(2020) 02 NCLT CK 0015

In the National Company Law Appellate Tribunal

Case No : Company Application No. 202 Of 2019 In (IB)-1489/(ND) Of 2018

Anuj Kumar Tiwari APPELLANT

Vs

Debashis Nanda And Ors RESPONDENT

Date of Decision : 28-02-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 3(33), 5(8), 5(8)(f), 5(20), 5(21), 9, 60(5)(c)
Real Estate (Regulation And Development) Act, 2016 — Section 2(d), 2(zn)

Citation : (2020) 02 NCLT CK 0015

Hon'ble Judges : Ina Malhotra, J;Hemant Kumar Sarangi, Member (Technical)

Bench : Division Bench

Advocate : Ishwar Mohapatra, Nikhlesh Krishnan, Abhishek Parmar

Final Decision : Disposed Of

Judgement

Hemant Kumar Sarangi, Member (T)

1. The present Application, being CA No. 202/2019 is preferred by Mr. Anuj Kumar Tiwari the ("the Operational Creditor").

2. Under the said application the following reliefs have been prayed for :-

a. "Dismissal/Cancel the decision of the Resolution Professional with respect to the status of M/s. Versatile Commotrade Private Limited as financial creditor and consequently as member of committee of creditors pursuant to Section 60(5)(c) of IBC;

b. Determine the status of M/s. Versatile Commotrade Private Limited; and

c. Any other order that the Hon'ble Tribunal may deem fit in the facts and circumstances of the case."

3. While dealing with CA 202/19, it is observed, from the record that, Mr. Anuj Kumar Tiwari had approached this Tribunal with an application under Section 9, of the IBC, 2016. Vide judgment dated 19.03.2019, in IB-1489/ND/2019, this

Tribunal had admitted the said application and appointed Mr. Sanjay Sahani as the Interim Resolution Professional (IRP).

4. Further the records reveal that, after constitution of Committee of Creditors (CoC), Mr. Debasish Nanda was appointed as Resolution Professional (RP), at the CoC meeting held on 11.04.2019 and this appointment was confirmed by this Tribunal, vide order dated 08.05.2019, in CA 148/2019.

5. The RP at the 2nd CoC meeting, expressed his inability/willingness to act as RP in the present state of working condition and CoC decided to proceed for replacement of RP by way of making application to NCLT, the sole member of CoC (present applicant) through mail dated 22.06.2019 requested RP to call for a meeting of CoC, for the purpose of replacement of RP and approval of the same by NCLT, in its reply the RP sent a mail to the applicant for convening the 3rd CoC meeting on 06.07.2019 and after 45 minutes sent a mail to reschedule the meeting on 03.07.2019

6. The Applicant in the present application states that, after 2nd CoC meeting, RP received claim application from one M/s. Versatile Commotrade Private Limited and approved the claim amounting to Rs. 4,17,07,549/- under the category of Financial Creditor. After approving the claim of M/s. Versatile Commotrade Private Limited, RP reconstituted CoC and reduced the voting percentage of the Applicant to 'NIL'

7. The Applicant states that, the RP acted in a biased manner by admitting the claim of M/s. Versatile Commotrade Private Limited, under the category of Financial Creditor, which is against the provision of I & B Code, 2016.

8. The basis of claim of the M/s. Versatile Commotrade Private Limited, as a Financial Creditor is that the Corporate Debtor executed Two agreements to sell with M/s. Versatile Commotrade Private Limited for the purpose of sale of land situated at Delhi. In pursuance of the said agreement the Corporate Debtor received Rs. 2,83,00,000/- as advance. As per this agreement, M/s. Versatile Commotrade Private Limited, was to pay balance sale consideration within stipulated time specified in the agreement, also, as per this agreement, if purchaser failed to pay the balance consideration within stipulated time, mentioned in the agreement, then advance amount received by the Corporate Debtor, will be forfeited and agreement to sell shall be cancelled.

9. The Applicant, in respect of the claim of M/s. Versatile Commotrade Private Limited, submits that, it will not fall under the category of Financial Creditor and that RP has made apparent error in treating the advance amount as Financial Debt, which is against the provision of I & B code, 2016. It further states that, the agreement does not specify any provision for interest payment if either party fails to perform its part of the contract and hence, there is no time value of money that will be derived to the person who has made the advance payment, so it is completely out of ambit of a financial debt.

