
(2021) 09 NCLT CK 0031

In the National Company Law Tribunal

Case No : I.A. 1450/2021 in I.A. 1035/2021 in C.P. 2946/I&B/MB/2019

Mr. Namdeo Patil & Anr

APPELLANT

Vs

Mr. Vishal Ghisulal Jain

RESPONDENT

Date of Decision : 08-09-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(8), 5(8)(f), 7, 60(5), 65
Real Estate (Regulation and Development) Act, 2016 — Section 2(d), 2(zk)
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2021) 09 NCLT CK 0031

Hon'ble Judges : Suchitra Kanuparthi, Member (J); Chandra Bhan Singh, Member (J)

Bench : Division Bench

Advocate : Mustafa Doctor, Prajakta Menezes, Aniruth Purusoththaman

Final Decision : Allowed/Dismissed

Judgement

Chandra Bhan Singh, Member (Technical)

1. The Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor, i.e., Wadhwa Buildcon LLP, by an order dated 28.07.2020, on a Petition of Section 7 of the Insolvency & Bankruptcy Code, 2016 (the 'Code') filed by the Financial Creditor, wherein Mr. Rakesh Kumar Tulsyan, was appointed as an Interim Resolution Professional (IRP) of the Corporate Debtor.

Submissions of the Applicant in IA 1035/2021:

2. The Applicant submits that the IRP, Mr. Rakesh Kumar Tulsyan, made the public announcement in Form A on 31.07.2020 for intimating commencement of CIRP and inviting claims from the creditors of the Corporate Debtor by 11.08.2020.

3. The Applicant submits that pursuant to the Public Announcement, the Applicant submitted its claim as the Financial Creditor under Form C dated 11.08.2020 of ₹ 32,57,14,026/- with the IRP. The Applicant had sanctioned and

disbursed advance to the Corporate Debtor for its Project Rhodesia wherein principal security was vide Mortgage Deed dated 03.02.2015 for 55% share of constructed area of Project Rhodesia. The balance 45% was agreed to be given to landowners by the Corporate Debtor under the Development Agreement dated 23.01.2006 for the said Project. Pursuant to verification of aforesaid claim, the Applicant was admitted as a Secured Financial creditor of the Corporate Debtor by the IRP.

4. The Applicant further submits that the IRP mentioned about his unwillingness to be appointed as a Resolution Professional (RP) due to his other commitments during the 1st meeting of Committee of Creditors (CoC) dated 27.08.2020. Therefore, the CoC proposed to appoint the Respondent, Mr. Vishal Ghisulal Jain, as the Resolution Professional (RP). This Tribunal approved the appointment of the Respondent as the RP of the Corporate Debtor vide Order dated 14.10.2020.

5. The Applicant submits that the RP, in the 4th CoC meeting dated 06.11.2021, informed that he has accepted the claim of one homebuyer. The RP also informed that the suspended partners are working out the strategies to boost sales with the main objective of successfully completing the CIRP. In the 5th meeting of the CoC dated 09.12.2020, the RP appraised the members about the admission of one home buyers' claim and reconstitution of the CoC of the Corporate Debtor on the basis of the claim received. The RP further informed that he has undertaken registration of certain flats sold prior to CIRP and received ₹ 35,88,895 in the designated bank account of HDFC towards disbursement of two registered flats sold.

6. The Applicant further submits that in the 6th meeting of the CoC of the Corporate Debtor dated 25.03.2021, the RP informed the CoC members about admission of 6 claims received from home buyers who have been allotted flats/ units as Landowners and again reconstituted the CoC on the basis of the fresh claims received from the Landowners. Thereby, the revised CoC members constituted by RP were of Landowners (voting 79.70%), Applicant (voting 19.97%) and one homebuyer (voting 1.63%). The revised re-constituted CoC of the Corporate Debtor was as follows:

7. The Applicant submits that the Applicant enquired from the RP and raised objections against the above reconstitution of the CoC as Landowners were admitted merely on the basis of allotment of constructed area and not on the basis of any financial debt raised from them which was pre-requisite as per the Code for any person to qualify as Financial Creditors of the Corporate Debtor. However, the RP ignored the objections raised and called the 7th CoC meeting on 29.04.2021 with the same reconstituted CoC and without addressing the concerns raised by the Applicant/ sole Financial Institution.

