(2020) 01 NCLT CK 0037

In the National Company Law Appellate Tribunal

Case No : (IB) No. 2090/ND Of 2019

Akriti Agnihotri And Ors — APPELLANT

Vs

Blackberry Realcon Pvt. Ltd. — RESPONDENT

Date of Decision : 27-01-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 2(2), 47, 144
Insolvency And Bankruptcy Code, 2016 — Section 5(8), 5(8)(f)

Citation : (2020) 01 NCLT CK 0037

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : Piyush Singh, Prateek Vats, Aditya Parolia, Aditi Sinha, Sakshi Arora, Manav Sharma, Abdhesh Chaudhary

Final Decision : Disposed Of

Judgement

Abni Ranjan Kumar Sinha, J

An application bearing No. CA-771/2020 has been filed on behalf of the Corporate Debtor/respondent.

We have heard the Ld. Counsel for applicant as well as Corporate Debtor who filed the present CA-771/2020.

Ld. Counsel for Corporate Debtor raised some objections, that in view of the Ordinance which was promulgated on 28.12.2019, some amendment is made regarding the initiation of the CIRP on behalf of the allottee of flat buyer, who is the financial creditor and comes under the definition of Section 5(8)(f) explanation of the IBC and against that ordinance one writ is filed before the Hon'ble Apex Court in WP (Civil)-26/2020, in which Hon'ble Apex Court held that "the status quo, as of today, with respect to the pending applications, shall be maintained in the meanwhile". She further submitted that under such circumstance, no order is required to be passed on the prayer made by the applicant during the pendency of the above mentioned writ petition.

On the other hand, Ld. Counsel for applicant submitted that earlier applicant was allotee but subsequently settlement arrived between the parties. Corporate Debtor vide letter dated 25.01.2019, on the surrender request of the applicant agreed to refund the amount paid by applicant to the Corporate Debtor i.e. Rs. 59,95,120/-, within 180 days from the date of issuance of letter dated 25.01.2019, to the applicant without deduction/penalty/interest.

He further submitted that in view of that agreement, now, he does not come under the definition of Section 5(8)(f) explanation of the IBC, 2016 rather he comes under the definition of Section 5(8) which shall be financial debt, a debt alongwith the interest. He further submitted that applicant does not come under any of the clause a to i of Section 5(8) of the IBC, rather he comes under Section 5(8) alone. He further submitted that on the similar situation the Co-ordinate Bench of NCLT, Allahabad in the case on CP No. 190/ALD/2018 held that "Applicant has filed present application for the alleged breach of compromise agreement dated 19.07.2017 arising out of Company Petition No. 43 of 2012 which got dismissed as infructuous vide order dated 07.08.2017 and it will be treated as decree of the Court". He further submitted that since it is a compromise agreement therefore, it can be treated on the basis of that decree, so, the petitioner is to be declared financial creditor and the debt is financial debt and he comes under the definition of Section 5(8) of the IBC.

Now, in the light of the submissions raised on behalf of the parties without going into the merit of the case, we would like to decide the issue whether in view of the matter pending before the Hon'ble Apex Court in WP (Civil)-26/2020 in which Hon'ble Apex Court held that "the status quo, as of today, with respect to the pending applications, shall be maintained in the meanwhile", this adjudicating authority can proceed further on the contention of the application that he does not come under Section 5(8)(f) explanation rather he comes under Section 5(8) alone.

Before considering the submissions made on behalf of the parties we would like to refer the page 25 of the application in which he mentioned that "It is further submitted that upon promulgation of the Insolvency & Bankruptcy (Second Amendment) Act, 2018, explanation to Section 5(8)(f) has been added to the IBC, 2016 so as to include any amount raise from an allottee under a real estate project within the purview of financial debt. The said explanation to Section 5(8)(f) clearly states that amount raised in real estate projects from allottees shall be deemed to be an amount having the commercial effect of a borrowing. It is further stated that this position of law and constitutional validity of the said provision has been upheld by the Hon'ble Supreme Court of India in Pioneer Urban Land & Infrastructure Limited and Anr. Vs. Union of India & Ors. Writ Petition (Civil) No. 43 of 2019.

