(2021) 04 NCLT CK 0031

In the National Company Law Tribunal

Case No : Interlocutory Appeal No. 322/IB Of 2020 In Company Application No. 1 Of 2017

M/s. IDBI Bank Limited — APPELLANT

Vs

V. Mahesh — RESPONDENT

Date of Decision : 21-04-2021

Acts Referred:

National Company Law Tribunal Rules, 2016 — Rule 11
Insolvency And Bankruptcy Code, 2016 — Section 5(8), 5(8)(c), 5(8)(d), 5(8)(e), 9, 60(5)(b), 60(5)(c)
Real Estate (Regulation And Development) Act, 2016 — Section 2(d), 2(zn)

Citation : (2021) 04 NCLT CK 0031

Hon'ble Judges : R. Varadharajan, J;Anil Kumar B, Member (Technical)

Bench : Division Bench

Advocate : Varun Srinivasan, NVS, V. Mahesh

Final Decision : Allowed

Judgement

1. This Application has been filed by M/s. IDBI Bank Limited under Section 60 (5) (b) and (c) of the Insolvency and Bankruptcy Code (IBC) 2016 r/w Rule 11 of NCLT Rules of 2016 aggrieved by the action of the Insolvency Resolution Professional (IRP) appointed by this Tribunal in relation to the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor viz., Vasan Health Care Pvt. Limited (VHCPL).

2. The Applicant Bank has moved this application against the decision of the Interim Resolution Professional (IRP) partially rejecting the claim filed by this Applicant/Financial Creditor with respect to Term Loan II.

2. The Learned Counsel for the Applicant Bank submitted that pursuant to an Application moved by an Operational Creditor under Section 9 of IBC, 2016 as against the Corporate Debtor, an Order came to be passed by this Tribunal on 21.04.2017, initiating Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor and the Respondent herein had been appointed as the

Interim Resolution Professional (IRP).

3. It is seen that vide an Order dated 04.05.2017 passed in Company A.No.463/2019 in CP/267/2015, in the matter of M/s. Vasan Health Care Pvt. Limited (VHCPL) the Hon'ble High Court of Madras had ordered an interim stay on the operation of the said Order dated 21.04.2017 passed by this Tribunal in CA/1(IB)/CB/2017 declaring commencement of CCIRP against the Corporate Debtor viz., M/s. Vasan Health Care Pvt. Limited (VHCPL). Subsequently, by virtue of another Order dated 05.09.2019 passed in CA/273/2019 in CP/267/2015 the Hon'ble Madras High Court was pleased to vacate the interim stay and the matter was remanded to this Tribunal for adjudication. Consequently, the Respondent/Interim Resolution Professional moved an Application before the Hon'ble NCLT seeking a revival of the Order dated 21.04.2017 as well as to permit him to make public announcement afresh, as the time period of the earlier announcement had got lapsed due to the stay order of the Hon'ble Madras High Court.

4. On the basis of the above, this Tribunal ordered for revival of its earlier Order for initiating CIRP as against the Corporate Debtor and accordingly directed the IRP to continue the CIRP as against the Corporate Debtor by causing fresh Public Announcement as per Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016, inviting the claims from the creditors and to subsequently verify the claims of the creditors in accordance with the provisions of the I&B Code, 2016 and IBBI (IRPCP) Regulations, 2016.

5. Accordingly, the Applicant Bank furnished its claim de novo before IRP to the tune of Rs.37,62,83,845 (Rupees thirty seven crores sixty two lakhs eighty three thousand eight hundred and forty five only).

6. The Learned Counsel for the Applicant Bank submitted that the claims submitted by them relate to sanction of financial assistance comprising of two separate terms loans, wherein, under the Term Loan 1, the Corporate Debtor, viz., M/s. Vasan Health Care Pvt Ltd., was sanctioned a term loan of Rs.30,00,00,000/- (Rupees thirty crore only) on 12.03.2013 and a Sanction Letter in lieu of the same was issued with Reference No.3612/CEiG/VHPL to set up nine new eye care centres located in various cities with charge on future receivables of specific centres including the nine new centers. The said sanction was secured by the personal guarantees rendered by the promoter directors of the Corporate Debtor. Further, the loan was secured by an equitable mortgage on land and building owned by the promoter directors situated at Alwarpet, Chennai.