8. The Applicant, vide various emails, requested the RP to apply correct provisions under the Code and address this issue first before proceeding anymore. The RP, vide his email dated 29.04.2021, replied that he will not

reconsider his decision of admitting Landowners as Financial Creditors of the Corporate Debtor because as RP, he can only collate and admit the claims but can not reject them. Thereafter, the RP proceeded to open the Resolution plans received from two Resolution Applicants, viz., Ankit Suresh Wadhwa (Promoter of the Corporate Debtor) and Mr. Hari & Bhagwandas Mulchandani.

9. The Applicant submits that the RP has failed to acknowledge that it is one of the primary duties of the RP to ensure that the provisions of the Code are upheld under all circumstances and that RP is facilitator of the resolution process whose administrative functions are overseen by the CoC and NCLT. Thus, aggrieved by the above-mentioned actions of the Respondent, i.e., RP, the Applicant seeks the following reliefs:

Submissions of the Respondent (RP) to IA 1035/2021:

10. The Respondent submits that he received a claim from 6 Landowners on the basis of a Development Agreement entered in the year 2012, a Flat Allotment Confirmation dated 20.07.2014 through which a total of 117 units/ flats and 20 commercial shops had been allotted to these 6 Landowners in the real estate project viz. Wadhwa Rhodesia being constructed by the Corporate Debtor and a Demand Promissory Note dated 09.01.2012. Then, the Respondent finally admitted claim of ₹ 1,27,25,09,613/- crores and thereafter, the Respondent admitted them into the CoC of the Corporate Debtor.

11. The Respondent further submits that by way of an amendment to Section 5(8) of the Code, an explanation was added clarifying that any amount raised from an allottee is deemed to be an amount having the commercial effect of a borrowing and would, therefore, be a financial debt. In the light of the allotment letter issued to these Landowners, they come within the definition of an allottee under the provisions of the Real Estate Regulation Act, 2016. Once these persons are to be treated as allottees under the provisions of the Real Estate Regulation Act, 2016, then they would have to also be considered to be Financial Creditors as they are the persons to whom a financial debt is owed as defined under Section 5(8) of the Code.

12. The Landowners handed over to the Corporate Debtor their valuable property in the form of the development rights over the land parcel in question and in consideration thereof, they were entitled to allotment of units as per the letter of allotment made out in their favor. It is submitted that this falls under the meaning of 'financial creditor' as set out in the Code after the insertion of explanation to Section 5(8) of the Code.

13. In view of above facts, the Respondent submits that the present application ought to be dismissed.

Submissions of the Intervener/ Applicant in IA 1450/2021 (Reply of the Intervener to IA 1035/2021):

14. The Interveners/ Applicants learned that the IA 1035/2021 was filed by Bank

of India challenging the inclusion of the Interveners/ Applicants as the Financial Creditors in the CoC of the Corporate Debtor. It is submitted that as per the definitions of the financial debt under the Code and RERA and that the Interveners are the allottee in Allotment Letter dated 20.07.2014, the Interveners claim can only be identified as a financial debt. Thus, they can be rightly included in the class of the Financial Creditors in the CoC of the Corporate Debtor. Also, the Supreme Court in Pioneer Urban Land and Infrastructure Limited Versus Union of India, has upheld the constitutionality of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. Through the Amendment Act, the 'real estate allottees (home buyers)' as defined under Section 2(d) of the Real Estate (Regulation and Development) Act, 2016 (RERA) were brought within the ambit of 'financial creditor' under the Insolvency and Bankruptcy Code, 2016.

15. It is further submitted that the claim of the Interveners also includes interest and a financial debt is a debt along with interest, if any, which is disbursed against the consideration for the time value of money. In the present scenario, Interveners claim is derived from the Development Agreement and Allotment Letter wherein the Interveners being the Landowners have provided their land for development in lieu for flats and commercial shops as consideration.

16. The Interveners/ Applicants submit that the Interveners/ Applicants have to be categorised as Financial Creditor qua the developer as they are promised and issued Allotment Letter for allotment of units against their investment of land in the project which is in form of financial assistance to the developer and which forms part of time value of money. By entering into Development Agreement, the burden of the Developer to purchase land is released. Against investment of land, the Developer promises to allot and handover Units to the Landowners. The relation between the Developer and the Landowner is similar to any other arrangement made by the developer under much known Barter System Agreement where in the Developer agrees to deliver flat or units on the services provided by the contractor. The arrangement between the Landowner and the Developer in Development Agreement falls within the definition of 'Financial Debt' as without the same, it would not be possible for the Developer to operate business without purchase of land which is in form of investment entrusted to the Developer by the Landowners.

