company, from time to time for any reason, then Respondent Company was bound to refund the amount received by it together with compensation, depending upon the appreciation in the value of Real Estate, which in any event, was not be less than as Rs. 9,75,000/-.

6. After lapse of sufficient long time, when no communication was received from the Respondent Company regarding status of

the aforesaid project, the petitioner submitted a notice to the respondent seeking refund of the minimum assured amount of Rs. 9,75,000/- along with compensation appreciation in the value of real estate on the basis of commitment made by the Respondent Company (Annexure A-7). Again, a letter dated 21.09.2017 (Annexure A-8) was submitted by the petitioner in the office of the respondent situated at Chandigarh which was acknowledged by it by affixing a stamp and signature as well. Again another letter was sent by the petitioner on 27.12.2017 (Annexure A-9). Finally, a legal notice dated 15.02.2018 (Annexure A-10) was sent by the petitioner through his counsel seeking refund of Rs. 9,75,000/- along with interest @ 18% per annum w.e.f. 10.06.2017 and compensation as per the terms of letter dated 06.07.2013 (Annexure A-7) but all in vain. A copy of terms and conditions which were to be incorporated in the buyer agreement has been placed on record (Annexure A-12 at pg. 112-113).

7. It is claimed that the Respondent is liable to pay an amount of Rs. 11,62,520/- and interest @ 18% per annum w.e.f. 01.08.2018 to the petitioner.

8. After service of notice when the matter came up for consideration on 03.10.2018 learned counsel for the respondent

sought time to file vakalatnama and reply. We granted two weeks' time for filing vakalatnama and reply. The matter was to be heard on 05.11.2018 when the matter was again posted for hearing on 12.11.2018. However, again time was sought and we granted one last opportunity to file reply within a week and fixed the matter for arguments on 17.12.2018. On 17.12.2018 we had saddled the respondent with cost of Rs. 20000/- on account of non-filing of reply and further granted a week's time for the said purpose and ordered listing of the matter on 24.01.2019.

9. Thereafter on 24.01.2019 neither the cost was paid nor any reply was filed by the Corporate Debtor inspite of direction issued by us on various occasions. Accordingly, we decided to proceed without reply. Accordingly, we heard the arguments and reserved the order.

10. Now we deal with the submissions made on behalf of the Financial Creditor.

11. According to the learned counsel there is no resistance nor the claim of the Financial Creditor in respect of 'unpaid debt' has been controverted. It must therefore be considered to have been admitted. We find substance in the submission.

12. Learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the application is complete as per the requirements of Section 7 (2) of the Code and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. He has further submitted that the details of default along with its dates have been clearly stated in part IV along with all the minute details. There is overwhelming evidence to prove default and name of the resolution professional has also been clearly specified.

13. It is patent that an application form (Annexure A-5) expressing an interest to acquire the plot/unit in the proposed project of the Respondent Company was submitted by the petitioner on 15.06.2013. The booking amount of Rs. 6,50,000/- was paid along with the said application form. According to the letter dated 06.07.2013 (Annexure A-7) the Respondent Company proposed to offer a plot/unit to the petitioner either in the project for which application form was submitted by the petitioner or in the other projects. In the event the Respondent Company failed to do so, a further commitment was made, namely in case the

petitioner does not accept the allotment of the alternative plot/unit offered by the Respondent Company for any reason then the petitioner would be entitled to refund of the amount received together with compensation depending upon appreciation in the value of Real Estate, which in any event, was not be less than Rs. 9,75,000/-. In the said letter it was also promised by the Respondent that the petitioner would receive the offer on and from 10.06.2017. The petitioner-allottee has not been paid any amount of compensation nor the status of the project is intimated to the petitioner.

14. Having heard the learned counsel for the petitioner it would first be necessary to examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-

**"Initiation of corporate insolvency resolution process by financial creditor.**

7 (1) .....

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3) .....

7 (4) .....

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) ....."

15. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. We are satisfied that a default amounting to lacs of rupees has occurred. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2 of Section 7 is complete; and no disciplinary

proceedings are pending against the proposed Interim Resolution Professional.

16. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (amendment) Ordinance, 2018 with effect from 6th June, 2018. In view of the revised definition, any amount raised from an allottee under a real estate project is deemed to be an amount having the commercial effect of a borrowing and thus is covered by the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has been amended to specifically include dues of home buyer i.e. Real Estate (Residential). The amendment also recognizes home buyer as "Financial Creditor". Accordingly, the home buyer can initiate Corporate Insolvency Resolution Process against defaulting builder or developer, as "Financial Creditor" in terms of Explanation to Section 5 (8) (f) of the Code with effect from 06.06.2018.

17. In light of the aforesaid facts it is patent the petitioner is thus covered by the expression 'Financial Creditor' as has been used in the amended definition of Section 5 (8) (f) of the Code and the explanation appended thereto. In that regard we draw support

from the observations made by Hon'ble the Appellate Tribunal in the case of ***Rajendra Kumar Saxena V. Earth Gracia Buildcon Pvt. Ltd.*** passed in Appeal (AT) (Insolvency) No. 187/2018 wherein it has been held as under:

> *"By the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 No. 6 of 2018 dated 6th June, 2018 followed by the Act, in clause (8), in Sub-clause (f), of Section 5 an explanation has been inserted as per which 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.* ***Thereby, after amendment of the Act, the allottees of real estate project have been treated as 'Financial Creditors'.***"
> (Emphasis supplied).

