

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**  
**Company Appeal (AT) (Insolvency) No. 1248 of 2019**

[Arising out of Order dated 13.09.2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No. III) in No. IB-28/ND/2018]

**IN THE MATTER OF:**

**M/s Aaj Finance & Credit Limited**  
**Registered Office at 803,**  
**Shakuntala Apartments,**  
**59 Nehru Place, New Delhi**

**....Appellant**

**Vs**

**M/s Keltech Infrastructure Ltd.**  
**Registered Office at 7,I.P. Building,**  
**U.G.F. 2&3, E-109,**  
**Pandav Nagar (Near Akahardham Temple)**  
**Patparganj, Delhi-110092**

**....Respondent**

**Present:**

**Shri Arun Sharma and Shri Saral Sharma, Advocates for**  
**Appellant**

**Shri Niraj Kr. Singh, Advocate for Respondent.**

**J U D G M E N T**

*[05<sup>th</sup> March, 2020]*

**Justice A.I.S. Cheema.**

The Appellant/Financial Creditor has filed this Appeal against Respondent/Corporate Debtor against Impugned Order dated 13.09.2019 passed in IB-28/ND/2018 passed by Adjudicating Authority, National Company Law Tribunal, New Delhi, Bench III, vide which the Adjudicating Authority

dismissed the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (I&B Code in Short) which was filed by the Appellant.

2. It has been argued and it is the Case of the Appellant that on 30<sup>th</sup> May, 2018 a Memo of Understanding (MoU) was executed between the Parties. The said document is at Annexure 2 (Colly) Page 50. As per this 'MoU', the Appellant gave a loan of Rs. 50 Lakhs by cheque dated 01.06.2013 to the Respondent/Corporate Debtor for 12 months with monthly interest of 2 %. The loan was given for a period of 12 months. The Respondent issued post dated cheques for next 12 months. For security the parties agreed that the Respondent will mortgage two flats bearing No. K-1/1802, K-1/2102 from plot No. GH-01 B, Sector 16 Noida Extension G. Noida (West) in favour of the Appellant. It is claimed that the said flats were offered only as security and actually mortgage was never executed.

3. It is stated that the Appellant in view of the 'MoU' had issued cheque of Rs. 50 lakhs dated 01.06.2013 which amount was received by the Corporate Debtor. On 3<sup>rd</sup> June, 2013 between the Parties there was execution of two "Buyer/Seller Agreements" (Page 137 &139) providing for Agreement by the Appellant to buy the above two Flats. The Appellant however, claims that even this was only by way of security for the amount which was advanced as loan.

4. After such Buyer/Seller Agreement, it appears from record that between the Parties still similar 'MoU's like one dated 30<sup>th</sup> May, 2013 were executed on 01.06.2014 (Page 52), 01,06,2015 Page (54) and 01.06.2016 (Page 56) in each of which Agreements, the Respondent similarly issued post dated Cheques, each time for 12 months. According to the Appellant, till July 2016 all the Post-Dated Cheques were honoured except three, where-after other cheques were not deposited in the Bank. Appellant claims that in view of this situation, Appellant issued letters on 2<sup>nd</sup> May, 2017 (Page 283) and 5<sup>th</sup> June 2017 (Page 187) asking for repayment of the Loan. First letter returned unserved and the second letter was not replied, Appellant claims that then notice dated 27.10.2017 (Page 189) was sent but the same was also not replied.

5. The appellant claims that there was debt due and there was default and hence Application under Section 7 was filed on 4<sup>th</sup> January, 2018.

6. On behalf of the Respondent, the case put up before the Adjudicating Authority as per the reply (Page 234) and which is argued in Appeal also is that the Appellant suppressed material facts in the Application under Section 7 of Insolvency and Bankruptcy Code, 2016. Respondent claims that the Appellant had entered into an Agreement dated 01.10.2016 (Page 263) whereby the Respondent agreed to transfer the property bearing No. K-708, 7<sup>TH</sup> Floor in Block No. K-1, Crossing Republic, Sector 6 in NH 24, Gaziabad for Rs. 50 lakhs. As per the Agreement, the construction of the Building was to be completed within 12

months from the date of signing of the Agreement, subject to Force Majeure Conditions and timely payment by the Buyer. In case of delay in completion of the Unit attributable to the promoter, after 180 days of the period of 12 months the promoter (Respondent) would pay penalty to the Buyer at Rs. 5 Per Square feet Per Month. The Respondent has claimed that the said Flat was allotted to the Appellant as repayment of the principal payment paid by cheque Bearing No. 378105 dated 31<sup>st</sup> May, 2013. It is argued that the Appellant has acknowledged execution of such Agreement in the letters dated 02<sup>nd</sup> May 2017 (Page 283) and 05<sup>th</sup> June 2017 (Page 187) which were sent by the Appellant. The Agreement however, was suppressed when Application under Section 7 was filed. According to the Respondent the Parties as per this Agreement, agreed to the arrangement of sale of the Flat to the Appellant in place of the repayment of the principle amount of Rs. 50 Lakhs. It is stated Agreement in no way shows or states that the Flat in question was towards Security. It is stated that the Appellant suppressed in the application this Genuine Transfer of Property Transaction. The Flat is ready for possession and Registry of 52 Flats in the concerned Building have already been completed. The Respondent showed Photographs of the premises before the Adjudicating Authority. Respondent claims that Respondent has continuously communicated and offered possession of the said premises to the Appellant. Letter dated 7<sup>th</sup> March 2018 (Page 290) is pointed out by the Respondent as the document by which possession was offered to the Appellant. Respondent Claims that the Agreement dated 01<sup>st</sup> October, 2016 is

substituted mode of performance of contract and repayment of principle amount by way of transfer of property which was agreed upon.