7. The Learned Counsel for the Applicant Bank submitted that on the other hand, the claim for Term Loan II arose by means of assignment of Purchase of Rent Receivable executed between the Applicant/Financial Creditor and M/s. Rent Works India Pvt Ltd., (Rent works). It is further submitted that the assignment provided finance for acquisition of specified equipment for 17 new hospitals/

clinics proposed to be set up by the Corporate Debtor across the country.

8. The Learned Counsel for the Applicant Bank submitted that on receipt of the claim furnished by the Applicant/Financial Creditor, the Respondent admitted the Applicant as a Financial Creditor for the outstanding amount of Rs.14.42 crore in respect of Term Loan-1, however, vide letter dated 07.02.2020, the Respondent had rejected the claim of the Applicant Bank as a Financial Creditor for the Term Loan-2.

9. The Learned Counsel for the Applicant Bank submitted that Rent works is a company incorporated under the Companies Act, 1956 having its registered office at Windsor House, Off CST Road, Kalina, Santacruz (East), Mumbai - 400 098. Rent works is in the business of providing equipment on lease.

10. The Learned Counsel for the Applicant Bank submitted that there was a Master Rental Agreement (MRA) entered into between Rentworks and the Corporate Debtor, which defines the broad contours subject to which Rentworks would provide the equipment lease. A copy of the Master Rent Agreements dated 29.06.2011 is also filed along with the typed set.

11. The Learned Counsel for the Applicant Bank has explained the characteristics of the transaction envisaged in the said MRA, whereby Corporate Debtor identified the equipment that would be required by it for its business and signed a Rental Schedule in the agreed form together with a supplier's invoice addressed to Rentworks in respect of the equipment. The authorized signatory of the Borrower would sign the Rental Schedule and authorized payment for the machinery to the supplier of the equipment supplied by him. The ownership of the equipment would remain with Rentworks. The Borrower on receipt and installation of the equipment would sign an acknowledgement of delivery and authority to pay.

12. The Learned Counsel for the Applicant Bank submitted that under Clause 4.6 of MRA, the Corporate Debtor had agreed that the payment of rent and other moneys under the MRA is absolute and unconditional irrespective as to the operation or non-operation of the equipment. It is further submitted that the said MRA further obligates the Corporate Debtor that it would pay the rent notwithstanding any defect in, breakdown, or non-delivery etc., of the equipment. It is further submitted that in terms of clause 5.2(c), the Corporate Debtor does not have any title to the equipment. Further, in terms of Clause 5.3, Rentworks assigns to the benefit of the Corporate Debtor of all supplier or manufacturer warranties which may be given to it in relation to the equipment. As per Clause 6.2, the Corporate Debtor has only a right to use the equipment and agreed to indemnify Rentworks against any costs, loss or liability it may reasonably incur as a result of removal of the equipment by the Corporate Debtor. Pursuant to Clause II pertaining to termination rents, only Rentworks has the right to terminate in specified circumstances and in case of termination, the Corporate Debtor would pay liquidated damages equal to the aggregate amount

of future rentals payable under MRA; the arrangement between Corporate Debtor and Rentworks in the aforementioned manner under the MRA and Rent Schedule together constitute the Rental Documents.

13. The Learned Counsel for the Applicant Bank has further submitted that the Applicant/Financial Creditor, agreed to purchase the rent receivables payable under the Rental Documents at a discounted value of Rs.36.60 crore applying an Internal Rate of Return (IRR) @ 11.25% on the terms and conditions mentioned in the letter of the Applicant dated 10.09.2013.

14. The Learned Counsel for the Applicant Bank submitted that necessary documents were executed by Rentworks and the Applicant to give effect to its Purchase of Rent Receivables. Rentworks intimated the Corporate Debtor about the assignment by a notification of Assignment Letter. The promoters of the Corporate Debtor, namely, Dr. A.M. Arun and his wife Mrs. Meera Arun executed Deed of Guarantee in favour of the Applicant on 23.08.2013 and an undertaking dated 12.09.2013 to pay the rent instalments.

