

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

CHENNAI BENCH, CHENNAI

COMPANY APPEAL (AT)(CH)(INSOLVENCY) NO.261 OF 2021

(Arising out of judgement dated 5th February, 2021 passed by the Adjudicating Authority, (National Company Law Tribunal, Bengaluru Bench) in I.A. No.416 of 2020 in CP. (IB) No.189/BB/2018.

In the matter of:

Axis Bank Ltd
Regd Office at
Trishul 3rd Floor,
Opposite Samartheshwar Temple Law
Garden Ellishbridge,
Ahmedabad
Gujarat 380006

Appellant

Vs

Samruddhi Realty Ltd
(Under Liquidation
2nd Floor, No.1, Tate Lane,
Richmond Road Cross Bangalore,
Bangalore Karnataka 560025

Corporate Debtor/Respondent 1

Through

Pankaj Srivastava
5, 5th Cross Navya Nagar,
Jakkur, Bangalore,
Karnataka 560064

Liquidator

Present:

Mr. Sharad Tyagi, Advocate for Mr. Yukti Makan, Advocate for Appellant.
Mr. Abhishek Anand, Advocates for Respondent/Liquidator.

JUDGEMENT
VIRTUAL MODE

JUSTICE M. VENUGOPAL, MEMBER (J)

The Appellant/Applicant, in IA 558/2021 in Company Appeal (AT)(CH)(Ins) No.261/2021 has prayed for condonation of delay of 13 days in preferring the instant Appeal on the ground that the order dated 05.02.2021 was made available on the website/web portal of the 'Adjudicating Authority' Comp App (AT)(CH)(Ins)No.261/2021

on 09.03.2021 when the 'Application' for obtaining certified copy of the order was made on 01.04.2021, the Applicant was informed that the 'Application' for securing the certified copy of the order was to be filed in prescribed format and later a certified copy of the order was prepared on 09.04.2021. Moreover, the certified copy was obtained on 16.04.2021 because of the fact that 'Adjudicating Authority' was not functional till 14.04.2021, on account of various local Holidays and later, the instant Appeal was filed. Under these circumstances, the Appeal came to be filed with a delay of 13 days, which is neither wilful nor wanton, but due to the aforesaid reasons.

2. Taking note of the reasons assigned by the Applicant/Appellant in IA No.558/2021 in Comp App (AT)(CH)(Ins) No.261/2021, this 'Tribunal' on being subjectively satisfied in regard to the reasons ascribed, condones the delay of 13 days and allows the IA No.558/2021 in Comp App (AT)(CH)(Ins) No.261/2021, in the interest of justice. No costs.

INTRODUCTION

3. The Appellant/Axis Bank Ltd has preferred the instant Company Appeal (AT)(CH)(Ins) No.261/2021 being aggrieved against the order dated 05.02.2021 in IA 416/2020 in CP(IB)No.189/BB/2018 passed by the 'Adjudicating Authority'.

4. The 'Adjudicating Authority' while passing the impugned order dated 5th February, 2021 in I.A. No.416 of 2020 in CP. (IB) No.189/BB/2018 (Filed by the Applicant/Axis Bank Ltd under Section 42 read with Section 60(5) of the I&B Code, 2016) at paragraph 5 to 9 had observed the following and dismissed the Interlocutory Application without costs.

“5.Mr. Sharad Tyagi, the Learned Senior Counsel for the Applicant, while reiterating various averments made in the Application, as briefly stated supra, has further inter-alia submitted that though the claim of Applicant was rejected during stage of CIRP itself by the Resolution Professional, the Applicant has right to submit its claim again before the Liquidator, in pursuant to the Public Announcement in Form II dated 17.03.2020, as Liquidation is a separate Proceeding, and the Legislature has provided opportunity second opportunity to claimant(s). As per the Agreement executed between the parties, it gives a right to the Bank to claim out of the Liquidation cost of the Corporate Debtor instead of from the Home Buyers. The Bank has disbursed the money to the Corporate Debtor. Therefore, the Applicant is entitled for the relief as sought for.

6. Mr. Abhishek Anand, the learned counsel for the Liquidator, on the other hand, has opposed the claim of the Applicant and it cannot file claim again during Liquidation process, as its claim was considered and rejected during the CIRP Process, as its claim was considered and rejected during the CIRP Process, by the Resolution Professional, as stated in the List of Claims of financial Creditors as on 27.02.2020, on the basis of judgement rendered in the case of India Bulls Housing Finance Limited Vs. Rudra Buildwell Projects Pvt Ltd. However, the Applicant did not assail the said rejection and claimed the same amount during Liquidation, which is not maintainable. Therefore, he has urged to dismiss Application.

