

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 1273 of 2019

[Arising out of Order dated 30.09.2019 passed by the National Company Law Tribunal, Principal Bench, New Delhi in C.P. (IB) No. 415(PB)/2019).

IN THE MATTER OF:

**Shri Bijay Pratap Singh,
06091, ATS Advantage, Ahinsa Khand,
Indirapuram,
Ghaziabad,
U.P.**

....Appellant

Vs.

**Unimax International
Through its Directors
Plot No.1 & 10, Sector 7, IIE Pant Nagar
Rudrapur District, U.S. Nagar
Uttarakhand – 263153**

**M/s Soho Infrastructure Pvt. Ltd.
Through Resolution Professional
Shri Pankaj Jain
CGF – 7a, NRI Complex
Mandakini, G.K. 4
New Delhi – 110019.**

....Respondents

Present:

For Appellant: Mr. Prabhat Kumar

**For Respondents: Ms. Srithi Badhwar, Advocate for R-2
Mr. Pankaj Jain, Advocate for RP
Mr. Nilanjan Chatterjee, Intervener**

J U D G M E N T

Venugopal M. J

The Appellant / Shareholder of the 'Corporate Debtor' / 2nd Respondent has preferred the present Company Appeal (AT) (Ins.) 1273/2019 as an 'Aggrieved person', as against the order dated 30.09.2019 in C.P.(IB) No. 415(PB)/2019 dated 30.09.2019 passed by the National Company Law Tribunal, ('NCLT') Principal Bench, New Delhi, in admitting the Section 9 application filed by the 1st Respondent / 'Financial Creditor'.

2. Earlier, the Adjudicating Authority ('NCLT') while passing the impugned order on 30.09.2019 at paragraph 14 to 16 had observed the following: -

"14. As per the invoices issued by the operational creditor from time to time with regard to supply of aluminum / M.S. Shuttering material to the 'Corporate Debtor' it is proved beyond doubt that 'goods' in terms of Section 5(21) of the Code were procured by the 'Corporate Debtor' from the 'Operational Creditor' on various occasions. It is patent from the perusal of the invoices and the delivery challans that the 'Corporate Debtor' had acknowledged the receipt of goods from the petitioner firm.

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15. For determination of the aforesaid issue it would be necessary to read the definition of the expression 'Operational Debt' given in Section 5(21) of the Code and the same is set out below: -

Section 5(21)

(21) "operational debt" means a claim in respect of the provision of **goods** or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

The definition of operational debt postulates that it is a claim, inter alia, in respect of the provision of 'goods' or 'services' including employment etc. A perusal of the invoices issued by the 'Operational Creditor' in the name of the 'Corporate Debtor' clearly shows that 'Operational Creditor' has supplied aluminum / MS Shuttering Material to the Corporate Debtor on various occasions. Therefore, the debt which is due and payable by the Operational Debtor to the Operational Creditor is prima facie covered by Section 5(21) of the Code.

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16. *There is no escape from the conclusion that 'Corporate Debtor' has committed default and the amount of Rs. 61,24,637/- as shown to be the closing balance for the financial year 1.4.2017 to 31.8.2018 has remained unpaid. Thus, default has been committed by the Corporate Debtor within the meaning of Section 3(12) read with Section 4 and Section 9(1) of the Code, 2016."*

and resultantly admitted the application.

3. The Learned Counsel for the Appellant contends that the 1st Respondent is based at Uttarakhand and was engaged in supply of aluminum frame work with standard accessories for a project, viz. Misty Heights Project developed by Maple Realcon Pvt. Ltd. According to the Appellant the Real Estate Firm was developing the project on behalf of Maple Realcon Pvt. Ltd. and requested the 1st Respondent to supply the aluminum frame work system.

4. It is the stand of the Appellant that during the course of business the 'Goods' were procured by the Real Estate Firm and payments were made regularly. As a matter of fact, a sum of Rs. 4,51,84,594/- was paid in total to the 1st Respondent. However, in regard to three bills there were some deficiencies and that the Appellant wrote a letter on 2.7.2016 clearly stating that goods were defective in nature and requested the 1st Respondent to lift the goods from the

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sight and provide fresh material in lieu of defective ones. The 1st Respondent furnished the reply dated 27.7.2016 and promised to send a team of technical experts to examine the deficiencies.