17. It is further submitted that the Landowners are not debarred from filing a claim as a Financial Creditor against the Developer Company. No provision specifically restricts or automatically disallows the Landowners who are promised under a contract to raise claim under the class of Financial Creditor and they are required to be categorised as Financial Creditor as they are promised and issued Allotment Letter for allotment of units against their investment of land in the project which is in form of finance assistance to the Developer.

18. The Interveners submit that the contention that Landowners cannot be considered as allottees and therefore, cannot be accepted as Financial Creditors

would frustrate the object of the Code and would have a chilling effect on the Landowners since they would be rendered remediless. Such an interpretation would discourage Landowners from offering their land for development on any terms with the Developer. The proposition that the definition of Allottee as read in RERA is to harmoniously read and in case of any conflict between the Code and the RERA, the provisions of Code shall prevail. No provision of the Code restricts the Landowners to raise their claim against the Developer Company under CIRP.

Findings:

19. IA 1035/2021 in CP(IB)-2946/2019 has been filed by Bank of India against the RP for accepting the claims of 6 land owners of the Wadhwa Rhodesia Project for an amount of Rs.129.98 crores consequent to which the voting share of the Applicant Bank, i.e., Bank of India, in the CoC of the Corporate Debtor Company has come down from 98.37% to 20.31% and the Landowners who were not there as a part of the CoC earlier, acquired a share of 79.35% in the CoC.

20. IA 1450/2021 in CP 2946/2019 has been filed by the 6 Landowners of the Wadhwa Rhodesia Project who had been made as a Financial Creditors by the RP after the 5th CoC meeting for a total amount of Rs.129.98 crores on the basis of the Development Agreement dated 23.01.2006. The Bench notes that this IA 1450/2021 is more in response to IA 1035/2021 in which they have not been made party. The Bench on 16.08.2021 heard all the concerned sides in both IA 1450/2021 and IA 1035/2021 in CP 2946/2019.

21. In view of this Development Agreement, these 6 Landowners were allotted by the Corporate Debtor certain residential and commercial units. With their admission in the CoC as a Financial Creditor, these Landowners acquired 79.35% of the voting share and the Bank of India which was earlier having a voting share of about 98.37% was reduced to about 20.31% in the CoC.

22. The Bench notes that the Corporate Debtor Company, i.e., M/s. Wadhwa Buildcon LLP, is a Real Estate Company against which Corporate Insolvency Resolution Process had commenced on 28.07.2020. The real estate Project undertaken by the Corporate Debtor are in the nature of joint venture wherein the land is provided by Landowners through different Development Agreements on the basis of area sharing model. One such joint venture project viz. Wadhwa Rhodesia has been undertaken by the Corporate Debtor on a parcel of land belonging to the 6 land owners viz. Mr. Namdeo Patil, Mr. Parshuram Patil, Mr. Ashok Patil, Mr. Vinayak Patil, Mr. Nana Patil and Ravikant Patil. As a consideration for the development rights, the Corporate Debtor had agreed to pay, as per the Development Agreement dated 23.01.2006, 45% of the constructed area out of the total construction. Thereby, the Corporate Debtor had an area sharing arrangement in the ratio of 45:55. In addition, the Landowners also received from the Corporate Debtor a refundable security deposit of Rs. 1.75 crores which was to be returned to the Landowners after when the constructed

developed area is handed over by the Corporate Debtor to the Landowners. A copy of the Development Agreement has been duly attached by the Applicant, i.e., Bank of India, to the Application.

23. The Bench notes that, as per the provisions of RERA Act, 2016, the Landowners are mandatorily classified as Promoters and not as 'Allottees' in a real estate Project. In this regard, the Applicant has produced before this Bench Form 'B' which has been filled up by Landowner and has been signed, verified and executed by Mr. Parsuram Patil, on behalf of the six Landowners on 02.05.2019 as a Co-Promoter of the Real Estate Project (Wadhwa Rodhesia). In the Application, the Form 'B' has been enclosed which has been executed by the Landowners with RERA, the relevant extract of which reads as under:

"1. That promoters have a legal title Report to the land on which the development of the proposed project is to be carried out

AND

A legally valid authentication of the title of such land along with an authenticated copy of the agreement between such owner and promoter for development of the real estate project is enclosed herewith.

