

Rna Exotica Flat Purchasers ... vs Skyline Construction Company And 4 Ors on 21 February, 2024

Author: Bharati Dangre

Bench: Bharati Dangre

2024:BHC-OS:3332

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO.2877 OF 2023
IN
SUIT NO.1237 OF 2018

RNA Exotica Flat Purchasers Association	.. Applicant
IN THE MATTER BETWEEN	
RNA Exotica Flat Purchasers Association	.. Plaintiff
Versus	
Skyline Construction Company and Ors	.. Defendants

...

Mr.Venkatesh Dhond, Senior Advocate a/w. Mr. Rohan Kelkar a/w Ms. Namrata Singh, Supriya Lopes, Mr.Chandrajit Das, Aman Sadiwala i/b Rashmikan & Partners for Applicant/Plaintiff. Mr. Prateek Seksaria, Senior Advocate a/w Mr. Shadab Jan a/w. Mr. Nishant Chothani, Mr. Rohit Agarwal, Adv. Joshua Borges and Ms. Dipashri Raorane i/b Mr. Parth Shah for Respondent No.1.
Mr. Harsh Sheth i/b. MDP & Partner for Respondent No.5 -(Axis Bank Ltd.)
Ms. K.H. Mastakar for Respondent nos.2 and 3 - (MCGM).
Mr. S.K. Dhekale, Court Receiver present.

CORAM: BHARATI DANGRE, J.
RESERVED ON : 20th DECEMBER 2023
PRONOUNCED ON: 21st FEBRUARY 2024

ORDER:

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1 The above mentioned Interim Application is taken out by the plaintiff, an Association registered under the Societies Ashish 2/33 IA 2877-23format.doc Registration Act, 1860, for appointment of Court Receiver, High Court Bombay, as Receiver of the Project, to take its possession and custody, and enable the members of the Association and the representatives of the Project Management Consultant/Architect appointed by it, to carry out an inspection of the project for preparation of detailed report, as a step towards its completion. A direction is also sought to confirm the appointment of the Project Management Consultant/Architect, so that the timelines as well as the amount to be incurred in completion of the project can be assessed, since the flat purchasers, the members of the Association are desirous of funding the project for its completion, with the assistance of the Court Receiver. 2 The Interim Application is filed in the backdrop of the fact that the Plaintiff Association is formed with the presence of 224 flat purchasers out of the total 309 flat purchasers in a project referred to as 'RNA Exotica' (herein referred to as 'the project').

The defendant no.1, Skyline Construction Company is a proprietary concern of Mrs. Saranga Agarwal, and a part of 'RNA' Group. The defendant no.1 had launched the residential project 'RNA Exotica' in the year 2020 at Goregaon (West) Mumbai, projecting it to be equipped with excellent amenities, modern facilities, grand elevation, high speed elevator, swimming pool, gymnasium etc. The project comprise of four towers with basement and ground stilt, 10 levels of podium, 1 level of E- Deck and 36 floors of 2/3 BHK flats. It was projected that the project shall be completed around December, 2013.

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The members of the Plaintiffs, based upon the projections and advertisements, purchased the flats in the project upon its launch in the year 2007 upto the year 2010 and standard agreement for sale came to be executed with defendant no.1. Neither in the allotment letters, nor in the agreement for sale the date of delivery of possession was mentioned and despite substantial payments as and when demanded by the defendant no.1, the project did not reach culmination and the construction work of the project which was undertaken in the year 2010, was interrupted from time to time and it is a specific case of the Plaintiff that it was virtually abandoned since November, 2017.

All the like minded buyers of the flats in the project, joined hands and formed an association with an object of collectively agitating their rights and grievances and they also registered themselves under the Societies Registration Act, 1860.

It is a case of the plaintiff that as on date only a bare shell structure of 33 floors is constructed and it is pleaded that the members of the association belong to middle class, who have obtained loan from banks and other financial institutions and continue to repay it and four of the members have passed away, awaiting possession of the new premises and according to the plaintiff, an approximate sum of Rs. 237 Crores is made over to defendant no.1.

The defendant no.1 entered into agreements for sale and issued allotment letters to the members between 2010-2019 and there are 60 unsold units according to the original plan, which have now become 77 as few duplexes are to be Ashish 4/33 IA 2877-23format.doc constructed as single units.

It is the specific case of the plaintiff, that the project was assured to be completed and the flats were to be ready for possession around December, 2013 but passage of more than a decade, the date of completion is not attained. The last date of completion as per MAHARERA website was scheduled as 31/10/2019, but even that has surpassed and as on date what exist on the site is a bare shell structure.

3 It is in this background, the plaintiff society filed a Suit on 17/03/2018, inter alia, seeking Specific Performance of the Agreement for Sale and Notice of Motion along with Interim Applications are filed therein, seeking urgent protective orders/ directions for timely completion of the project.

Interim Application No.1011 of 2019 was filed seeking appointment of Court Receiver and the relief seeking permission to complete the project through self development and by order dated 29/11/2019, this Court appointed the Court Receiver, as a Receiver for appointing a licensed surveyor from its panel for conducting a survey. The Receiver, appointed M/s. H. Mehta and Associates, to submit its report, who surveyed the entire project. The very same order directed defendant no.1 not to create any third party rights in respect of the unsold flats and to make a disclosure of their immovable properties, bank accounts, shares, joint ventures, movable properties by filing an affidavit.

