

MOOT COURT PROPOSITION

The Insolvency and Bankruptcy Code, 2016 came into effect on 28 May, 2016. Initially as per Insolvency and Bankruptcy Code, 2016, the term “**FINANCIAL DEBT**” was defined under section 5 (8).

As per Section 5 [(8) (f)]:-

“Any amount raised under any other transaction, including any forward Sale or Purchase agreement, having the commercial effect of a borrowing”.

The above definition does not cover the allottee under a Real Estate Projects but after the Insolvency and Bankruptcy code (Second Amendment) Act, 2018, in clause “ f “ of Section 5 Sub-section 8, an explanation was inserted. Clause f of Section 5 of Sub-section 8 read as follows after the second amendment in Insolvency and Bankruptcy code:

“(f) Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;”

EXPLANATION: - For the purpose of this sub-clause, -

- (i) Any amount raised from an allottee under real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

- (ii) The expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the real Estate Regulation and development) Act, 2016.

That after insertion of the word “allottee” of real estate project in the definition of the Financial debt, various allottee’s had rushed to the Hon’ble NCLT for redressal of their grievances and most of the allottee’s were asking for refund of the hard-earned money.

That the Hon’ble NCLT (National Company Law Tribunal) after issuing notice to the developer and after providing of opportunity of being heard, appoint Interim Resolution Professional and the entire Business of the real estate was taken over by the IRP.

There are some real estate developers who are good in the Financial position to run their business; after filing the petition by the allottees before NCLT, those real estate businesses are also being affected and taken over by the IRP.

The interest of the Real estate developers are being adversely affected by the decision of the Hon’ble NCLT. Thereafter a group of the real estate developers thought of challenging the Second amendment of Insolvency and bankruptcy code to safeguard the interest of real estate developers.

MOOT COURT PROBLEM

M/s Diwan Chand Infrastructure Pvt. Ltd., (hereinafter known as “company”), is a company incorporated under the Companies Act, 1956 and engaged in the business of real estate development and currently constructing approx. 1500 flats at Noida, Uttar Pradesh. The authorized share capital of the company is Rs. 25,00,00,000/- (Rs. Twenty Five Crores). The company has worth of approx. Rs. 500/- crores.

The project is almost completed and the company is offering possession to the Allottees who had paid the entire amount of installment. The company has also executed the conveyance deed in favour of the allottees and most of the flats were occupied by the allottees.

Mr. Mukesh Sachdeva, one of the allottee, who has booked one flat of approx. value of Rs. 50,00,000/- (Rs. Fifty Lakhs Only). He has opted for installment payment plan. He has paid an initial booking amount of Rs. 5,00,000/- (Rs. Five Lakhs Only), thereafter he has paid only two installments of Rs. 2,00,000/- (Rs. Two Lakhs Each) each and defaulted in making the further payment of installments. He has paid total amount of Rs. 9,00,000/- (Rs. Nine Lakhs Only) against the flat value of Rs. 50,00,000/- (Rs. Fifty Lacs only). An agreement to Sale has also been executed between the company and Mr. Sachdeva,

detailing the terms and conditions of the agreement. As per the agreement, Mr. Sachdeva has to make the payment of installment in time otherwise the company can impose interest and penal interest on defaulted payment of installments. The possession of flat will be delivered within the period of three and half years from the date of start of construction with the grace period of six months due to force majeure.

Once Mr. Sachdeva has defaulted in making the payment of installment then the company had imposed interest and penal interest as per agreement while demanding the installments. Even after several demand of installments raised by the company, Mr. Sachdeva did not pay the installments further. Therefore, an amount of installments along with interest and penal interest become approx. Rs. 55,00,000/- (Rs. Fifty Five Lakhs Only) i.e. more than the current price of the flat in question, therefore, Mr. Sachdeva is not interested to take the possession of flat and only interested to take refund of the amount invested by him.

The grievances are being redressed in time bound manner before the NCLT, therefore, Mr. Sachdeva had approached before the Hon'ble NCLT, rather than to approach before the RERA or Consumer Forum, and filed a case against M/s Diwan Chand Infrastructure Pvt. Ltd, to initiate a corporate Insolvency Resolution process.

The Hon'ble NCLT has admitted the application and issue notice to the Corporate Debtor (M/s Diwan Chand Infrastructure Pvt. Ltd). The Corporate Debtor has appeared before the NCLT and filed its reply and taken a several preliminary objections including the Second amendment made by the Govt. including the Allottee as a Financial Creditor is in violation of Article 14 of Constitution of India.

M/s Diwan Chand Infrastructure Pvt. Ltd., has challenged the validity of the Second amendment, including Mr. Mukesh Sachdeva as Financial Creditor before the Hon'ble Supreme Court of India.

The question of law arises before the Hon'ble Supreme Court of India are as follows:

1. Whether the Inclusion of the Allottee in Second amendment is Violative of Article 14 and 19 of Constitution of India.
2. Whether the amendment is in conflict with the Provisions of RERA (Real Estate Regulatory authority) and Consumer Protection Act, where the remedies available to the allottees for refund, delay compensation and possession of flat/plot.
3. Whether the second amendment has the effect of driving to insolvency, financial solvent and healthy real estate developers/business, who do not have any defaults on debts from

other financial creditors. Is it contrary of law that even a single allottee (irrespective of the amount invested) can liquidate the financially solvent company.

4. Whether the second amendment is arbitrary in its differential impact on allottees who seek refund of monies and allottees who seek possession of the units booked by them.