5. The Learned Counsel for the Appellant points out that the Appellant wrote a Letter / Reminder to the 1st Respondent on 25.08.2016 but the same was of no avail. Likewise, on 27.1.2017 another request was made and that the 1st Respondent neither cured the defect nor supplied fresh materials as requested in earlier correspondence.

6. The Learned Counsel for the Appellant proceeds to make a relevant mention that in spite of an existence of a 'pre-existing' dispute, the 1st Respondent / 'Financial Creditor' projected an application u/s 9 of 'I&B' Code claiming a sum of Rs. 62,06,786 as an outstanding sum. The grievance of the Appellant is that the said application was filed before the Adjudicating Authority despite the fact that Section 8(1) Demand Notice was not delivered to it and there was a pre-existing dispute in the matter.

7. The clear-cut stand of the Appellant is that no Demand Notice was delivered to the Appellant in terms of Section 8 of the Code and further that no 'Affidavit' was filed as per Section 9(3)(b) of the 'Code'. Apart from that, there exists dispute between the parties and no 'debt' is due and payable.

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8. According to the Appellant, the 1st Respondent / 'Operational Creditor' had filed an application before the Adjudicating Authority by suppressing material facts and without disclosing that there was 'pre-existing dispute' between the parties. Moreover, the Adjudicating Authority ('NCLT') New Delhi, Principal Bench while passing the impugned order on 30.09.2019 had not taken into consideration the defenses raised by the 'Corporate Debtor'. In fact, the Adjudicating Authority had ignored the Letters dated 2.07.2016, 27.7.2016, 25.08.2016 and 27.01.2017 and the postal receipts filed by the 'Corporate Debtor'.

9. The Learned Counsel for the Appellant comes out with a plea that the Adjudicating Authority was not justified in initiating a 'CIRP' process in respect of a running concern which is about to complete two projects successfully in which numerous Home Buyers are to obtain possession.

10. The Learned Counsel for the Appellant contends that the Appellant had made all the payments i.e. more than 80% regarding the business transaction made with the 1st Respondent. As a matter of fact, only disputed payments were withheld due to an 'existence of dispute'.

11. The Learned Counsel for the Appellant points out that fresh / sufficient goods were not supplied in lieu of the defective goods in spite of communication dated 02.07.2016 which was acknowledged by the 1st Respondent through letter dated 27.07.2016.

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12. The Learned Counsel for the Appellant submits that as regards the 'pre-existing dispute' there is a proceeding under Section 138 of the Negotiable Instruments Act, 1881 pending between the parties, though the Appellant has no knowledge about it. Continuing further, the 1st Respondent / 'Operational Creditor' / Applicant filed an application u/s 9 of the 'I&B' Code despite the fact that Section 8(1)(a) Notice was not delivered to the Appellant and there was a pre-existing dispute in the matter. Hence the said application is a defective one.

13. In response, the Learned Counsel for the 1st Respondent / 'Operational Creditor' submits that the 'Corporate Debtor' is a heavy debt owned Company and its solvency ratio is much below the potential solvency ratio of 2:1 as per its 'Books of Accounts' and therefore, in the interest of suppliers, creditors, stakeholders, vendors etc., it is fair and equitable to continue the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor' under the supervision of appointed 'Resolution Professional' and upon the liquidated outstanding 'Operational Debt' sum on the 'Corporate Debtor'.

14. The Learned Counsel for the 1st Respondent brings to the notice of this Tribunal that the 2nd Respondent / 'Corporate Debtor' after receipt of materials from the 1st Respondent / 'Operational Creditor' had utilised the same for its project, viz. 'Misty Heights' and issued one appreciation letter to the 'Operational Creditor' for its goods and services and quality of materials and the said

appreciation letter indicates that the 'Corporate Debtor' was fully satisfied with the material and the business standard of the 'Operational Creditor'.

15. The Learned Counsel for the 1st Respondent projects an argument that since October, 2015 and later, during the financial year 2016-2017 and as per Last 'Invoice' till 23.05.2017, the 'Operational Creditor' had supplied materials, goods etc. to the 'Corporate Debtor' amounting to Rs. 5,21,91,380.72/- against which a payment of only Rs. 4,59,84,594/- was received from the 'Corporate Debtor'.