The defendant no.1, however has failed to comply with the said direction.

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Since the Covid Pandemic hit the nation and the lock down was declared, the surveyor on inspecting the project, on 3/07/2021, submitted a report to the Court, setting out the details of the accomplished work, valuation of the same, the details of the balance work, valuation and cost of the same and giving the estimation of time for completion of the balance construction. 4 In order to

complete the project in an expeditious manner, the Plaintiff consulted a Project Management Consultant (PMC) and engaged a well known PMC M/s. David Adamson India Pvt Ltd "DAIPL".

It obtained the preliminary project report outlining the proposed frame work, cost and timeline to complete the project and it was based on the information and the previous reports furnished to the PMC.

5 Present Interim Application is taken out by the Plaintiff on 12/04/2023, seeking the reliefs, which are already set out in the above paragraphs, with an aim, to conclude the project by undertaking self development, as their wait for their 'homes' turned out to be too long and they no longer intend to depend upon respondent no.1 for its completion.

By order dated 3/05/2023, the Court directed appointment of an Officer nominated by the Prothonotary and Senior Master for the purpose of carrying out survey/inspection of the project together with the representative of the Plaintiff, its project management consultant as well as defendant nos.1 to 5.

Accordingly the Court Commissioner, submitted its Ashish 6/33 IA 2877-23format.doc report on 10/07/2023, and pursuant thereto, the PMC also prepared a detailed project report dated 9/08/2023. 6 When the Plaintiff Association moved the Court for further orders, it was informed of the personal insolvency proceedings initiated against defendant no.1 and a plea of moratorium under Section 96 of the Insolvency and Bankruptcy Code (herein after referred to as IBC) is pressed into service.

It is in the wake of the aforesaid development, the question arises, whether the relief sought in the application filed by the Plaintiff deserve consideration or in the wake of the IBC proceedings initiated against the defendant no.1, the bar contemplated under Section 96 of IBC has triggered, which do not permit initiation or continuation of any legal proceedings. 7 Heard Senior counsel Mr. Venkatesh Dhond for the Plaintiff/ Applicant and Mr. Prateek Seksaria for the defendant no.1.

It is the submission of Mr. Seksaria, representing defendant no.1, that the Suit is filed inter alia seeking Specific Performance of Agreement for Sales executed with the members of Plaintiff Association as well as claiming compensation for loss caused due to failure in handing over the possession of the respective flats. Additionally, according to him the plaintiff, has also sought refund of the amounts paid by its members along with the compensation and damages, as per the ready reckoner rate.

One of the creditors of defendant no.1, has filed an Ashish 7/33 IA 2877-23format.doc application under Section 95 of IBC seeking initiation of personal insolvency proceedings against the defendant no.1 and it is the submission of Mr. Seksaria that in the wake of filing of such an application under Section 95, an interim moratorium under Section 96 of IBC has triggered, which bars initiation or continuation of any legal proceedings 'in respect of any debt' of defendant no.1, until such application is finally admitted under Section 100 of IBC.

It is therefore submitted by the learned counsel, that the present Suit filed by the Plaintiff being, in respect of 'debt', cannot proceed.

He would place reliance upon the definition of the term 'debt' as defined in Section 3(11) of IBC as well as the definition of the term 'claim', under Section 3(6). He has also placed his reliance upon the decision of the Apex Court in case of Dilip B Jiwrajka vs Union of India WP Civil No.1281 of 2021 decided on 9/11/2023, as well as the decision, in case of Pioneer Urban Land and Infrastructure Limited and anr vs Union of India and Ors (2019) 8 SCC 416.

8 Mr. Seksaria, representing the defendant no.1, would submit that in context of home buyers and flat purchasers under IBC, the Supreme Court has held that providing flats to home buyers under the Contract would constitute 'payment or re- compensation' and he would urge that the combined reading of the definitions under the IBC as well as the meaning of 'payment', would make it clear that the present Suit seeking specific performance or damages based on breach of contract, Ashish 8/33 IA 2877-23format.doc giving rise to right to payment would be a 'claim' and since the Suit filed by the Plaintiff seek a relief of possession of flat as well as refund of monies, it is nothing but a claim, which has become due and therefore, since the Suit seek Specific Performance of Contract and reasonable compensation and damages, which is a 'debt' and would fall within the ambit of IBC.

9 Mr. Seksaria would assertively submit that, in the wake of its claim for performance/compensation, being one for 'debt', the Plaintiff's status is that of a 'creditor' under Section 3(10) and therefore, once an application filed under Section 95 is admitted, the Plaintiff will register its claim with resolution professional as required under Section 103 and thereafter, the claim shall be dealt in accordance with the resolution plan under Section 105 of the IBC. It is suggested that, since the scheme under IBC provide a holistic treatment to the claims against defendant no.1, it shall ensure restructuring of the debt as well as its affairs, the Plaintiff/Applicant must fall in line and cannot continue with the Suit and press for the reliefs therein. 10 In contrast, the learned senior counsel Mr. Venkatesh Dhond, do not dispute the fact that the proceeding have been filed against Mrs. Agarwal under Section 95 of the IBC but he would contest the argument of Mr. Seksaria, by submitting that Section 96 (1) which relate to an interim moratorium extends only in relation to 'debts' and it provide a deemed stay and bar in instituting, of only such actions/proceedings, which are in respect of any 'debt'.