2. That the project land is mortgaged with Bank of India, Panchpakadi Branch, Thane for a project loan of Rs. 40 crores.

3. That the project shall be completed by promoter, i.e., Wadhwa Buildcon LLP by December, 2019.

4. That seventy percent/ hundred percent of the amounts to be realized bhereinafter by co-prmoter for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover cost of construction and the land cost and shall be used only for that purpose.

5. ...

6. That the co-promoter shall get the accounts audited within six months after the end of every financial year by a practicing Chartered Accountant, and shall produce a statement of accounts duly certified and signed by such practicing Chartered accountant, and it shall be verified during the audit that the amounts collected for a particular project have been utilized for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

..."

24. The Bench notes that the contention of the 6 Landowners are mainly three-fold: (i) That, even though they are Co-Developer/ Co-Promoter, since they are allotted 117 flats and 20 commercial shops in the project, their claim can be termed as a financial debt, (ii) These six Intervenor

Landowners further mentioned that the claim amount includes 'interest' and therefore, it satisfies the criteria of 'time value of money', and (iii) the Intervenor mentions that they, i.e., 6 Landowners had entered into a "barter system of agreement" wherein in lieu of land, the Developer had agreed to deliver flats/ commercial units.

25. The Bench also notes that Resolution Professional, who has been made Respondent in this IA 1035/2021 filed by the Applicant, in his Reply had advanced similar arguments as the 6 Landowners'. The RP has mainly mentioned the following:

i. In light of the allotment of the 117 flats and commercial shops, the 6 Landowners come within the definition of an "Allottee" under the provisions of IBC, 2016 as well as RERA, 2016 and, therefore, they have been considered by the RP as the Financial Creditor.

ii. The RP also mentions that the Applicant cannot challenge the claim of the other Financial Creditors in light of the Order of 24.01.2020 of Hon'ble NCLAT in the matter of Dipco Pvt Ltd vs. Jayesh Sanghrajka in CA(AT) (Insolvency) No.37 of 2020, the relevant para of which is reproduced as under:

"8. As per Section 60(5), though the NCLT is empowered to entertain or dispose of any application or proceeding by or against the 'Corporate Debtor' or Corporate Person', it does not invest the NCLT with the jurisdiction to re-determine and collate the claim. The decision for collating the claim, if any, taken by the 'Resolution Professional', the same being judicial or quasi-judicial, the NCLT cannot sit in Appeal."

26. The Bench here would like to refer Section 5(8)(f) of the Code as per which, two pre-requisites are important to be fulfilled before a person can be classified as Home Buyer. The first prerequisite is that "amount raised by allottee" and the second prerequisite is "allottee in a real estate Project" as defined under RERA, 2016. It is clear to this Bench that these 6 Landowners do not satisfy any of these prerequisites of Section 5(8)(f) of the Code for two reasons: first, under the Development Agreement with the Corporate Debtor of these 6 land owners of 23.01.2006, no amount was raised by the Corporate Debtor and no amount was ever disbursed against the consideration of 'time value of money'. In fact, contrary to it, the land owners received security deposit of Rs.1.75 crore from the Corporate Debtor. Therefore, no money was disbursed by the 6 land owners for the time value of money which has to be satisfied u/s 5(8) of the IBC. In this regard, and as submitted by the Applicant, this Bench would like to refer to the interpretation of the Hon'ble Supreme Court of the term "disbursal" in Pioneer Urban Land and Infrastructure Ltd. vs Union of India (2019) 8 SCC 416 where the Hon'ble Supreme Court had interpreted the term 'disbursal' in the following manner:

"70. 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 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."

71. In the present case, 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 lender, but is with the borrower, who then utilizes the money..."

