(2022) 11 NCLT CK 0016

In the National Company Law Tribunal

Case No : IA 161 Of 2022

L&T Finance Limited	APPELLANT
Vs	
Shri Sanjay Kumar Singh	RESPONDENT

Date of Decision : 03-11-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 3(33), 5(7), 5(8), 5(8)(f), 5(8)(h), 5(8)(i), 7, 21(6A)(b), 60(5), 220
Real Estate (Regulation and Development) Act, 2016 — Section 2(d), 2(zk)
Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 — Regulation 11
Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 — Regulation 13
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2022) 11 NCLT CK 0016

Hon'ble Judges : Dr. Madan B. Gosavi, Member (J);Kaushalendra Kumar Singh, Member (T)

Bench : Division Bench

Advocate : Neeraj Kr. Gupta, Ravi Pahwa, Rajat Lohia, Vijay Assudani

Final Decision : Disposed Of

Judgement

1. In pursuance to the section 7 petition filed by M/s Motel Rahans Private Limited, the corporate debtor namely JSM Devcons Private Limited was admitted under corporate insolvency resolution process (CIRP) vide order dated 17.03.2022 by this Adjudicating Authority. Mr. Sanjay Kumar Singh was appointed as Interim Resolution Professional (IRP). During the CIRP proceedings various IAs have been filed by the home buyers and other financial creditors. The IA No. 139 and 161 of 2022 as well as IA No.155 of 2022 have been filed for removal of IRP in view of his conduct as well as for exclusion of Ashoka Hi-Tech Builders Private Limited from the Committee of Creditors (CoC).

The issues being in common, all these three IAs were heard together and are decided by way of this common order.

2. The averments made by the applicants in IA 139 of 2022 & IA 161 of 2022 are summarized hereunder:

(i) Following the initiation of CIRP and appointment of IRP, the claims were filed by various persons including home buyers who constituted a class of creditors within the meaning of section 21(6A)(b) requiring appointment of an insolvency professional as Authorised Representative (AR). Mr. Sunil Prakash Sharma was appointed as AR for the said class of home buyers vide order dated 06.05.2022.

(ii) The IRP formed the CoC consisting of the following financial creditors having voting percentage right as stated below:

Sr.

Name of Financial Creditor

% Voting Share

(i)

Ashok Vashodia

1.31

(ii)

Deepak Pahwa

3.13

(iii)

Harish Chandra Khandelwal HUF

0.26

(iv)

Harish Chandra Khandelwal

0.03

(v)

Hritik Roshan

3.80

(vi)

Motel Rahans Private Limited

0.75

(vii)

L&T Housing Finance Limited

42.10

(viii)

Home Buyers (as class of Creditors under section 21(6A)(b)

48.61

100.00

Total

(iii) M/s Ashoka Hi-Tech Builders Private Limited (Ashoka Hi-Tech) filed its claim in the month of April 2022 for an amount of Rs. 395,37,17,091/- (Rupees three hundred ninety five crore thirty seven lakh seventeen thousand and ninety one) as a financial creditor of the corporate debtor. However, the said claim was not decided by the IRP and therefore, Ashoka Hi-Tech moved an application before the Adjudicating Authority seeking direction for IRP to decide its claim. The Adjudicating Authority vide order dated 09.06.2022 directed the IRP to consider and decide the said claim within three days.

(iv) Following that, the IRP on the same date referred the matter for legal opinion of Justice GB Pattnaik former Chief Justice of India and subsequently based on his opinion, considered and included the claim of Ashoka Hi-Tech to theextent of Rs. 328,64,07,582/- in the status of financial creditor and reconstituted the CoC having voting percentage right as stated below:

Sr.

Name of Financial Creditor

% Voting Share

(i)

Ashok Vashodia

0.46

(ii)

Harish Chandra Khandelwal HUF

0.09

(iii)

Harish Chandra Khandelwal

0.01

(iv)

Hritik Roshan

1.35

(v)

Motel Rahans Private Limited

0.27

(vi)

L&T Housing Finance Limited

14.91

(vii)

Home Buyers (as class of Creditors

24.25

under section 21(6A)(b)

(viii)

Ashoka   Hi-Tech   Builders   Private

58.66

Limited

Total

100.00

(v) The voting percentage of home buyers substantially reduced from 48.61% to 24.25% after inclusion of Ashoka Hi-Tech as a financial creditor. The fees for the former Chief Justice of India Mr. G.B. Pattnaik for his opinion was approved and paid by the CoC of the corporate debtor merely on the consent of Ashoka Hi-Tech who was having 58.66% voting shares.