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Mr. Dhond contradict the submission, that the present Suit, which is for Specific Performance and the relief sought therein would amount to a 'debt' and he has relied upon the decision of the Apex Court in case of Kesoram Industries and Cotton Mills Ltd. vs. Commissioner of Wealth Tax (Central Calcutta) AIR (1996) SC 1370, which has defined the term 'debt' and it is his submission that, the present Suit is for Specific Performance of a Contract and is not for a recovery of 'debt due'.

Mr. Dhond also make an attempt to distinguish the observations of the Apex Court in case of Pioneer Urban land and Infrastructure Ltd and Anr (Supra) and he would want me to read the observations, in the light of the facts involved and the arguments canvassed and drawing a distinction, he would submit that the Court in the facts involved, was considering the scope and ambit of the expression 'financial debt' and the observations must therefore, be construed accordingly. It is his specific submission, that when the provisions of Specific Relief Act, 1963 are carefully read, it is abundantly clear that, in order for the Plaintiff's to claim that payment is 'due' to them 'in law', they first have to show that they are 'entitled to compensation' outright; or that in order 'to satisfy the justice of the case... some compensation... should also be made to them'.

According to him there is no liability or obligation in respect of a claim which is due in law to the Plaintiffs today and what they have today is mere expectancy of a 'sum payable upon a contingency' and no such contingency has yet occurred.

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Further by relying upon a decision of the Apex Court in case of Swiss Ribbons Pvt Ltd and anr vs. Union of India and ors, (2019) 4 SCC 17, he would urge that even assuming for the sake of it, the Plaintiffs have a 'claim' as against the defendant no.1, until the same becomes 'due' no question arises, which may be said to be 'in relation to any debt'; nor the action in the Suit be described as one 'in respect of any debt'.

In short, the submission of Mr. Dhond is, that IBC has distinguished between the two terms 'debt' and 'claim', as they are not synonymous and though the expression 'debt' would include a 'claim', it do not include every claim and every claim is not a 'debt'.

In the wake of the above, it is submission of Mr. Dhond that there is no embargo in proceeding with the Interim Application filed in the Suit, as it is not relateable to any 'Debt' 11 In order to appreciate the impact of the interim moratorium imposed, upon an application filed by creditor to initiate insolvency resolution process under the IBC upon the Suit instituted by the Plaintiff for Specific

Performance, it is necessary to refer to the reliefs sought therein.

The Complaint in Suit No.1237 of 2018 filed for Specific Performance comprises of the following reliefs:

a) That this Hon'ble Court be pleased to order, direct and declare that the said agreement for sale and/or the agreement evidenced by the allotment letter (Exhibit - 'C, C-1 and C-2') allotting flats to the members of the plaintiff Association in the project 'RNA EXOTICA' constructed by the Defendant No.1 as per the specifications in the marketing brochure....is a valid, legal, concluded and binding upon the Defendant No.1 and 2;

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b) That this Hon'ble Court be pleased to order, decree and direct the Defendant No.1 to specifically perform the said agreement for sale and/or the agreement evidenced by the allotment letter (Exhibit - "C, C-1 and C-2") allotting flats to the members of the plaintiff in the project 'RNA EXOTICA' constructed by the Defendant No.1 as per the specifications in the marketing brochure on the said property and hand over the respective flats by completion of the project in a time bound manner;

c) That the Hon'ble Court be pleased to declare that the said agreement for sale and/or agreement evidenced by the allotment letters (Exhibit "C, C-1 and C-2") and the flats mentioned therein creates vested right in the members of the Plaintiff Association in respect of the suit flats along with one parking space each in the building of the said project i.e. 'RNA EXOTICA' constructed/ to be constructed on the said property;

(g) This Hon'ble Court be pleased to order and decree the Defendant No.1, its Directors/ partners, servants, officers and agents jointly and severally to pay the Plaintiff reasonable compensation and damages in the facts and circumstances of the case, which has been caused to the Plaintiff due to the not handing over possession of the suit flat and not performing their obligations under the agreement evidenced by the confirmation letter and future losses and damages as may be quantified, however adhoc compensation being quantified at Rs. 1,00,000/- per member per month of the Plaintiffs association of members;

(i) Without prejudice to the aforesaid and in the alternative only in the event of the relief of specific performance not being granted by this Hon'ble Court then, the Defendant No.1, its Directors/partners/ officers/agents/servants jointly and severally be liable to repay to the Plaintiff paid amounts with escalation calculated at the current market value of the suit flat along- with compensation and damages as may be computed as per the ready reckoner;"

j) Without prejudice and in the alternative only in the event of the relief of specific performance not been granted by this Hon'ble Court, the Defendant No.1, its Directors/partners/officers/agents/servants jointly and severally be ordered and decreed to hand over a flat of the same/equivalent area and of the same market value in the nearby vicinity of the Defendant its partners, affiliates or sister concerns as per

the same terms and conditions of the agreement between the parties as inter alia evidenced by the Ashish 12/33 IA 2877-23format.doc confirmation letter and amenities and specifications promised in the marketing brochure;"

12 In the wake of the reliefs to the above effect, it is necessary to ascertain whether the claims in the Suit, are in relation to a 'debt'. For determining it to be so it is necessary to deliberate upon the term 'debt', for the purpose of IBC.