16. The Learned Counsel for the 1st Respondent takes a stand that the 2nd Respondent / 'Corporate Debtor' had relied on three years old forged and fabricated letters to raise the false ground of 'pre-existing dispute' and this alleged forged letters are created in a single night for taking an illegal defence of 'dispute'. Also, the 1st Respondent was shocked that the signatures and Company's seal on the Letter / Reply 27.7.2016 was fabricated by the 2nd Respondent / 'Corporate Debtor' with an intent to mislead this Tribunal. Indeed, the 2nd Respondent / 'Corporate Debtor' till 02.07.2016 had not raised any dispute in regard to customisation of the material supplied and also not raised any issue to the effect that such material was not in accordance with the 'Drawing'. For more than nine months, without raising any dispute, the 2nd Respondent / 'Corporate Debtor' continued the construction for more than nine months and hence the contents of letter dated 2.7.2016 were concocted,

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fabricated and manufactured only for the purpose of the present case and to escape from the legal liabilities.

17. It is the plea of the 1st Respondent that the alleged letter dated 2.07.2016 never, ever came into existence prior to the issuance of Demand Notice dated 10.12.2016 and in fact, neither the 'Corporate Debtor' / 2nd Respondent had disputed the existence of default nor made the payment of unpaid 'Operational debt' nor objected to the receipt of materials till the filing of Section 9 application before the Adjudicating Authority.

18. According to the 1st Respondent / Operational Creditor to the Corporate Debtor/ 2nd Respondent, it supplied goods as per last Invoice till 23.05.2017 amounting to Rs. 5,21,91,380.72/- and that a sum of Rs. 4,59,84,594/- was received from the Corporate Debtor. The 2nd Respondent/Corporate Debtor had defaulted a principal sum of Rs. 62.06,786.72/- along with interest at 24 % p.a. i.e. Rs 22,34,443/- till 27.11.2018 and the total outstanding liquidated amount of Rs. 84,41,229/- had remained unpaid and therefore, default was committed by the Corporate Debtor.

19. The Learned Counsel for the 1st Respondent refers to the three cheques bearing No. 763156, 763157, 763158 dated 22.11.2018 for a sum of Rs. 6/- Lakhs against the outstanding liabilities and for the admission of 'Debt' and since the cheques got dishonored upon presentation necessary proceeding u/s 138 of NI Act was initiated against the 'Corporate Debtor'.

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20. The Learned Counsel for the 1st Respondent contends that the 2nd Respondent / 'Corporate Debtor' had refused to receive the notice and the said notice was duly tendered by the postman for acceptance, but the same was refused to be received by the 'Corporate Debtor' and as per decision of Hon'ble Supreme Court in Gujarat Electricity Board and Ors. Vs. Atmaram Sungomal Poshani reported in AIR 1989 Supreme Court Page 1433 the service of notice was deemed to be a proper service upon the 'Corporate Debtor'.

21. The Learned Counsel for the 1st Respondent contends that on earlier occasion, the 2nd Respondent / 'Corporate Debtor' went into 'Insolvency' and 'CIRP' was issued against it and that the 'Corporate Debtor' filed an Company Appeal(AT)(Ins.) No. 484/2018 before this Tribunal and raised an illegal defence of not receiving the 'Demand Notice' and subsequently, settled the matter with the 'Operational Creditor'.

22. In the 'Application before the Adjudicating Authority the 1st Respondent /Operational Creditor under Part- IV column the due amount from the 2nd Respondent /Corporate Debtor had mentioned as Rs. 61,24,637/- along with interest at 24% p.a. amounting to Rs. 22,04,870/-, in all a sum of Rs. 83,29,507/-

23. It is the stand of the 1st Respondent that it filed an additional affidavit stating that the validity of alleged letters is not admissible in the eye of law and

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also that it is a blatant lie to contend that the Appellant had not received the Section 8 Notice.

24. It transpires from the contents of Affidavit dated 06.01.2020 of the 2nd Respondent (IRP) of the 'Corporate Debtor' that the 2nd Respondent had received and verified the claims, received from the Creditors of the 'Corporate Debtor' from the date of commencement of Insolvency till 06.01.2020 and the same runs as under:-

(Amount in Rs.)