15. The Learned Counsel for the Applicant Bank submitted that in the above background, the Applicant/Financial Creditor filed its claim as a Financial Creditor for the amount due from the Corporate Debtor, prima facie, it is submitted that the claim filed by this Applicant/Financial Creditor, successor in interest of Rentworks, should have been accepted without further enquiry on the ground that the transaction between Rentworks and the Corporate Debtor unequivocally contemplates a definite return of 11.25% as found in para 7 of the Rental Schedule. It is, therefore, submitted that the above would lead to the conclusion that the acquisition of equipment by Rentworks is in the nature of financial arrangement against consideration for the time value of money. It is, however, submitted that for the funding by Rentworks for the acquisition of the equipment, the Corporate Debtor would have to borrow amount or infuse further capital into the business. It is pursuant to this that the Applicant was approached and accordingly provided the sanction.

16. The Learned Counsel for the Applicant Bank submitted that the examination whether the transaction amounted to financial lease or operating lease was unwarranted and in the event of such classification sought to refer to the Accounting Standard (AS) 19 "Leases" issued by the Institute of Chartered Accountants of India, a statutory body, which was relevant to the transaction when it was entered into.

17. The Learned Counsel for the Applicant Bank submit that as per AS-19, a "lease" is an agreement whereby the lessor conveys to the lessee in return for payment or series of payments, the right to use an asset for an agreed period of time the relevant portions of which is reproduced below:-

AS-19

"5.The classification of leases adopted in this Standard is based on the extent to which risks and rewards incident to ownership of a leased asset lie with the lessor or the lessee. Risks include the possibilities of losses from idle capacity or technological obsolescence and of variations in return due to changing economic conditions. Rewards may be represented by the expectation of profitable operation over the economic life of the asset and of gain from appreciation in value or realization of residual value.

6. A lease is classified as a finance lease if it transfers substantially all the risks and rewards incident to ownership. Title may or may not eventually be transferred. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incident to ownership.

8. Whether a lease is a finance lease or an operating lease depends on the substance of the transaction rather than its form. Examples of situations which would normally lead to a lease being classified as a finance lease are: (1) the lease transfers ownership of the asset to the lessee by the end of the lease term:

(b) the lessee has the option to purchase the asset at a price which is expected to be sufficiently lower than the fair value at the date the option becomes exercisable such that, at the inception of the lease, it is reasonably certain that the option will be exercised;

(c) the lease term is for the major part of the economic life of the asset even if title is not transferred;

(d) at the inception of the lease the present value of the minimum lease payments amount to at least substantially all of the fair value of the leased asset; and

(e) the leased asset is of a specialised nature such that only the lessee can use it without major modifications being made.

9. Indicators of situations which individually or in combination could also lead to a lease being classified as a finance lease are:

(a) if the lessee can cancel the lease, the lessor's losses associated with the cancellation are borne by the lessee;

(b) gains or losses from the fluctuation in the fair value of the residential fall to the lessee (for example in the form of a rent rebate equalling most of the sales proceeds at the end of the lease); and

(c) the lessee can continue the lease for a secondary period at a rent which is substantially lower than market rent".

18. The Learned Counsel for the Applicant Bank submitted that from a perusal of the above, the situations that would normally lead to a lease being classified as a finance lease are: that the lease term is for a major part of the economic life of the asset even if the title is not transferred; that at the inception of the lease the present value of the minimum lease payments amounts to at least substantially

all of the fair value of the leased asset; and that the leased asset is a specialised nature such that only the lessee can use it without major modifications being made.

19. The Learned Counsel for the Applicant Bank submitted that in the present case, the lease is for 36 months. During this period, the renter, namely, the Corporate Debtor, receives the fair value of the equipment and the assets leased are of special nature. It is, therefore, submitted that the transaction with respect to Term Loan II is concerned will clearly come within the ambit of a financial lease.

20. The Learned Counsel for the Applicant Bank submitted that the classification of lease depends upon the extent to which risks and rewards incidental ownership of the leased asset lie with the lessor or the lessee. It is, hence, submitted that the key criterion to determine the type of lease is whether or not it transfer substantially all the risks and rewards incidental ownership.