The IBC code, 2016 is an Act to consolidate and amend the laws relating to reorganization and Insolvency Resolution of corporate persons, partnership firms and individuals in a time bound, manner for maximization of value of assets of such persons and to promote entrepreneurship, availability of credit and balance the interest of all stakeholders.

The Code has defined certain terms and it is necessary to reproduce the relevant one:

3(6) "claim" means----

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

(30) "secured creditor" means a creditor in favour of whom security interest is credited;"

13 The IBC set out the process for Insolvency and Liquidation of corporate debtors and the process to be followed Ashish 13/33 IA 2877-23format.doc upon initiation of corporate insolvency is set out in the Code, which can be either by a financial creditor or an operational creditor. The code also set out the process contemplated upon initiation of corporate insolvency and time limit for its completion.

Section 94 in the code is a provision for an application by the debtor to initiate Insolvency Resolution Process and it contemplate that a debtor who commits a default may apply either personally or through a Resolution Professional, to the adjudicating Authority for initiating Insolvency Resolution Process (IRP), by submitting an application and this application shall be

submitted in respect of 'debts'.

Section 95 prescribe the process to be adopted, when an application is made by a creditor for initiation of Insolvency Resolution. It contemplate that a creditor may apply either by himself or jointly with other creditors or through a Resolution Professional to the adjudicating authority for initiating an Insolvency Resolution Process by submitting an application.

Upon such an application being made Section 96 provide for interim moratorium and the section reads thus:

"96. Interim moratorium (1) When an application is filed under section 94 or 95-

(a) an interim moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period-

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and Ashish 14/33 IA 2877-23format.doc

(ii) the creditors of the debtors shall not initiate any legal action or proceedings in respect of any debt. (2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application. (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

14 From reading of the above provision it is evident that when an application is filed either by a debtor, who is in default or by a creditor, an interim moratorium shall come into force, on the date of the application, in relation to all the debts and it shall cease to have effect, on the date of admission of such an application and what is prohibited during the period of interim moratorium is any legal action in pending proceeding, in respect of any debt and upon imposition of moratorium, it shall be deemed to have been stayed.

15 At this stage, it is relevant to note another provision in the code in form of Section 14, which provide for imposition of moratorium on admission of the application under Section 7 or Section 9 or Section 10 and it is a power to be exercised by the adjudicating authority, declaring a moratorium for the purpose referred to in Section 14 and causing a public announcement of the initiation of CIRP and calling for submissions of claim and for appointment of an interim Resolution Professional, in the manner provided in Section 16. Section 14 of IBC read as under:

"14 Moratorium (1) Subject to provisions of sub-sections (2) and (3) of the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium

for prohibiting all of the Ashish 15/33 IA 2877-23format.doc following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action of foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]"

By virtue of sub-section (4) of Section 14, the order of moratorium shall have effect from the date of such order till the completion of Corporate Insolvency Resolution Process.

16 Reading of the above two provisions i.e. Section 14 and Section 95, which relate to imposition of a moratorium, at two different stages of the proceedings, its effect is clearly spelled out.

The purpose of moratorium include keeping the Corporate Debtor's assets together during the Insolvency Ashish 16/33 IA 2877-23format.doc Resolution Process and facilitating the orderly completion of the process envisaged during the Insolvency Resolution Process and ensuring that the company may continue as a going concern, while the creditors take a view on the resolution of default. It also ensures that multiple proceedings are not taking place simultaneously and it helps obviate the possibility of potentially conflicting out comes of related proceedings and ensure that the resolution process is collective one.

An order of moratorium inter alia prohibits institution or continuation of Suits in legal proceedings against the corporate debtors to ensure disposal of any assets of the corporate debtor and the debt enforcement action under different statutes. The moratorium on initiation and continuation of legal proceedings, including debt enforcement action, ensures a standstill period during which the creditors shall not resort to individual enforcement action, as it may be frustrate the object of Corporate Insolvency Resolution Process. The prohibition on disposal of the corporate debtors assets on the other hand ensure that the corporate debtor on its management do not transfer its assets, thereby stripping the corporate creditor of its valid claim during the process.

17 In the scheme of the IBC, it is evident that upon an application being filed to initiate Insolvency Resolution Process, an interim moratorium shall commence in relation to all 'debts', the term being assigned a specific meaning, i.e. a liability or obligation in respect of a claim which is due from any person and which shall include a financial and operational debt.