(vi) The IRP conducted 3rd CoC meeting despite the request made by the financial creditors to change the date of the meeting, however, the IRP did not change the date and with consultation of Ashoka Hi-Tech made changes in resolutions for approval of evaluation matrix, eligibility criteria and invitation for expression of interest for the resolution applicant.

(vii) The IRP, in spite of being placed under suspension vide order dated 23.08.2022 by the Disciplinary Committee of IBBI for his misconduct in some other matter, sent the notice dated 25.08.2022 of 4th CoC meeting to be held on 27.08.2022, wherein the agenda was to take notice of the outcome of the expression of interest and also for issuance of request for resolution plan to the resolution applicant. The financial creditors (other than Ashoka Hi-Tech), therefore sent an e-mail for postponing the date of the meeting.

(viii) Briefly, the facts of the case are that a development agreement dated 01.04.2009 was entered into between Ashoka Hi-Tech and the corporate debtor, wherein, Ashoka Hi-Tech had to provide the land admeasuring 11.40 acres at Indore and the corporate debtor was to construct real estate units consisting of 11 towers namely "Pinnacle D Dreams" on the said land. The real estate units or the revenue on sale thereof were to be shared by the corporate debtor and Ashoka Hi-Tech in the ratio of 68:32.

(ix) The licence to construct the building was applied for and was granted in the name of Ashoka Hi-Tech. Even the term loan of Rs.38,00,00,000/- was obtained by the corporate debtor on the basis of corporate guarantee given by Ashoka Hi-tech on the same land used for the project. Moreover, the corporate debtor and Ashoka Hi-Tech were joint signatories of the sale deeds executed for some of the constructed flats. Therefore, Ashoka Hi-Tech falls under the category of developer and cannot be treated as allottee like other home buyers/financial creditors.

(x) The project has been the joint venture of the corporate debtor & Ashoka Hi-Tech, however, the RP has incorrectly considered and included the claim of Ashoka Hi-Tech as financial creditor. The balance sheets of Ashoka Hi-Tech, also reflects the contribution of its land as its stock-in-trade year after year and not as a financial creditor to the corporate debtor (JSM Devcons Private Limited).

(xi) The Hon'ble NCLAT in the matter of Namdeo Ramchandra Patil Vs. Vishal Ghisulal Jain RP of Corporate debtor in Co. Appeal(AT)(INS) 821 and 940 of 2021, vide order dated 19.09.2022, has held that contribution of land does not qualify under section 5(8) (f) of the Code as it lacks the essential element of disbursement and also raising of an amount.

(xii) Further, the Hon'ble NCLAT in the matter of Nikhil Gandhi Vs. Sudip Bhattacharya RP of Reliance Naval and Engineering Limited in Company Appeal(AT)(Insolvency) No.1109 of 2022, vide order dated 14.10.2022, has held that in absence of any payment towards invocation of guarantee, section 5(8)(h) cannot be invoked

3. The defence taken by Ashoka Hi-Tech and as presented/argued by the learned Advocate are summarized as under:

(i) The Ashoka Hi-Tech had purchased a land on 23.03.2009 admeasuring 11.40 acres in Indore vide two registered sale deeds. Following that it had entered into an agreement with corporate debtor on 01.04.2009 for development and construction of multistoried township consisting of 11 towers namely "Pinnacle D Dreams" on the said land admeasuring 11.40 acres. The terms of the agreement were such that Ashoka Hi-Tech was to get 32% of the constructed flats and the period for completion of the project was 60 months including grace period of six months.

(ii) Further, Ashoka Hi-Tech and corporate debtor entered into consent cum admission deed on 07.04.2015 wherein, various flats and various towers were divided between them and the said deed can be construed as an allotment letter in favour of Ashoka Hi-Tech, making it allottee as per section 2(d) of RERA. Moreover, the corporate guarantee was given by Ashoka Hi-Tech on 27.11.2015 for sanctioning loan of Rs. 38,00,00,000/- by L&T Housing Finance Limited to the corporate debtor for which a facility agreement was also executed on the same date. Thereby, Ashoka Hi-Tech is a financial creditor of the corporate debtor as per provisions of section 5(8)(f), (h) & (i) of the Code.

(iii) The application IA 139 of 2022 is not maintainable as it has been filed by one of the home buyers and not by the authorized representative appointed for the class of creditors. Further the said home buyer is having only 0.07% voting share out of entire class of creditors of 347 home buyers with 24.25% voting share.

