

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 35 of 2019

IN THE MATTER OF:

Anil Kumar Tulsiani

...Appellant

Vs.

Rakesh Kumar Gupta & Anr.

...Respondents

**Present: For Appellant: - Mr. Virendra Ganda, senior Advocate with Ms. Simran Jyoti Singh, Mr. Jitendra Chaudhary, Advocates.
Mr. Anil Kumar Tulsiani.**

**For Respondents: - Ms. Sumedha Singh, Advocate for RP and Mr. Anil Kumar Jain, R.P.
Mr. Mayank Goel and Mr. Monamshel Maring, Advocates for R1 & 2.**

O R D E R

22.01.2019— This appeal has been preferred by Mr. Anil Kumar Tulsiani, Director of 'Sunshine Infraheights Private Limited'- ('Corporate Debtor') against the order dated 17th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench. By the said order, the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) filed by the Respondents- Mr. Rakesh Kumar Gupta and Ms. Swati Goel, has been admitted.

2. Learned counsel appearing on behalf of the Appellant submitted that there was no default on the part of the 'Corporate Debtor' and therefore, the application under Section 7 was not maintainable.

3. Reliance has been placed on the impugned order wherein the stand taken by the 'Corporate Debtor' was noticed, as follows:

"6. The respondents on putting in appearance before this Bench have filed their reply. It is submitted by the ld. Counsel that the submissions made in the present petition are contrary to the stand taken by the Financial creditors in their legal Notice. The amounts are acknowledged towards the payment of plots Nos. A71, A72 and A73, for which the total sale consideration is Rs. 96 Lakhs. Ld. Counsel submits that the Corporate Debtor is ready to deliver and transfer these three plots, subject to payment of the full sale consideration. In fact, the stamp papers have also been procured for and on behalf of the petitioners. it is therefore submitted that the petitioners have wrongfully invoked the provisions under the Code. Reliance has been placed by the Corporate Debtor on a draft copy of the agreement to sell. It is, however, not in dispute that this agreement

was never finalized and remained unsigned and unexecuted by the petitioners. the financial claim is also being disputed on grounds that the cheques wee disbursed towards another transaction.”

4. The Contesting Respondents- Mr. Rakesh Kumar Gupta and Ms. Swati Goel have appeared and not disputed the stand taken by the ‘Corporate Debtor’ before the Adjudicating Authority that the ‘Corporate Debtor’ was ready to deliver and transfer three plots, subject to payment of the full sale consideration. The Adjudicating Authority failed to consider the aforesaid plea taken by the ‘Corporate Debtor’, and admitted the application under Section 7 of the ‘I&B Code’.

5. Normally, an ‘allottee’ of Real Estate comes within the meaning of ‘Financial Creditor’ but if such an ‘allottee’ does not pay the full amount, cannot allege default on the part of the ‘Corporate Debtor’. If the ‘Corporate Debtor’ does not complete the work within time and the ‘allottee’ is agreed to pay the total amount or has paid the total amount then only the ‘allottee’ can allege default. Similarly, if ‘allottee’ finds that completion has not been made by the ‘Corporate Debtor’ within time and if request to return the amount disbursed to the ‘Corporate Debtor’, on failure to refund the amount the allottee can claim the default on the part of the ‘Corporate Debtor’.

6. In the present case, we find that the 'Corporate Debtor' had procured the stamp papers much before the admission of the application under Section 7 and was ready to execute the sale deed in favour of the Respondents- allottees subject to payment of total consideration amount. The 'Corporate Debtor' having ready to execute the sale deed subject to payment of full consideration amount, we hold that there was no default on the part of the 'Corporate Debtor'. The Adjudicating Authority has failed to consider the aforesaid aspect.

7. It is informed that the parties have already settled the matter and alternative plots have been allotted which are going to be registered in the name of the Respondents.

8. The 'Interim Resolution Professional' has also appeared and not disputed the aforesaid facts but he claimed fee and cost incurred by him.

9. In view of the finding aforesaid, we set aside the impugned order dated 17th December, 2018. In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, 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' 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.

10. Mr. Anil Kumar Jain, 'Interim Resolution Professional' present in person. It is intimated that he has incurred expenditure of about Rs. 76,000/- and the 'Committee of Creditors' have approved his fee @ Rs. 3,00,000/- per month. He has worked as 'Interim Resolution Professional' for one month and one week approximately. Therefore, we quantify payment of total amount of Rs. 4,00,000/- towards his fees and expenses which the 'Corporate Debtor' will pay within one month.

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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