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The term claim is also assigned a meaning, in section 3 (6) of the code and that will cover a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It shall also cover a right to remedy for breach of contract, if such breach give rise to a right of payment, whether or not such right is reduced to judgment, fixed, matured, un-matured, disputed, undisputed, secured or unsecured.

18 The moot question, which arises for consideration in the wake of the arguments of the respective senior counsel is, whether the Suit filed for Specific Performance by the Plaintiff is a claim set up in respect of a 'debt' and if it is so, then on an application being filed for initiation of the Insolvency Resolution Process, there shall be a bar to continue the legal action and the pending proceedings, in respect of any debt, shall be deemed to have been stayed.

19 The term 'Debt' as per the Cambridge dictionary is understood as something, especially money, i.e. owed to someone else or the state of owing something.

In Union of India vs. Raman Iron Foundry (1974) 2 SCC 231, the word 'debt' standing alone, was held as applicable to a sum of money, which has been promised at a future date as to a sum now due and payable.

Understanding the term in reference to 'debt owing and debt due' in clause no.18 of general conditions of contract contained in standard form of contract, under the caption 'Recovery of sums due', the term received the following Ashish 18/33 IA 2877-23format.doc interpretation:

"9. The first thing that strikes one on looking at Clause 18 is its heading which reads: 'Recovery of Sums Due'. It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clause and affording a key to a better understanding of its meaning. The heading of Clause 18 clearly suggests that this clause is intended to deal with the subject of recovery of sums due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a 'debt', for a sum due is the same thing as a debt due. The classical definition of 'debt' is to be found in *Webb v. Stenton* where Lindley, L.J., said: a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in futuro that is immaterial. There must be an existing obligation to pay a sum of money now or in future, The following passage from the judgment of the Supreme Court of California in *People v. Arguello*, which was approved by this Court in *Kesoram Industries v. Commissioner of Wealth Tax*, clearly brings out the essential characteristics of a debt: (at p. 702) Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti, it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti, or in other words, which is presently payable. Recovery of such sums is the subject matter of Clause 18 according to the heading. That is the dominant idea running through the entire Clause 18."

20 The Apex Court was dealing with a contract for supply of certain materials to the Government of India and upon the respondent submitting its bid, it was subjected to the General Conditions of Contract (GCC) contained in the standard form of Ashish 19/33 IA 2877-23format.doc contract. The Performance of contract ran into problem and dispute arose between the parties giving rise to a claim by both, the Government intimating the respondent that in case of failure to pay the damages within stipulated time, the amount would be recovered from its pending bills in respect of other contracts. Consequently, the respondent filed an application in the High Court under Section 20 of the Arbitration Act for appointment of arbitrator, this application was allowed and accordingly the arbitration proceedings were initiated.

During the pendency of the Arbitral proceeding, apprehending that the amounts due and payable by the appellant would be appropriated towards the recovery of the amounts of damages, the respondent filed an Interim Application under Section 41 r/w second schedule of the Arbitration

Act, praying for status quo and restraining the Union of India from recovering its claim for damages from the pending bills. The High Court issued an injunction accordingly, which was challenged before the Apex Court.

By specifically referring to clause 18, which provided a mode for recovery of sums due, it was held that the words 'any claim for payment of a sum of money' occurring therein, must be read not in isolation but in the context of the clause, which suggested that it intended to deal with the subject of recovery of sum, as due.

21 Referring to the Indian scenario, where there is no qualitative difference in the nature of claim, whether it is for liquidated damages or for un-liquidated damages, it was held Ashish 20/33 IA 2877-23format.doc that a claim for un-liquidated damages does not give rise to a debt, until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, it was held that the party committing the breach does not eo instanti incur any peculiar obligation, nor does the party complaining of the breach becomes entitled to a 'debt' due from the other party and the only right, which the party aggrieved by the breach, the right to sue for damages. In paragraph 11 of the report, Justice P.N. Baghwati (as his Lordships was then) held as under:

"A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of Clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so."

22 Upon amendment in the IBC, 2016, the term 'debt' as well as 'financial debt' once again garnered attention of the Apex Court in case of Pioneer Urban Land and Infrastructure Ltd. (supra) in light of the second amendment Act, of 2018, with reference to the allottees of real estate/ home buyers.

Called upon to determine the scope of 'financial Ashish 21/33 IA 2877-23format.doc debt' by insertion of clause (f), the Court considered the meaning of the term 'debt and claim' assigned in Section 3(11) and 3(6) of the Code, which was construed along with the term 'default', as defined in section 3(12).

Para 68 and 69, contain the pertinent observations which are as below:

"68. Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. The learned counsel for the petitioners relied upon the judgment in Union of India v. Raman Iron Foundry, and, in particular relied strongly upon the sentence reading: (SCC p. 243, para 11)

11... Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority."

69. It is precisely to do away with judgments such as Raman Iron Foundry that "claim" is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgment. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order. The expression "payment" is again an expression which is elastic enough to include "recompense", and includes repayment for this purpose, see H.P Housing & Urban Development Authority v. Ranjit Singh Ram (at paras 13 and 14 therein), where Webster's Comprehensive Dictionary (International Edn.), Vol. 2 and Law Lexicon by P Ramanatha Aiyar (2nd Edn, Reprint) are quoted."