S.No.	Particulars	Claims Received	Claims Admitted	Under Verification
A.	Financial Creditors			
1.	Financial Institutions	20,50,58,796	18,07,02,281	2,03,64,947
2.	Home Buyers	3,75,53,669	2,17,41,335	1,58,12,334
B.	Operational Creditors	10,98,798	----	10,98,798
	TOTAL	24,37,11,263	20,24,43,616	3,72,76,079

25. As on 06.01.2020 the 2nd Respondent with a view to carry out the CIRP of the 'Corporate Debtor' had incurred a total expense of Rs. 6,98,007/- from the date of initiation of CIRP till 06.01.2020.

26. The 'Interim Resolution Professional' Mr. Punkaj Jain of the 2nd Respondent / 'Corporate Debtor' in his Affidavit dated 06.01.2020 had averred that despite several reminders, the suspended Board of Directors of the **Company Appeal (AT) (Insolvency) No. 1273 of 2019**

'Corporate Debtor' had not provided the requisite information which includes the statement of affairs (as on Insolvency commencement date), Tally / Accounting Data etc. As such, the Resolution Process is not moving forward.

27. Apart from the above, the 2nd Respondent on 04.01.2020 had received an e.mail from the 1st Respondent attaching the rejoinder of the Appellant in Company Appeal (AT)(Ins.) 1273/2019 wherein it was mentioned that two housing projects at Patna were also complete and many Home Buyers and the 2nd Respondent / 'Corporate Debtor' (Soho Infrastructure Pvt. Ltd.) had already executed registered 'Sale Deed' and handed over physical possession to the Buyers.

28. The 'Resolution Professional' of the 2nd Respondent / 'Corporate Debtor' in its Affidavit dated 28.1.2020 had averred that from the preliminary documents received from the Appellant, it came to light that an outstanding sum of Rs. 4,63,00,000/- is due to the 'Corporate Debtor' from M/s. Apex Heights Pvt. Ltd. based on a business loan given by the 'Corporate Debtor' to it, in the year 2016. Further, out of a claim of Rs. 45,70,80,961/- filed by the 'Corporate Debtor' during the initiation of CIRP of another Company Maple Realcon Pvt. Ltd. out of which only a meagre sum of Rs. 17,01,182/- was accepted and the balance was rejected by the 'Resolution Professional of Maple Realcon Pvt. Ltd. etc.

29. The grievance of the 'Resolution Professional' / 2nd Respondent is that till date the Appellant, or the other members of the suspended management of the **Company Appeal (AT) (Insolvency) No. 1273 of 2019**

‘Corporate Debtor’, has not provided the pertinent documents and information sought for, except the financial statement for the year 2018-19 and the tax audit reports. Furthermore, the suspended management of the ‘Corporate Debtor’ had also failed to provide substantial data for the payment of the salaries or the expenses likely to be incurred by the business so as to facilitate the 2nd Respondents (RP) to obtain sanctions of the required amount. In respect of the Home Buyers, the Appellant had failed to furnish to the ‘Resolution Professional’ of the 2nd Respondent the relevant contracts as well as the pertinent information as to the payment plans entered into by the Home Buyers together with the details about the accounts of the Home Buyers mentioned by the ‘Corporate Debtor’.

30. The Learned Counsel for the 2nd Respondent refers to the Affidavit of the Resolution Professional dated 28.1.2020 and points out that the suspended management of the ‘Corporate Debtor’ are not sharing the information / documents in details and / or even violating the period of moratorium by registering sale deeds in favour of the allottees without any notice / information to the ‘Resolution Professional’.

31. The Learned Counsel for the 2nd Respondent points out that after the commencement of lock-down on 25th March, 2020, no further physical meetings could be held with the ‘Committee of Creditors’ and that for an extension of ‘Corporate Insolvency Resolution Process’ of the ‘Corporate Debtor’ till

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26.6.2020. The 2nd Respondent had filed e-application before the Adjudicating Authority ('NCLT') Principal Bench, New Delhi. In fact, on 12.05.2020 the Resolution Professional had responded to the letter sent by M/s. Shika Rani dated 8.5.2020 wherein a request was made to the Association not to initiate any work on their own as it would be in violation of 'I&B' Code. Besides this, the 'Resolution Professional' had incurred an expense of Rs. 18,73,213/- (for the period from 30.09.2019) till 4.6.2020.