21. The Learned Counsel for the Applicant Bank has sought to reproduce Clause 4.6 of the MRA, which reads as follows:-

"Your obligation to pay rent other moneys under this Agreement is absolute and unconditional irrespective as to the operation, non-operation of the Equipment. Without limitation, your payment obligation will continue notwithstanding any defect in, breakdown, accident, loss, theft or damage to or non-delivery of, the Equipment and you shall not be entitled to withhold the payment of any rent event, if any, Equipment does not function".

22. The Learned Counsel for the Applicant Bank further submitted that Clause 5.2 (a) states

"You have examined the Equipment before accepting it and have satisfied yourself as to its condition and suitability for your purposes and its compliance with any prescribed safety standards".

23. The Learned Counsel for the Applicant Bank submitted that the stipulations in the MRA are sufficient to demonstrate that there was transfer of the risks and rewards to the Corporate Debtor.

24. On the basis of averments made by the Applicant Bank in the Application and on a perusal of the same, it is found that the Resolution Professional rejected the claim of the Applicant as a Financial Creditor in their capacity as a successor in interest of Rentworks on five grounds as explained below:-

(i) The Respondent refers to the confirmation from Rentworks and the Corporate Debtor stating that the transaction was only in the nature of an operational debt and not classified/treated as a loan or finance transaction by the respective parties.

(ii) The mere accounting treatment adopted by the entities or their statutory auditors is not a reliable method to ascertain the nature of transaction vis-à-vis the Accounting Standards.

(iii) The error can be rectified even post facto by passing suitable accounting entries and reporting the impact of the revision in the form of a foot note or Notes on Accounts.

(iv) As far as Rentworks is concerned, it had done a back-to-back transaction with the Applicant/Financial Creditor within a few days of the transaction;

(v) The profit accrued in this transaction would have been captured in its books of accounts.

25. The Applicant Bank has stated that the Respondent IRP has not examined the Rental Documents in arriving at a clear conclusion and submitted that based on the grounds four and five, Respondent/Interim Resolution Professional had taken a view that section 5(8)(d) & (c) of IBC, 2016 is not applicable to the Applicant/Financial Creditor. Further, the Respondent/Interim Resolution Professional has not disputed the purchase of the receivables by the Applicant/ Financial Creditor. It is submitted that Sale on non-recourse basis is only between the Applicant and Rentworks and not with the Corporate Debtor and Rentworks or Applicant/Financial Creditor and the Corporate Debtor. The Applicant/Financial Creditor is a successor in interest of Rentworks and if Rentworks can be construed as a financial creditor under Rental Documents, the Applicant/Financial Creditor can derive the said benefit by virtue of its purchase of the receivables.

26. The Applicant Bank reiterated that the conclusion reached by the Respondent/ Interim Resolution Professional is not borne out by the Rental Documents and failure to apply the Accounting Standards to ascertain the true character of the transaction has led to an incorrect conclusion and maintained that they retain the characteristics of Financial Creditor.

27. The Respondent RP has submitted that the IRP/Respondent herein has been taking care of the affairs of the Corporate Debtor as a going concern by ensuring that there is continuing business operations ever since he had been appointed as the Interim Resolution Professional of the Corporate Debtor and caused to publish a Public Announcement dated 04.10.2019 wherein it has been stated that the CIRP period of 180 days has been calculated from the date of the Revival Order dated 03.10.2019, thereby marking the estimated date of closure of the CIRP on 31.03.2020. Consequently, numerous claims had been received by the IRP/Respondent herein connection with the instant Corporate Debtor.

28. The Respondent submitted that Rejection of the Claim of the Applicant partly, was done after a thorough scrutiny of the documents submitted by them, reply to the clarifications sought for and submitted, verification of the claim with the Books of Accounts of the CD, wherever considered necessary and the Assignor's confirmation as to the nature of the transaction.

