

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT)(Insolvency) No. 209 of 2019

IN THE MATTER OF:

Shakebuddin Irtebatuddin Khan

...Appellant

Vs

Qumruddin Faizi & Anr.

....Respondents

Present:

For Appellant: Mr. Samar Raza, Ms. Ishita Sharma Mr. Wasim Razvi, Advocates and Mr. S.I. Khan in person

For Respondents: Mr. Rahul Chitnis, Mr. Aadkitya A. Pandey, Advocates and Mr. Vidyadhar Apte, C.S.

ORDER

08.08.2019 The Respondent- Qumruddin Faizi, shareholder of Kaizen AAC Blocks Private Limited ('Corporate Debtor') filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (henceforth referred as '**IBC**') for initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. The Adjudicating Authority (National Company Law Tribunal, Mumbai Bench), Mumbai, by the impugned order dated 23rd January, 2019 admitted the application which is under challenge in the present case.

2. Learned Counsel for the Appellant, which is another shareholder, submitted that the Respondent Qumruddin Faizi was shareholder of 'Corporate Debtor' and does not come within the meaning of "Financial Creditor" as defined under Section 5(7) r/w Section 5(8) of IBC. It is submitted that the amount was deposited as loan without interest and therefore it does not come within clause (a) of Section 5(8) of IBC. It is further submitted that in absence of any claim, no default can be alleged.

3. Learned Counsel appearing on behalf of 1st Respondent opposed the prayer and referred to the record to suggest that 1st Respondent comes within the meaning of 'Financial Creditor' and the amount disbursed by him was for consideration of 'time value' for money. The Adjudicating Authority in the impugned order has noticed the stand taken by the 1st Respondent. Relevant paragraphs are as follows:

"2.1 However, it alleged that the Shares were not allotted. The Petitioner is also one of the Directors in the Company having 500 shares which is 5% of the total Equity. In the Books of the Debtor Company the amount was treated as 'Loan Liability'.

3. *Since the shares were not allotted for the impugned amount of ₹ 52 lakhs supra, the Petitioner relied upon the provisions of Section 42(6) of the Companies Act, 2013, reproduced below:*

"42 (1).....

(2).....

(3)....

(4)....

(5)...

(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay

that money with interest at the rate of twelve percent per annum from the expiry of the sixtieth day:

Provided *that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilized for any purpose other than –*

*(a) for adjustment against allotment of securities; or
(b) for the repayment of monies where the company is unable to allot securities.”*

3.1 As a consequence, in case of non-allotment of Shares, the amount received to purchase of shares shall bear interest @ 12% per annum, if within 60 days not refunded or fails to repay the Application money.”

4. The Adjudicating Authority has noticed that the Legal Notice dated 24.06.2017 was issued by the 1st Respondent addressed to the ‘Corporate Debtor’ and others intimating the defaults such as non-issue of share, Balance Sheet, Account and confirmation of the share allotment & remuneration and non-informing board meeting and the AGM and suppressing the profit of the Company. The details of the Lawyer’s notice have also been recorded by the Adjudicating Authority.

5. From the aforesaid facts, we find that the ‘Corporate Debtor’ has accepted the loan liability and in terms of the provisions of law, has been noticed by the Adjudicating Authority as quoted above.

6. The Respondent No. 1 who applied for refund of money was required to be paid interest @ 12% per annum from the expiry of 60 days thereby from 61st day should be treated as debt in default.

7. The 1st Respondent has filed an application under Section 7 (in Form No. 1) and shows the claim of outstanding financial debt of Rs. 52,00,000/- plus interest of Rs. 21,29,829/- totaling Rs. 73,29,891/- as on 31.05.2018. The record being complete and the Adjudicating Authority being satisfied, admitted the Application under Section 9 of the IBC.

8. In view of the aforesaid facts, we are not inclined to interfere with the impugned order dated 23rd January, 2019. The Appeal is accordingly dismissed.
No Cost.

[Justice S.J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member(Technical)

Akc/ Gc