32. By way of Reply, the Appellant contends that in the instant case before the Adjudicating Authority a specific plea was raised about the existence of dispute and reliance was placed on the decision of Hon'ble Supreme Court in 'Mobilox Innovations(P) Ltd. Vs. Kirusa Software(P) Ltd.' (2018) 1 SCC page 353 and further the Appellant also relied on the decision of Hon'ble Supreme Court in 'Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors and Cable Ltd., 2018 SCC online SC page 2113.

33. The Learned Counsel for the Appellant refers to the observation made by this Tribunal in 'Laina Power Engg.' Vs. 'Sokeo Power Pvt. Ltd.' (Company Appeal) (AT)(Ins.) 452/2018 wherein it is stated as under:-

"All these disputes were raised by the respondent much prior to issuance of demand notice under Section 8(1) issued on 7th July, 2017. There is nothing on record to
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suggest any correctional measure was taken by the appellant. On the other hand, respondent pleaded before the Adjudicating Authority that there is an 'existence of dispute'.

34. The Learned Counsel for the Appellant refers to the decision of Hon'ble Supreme Court in 'Mobilox Innovations(P) Ltd.' Vs. 'Kirusa Software (P) Ltd.' (2018) 1 SCC Page 353 wherein at paragraph 42 observed as under:-

"42. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist.....We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined "dispute" as meaning a "bona fide suit or arbitration proceedings....". In its present avatar, Section 5(6) excludes the expression "bona fide" which is of significance. Therefore, it is difficult to import the expression "bona fide" into Section 8(2)(a) in order to judge whether a dispute exists or not."

35. The Learned Counsel for the Appellant forcefully submits that the application of the 1st Respondent / 'Operational Creditor' claims that notice was returned as 'unclaimed' and if that be the case, then the Demand Notice was not
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delivered as per Rule 5(ii) of the Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016. Furthermore, it is the crystalline stand of the Appellant is that the Adjudicating Authority wrongly assumed that service was effected and further that it is an admitted fact that no notice through electronic mail' was delivered and notice by hand was given and the notice claimed to have been given was returned as unclaimed. Therefore, the impugned order of the Adjudicating Authority was passed on wrong premises and the same is liable to be set aside, in the interest of justice.

36. In this connection, it is useful for this Tribunal to extract Rule 5 of the 'Insolvency & Bankruptcy' (Application to Adjudicating Authority) Rules, 2016 which runs as follows:-

“Demand notice by operational creditor – (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely,-

(a) A demand notice in Form 3; or

(b) A copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to file corporate debtor,

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(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.”

37. One of the essential features for consideration of an Application under Section 9 of I & B Code is service of notice. A mere perusal of the paragraph 11 of the Impugned Order passed by the Adjudicating Authority patently indicates that a perusal of the pleadings showed that the proper ‘service’ was effected on the registered office of the 2nd Respondent/ Corporate Debtor situated at D-410, Pocket 16, Sector VII, Rohini, New Delhi – 110085. Also, it was observed by the Adjudicating Authority that there was no change in the address of the ‘Corporate Debtor’ in the ‘Ministry of Corporate Affairs Record’ which also shows the same address. Even the Resolution passed by the ‘Corporate Debtor’ on 27.03.2019 had shown the same ‘Registered Office’ address. Therefore, the Adjudicating Authority had very rightly adverted to Section 27 of the General Clauses Act and Section 20 of the Companies Act, 2013 read with Rule 35 of the Companies (Incorporation) Rules, 2014 in and by which the ‘service’ is to be effected on the ‘Registered Office’ address and that process was carried out. Therefore, this **Company Appeal (AT) (Insolvency) No. 1273 of 2019**

Tribunal holds that it was 'Sufficient service' of the 'Demand Notice'. As such, the plea taken on behalf of the Appellant that there was no service affected upon the 'Corporate Debtor' is not acceded to by this Tribunal. The other plea taken that there was no service by hand or electronic mail service to the 'Corporate Debtor' relegates to the background and it pales into insignificance because of the fact that failure/omission to effect service by hand or electronic mail service is not fatal to the instant case.