29. The Respondent RP has explained the transaction envisaged in Renting out

Medical Equipment on HIRE for use by the Corporate Debtor, in return for monthly, "Rental charges" to be paid to RWIPL. The total amount covered through this Arrangement is around Rs.200 Crore and is covered under a generic Master Rental Agreement ("MRA') dated 29.06.2011 and thereafter the Rent Charges Receivables by RWIPL from Corporate Debtor were SOLD to various interested parties for a certain sum of money and RWIPL, in turn ASSIGNED THEIR RENT RECEIVABLES IN FAVOUR of those parties. The parties are Siemens Financial Services Private Limited, Axis Bank, L & T Finance, Reliance Commercial Finance Limited and this Applicant as well (i.e.,) IDBI Bank Limited. The Respondent RP has sought to reproduce the wordings in the "Notification of Assignment Letter" for the purpose of easy reference

30. Both the parties were heard in detail. On the perusal of the documents submitted by the parties and submissions made during the course of hearing, this Adjudicating Authority makes the following observations:

31. As per the definition of the expression financial debt in sub- section 8 of Section 5 of IBC, 2016 which is as follows:-

(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;

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

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(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-clause (a) to (h) of this clause;

32. On careful examination of the relevant clauses of the Master Rental Agreement (MRA), the transaction takes the form of financial debt in respect of which there is an amount of the liability in respect of the lease which is deemed as a 'financial lease' under the Accounting Standards (AS) - ICAI. Further, as per Section 5(8)(e) a 'financial debt' includes receivables sold or discounted other than any receivables sold on non-recourse basis;

33. There are two documents governing the transactions contemplated in this Application under consideration, namely,

i. The Master Rental Agreement dated 29.06.2011 between the Rentworks India Private Ltd., and Vasan Healthcare Private Limited of the Corporate Debtor.

ii. The documents evidencing purchase of rental agreement dated 10.09.2013 by the IDBI Bank, the Applicant from Rentworks India Private Ltd.,

34. In this context, the relevant portion of the Master Rental Agreement between the Rentworks India Private Ltd., and Vasan Healthcare Private Limited is reproduced below:

"26. Agreement and Agency

26.1 We may sell or assign either absolute or by way of security all or any of our rights and/or obligations under the Agreement and/or to the Equipment to any other person. Upon such assignment, you acknowledge that:

a) We shall be entitled to transfer all Rental related information to such person; and

b) Where applicable, you will recognise the person as the new owner of the Equipment and that you will hold the Equipment on behalf of the person subject to the terms and conditions of this Agreement.

26.2 You shall not assign any of your obligations or rights hereunder to a third party".

35. Further the first paragraph of the relevant document towards rental receivables by IDBI Bank from Rentworks India Private Ltd., is cull out and reproduced it.

"We refer to our Sanction Letter Ref. No. IDBI/NPT/CBG/13- 14/67 dated July 24, 2013 (hereinafter collectively referred to as "Original Sanction Letter") issued to you and to your application requesting us to purchase rent receivables payable by Vasan Healthcare Private Limited to you under and in terms of the Master Rental Agreement dated June 29, 2011 read with the Rental Schedule dated June 29, 2011 (collectively referred to as the "Rental Documents"). The request has been considered and IDBI Bank is agreeable, in principle, to purchase the rent receivables payable under the Rental Documents at a discounted value of Rs.36,60,000/- on the terms and conditions set out to the Appendix-I hereto. This letter shall form an integral part of the documents to be entered into by you with IDBI Bank".

36. On a careful examination of these documents and relevant portions, we are of the considered view that the amount due to the Applicant Bank constitutes a 'financial debt' which was disbursed to the successor for the time value of money.

37. The contention of the Respondent rejecting the claim of the Applicant Bank do not hold good in view of the reference to the nature of rental agreement which is a financial lease agreement in substance then in form, which is capable of being assigned as per the Clause 26 of the agreement and consequent upon purchase of the rent receivable contained therein the Applicant Bank has acquired the right of the financial creditor as succession in interest.

38. Accordingly, the rejection of the claim by the Respondent in respect of Term Loan II is hereby set aside and since the claim of the Applicant Bank in relation to Term Loan II qualifies to be a 'financial debt', we hereby direct the Respondent to admit the claim of the Applicant Bank in relation to Term Loan II and treat the Applicant Bank as a 'Financial Creditor' in terms of the provisions of IBC, 2016. Accordingly, the Application stands allowed.

