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NCLAT REITERATES THAT A DECREE-HOLDER CANNOT BE TREATED AS A FINANCIAL CREDITOR FOR TRIGGERING CIRP UNDER IBC

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The National Company Law Appellate Tribunal, Delhi (NCLAT) in the case of *Sh. Sushil Ansal Vs Ashok Tripathi and Ors*, has reiterated that a decree-holder though covered under the definition of creditor under Section 3(10) of the Insolvency and Bankruptcy Code (IBC) would not fall within the class of financial creditors and therefore, a decree holder cannot initiate a corporate insolvency resolution process (CIRP) against a corporate debtor with an object to execute a decree.

In the facts of the case, Respondent Nos 1 and 2 (Respondents), as allottees of a home in a housing project in Lucknow, approached the Uttar Pradesh Real Estate Regulatory Authority (UP RERA) for recovery of their dues against the developer, Ansal Properties and Infrastructure Limited (Corporate Debtor), who had failed to honour the timelines under the built up agreement/ builder buyer agreement. What followed was the grant of orders and a recovery certificate issued by UP RERA in favour of the Respondents against the Corporate Debtor for recovery of the amount as arrears of land revenue.

Instead of filing for execution before a civil court, the Respondents approached the NCLT, Delhi for initiation of a CIRP against the Corporate Debtor under Section 7 of the IBC, in their capacity as decree holders. The NCLT, Delhi, relying upon the decision of the NCLAT in *Ugro Capital Limited v. Bangalore Dehydration and Drying Equipment Co Pvt Ltd*. admitted the application of the Respondents and appointed an interim resolution professional.

Thereafter, the Appellant, former director and shareholder of the Corporate Debtor, filed an appeal before the NCLAT challenging NCLT's order. During the pendency of the Appeal before NCLAT, the parties arrived at a settlement and the Appeal was not contested by the Respondents on the issue of the maintainability of the Section 7 application.

While examining the maintainability of the Section 7 application filed by the Respondents, the NCLAT analyzed the definition of financial creditor and financial debt under Sections 5(7) and 5(8) of the IBC respectively. It observed that sub-clause (f) of sub-section (8) of Section 5 of the IBC provides that any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing would fall within the ambit of a financial debt and that the explanation added to the sub-section provides that 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. Thus, to determine a financial debt, one would need to see whether the debt was disbursed against the consideration for the time value of money

which may include an amount raised from an allottee under a real estate project, and whether such transaction has the commercial effect of a borrowing.

In this regard, the NCLAT came to a finding that the Respondents had approached the NCLT as decree holders, and not as allottees in a real estate project. It held that while a decree-holder is covered by the definition of a creditor under Section 3(10) of the IBC, a decree holder does not fall within the class of creditors classified as financial creditors and cannot initiate a CIRP under Section 7 of the IBC.

The NCLAT observed that the Respondents approached the NCLT only with a view to execute the decree issued by UP RERA and relying on their earlier decision in *G. Eswara Rao Vs Stressed Assets Stabilisation Fund and Ors.*, the NCLAT concluded that the Respondents' application was not maintainable. The NCLAT set aside NCLT Delhi's impugned order admitting the application under Section 7 of the IBC.

Comment

The Insolvency and Bankruptcy Code (Amendment) Act, 2020, amended Section 7(1) of the IBC, which now prescribes a minimum threshold for initiation of insolvency proceedings by home-buyers or allottees in a real estate project. The amended Section 7 requires a CIRP to be initiated by not less than one hundred allottees or not less than ten per cent of the total number of allottees under the same real estate project, whichever is less. The validity of the 2020 Amendment Act is currently under challenge before the Supreme Court.

While remedies are available to an allottee against a developer under the Real Estate (Regulation and Development) Act, 2016 (RERA 2016) and under IBC (with the aforesaid threshold) it is noteworthy that once an allottee receives a recovery certificate under the RERA, 2016, the same cannot be executed by invoking Section 7 of the IBC and the allottee has to resort to execution proceedings to recover its dues against a builder or developer.

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