23 Reading of the aforesaid, and the reliance upon Raman Iron Foundry (Supra), it is clarified that the construction of the term 'claim' to mean a right to payment or right to remedy for a breach of contract, a debt is construed to be a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, notwithstanding that there is no adjudication of the breach, followed by a judgment, decree or order and it is clarified that the expression payment is elastic enough to include 'recompense' and include 're-payment'.

24 The submission of Mr. Seksaria that for the purposes of IBC, the meaning of the term 'debt' has received an expanded interpretation from the classical meaning of 'debt' in Raman Iron Foundry, definitely deserve attention and by focusing on the purpose of IBC, being to consolidate all the claims of the creditors, I find sufficient justification in accepting the wider interpretation.

25 The Apex Court in case of Dilip Jiwrarka (Supra) has analyzed the scheme of the code and once again propounded upon the impact of moratorium under Section 14 versus Interim moratorium under Section 96 of chapter III and the clarification is offered to the following effect.

"57. Section 96, as its marginal note indicates deals with an interim-moratorium. In Terms of Section 96, the interim moratorium takes effect on the date of the application. In other words, the very submission of an application under Section 94

or Section 95 triggers the interim moratorium which then ceases to have effect on the date of the admission of the application (under Section 100). The consequences which flow from an interim moratorium are specified in clause (b) of sub-section (1) of Section 96. The impact of the interim-moratorium under Section 96 is that a legal action or proceeding pending in respect of any debt is deemed to have been stayed and the creditors or the debtors shall not initiate any legal action or proceedings in respect of any debt. The crucial words which are used both in clause (b)(i) and clause (b)(ii) of sub-section (1) of Section 96 are "in respect of any debt". These words indicate that the interim- moratorium which is intended to operate by the legislature is Ashish 23/33 IA 2877-23format.doc primarily in respect of a debt as opposed to a debtor Clause

(b) of sub-section (1) indicates that the purpose of the interim-moratorium is to restrain the initiation or the continuation of legal action or proceedings against the debt

58. This must be contra-distinguished from the provisions for moratorium which are contained in Section 14 in relation to the CIRP under Part II. Section 14(1)(a) provides that on the insolvency commencement date, the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including proceedings in execution shall stand prohibited by an order of the adjudicating authority. Clause (b) of sub-section (1) of Section 14 empowers the adjudicating authority to declare a moratorium restraining the transfer, encumbrance, alienation or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein.

Significantly, the moratorium under Section 14 operates on the order passed by an adjudicating authority. The purpose of the moratorium under Section 96 is protective. The object of the moratorium is to insulate the corporate debtor from the institution of legal actions or the continuation of legal actions or proceedings in respect of the debt."

26 The bone of contention between the parties is, whether any money in the nature of debt has become payable and therefore, 'due' as on date.

As per Mr. Dhond the term 'claim' would cover right to payment and also right to remedy for breach of contract if such breach give rise to a right of payment, but it necessarily must be capable of being monetized. Mr. Dhond has also relied upon Section 101 of the IBC, which has clarified the effect of moratorium and according to him, the provision make it clear that any pending legal action or proceedings in respect of 'any debt' shall be deemed to have been stayed and the creditors thereupon are prohibited from initiating any legal action/ proceeding, in respect of any 'debt' and similarly the debtor is also restrained from transferring, alienating, encumbering or Ashish 24/33 IA 2877-23format.doc disposing off any of his assets or his legal rights or beneficiary interest therein.

27 The IBC is enacted with a predominant object to bring insolvency law in India under a single unified umbrella with the object of speeding up insolvency process. The scheme of the Code is to make an attempt, by divesting the erstwhile management of powers and vesting it in a professional agency, to continue the business of corporate body as a going concern until a resolution plan is drawn up, in which even the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. The process is expected to be carried out within a stipulated period with a permissible maximum extension or else the chopper comes down and the liquidation process begins.

The process contemplate submission of a resolution plan to the resolution professional, who shall examine the plan to see if it conforms to the requirement of the statute and once this stage is over, it shall be presented to the committee of creditors for its approval. Which will be then approved by a prescribed number of votes.

The resolution plan submitted by the prospective resolution applicant is expected to provide for measures as may be necessary for the insolvency resolution of the corporate debtor for maximization of the value of its asset, which may include transfer or sale of assets or part thereof, whether subject to security interest or not. In *Innovative Industries Ltd vs ICICI Bank & Anr* (2018) 1 SCC 407, the scheme of the various Ashish 25/33 IA 2877-23format.doc provision of IBC is discussed in length with reference to the 'debt' and the relevant observation is to the following effect:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non- payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services."

28 Further in paragraph 32, the nature of moratorium and its effect is also pronounced to the following effect:

"32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the Ashish 26/33 IA 2877-23format.doc resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors."

29 Hence it is noted that one of the dominant objects of IBC is to see that an attempt is made to revive the corporate debtor and make it a running concern and for that purpose, the resolution applicant shall prepare a resolution plan, which will receive an approval before it is placed before the company of creditors and once it receives the approval through it, it is binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders and the moratorium order passed by the adjudicating authority shall cease to operate, once the adjudicating authority approves the resolution plan.