A bare perusal of the aforesaid paragraph of the judgment would show that even without any element of 'assured return' an allottee in the real estate project has to be regarded as a 'Financial Creditors'. The petitioner eminently fulfills the aforesaid condition.

18. The amount has been raised from the petitioner/allottee under a real estate project. In such a situation not only the debt

has a commercial effect of borrowings and come within the scope of 'financial debt' but also the petitioner is covered by the definition of expression 'financial creditor'.

19. Therefore, petitioner being financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the respondent corporate debtor in case of default in repayment of financial debt.

20. As a sequel to the aforesaid discussion and the material placed on record it is confirmed that applicant-financial creditor had disbursed the money to the respondent corporate debtor as consideration for purchase of a residential flat. A considerable long period has lapsed, the principal amount disbursed has not been refunded by the respondent corporate debtor as per the commitment made by it in the letter Annexure A-7. It is accordingly held that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one Lakh. Thus, the application warrant admission as it is complete in all respects.

21. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

22. Mr. Parmod Goel, Nil 26-AB, First Floor, Malviya Nagar, New Delhi-110017, email id – pramodgoel@yahoo.co.in, Registration No. IBBI/IPA-001/IP-P00282/2017-18/10526 is appointed as an Interim Resolution Professional.

23. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

24. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

"(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

25. It is made clear that the provisions of moratorium shall not apply to such transactions which might be notified by the Central Government in consultation with any financial regulator. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

26. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else the Interim Resolution Professional/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional/Resolution Professional shall be under a duty to

protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

27. Before parting we wish to observe about the approach adopted by the Corporate Debtor-Respondent. In that regard it would be appropriate to refer to the orders granting time to the Corporate Debtor-Respondent for filing reply. The aforesaid position would become evident from a series of orders dated 03.10.2018, 12.11.2018, 17.12.2018 & 24.01.2019 which are set out below:-

Order dated 03.10.2018

"Ld. Counsel for the respondent seeks and is granted two weeks time to file vakalatnama and reply.

Rejoinder, if any, be filed within one week thereafter with a copy in advance to the counsel opposite.

List for further consideration on 05.11.2018.

Order dated 12.11.2018

One last opportunity granted to file reply within a week with a copy in advance to the counsel for the petitioner. Vakalatnama and resolution of the respondent company may also be filed before the next date of hearing.

Rejoinder, if any, be filed within one week thereafter with a copy in advance to the counsel opposite. If the reply is not filed then no further adjournment shall be granted and the same shall proceed on merit.

List for arguments on 17.12.2018.

Order dated 17.12.2018

Despite last opportunity granted on 12.11.2018 reply has not been filed and further time has been sought. Let reply be now filed within one week with a copy in advance to the counsel for the petitioner which shall be subject to payment of Rs. 20,000/- as cost to be payable to the petitioner.

Rejoinder, if any, be filed within one week with a copy in advance to the counsel opposite.

List for arguments on 24.01.2019.

Order dated 24.01.2019

On 17.12.2018 the following order was passed:-

"Despite last opportunity granted on 12.11.2018 reply has not been filed and further time has been sought. Let reply be now filed within one week with a copy in advance to the counsel for the petitioner which shall be subject to payment of Rs. 20,000/- as cost to be payable to the petitioner.

Rejoinder, if any, be filed within one week with a copy in advance to the counsel opposite."

It is seen from the reading of the order that despite the last opportunity granted on 12.11.2018 further time of one week was given to file reply. Over a period of one month is gone by but no reply has been filed nor the cost of Rs. 20,000/- has been paid. We do not see the possibility of granting any further time to file reply.

Arguments heard. Put up for order tomorrow i.e. 25.01.2019."

The aforesaid details concerning the conduct of the Corporate Debtor-Respondent would reveal that a designed effort has been made to impede the insolvency proceedings by seeking time over and over again for filing reply. The leniency shown by the Bench has been misused. It was therefore, in these circumstances that the order dated 12.11.2018 was passed whereby direction was issued that in case reply was not filed then no further adjournment was to be granted and the matter was to proceed on merit. Further we had saddled the respondent with cost of Rs. 20000/- on account of non-filing of reply and granted a week time for the said purpose and ordered for listing the matter on 24.01.2019 but the position remains the same. We are constrained to observe that in some of the cases the Corporate Debtor-Respondent deliberately delay the proceedings so as to avoid the initiation of Corporate Insolvency Resolution Process. This case thus is a classic example of such a conduct. We say no more on this issue.

28. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely Mr. Parmod Goel to meet out the expenses to perform the functions assigned to

him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

29. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

-Sd/-
25.01.20

**(M.M.KUMAR)**
**PRESIDENT**

-Sd-

**(DR. DEEPTI MUKESH)**
**MEMBER (JUDICIAL)**

**25.01.2019**
**(VINEET)**

*C.P. No.(IB)-1082(PB)/2018*
*KIRAN MALHOTRA V. ALCHEMIST TOWNSHIP INDIA LTD.*

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30/1/2019
वी.वी.राजू V.V.B. RAJU
उप रजिस्ट्रार DEPUTY REGISTRAR
राष्ट्रीय कम्पनी विधि अधिकरण
NATIONAL COMPANY LAW TRIBUNAL
Block-3, 6th Floor, CGO COMPLEX
LODHI ROAD, NEW DELHI - 110003