(iv) The corporate debtor was to construct real estate units on the land of the Ashoka Hi-Tech and such units were to be shared by the corporate debtor and Ashoka Hi-Tech in the ratio of 68:32. The revenue generated from the sale of such units was to be shared as per the said agreed ratio.

(v) Ashoka Hi-Tech is neither a related party nor a developer or a promoter of the corporate debtor. The corporate debtor was the developer and as per the agreement dated 01.04.2009 the corporate debtor was given right to develop and construct flats which falls within the definition of "transaction" as envisaged under section 3(33) of the Code.

(vi) The disbursement was 11.4 acres of land to the corporate debtor to develop and construct flats, however, 32% of such area which the corporate debtor ought to return to Ashoka Hi-Tech is the consideration for time value of money and therefore Ashoka Hi-Tech is a financial creditor.

(vii) Ashoka Hi-Tech has vide the admission deed dated 07.04.2015 became allottee as per section 2(d) of RERA Act and cannot be considered as promoter as per section 2 (zk) of RERA Act. Further, corporate guarantee was given on 27.11.2015 by Ashoka Hi-Tech to secure the financial assistance given by L&T to the project and the developer executed the indemnity deed dated 11.12.2015 in favour of Ashoka Hi-Tech. Therefore, Ashoka Hi-Tech being the homebuyer is a financial creditor as per section 5(8) (f) of the Code.

4. The objections made by the IRP in IA 139 of 2022 are summarised hereunder:

(i) The Authorized Representative (AR) is appointed by the Adjudicating Authority vide order dated 06.05.2022 to represent the financial creditors-home buyers, however the application is filed by one of the home buyer and not by the AR and therefore, the application is not maintainable.

(ii) The home-buyers have not co-operated with the IRP since the commencement of CIRP and has voted against all the resolutions placed before the CoC for voting including the resolution for the expenses like cost of public announcement, deployment of security guards at the site, appointment of valuers, appointment of transaction auditors, cost of newspaper publications, issuance of Form-G, extension of time for completion of CIRP and resolution process.

(iii) Further, with the introduction of RERA, the applicant i.e. Mr. Sanjay Kundra is a secretary of Pinnacle Sangharsh Samiti and the corporate debtor. It was agreed that the home-buyers would pay the balance outstanding amount for the completion of the project. The said Samiti was formed to collect the balance money and complete the construction for the home-buyers. However, they failed to collect the outstanding money which has led to commencement of CIRP.

(iv) The IRP has, in compliance with provisions and regulations of the Code supported by the legal opinion of Hon'ble Justice Mr. G.B. Pattnaik, admitted the claim of Ashoka Hi-Tech. The IRP received claims from around 357 home-buyers and Ashoka Hi-Tech, therefore, the CoC was reconstituted and the same was brought on record with 3rd status report dated 07.07.2022.

(v) The land was given to the corporate debtor by Ashoka Hi-Tech in the form of the development rights over the land and as per the development agreement Ashoka Hi-Tech was entitled to allotment of units amounting to 32% of the constructed area within five years, failing which the corporate debtor was liable to pay an interest @12% to Ashoka Hi-Tech. Therefore, it cannot be termed as revenue sharing arrangement.

(vi) The claim of L&T has been admitted, however, the claim of Ashoka Hi-Tech to the extent which relates to the same debt for which the claim of L&T is admitted, has not been admitted by the IRP.

5. The submissions made in IA 155 of 2022 by its applicant are summarized hereunder:

(i) The inclusion of the claim of Ashoka Hi-Tech as financial creditor of the corporate debtor by the IRP is against the provisions of the Code. Since, no amount was disbursed to the corporate debtor by Ashoka Hi-Tech, its claim of Rs.395 crores cannot be considered as financial debt.

(ii) That despite the request made by the financial creditors to postpone the CoC meetings, the IRP did not consider their request and conducted the meetings and got the resolutions approved by Ashoka Hi-Tech having majority voting shares. Thereby the control of the CoC was given to Ashoka Hi-Tech though their claim is not covered within the definition of the financial creditor and financial debt under section 5(7) and 5(8) respectively of the Code.