In this regard, we would also like to refer to the decision of the Coordinated Bench of NCLT, Delhi in the case of Global Credit Capital Ltd vs Venta Realtech Pvt. Ltd. dated 26.02.2020 wherein the NCLT Bench while dealing with a similar matter had held that land owners having area sharing arrangement, who are Promoter as per RERA, cannot claim as Financial Creditor on the basis of Development Agreement and allotment letters unless money was raised from them under the Real Estate Project. Further, NCLT, Delhi in another matter of Arenja Enterprises Private Limited Vs. Edward Keventer (Successors) Private Limited (IB/775/ND2019) dealt with the similar issue whether claim filed by the Applicants having area sharing arrangement under real estate project fall within purview of definition of Financial Debt as defined under Section 5(8)(f) of the IBC, 2016. In this matter, the NCLT, Delhi held that the Financial Debt refers to non-payment of money, which is due and payable and default has occurred in paying the same. In connection with financial creditors falling in the category of home buyers, any amount raised from an allottee under real estate project shall be deemed to be an amount having commercial effect of borrowing. Therefore, it held that when claim was not filed basis any amount raised or for non-payment of any money but merely on basis of arrangement whereby the Applicant was to receive specified built up area hence the contention that such application is financial creditor is misconceived and accordingly held that Section 7 Petition by the Applicant was not maintainable. The aforesaid Judgment of NCLT, Delhi in Arenja Enterprises was upheld by Hon'ble NCLAT in (Company Appeal (AT) (Insolvency) No. 528 of 2020.

27. Secondly, the Landowners on Affidavit have stated that they are co-Promoters and the same was uploaded on the Maharashtra RERA website. The Bench notes that the explanation provided for definition of 'Promoter' as per section 2(zk) of the RERA, 2016 clarifies the Promoter as, "where the person who constructs or converts building into apartments or develops a plot for sale and the person who sells apartment or plots are different persons, both of them shall be deemed to be promoters and shall be jointly liable as such for the functions and responsibility specified, under this act". It is clear to this Bench that

RERA has distinguished and defined "Allottee" and "Promoters" very differently and in no way both can be treated as the same.

28. This Bench also notes that the six Landowners have claimed that their claim is a Financial Claim as it has an 'interest' component of 24%.

However, the Bench notes that this 24% interest claim is for delayed construction and not for 'time value' of money disbursed. Therefore, the claim of 24% interest is in nature of damages/ penalty for delayed construction and not for interest against financial debt.

29. The Bench notes that the RP in his Reply has mentioned that NCLT does not have jurisdiction to look into any issue relating re-determination and collation of claims. In this regard, he has referred to a Judgment dated 24.01.2020 of Hon'ble NCLAT in case of Dipco Pvt. Ltd. v Jayesh Sanghrajka wherein the Hon'ble NCLAT has held that re-determination and collation of claims is within the purview of RP and NCLT cannot sit in appeal over it. However, this Bench notes that the facts of the case were totally different compared to the present case, mainly on two grounds: (1) In the matter before the Hon'ble NCLAT, the Applicant was HDFC Bank whose share in Committee of Creditors would have increased from 21.26% to about 51%, and (2) More than 330 days had passed in that matter and the CoC had already approved the Resolution Plan which was to be placed before the Adjudicating Authority. It was at that time that HDFC Bank had moved an Application u/s 65 of the Code.

30. This Bench is of the considered view that in the present case, the Promoter of the Project who should not be considered as a Financial Creditor at all have not only been considered as a Financial Creditor but has usurped the CoC as a result of RP wrongly registering their claim as that of a Financial Creditor and thereby making the six land owners part of the CoC with about 80% voting share, reducing the legitimate 98.37% of the Applicant, i.e., Bank of India to 19.97%. This has resulted into handing over the CoC with 80% share to a party who should not be there at all. Secondly, as mentioned during the course of hearing no Resolution Plan has been approved by the CoC and no plan has been filed by the RP before the Adjudicating Authority.

31. The Bench is also of the view that RP has arbitrarily admitted the claim of Rs.127.25 crores of the Promoters without proper verification from the Books of Accounts of the Corporate Debtor. In this regard, the Bench notes the contention of the Applicant, i.e., Bank of India, whose shares in the CoC, as a result of arbitrariness of the RP, has been reduced from 98.37% to 20.31%. It is expected of the RP that in case of Real Estate Project having homebuyers, he/she should have a clear understanding of the provisions of RERA and other related issues to distinguish between an "Allottee" and a "Promoter" in a Real Estate Project.

32. The Bench, in view of the above, Orders the following:

i. "Allows" IA 1035/2021 and consequently "Dismisses" IA 1450/2021. The Bench

also directs the RP to reconstitute the CoC based on the above Order and convene the meeting of the reconstituted CoC within a week's time from the date of this Order.

ii. The Registry to send a copy of this Order to the IBBI for it to take an appropriate view regarding the conduct/ competence of the RP in dealing with this particular case.