38. As per Section 3 (23) (e) of the I&B Code 'person' includes 'Partnership' and as per Section 5 (20) of the Code 'Operational Creditor' means a person to whom an Operational Debt is owed etc. The 1st Respondent/Financial Creditor's name as a 'Partnership Firm' finds a place in the 'Register of Firms', as per Delhi Partnership (Registration of Firms Rules 1972) as observed by the Adjudicating Authority in the impugned order. Moreover, a Partnership Deed dated 06.05.2005 was placed on record before the Adjudicating Authority. Therefore, the application filed by the 1st Respondent/ Operation Creditor before the Adjudicating Authority under Section 9 of the I & B Code is perfectly maintainable in law.

39. It is to be relevantly pointed out that a 'dispute' does not mean a mere denial viz. no payment is due because there is a dispute. It is to be remembered that I & B Code is not substitute for 'Debt Enforcement Procedure'.

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40. In the present case, the 1st Respondent / 'Operational Creditor' has come out with the plea that the letters dated 2.7.2016, 27.7.2016, 25.08.2016 and 27.01.2016 are believed to be false and they are concocted, fabricated and manufactured for the purpose of this case to take an illegal defense. Further, the 1st Respondent / 'Operational Creditor' has taken a stand that the signatures and the Company's seal on the letter / reply dated 27.7.2016 was fabricated by the 'Corporate Debtor'. Therefore, this Tribunal is of the considered view that the plea of the 1st Respondent / 'Operational Creditor' that the alleged forged letters were created in a single night for taking an illegal defense of dispute and the 'Corporate Debtor' is liable to be tried for 'perjury' can be pleaded / agitated before the Competent Forum.

41. As regards the plea of the Appellant is concerned that the 1st Respondent / 'Operational Creditor' had accepted the payments of Rs. 4,51,84,594/- in respect of supplies and full and final payment of Rs. 12/- lakhs on 17.5.2017. No tangible / substantial material / evidence is produced on the side of the Appellant to show that it was a final payment in full quit and nothing remains to be paid by the 2nd Respondent/ Corporate Debtor. Therefore, this Tribunal negatives the plea of the matter had been settled and no sum remains to be paid by the 2nd Respondent / 'Corporate Debtor' to the 1st Respondent/Operational Creditor other than the purported full and final payment of Rs. 12 lakhs made on 17.5.2017.

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42. In regard to the plea of 'dishonour of cheques' amounting to Rs. 6 lakhs taken by the 1st Respondent / 'Operational Creditor', the contention of the Appellant is that the same was not taken as a plea by the 1st Respondent and as such the same is not to be accepted, it is to be relevantly pointed out if the 'Corporate Debtor' had paid the full and final payment of Rs. 12 /- lakhs on 17.5.2017 and that the 1st Respondent / 'Operational Creditor' has accepted the payment of Rs. 4,51,84,594/- against supplies, then there is no need or necessity for the 'Corporate Debtor' to issue three cheques dated 22.11.2018 amounting to Rs. 6 /-lakhs to and in favour of the 1st Respondent / 'Operational Creditor' which were dishonoured. In reality, the 1st Respondent / 'Operational Creditor' had initiated Proceedings under Section 138 of the NI Act, 1881 against the 'Corporate Debtor'. Although, the Appellant has taken a plea that these cheques were issued by the 'Corporate Debtor' for some other project and not for the project concerning the subject matter in issue, the same is not established by the Appellant to the subjective satisfaction of this Tribunal.

43. It is not in dispute that the 2nd Respondent / 'Corporate Debtor' had procured the goods from the 1st Respondent / 'Operational Creditor' on several occasions and that the 'Corporate Debtor' had acknowledged the receipt of 'Goods'. Suffice it for this Tribunal to significantly point out that the 1st Respondent / 'Operational Creditor' had supplied Aluminum / M.S. Shuttering Material to the 'Corporate Debtor'. Section 5(21) of the 'I&B' Code defines

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‘operational debt’. If a ‘Debt’ is due and payable one to the ‘Operational Creditor’ by the ‘Operational Debtor’ then the said ‘Debtor’ will squarely come within the purview of the ingredients of the definition of Section 5(21) of the Code. In a given case, if it is exhibited that there is a clear default of minimum of Rs. 1/- Lakh, then the dispute in regard to quantum of the amount claimed can not be an hindrance in admitting an Application/ Petition filed either under Section 7 or 9 of the I & B Code.

44. The aspect of ‘Addition of Parties’ in a given proceeding is within the exclusive domain of a concerned Court/ Tribunal. A party/ parties are not to be added /arrayed as parties in a given application to introduce a fresh/new cause of action.