(iii) The conduct of the IRP is unilateral and not in the interest of the corporate debtor. The conduct of the IRP in another matter i.e., Company Appeal (AT) (Ins) No. 112 of 2021, was taken note by the Hon'ble NCLAT vide order dated 29.11.2021. The directions were given by the Hon'ble NCLAT in the said matter to replace the IRP namely Mr. Sanjay Kumar Singh. The Hon'ble NCLAT also referred the matter to IBBI for investigation regarding the conduct of the said

IRP Mr. Sanjay Kumar Singh.

(iv) The Disciplinary Committee (DC) of IBBI found that Mr. Sanjay Kumar Singh has acted against the Code and therefore, the DC vide order dated 23.08.2022, in exercise of the powers conferred under Section 220 of the Code read with Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 and Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, suspended the registration of Mr. Sanjay Kumar Singh having Registration No. IBBI/IPA-002/IP-N00188/2017-18/10505 for a period of two years.

6. We have heard the learned Counsels appearing for the applicants, IRP and Ashoka Hi-Tech (respondent) and have perused the materials available on record. It is noted that Ashoka Hi-Tech had purchased a land 11.40 acres on 23.03.2009 and following that it had entered into a development agreement with the corporate debtor JSM Devcons Private Limited on 01.04.2009 for construction of the multistoried township in the name of "Pinnacle D Dreams" consisting of 11 towers over the said land. It was also agreed to share the real estate units (flats) or the revenue generated from the sale of constructed flats in the ratio of 64:32 between the corporate debtor and Ashoka Hi-Tech. It is also noted that the loan amounting to Rs.38,00,00,000/- was given by L&T Housing Finance Limited to the corporate debtor M/s JSM Devcons Private Limited and such loan was secured on the land for the project through a corporate guarantee deed executed by the land owner Ashoka Hi-Tech as a guarantor. The claim of the L&T Housing Finance Limited being a financial creditor is already admitted by the IRP of the corporate debtor to the extent of Rs.83,53,77,672/- and is undisputed.

7. It is further noted that Ashoka Hi-Tech has computed its claim of Rs.395,37,17,091/- as under:

(i) The corporate debtor and Ashoka Hi-Tech sold around 858514 square feets of constructed prakosht at an average rate of Rs.2500/-, where 32% share of Ashoka Hi-Tech from such sale amounted to Rs.68,68,11,200/-. However, the corporate debtor paid only Rs.25,95,27,010/-. Therefore, a sum of Rs.42,72,84,190/- remains due and interest thereon @12% from 01.06.2015 to 30.04.2022 amounts to Rs. 35,46,45,878/-. Thus the outstanding amount thereon is Rs.78,19,30,068/-.

(ii) Subsequently, the corporate debtor and Ashoka Hi-Tech entered into a supplementary agreement dated 17.04.2015, wherein it was elaborated that out of 11 towers only 3 towers were fully constructed and other 3 were in the construction process. Further, out of total saleable area of 1257792 sq. ft. the corporate debtor already sold 858514 sq. ft. and the remaining area was to be divided as per the agreed ratio of 68:32 between the corporate debtor and Ashoka Hi-Tech. The calculated remaining area i.e. 128041 sq. ft. [32% of (1257792 less 858514)] which could have been sold for Rs.38,41,23,000/- and interest thereon @ 12% from 01.06.2015 to 30.04.2022 amounted to Rs.32,26,63,320/-. Therefore, total claim from the share of unsold area amounted to Rs.70,67,86,320/-.

(iii) Further, if five multistoried building had been constructed on the remaining land then a saleable area of 1250000 sq. ft. would have been made and accordingly, 32% share of Ashoka Hi-Tech i.e. 400000 sq. ft. would have amounted to Rs.120,00,00,000/- and interest @ 12% thereon from 01.06.2015 to 30.04.2022 being Rs.100,80,00,000/-. Thus the share of Ashoka Hi-Tech for the area yet to be developed on the land amounts to Rs.220,80,00,00/-.

(iv) Legal expenses amounting to Rs.70,00,703/-.

(v) Loss of goodwill amounting to Rs.25,00,00,000/-.

Thus, the total amount of claim made by Ashoka Hi-Tech amounted to Rs.395,37,17,091/-. However, the IRP admitted the claim of Ashoka Hi-Tech as financial creditor to the extent of Rs.328,64,07,582/- (after reducing the claim of L&T Housing Finance Limited).