10. The Applicant further submits, that claim by M/s. Versatile Commotrade Private Limited, will fall under the category of Operational Debt only if it satisfies:-

The term Operational Creditor, definition under section 5(20) of the IBC is as follows-

"any person to whome an operational debt is owed and includes any person to whome such debt has been legally assigned or transferred"

In order to ascertain whether a person would fall within the definition of an Operational Creditor, the debt owed to such a person must fall within the definition of an operational debt as defined under Section 5(21) of the IBC, as follows-"a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any state Government or any local authority."

As per the definition, M/s. Versatile Commotrade Private Limited has neither supplied any goods nor any services to the Corporate Debtor and hence does not fall in the category of Operational Creditors.

11. In its reply M/s. Versatile Commotrade Private Limited, states that before making submissions on the allegations/ plea raised by the Operational Creditor in captioned application, it would be appropriate to reproduce relevant portion of Section 5(8) of IBC, 2016 below;

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

(f) Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing."

12. It is evident from the above reproduced portion of Section 5(8)(f) of IBC, that for treating a debt as financial debt so as to categorize a particular creditor as financial creditor, it is required that the debt claim should be of a financial debt which is disbursed against the consideration for time value of money and includes any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing.

Recently, the Hon'ble Supreme Court in the judgement of Pioneer Land & Infrastructure Ltd Vs. U.O.I., had analyzed in detail the scope and effect of Section 5(8) as well as Section 5(8) (f) of IBC and relevant portion of the said judgement which directly covers the issue in hand is quoted as under:-

"70. 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 judgement. 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..."

"72. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against consideration for time value of money. "Disbursement", is defined in Black's Law Disctionary (10th edn.) 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.

....

78. and now to the precise language of Section 5(8)(f). first and foremost, the sub-clause does appear to be a residuary provision which is "catch all" in nature. This is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing.

79. as correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay installments at various stages of construction, so that they themselves then fund the project either partially or completely.

13. Thus, as it is observed in the above reproduced paras of the ruling in Pioneer Urban Vs. U.O.I of the Hon'ble Supreme Court, it is evident that Section 5(8)(f) is residuary provisions which is "Catch all" in nature and it covers any transaction under which any amount is paid for a particular purpose and it is not required that to cover such amount within the definition of financial debt, the money given should be as loan transaction. It is also evident that money given as advance to be used for the purpose of profits and to give back the equivalent of money given, would take the character of financial debt.

14. Now examination of facts of the present case as detailed below viz-a-viz above position of law, would make it clear that sale transaction between the corporate debtor and M/s. Versatile Commotrade Private Limited was entered by the corporate debtor to make huge profit and money paid by the M/s. Versatile Commotrade Private Limited to the Corporate Debtor was in the nature of advance paid for particular purpose for purchase of the property and Corporate Debtor was to give back equivalent money paid by executing sale deed and the corporate debtor being in the business of real estate, was obviously doing the same for huge profit purpose. Thus, advance money paid had commercial effect of borrowing. As such, above amount paid by M/s. Versatile was a debt disbursed against the consideration of time value of money under Sale Agreement having

the commercial effect of borrowing as defined in the above judgement of the Hon'ble Supreme Court and therefore, the RP had rightly treated M/s. Versatile Commotrade Private Limited as a "Financial Creditor".

15. The Applicant has filed its rejoinder, in which the Applicant states that, in their reply M/s. Versatile relied on the decision of Hon'ble Supreme Court in the matter of M/s. Pioneer Urban Land & Infrastructure Limited & Anr. Vs. U.O.I & Ors. It is submitted that in this judgement Hon'ble Supreme Court analysed in details the scope and effect of explanation to Section 5(8)(f) of the IBC & more particularly constitutional validity of treating the home buyers as financial creditors which was inserted in the explanation to the Section 5(8)(f) of the IBC, 2016 by way of amendment in 2018, however, in the present case this transaction is not related to home buyers of a real estate project and as such the observations, comment, remarks made by Hon'ble Supreme Court in the above matter cannot be made applicable here, as fact and circumstances are entirely different. It is pertinent to mention that Hon'ble Supreme Court has used the word "allottee" and "home buyer" in all observations, comment, remarks through the judgement meaning thereby this judgement cannot be made applicable to this present case in which advance was made as earnest money for purchase of land.