45. In as much as the 2nd Respondent /‘Corporate Debtor’ had committed default as per definition Section 3(12) of the Code which defines ‘default’ and in spite of notice the 2nd Respondent had failed to effect the payments due to 1st Respondent / ‘Operational Creditor’ and an amount of Rs. 61,24,637/- was due as on date of filing of the application before the Adjudicating Authority coupled with interest @ 24% p.a., this ‘Tribunal’ without any haziness comes to a consequent conclusion that the view arrived at by the Learned Adjudicating Authority that the 2nd Respondent/Corporate Debtor had committed default and ultimately admitting the application filed by the 1st Respondent/ Operational

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Creditor is free from any legal infirmities. Resultantly, the present Appeal fails and the same is accordingly dismissed but without costs.

46. In the present case, the intervenors filed I.A. No. 426 of 2020 seeking to implead themselves stating that they are all 'Home Buyers' and 'Financial Creditors' of the 'Corporate Debtor' Company and their interest would be impaired if any order is passed in the instant appeal without considering their case and the Learned Counsel for the 'intervenors' to lend support to his contention referred to the order dated 4.2.2020 passed by this Tribunal in Company Appeal (AT)(Ins.) No. 926/2019 Flat Buyers Association Winter Hills – 77, Gurgaon Vs. Umang Realtech Pvt. Ltd. through IRP and others wherein at paragraph 21, 22 and 25, it is observed as under:

“OBSERVATIONS ON FINDINGS OF THIS APPELLATE TRIBUNAL:

21. In Corporate Insolvency Resolution Process against real estate, if allottees (Financial Creditors) or Financial Institutions/ Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where separate plan(s) are approved by different authorities, land and its owner may be different and mainly the allottees (financial creditors), financial institutions (financial creditors) operational creditors are different for such separate project. Therefore, all the **Company Appeal (AT) (Insolvency) No. 1273 of 2019**

asset of the company (Corporate Debtor) are not to be maximized. The asset of the company (Corporate Debtor-real estate) of that particular project is to be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority. Any other allottees (Financial Creditors) or financial institutions/banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained. So, we hold that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not other projects which are separate at other places for which separate plans approved. For example- in this case the Winter Hill- 77 Gurgaon Project of the 'Corporate Debtor' has been place of Corporate Insolvency Resolution Process. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised.

22. Further, a 'Secured Creditor' such as 'financial institutions/banks', cannot be provided with the asset (flat/apartment) by preference over the allottees (Unsecured Financial Creditors) for whom the project has been approved. Their

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claims are to be satisfied by providing the flat/apartment. While satisfying the allottees, one or other allottee may agree to opt for another flat/apartment or one tower or other tower if not allotted to any other. In such case their agreements can be modified by the Interim Resolution Professional/Resolution Professional with the counter signature of the Promoter and the allottees, so that the allottees (financial creditors), who are on rent or paying interest to banks may like to get earlier possession and are relieved from paying rent or interest to banks.

25. In the light of aforesaid discussions, as we find it is very difficult to follow the process as in normal course is followed in a Corporate Insolvency Resolution Process, we are of the view, that a 'Reverse Corporate Insolvency Resolution Process, can be followed in the cases of real estate infrastructure companies in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganised workmen."

and prayed for allowing the application to secure the ends of justice.

47. At this juncture, this Tribunal, considering the facts and attendant circumstances of the present case which float on the surface opines that it is just and proper for the intervenors to take recourse before the Resolution Professional/ Competent Forum and to seek necessary reliefs for redressal of

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their grievances in accordance with Law. Viewed in that perspective the I.A. No. 426 / 2020 is not entertained and is closed. I.A. No. 3687/2019 (stay) is closed.

48. Before parting, this Tribunal, pellucidly makes it clear that the Resolution Professional of the 2nd Respondent/ Corporate Debtor while continuing/conducting the Corporate Insolvency Resolution Process of the Corporate Debtor can lay a claim before the Adjudicating Authority towards his fees and expenses incurred for the initiation of CIRP from 30.09.2019 onwards by filing necessary application if he so desires/advised.

**[Justice Venugopal. M]
Member (Judicial)**

**[Balvinder Singh]
Member (Technical)**

**[Alok Srivastava]
Member (Technical)**

NEW DELHI

15th June, 2020/

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