The aforesaid object of the Code shall be borne in mind while the arguments of Mr. Dhond are to be appreciated. 30 Keeping this in mind the intent of the legislation, the terms defined therein must be assigned the intended meaning.

Debt is understood to mean a liability or obligation in respect of a claim, which is due from any person and this include financial debt and operational debt.

Debt is thus a liability or obligation in respect of a claim and claim is understood to mean right to payment, as well as right to remedy for breach of contract, if such breach gives rise to right of payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

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The Suit for specific performance with the reliefs

prayed therein, may result either in grant of specific performance or it may result in payment of compensation, as the Plaintiff Association has sought completion of the project by granting Specific Performance of the Agreements for Sale. It is the specific claim, that the Association till date, has paid an amount of approximately Rs.237 crores to the respondent and the background facts disclose that some flat purchasers filed complaint before the RERA Authority, which had passed an order of refund of amount and infact a recovery warrant was issued in execution of the RERA order.

The Plaintiff by default, would therefore be entitled for damages, in case if the Specific Performance of the Agreement cannot be granted by the Court, though the court shall consider the prayer for grant of Specific Performance.

Though, at present it cannot be said with certainty as to what would be the out come of the Suit for Specific Performance, one thing is certain that it is a claim i.e. a remedy is invoked for breach of contract and its breach give rise to a right of payment, whether or not such right is reduced to judgment, or not been crystallized, it will not cease to be a 'claim' giving rise to a liability or obligation in form of a 'debt'.

A simple but clear definition of the word 'debt' is found in Webb vs. Stenton (1883) 11 QBD 518, 527, wherein Lindley L.J. declared "... a debt is a sum of money, which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti, solvendum in futuro."

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In Kesoram Industries and Cotton Mills Ltd. (supra),

it is categorically held that a debt, uncertain in amount which will become certain when accounts are finally dealt with by Insurance Committee, though there was a 'debt' at a material time, though it was not presently payable an amount was not ascertained. The observations to that effect read thus:

"23. We have briefly noticed the judgments cited at the Bar. There is no conflict on the definition of the word "debt". All the decisions agree that the meaning of the expression "debt" may take colour from the provisions of the concerned Act : It may have different shades of meaning. But the following definition is unanimously accepted:

"a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation : debitum in praesenti, solvendum in future".

The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in praesenti or in future till the contingency happened. But if there is a debt the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount. In short, a debt owed within the meaning of Section 2(m) of the Wealth Tax Act can be defined as a liability to pay in praesenti or in future an ascertainable sum of money." 33 The further discussion on the point, where a debt is established in praesenti also throws a light on the ascertainability of the amount and whether it is a necessary concomitant of debt and the following observation has a bearing on the issue before me and it reads thus:

"16. The Kings Bench Division in *Seabrook Estate Co. Ltd. v. Ford*, held that money on the hand of a Receiver for debenture holders was not a debt owing or accruing, and, therefore, was not liable to attachment. But Hallett J. accepted the following proposition laid down by Rowlatt, J. In *O'Driscoll v. Manchester Insurance Committee*:

"...where a debt is established in presenti, it is not sufficient objection to say that the exact amount of debt will be the subject of a calculation which has not yet been made and, it may be, cannot yet be made".

This question fell to be decided again in *Dawson v. Preston (Law Society:*

Garnishee). The question there was whether sum representing damages paid to legal aid fund could be attached by a creditor of a legally aided plaintiff. At the time when the garnishee order was sought to be issued, a part of the decree Ashish 29/33 IA 2877-23format.doc amount was with the Law Society, subject to any charge conferred on the Law Society to cover the prescribed deductions which remained to be quantified, e.g. deduction for the taxed costs of the action. The Court held that there was an existing debt although the payment of the debt was deferred pending the ascertainment of the amount of the charge in favour of the Law Society Ormerod, J., observed;

".... that is merely a question of ascertaining the debt why'd has to be paid over to the assisted person and does not prevent that debt from being an existing debt at the material date."

This decision also recognized that, if there was a liability in presenti, the fact that the amount was to be ascertained did not make it any less a debt."

34 The Apex Court in *State Bank of Bikaner and Jaipur vs M/s Ballab Das and Co. and Ors* AIR (1999) SC 3408, while dealing with the term 'debt' under the Recovery of Debts Due to Banks and

Financial Institutions Act of 1993 has construed the term debt 'to mean a liability, which is alleged as due from any person to a bank or a financial institution or by consortium of banks has held that it would be immaterial whether the liability is secured or unsecured or whether it is payable under a decree or an order of civil court or otherwise, however it should be subsisting and legally recoverable on the date on which the proceedings have initiated for recovering the same.

Dealing with a case, where the appellant bank had filed two Suits during the pendency of which, the Debt Recovery Act 1993, came into force and the bank had pleaded that the respondents had borrowed the money and the amounts payable have not been paid and the amount remaining outstanding, the question arose for determination, whether on establishment of the tribunal at Jaipur, the bank would have been required to file an application for recovery of the outstanding, before the tribunal in the wake of the bar created under Section 18.