On the basis of averment made in the application filed on behalf of the applicant at page 25 of the application, we find that the application claims himself to be the Financial Creditor on the basis financial debt under Section 5(8)(f) explanation, but now he has changed his stand and claims himself to be financial creditor, but not under Section 5(8)(f) explanation rather under Section 5(8) of the IBC. Therefore, we would like to refer Section 5(8), which is quoted below:-

Section 5(8): financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis; if) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Mere plain reading of the provisions shows that financial debt means a debt alongwith the interest, if any which is disbursed against the consideration for the time value of money, and includes clause a to i of Section 5(8) of the IBC, that has been discussed by the Hon'ble Apex Court in the case of "Pioneer Urban Land & Infrastructure Limited and Anr. Vs. Union of India & Ors. Writ Petition (Civil) No. 43 of 2019", which is also referred at page No. 25 of the application, which shows that applicant placed reliance upon the decision that is the reason he quoted that decisions in the application. The Hon'ble Apex Court in that decision held that:-

61. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money.

"Disbursement" is defined in Black's Law Dictionary (10th ed.) to mean: "1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose." In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the 'Dictionary of Banking Terms' (Second edition) by Thomas P. Fitch in which "time value for money" was defined thus: "present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis." That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

66. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (Second Edition, 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out herein below:

"borrow-vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard, to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole: make sure you borrow enough."

"commercial, -adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television."

In view of the aforesaid decision upon which the petitioner placed reliance, when we shall consider the case in hand then we find that the claim of the petitioner is that he entered into the agreement with the developer to buy commercial unit in project namely "Paras Sqaure" which was developed by the Corporate Debtor and accordingly, he paid the installment.

Further the case of the applicant is that thereafter in view of letter dated 25.01.2019 the Corporate Debtor agreed to refund the amount paid by the Financial Creditor and on the basis of that present application is filed for the defaulted amount. Therefore, we are of the considered view that the defaulted amount, which Financial Creditor wanted to get back from the Corporate Debtor, was the amount deposited as an installment under the Real Estate Project namely "Paras Square". Therefore, we are unable to accept the contention of the applicant he does not come under the definition of Section 5(8)(f) explanation.

So far the next contention of the applicant that the present application is filed on the basis of compromise decree is concerned.

At this juncture, we would like to refer the definition of decree, the same is quoted below:-Definition of Decree:-

Section 2(2) of the CPC defines that "A decree is the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144 but shall not include:-

(i) Any adjudication from which an appeal lies as an appeal from an order

(ii) Any order of dismissal for default

Explanation:- The decree is preliminary when further proceedings have to be taken before the suit can be completed disposed of. It is final when such adjudication completely disposes of the suit. IT may be partly preliminary or partly final."

At this juncture, we would like to refer the decision of the co-ordinate bench of NCLT, Allahabad in the case on CP No. 190/ALD/2018 held that "Applicant has filed present application for the alleged breach of compromise agreement dated 19.07.2017 arising out of Company Petition No. 43 of 2012 which got dismissed as infructuous vide order dated 07.08.2017 and it will be treated as decree of the Court" and upon which Ld. Counsel for applicant placed reliance is concerned, in course of arguments we have notice in that decision definition of decree was not discussed by them. Therefore, we are unable to accept the view taken by the co-ordinate bench of NCLT Allahabad that the compromise arrived between the parties treated as decree likewise the letter dated 25.01.2019 will also be treated as decree.

In course of arguments. Ld. Counsel for applicant fairly conceded that vide letter dated 25.01.2019 which is annexed 1 page 12 of the application does not come under the definition of decree. We are of the considered view that letter dated 25.01.2019 shall not be treated as decree.

For the reasons discussed above, we are of the considered view that applicant is an allottee under Section 5(8)(f) of the IBC and same is challenged before the Hon'ble Apex Court in WP (Civil)-26/2020 in which Hon'ble Apex Court held that "the status quo, as of today, with respect to the pending applications, shall be maintained in the meanwhile".

Therefore, under such circumstances, we restrained ourselves to give any finding on the merit of the case and facts mentioned in the application rather we are of the considered view that shall be considered after disposal of the writ pending in the Hon'ble Apex Court. Hence, list the case on 04.03.2020, awaiting order in case of Hon'ble Apex Court in WP (Civil)-26/2020.