16. The Applicant further states that, the respondent through its reply made averment in para 5 of the reply in which respondent drew the attention to the residuary provision which is "Catch All" in nature in para 64 & 65 of the Hon'ble Supreme Court judgement in Pioneer Urban Land & Infrastructure Limited & Anr. Vs. U.O.I & Ors. For this purpose relevant portion is reproduced below:

"64. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by paragraph (f) and that the precise scope of paragraph (f) is uncertain. Equally, paragraph (f) seems to be a "catch all" provision which is really residuary in nature, and which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

65. and now to the precise language of section 5(8)(f). first and foremost, the sub-clause does not appear to be a residuary provision which is "catch-all" in nature. This is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any other clauses, would amount to a financial debt if they had the commercial effect of borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows:

(33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely."

17. On detailed perusal of the clause 64 & 65 it is evident that a transaction will fall in the residuary clause (f) of section 5(8) under the category of financial debt, only if the transaction has commercial effect of borrowing, as such it will not fall within the category of financial debt. Moreover, Hon'ble Supreme Court in this clause 65 made reference to real estate allottee in order to conclude this observation which is not the case here as the transaction is in relation to purchase of land which does not fall within the ambit of real estate transaction.

18. Applicant further states that as per the clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 are reproduced below;

"(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

(zn)"real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto."

19. The Applicant further states that, M/s. Versatile is not a real estate allottee and is not covered by the abovementioned definition. Also, the Corporate Debtor is not undertaking any real estate project as covered by the abovementioned definition.

20. Considering the submissions made by the Applicant as well as the Respondent, in the present CA, this bench is of the view that the contentions/ or claims being raised by the M/s. Versatile Commotrade Private Limited as a financial creditor is correct, M/s. Versatile Commotrade has a right to claim the advances and therefore, shall within the definition of Financial Creditor. Also, liquidated damages after being proven can be deducted.

This bench in deciding the present CA, places its reliance of the decision of Hon'ble Apex Court in the case of Pioneer Land & Infrastructure Ltd Vs. U.O.I., had analyzed in detail the scope and effect of Section 5(8) as well as Section 5(8) (f) of IBC and relevant portion of the said judgement which directly covers the issue in hand is quoted as under:-"70. 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 judgement. 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..."

"72. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against consideration for time value of money. "Disbursement", is defined in Black's Law Disctionary (10th edn.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable.

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79. as correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay installments at various stages of construction, so that they themselves then fund the project either partially or completely.

21. Thus, as it is observed in the above reproduced paras of the ruling in Pioneer Urban Vs. U.O.I of the Hon'ble Supreme Court, it is evident that Section 5(8)(f) is residuary provisions which is "Catch all" in nature and it covers any transaction under which any amount is paid for a particular purpose and it is not required that to cover such amount within the definition of financial debt, the money given should be as loan transaction. It is also evident that money given as advance to be used for the purpose of profits and to give back the equivalent of money given, would take the character of financial debt.

22. Now examination of facts of the present case as detailed below viz-a-viz above position of law, would make it clear that sale transaction between the corporate debtor and M/s. Versatile Commotrade Private Limited was entered by the corporate debtor to make huge profit and money paid by the M/s. Versatile Commotrade Private Limited to the Corporate Debtor was in the nature of advance paid for particular purpose for purchase of the property and Corporate Debtor was to give back equivalent money paid by executing sale deed and the

corporate debtor being in the business of real estate, was obviously doing the same for huge profit purpose. Thus, advance money paid had commercial effect of borrowing. As such, above amount paid by M/s. Versatile was a debt disbursed against the consideration of time value of money under Sale Agreement having the commercial effect of borrowing as defined in the above judgement of the Hon'ble Supreme Court and therefore, the RP had rightly treated M/s. Versatile Commotrade Private Limited as a "Financial Creditor".

23. Both the CA's stand disposed of with the above order.

24. Copy of order be supplied to parties.