8. The issue in the case is that whether Ashoka Hi-Tech who vide agreement dated 01.04.2009 with the corporate debtor M/s JSM Devcons Private Limited has agreed to develop the land can be treated as financial creditor and thereby included as member of CoC. We have noted the fact that pursuant to the said agreement dated 01.04.2009 for construction of 11 towers on the land owned by Ashoka Hi-Tech, it was decided to share the real estate units and/or the revenue generated in the ratio of 68:32 between the corporate debtor and Ashoka Hi-Tech. The cost of construction was to be borne by the corporate debtor and the required approvals were obtained by Ashoka Hi-Tech being the owner of the land. The construction of 3 towers was complete; and another 3 towers were in the stage of completion. The construction of balance 5 towers had not started. Further, by sharing the revenue against the sale of constructed flats, Ashoka Hi-Tech had already received its share to the extent of Rs.25,95,27,010/- from the corporate debtor. Moreover, Ashoka Hi-Tech was one of the party to the registered sale deed of the constructed units and has received the share in the revenue generated from such flats sold to the home-buyers. As could be inferred from the financial accounts of the Ashoka Hi-Tech, after sharing the revenue on sale of the flats, the income thereof has been offered as their business income. The land (corresponding to unsold flats) has been shown in their balance sheet as stock in trade. From the facts of the case, it is very clear that Ashoka Hi-Tech is one of the party to the joint venture which was done along with corporate debtor with a view to earn profits through sale of constructed flats to the home-buyers. Ashoka Hi-Tech is one of the selling party while executing the sale deeds and as such it cannot be treated as an allottee like any other home-buyers and their claim of Rs.395.37 crores, as detailed in para 7 above, does not fall under the definition of financial debt under Section 5(8) of the Code. Therefore, we are of the considered view that the IRP has wrongly assigned the claim of Ashoka Hi-Tech as financial debt. Even otherwise, Ashoka Hi-Tech being one of the party of the joint venture cannot be included as member of the CoC.

9. Reliance is also placed on a recent decision of the Hon'ble NCLAT in the case of "Namdeo Ramchandra Patil vs. Vishal Ghisulal Jain RP of the Corporate debtor" in Co. Appeal(AT)(INS) 821 and 940 of 2021 dated 19.09.2022, wherein it is held that contribution of land does not qualify under section 5(8)(f) of the Code to entitle the landowners as a financial creditor. The facts of that case were that the corporate debtor was a real estate company and the joint venture real estate project was undertaken by the corporate debtor on the land belonging to the landowners. A development agreement was entered into between the parties and accordingly it was agreed to share the constructed area in the ratio of 45:55. The relevant para reads as under:

13. When we look into the provision of Section 5(8)(f) Explanation (i) and (ii), it is clear that pre-condition for a debt being a Financial Debt is disbursement against the time value of money and when any amount is raised from an allotment under real estate such transaction is also covered under Section 5(8)(f). The pre-condition for application of Explanation (i) of Section 5(8)(f) is raising of an amount from allottee. The present is not a case where an amount has been raised from the Appellants – the Landowners. The submission of the Appellant that they are allottees within the meaning of Section 2(d) of RERA Act does not make their transaction as a Financial Debt within the meaning of Section 5(8)(f).

10. Accordingly, Ashoka Hi-Tech Builders Private Limited cannot be considered as a financial creditor and therefore, cannot be a member of the CoC.

11. It is further noted that the Disciplinary Committee of the Insolvency and Bankruptcy Board of India has vide order dated 23.08.2022 suspended the IRP Mr. Sanjay Kumar Singh for two years. This Adjudicating Authority vide order dated 13.10.2022 in IA 189 of 2022 had already directed to replace the IRP/RP Mr. Sanjay Kumar Singh and had asked the remaining financial creditors to suggest the name of the new Insolvency Professional. Subsequently, the Authorized representative of the class of creditors except Ashoka Hi-Tech Builders Private Limited has suggested the name of Ms. Chhaya Gupta as new resolution professional and the consent of Ms. Chhaya Gupta to act as RP is also placed on record.

12. Accordingly, we appoint Ms. Chhaya Gupta, Registration No. IBBI/IPA-002/IP-N00984/2020-2021/13133, to act as Resolution Professional. The new RP is directed to reconstitute the CoC after excluding Ashoka Hi-Tech from the CoC and to conduct the Corporate Insolvency Resolution Process ahead as per the provisions of Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder.

With this, IA 139 of 2022, IA 155 of 2022 & IA 161 of 2022 stand allowed on the aforesaid issues and disposed of.

13. Registry is directed to serve a copy of this order to new RP Ms. Chhaya Gupta and to the applicants & respondents in the respective IAs.