7. In a transaction of loan, Parties may agree to convert the relationship into that of Builder Buyer. Nothing prohibits the Parties. The latest admitted document between the Parties is the Agreement Dated 01.10.2016 as of Buyer-Seller. In an Application under Section 7 of Insolvency and Bankruptcy Code, 2016 it is not possible in the summary jurisdiction to enter into detailed analysis at the instance of a party that real transaction is different. Such exercise may be possible in a suit when there is dispute regarding the real nature of transaction. This however, is not possible in summary proceeding under Insolvency and Bankruptcy Code, 2016, the main object of which is not recovery of money but to see if Resolution of a Corporate Debtor is necessary.

8. The Appellant in response to the defence of the Respondent is claiming that even this Agreement dated 01<sup>st</sup> October, 2016 was only a means of creating security for the repayment of money of loan. The document does not say so & we cannot travel beyond.

9. The Adjudicating Authority after hearing the Parties and considering the documents, observed that there were various 'MoU's entered between the Parties and security was created in the form of offer of two Flats by way of mortgage but no charge as such was created. The interest amounts had been paid till June 2016. The Adjudicating Authority then referred to the contents of the Agreement

dated 01<sup>st</sup> October, 2016 to find that the Appellant had chosen to enter into such Agreement for Flat in “Kumar Golf Vistas (page 47)” and in view such Agreement, the Appellant became Home Buyer taking into considerations Section 5 (8) (f) of Insolvency and Bankruptcy Code, 2016 read with explanation. The Adjudicating Authority then referred to the contents of the Agreement dated 1<sup>st</sup> October, 2016 and calculated the period of 12 months and grace period of 180 days to find that the possession had been offered within given time. The Adjudicating Authority, held that the Application under Section 7 was filed on 4<sup>th</sup> January, 2018 which was much before the period of 12 months plus 180 days as stated in the Agreement dated 01.10.2016 and thus observed that it was premature petition and dismissed the same.

10. The Appellant claims that during the pendency of proceeding under Section 7 of Insolvency and Bankruptcy Code, 2016, the Director of the Respondent had entered into settlement, copy of which has been filed at Annexure - 4A (Page 91) and offered two Cheques. One Cheque was of Rs. 25 lakhs and another was of Rs. 45 lakhs. The Cheque of Rs. 25 lakhs was offered for encasement and the Cheque of Rs. 45 lakhs were offered as security in case, the Respondent fails to complete the Registry of one Flat of the value of Rs. 45 Lakhs.

Learned Counsel for the Appellant argued that the conduct of the Respondent needs to be seen that after execution of such document, another Director of the Respondent sent letter dated 03<sup>rd</sup> April, 2018 (Annexure A1- Diary

No. 18124) resiling from such Agreement entered into by the earlier Director Mr. Narendra Kumar and claiming that he was not well.

Although, these documents are being pointed out to us, fact remains that these do not appear to have been brought to the notice of the Adjudicating Authority as impugned order nowhere deals with the same. Even if we are to look into these documents, it can be stated that there is dispute regarding this settlement which is admittedly stated to be during the pendency of the Application under Section 7 of Insolvency and Bankruptcy Code, 2016. The same cannot be taken note of, in the absence of the same being brought on record of the Adjudicating Authority to record the settlement, if really such Agreement had been entered into.

11. The admitted document executed between the Parties, which is latest in terms of time is the Agreement dated 1<sup>st</sup> October, 2016 and considering the contents of the same, we do not find any reason to disagree with the Adjudicating Authority that after the earlier 'MoU's parties entered in to the execution of an arrangement as seen in the Builder Buyer Agreement dated 1<sup>st</sup> October, 2016. No doubt, in the primary stage, after the 'MoU' dated 30<sup>th</sup> May, 2013 two Buyer/Seller Agreements dated 03.06.2013 were executed but then that arrangement appears to have been given up when Parties entered into further three fresh 'MoU's dated 01.06.2014, 01.06.2015 and 01.06.2016 referring to earlier Cheque of loan dated 01.06.2013. In these circumstances, where record shows the latest arrangement between the Parties of Builder Buyer Agreement

dated 01.10.2016 and even possession has been offered on 7<sup>th</sup> March, 2018 (Page 290), which cannot be said to be beyond the period stipulated in the Agreement, we do not find any reason to admit the Application under Section 7 as was filed by the Appellant. We do not find any reason to interfere in the dismissal of such application.

There is no substance in the Appeal. The Appeal is dismissed. No costs.

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

[Justice A.B. Singh]  
Member (Judicial)

[Kanthi Narahari]  
Member (Technical)

**New Delhi**

Basant B.