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Since the Suits filed by the bank were pending, upon the establishment of the tribunal Section 31 of the Act, became applicable to those Suits and they were to be treated as transferred to the tribunal and it was argued that the applications made by the bank for getting the Suits transferred to DRT were prematured, till the Court decides that the amounts are still due and payable to the bank and they cannot be treated as suits for recovery of debts.

Repelling the said contention, and on consideration of the definition of the term debt under Section 2(g) of the Act, the Apex Court observed thus:

"7. According to the definition, the term 'debt' means liability which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions. It should have arisen during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force. The liability to be discharged may be in cash or otherwise. It would be immaterial whether the liability is secured or unsecured or whether it is payable under a decree or an order of any civil Court or otherwise. However, it should be subsisting and legally recoverable on the date on which proceedings are initiated for recovering the same."

8. The important words in the definition "alleged as due"

have been overlooked by the High Court and, therefore, it has erroneously held that unless the amounts claimed by the bank are determined or decided by a competent forum they cannot be said to be due and would not amount to 'debt' under the Act. What was necessary for the High Court to consider was whether the bank has alleged in the suits that the amounts are due to the bank from the respondents, that the liability of the respondent has arisen during the course of its business activity, that the said liability is still subsisting and legally recoverable.

9. The High Court should have appreciated that the bank has alleged in the suits- complaints that the respondents had borrowed money for the goods exported under the bills Ashish 31/33 IA 2877-23format.doc referred to in the suits and that the amounts payable under the bills have not been paid by the foreign buyer to the bank under the agreement between the parties and, therefore, they have remained outstanding. This is the cause of action disclosed in the complaints. Obviously, if this cause of action had arisen after the establishment of the Tribunal and not in the Civil Court and the bar created under Section 18 would have also applied. As the suits were filed by the bank before establishment of the Tribunal and were pending in the Civil Court when the Tribunal came to be established under the Act, Section 31 became applicable to those suits and they shall have to be treated as transferred to the Tribunal on and from the date the Tribunal was established.

35 In the Suit filed seeking specific performance under the Specific Relief Act, 1963, it is open for the plaintiff to claim compensation for breach of a contract in addition to such performance and as per Section 21 of the Act, if in any such Suit a Court decides that a specific performance ought not to be granted but there is a contract between the parties, which has been breached by the defendant and that the plaintiff is entitled to compensation for that breach, it shall be within the powers of the Court to award such compensation accordingly. There is another contingency contemplated under sub-section (3) of Section (21) to the effect that if, in any such Suit, the Court decides that the specific performance ought to be granted, but that is not sufficient to satisfy the justice of the case, and some compensation for breach of the contract should also be made to the plaintiff then it shall award such compensation.

Though the aforesaid provision is to be read with a rider that no compensation shall be awarded unless the plaintiff has claimed so but the proviso contemplates that at any stage of the proceedings the court may allow the plaintiff to amend the Ashish 32/33 IA 2877-23format.doc complaint, for including a claim for such compensation.

What is significant is the explanation appended to the said section which reads thus:-

"The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by the said section".

36 The perusal of the complaint along with the relief sought therein would reveal that the suit is filed by the plaintiff association, for a declaration that the agreements for sale, and or the agreement evidenced by the allotment letter, allotting flats to its members in the project 'RNA Exotica'

constructed by the defendant no.1 to be valid, legal, concluded and binding and hence calling upon the defendant no.1 to perform the said agreement and to hand over the respective flats on completion of the project in time bound manner, in addition, the plaintiff also seek an order and decree for compensation and damages, owing to the Plaintiff, due to the non handing over possession of the flats and not performing their obligations, under the agreement evidenced by the confirmation letter and for future losses and damages, quantified, at Rs. 1,00,000/- per member per month to each member of the Plaintiffs association.

In the event of the relief of specific performance not being granted, it is prayed that Defendant No.1, shall repay to the Plaintiff paid amounts with escalation calculated at the current market value of the suit flat along-with compensation and damages as may be computed as per the ready reckoner.

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In the wake of the aforesaid, it is evident that upon the relief being granted to the aforesaid effect, it would amount to a 'debt' and if the defendant no.1 is undergoing the CIRP proceedings, then the claim of the plaintiff shall not be continued to be adjudicated in a forum other than the NCLT, which at the end of the process, would draw a resolution plan as, contemplated under Section 30, which shall be approved under Section 31 and bind the corporate debtor and its employees, members, creditors to whom a debt in respect of payment of dues arising under any law for the time being in force and since the Plaintiff Society would be one such creditor, it must ultimately fall in line with the resolution plan.

For the aforesaid reasons, the term debt cannot be given a constricted meaning particularly in the wake of the laudable object underlying the IBC. For this reason, when an application is filed against defendant no.1 for initiation of Insolvency Resolution Process, with an interim moratorium being imposed, the interim application filed by the plaintiff do not deserve consideration and must await the outcome of the proceedings before the National Company Law Tribunal (NCLT), Mumbai.

(SMT. BHARATI DANGRE, J.) Ashish