7. The object of the Code is to see that the CIRP Process/Liquidation process is to be continued in a time-bound manner as prescribed in the Provisions of the Code and Rules made thereunder. The CIRP and the Liquidation process, if not completed within the stipulated period, the object of the Code will be defeated. The contention of the Learned Senior Counsel for the Applicant that the Applicant can avail opportunity with reference to Public Notification issued by Liquidator, even though its claim was rejected during CIRP by IRP/ 'Resolution Professional', is not correcte and not tenable. While it is true that all claimants, which include claimants during CIRP, have to make/reiterate their claim again to Liquidator, but old claimants will reiterate their claim made earlier in CIRP, and fresh claimants, who have not availed opportunity during CIRP, can make their claim. It is relevant to point out here the Liquidation proceedings are part of insolvency proceedings initiated under the Provisions of Code and it is second stage of CIRP in respect of Corporate Debtor. Moreover, the Liquidator cannot ignore the decisions taken by IRP/ 'Resolution Professional' and reverse them except any new development takes place in such claims. Moreover, there cannot be two claims in respect of same debt.

8. As rightly pointed by the Learned Counsel for the Respondent, that if the Applicant is aggrieved by the decision of then IRP/ 'Resolution Professional', the Applicant has to take recourse to remedy by way of Appeal as provided under the provisions of Code within fourteen days of the receipt of such decision. It is not in dispute that 'Resolution

Professional’, as early as on 3rd March, 2020 replied to the Applicant stating that its claim has been updated on the website of the Corporate Debtor and stand rejected. Since the Liquidator has accepted the claims of Allottee in question, the Applicant cannot ask to replace them, that too without impleading those allottees in the instant Application. The Respondent has considered the case of Applicant and rejected its case with cogent reasons and thus the impugned rejection cannot be found fault with. The Applicant, admittedly has right against the allottees in question to proceed basing on various documents executed between the parties.

9. For the aforesaid reasons and circumstances of case and the law on the issue, we are of the considered opinion that the Applicant failed to make out any case so as to interfere in the impugned action of Respondent. We are satisfied that the Liquidator is carrying out the Liquidation process in question, in accordance with law.”

APPELLANT’S CONTENTIONS:

5. The Learned Counsel for the Appellant submits that the impugned order in IA No.416/2020 in CP (IB)/189/BB/2018 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Bengaluru Bench) is contrary to the fact and law.

6. The Learned Counsel for the Appellant contends that the Appellant is a ‘secured creditor’ and had invested a substantial amount in the Project by granting loan to the ‘Corporate Debtor’ at the behest of ‘Home Buyers’ on the

strength of the 'Tripartite Arrangement' and 'PTM' executed by the Corporate Debtor and other loan documents executed by the respective 'Home Buyers'.

7. The Learned Counsel for the Appellant takes a stand that the 'Debt Recovery Tribunal' based on the loan documents/tripartite arrangement, averment made and argument advanced by the Appellant/Applicant, Corporate Debtor and the respective 'Home Buyers', had issued 'Recovery Certificate' in favour of the Appellant and against the Corporate Debtor as well as the respective 'Home Buyers' and recovery proceedings against the defaulting 'Home Buyers' are also pending before the 'Debt Recovery Tribunal'.

8. It is represented on behalf of the Appellant that it has a claim to recover from the 'Corporate Debtor' as the definition of claim under Section 3(6) of the Code is inclusive of a right to payment, whether or not such rights is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured/unsecured right to remedy for breach of contract under any other law for time being in force if such breach gives rise to a right to payment irrespective of condition or status attending it.

9. It is the version of the Appellant that its claim is nothing but a 'Debt' as defined under Section 3(11) of the I&B Code, as the same being a liability or obligation in respect of a claim which is due from any person as a 'Financial Creditor'.

10. The Learned Counsel for the Appellant projects an argument that the 'Adjudicating Authority' had failed to appreciate that the 'Corporate Debtor' had created 'lien' over the flats/units, which falls within the definition of security interest as per Section 3(31) of the Code and hence shall be

considered as a 'secured creditor' as per definition 'secured creditor' under the Code.

11. The Learned Counsel for the Appellant points out that the 'Home Buyers/allottees' had subrogated all the rights under the 'Flats/Units' in favour of the Appellant and further that the Appellant is entitled to receive entire refund of its dues from the 'Home Buyers' in case of delay in construction of the flat/project as agreed in the Indemnity Letter/Bond executed by the relevant 'Home Buyers'.

12. The Learned Counsel for the Appellant contends that the substantial sum towards the cost of flats/units was financed by the Appellant, if any payment is contemplated under the 'Liquidation' to the 'Home Buyers' for settlement of their claim, it ought to be first utilised to pay off the dues of the Appellant.

13. The Learned Counsel for the Appellant submits that the Appellant is to be considered as a 'secured Financial Creditor' and shall be considered as a part of the 'Committee of Creditors'. In fact, all the 'Home Buyers' (numbering 13) had already transferred their respective rights under the flats/units in favour of the Appellant, as evident from 'lien' marked by the 'Corporate Debtor' in favour of the 'Appellant', subrogation clause mentioned in the Tripartite Agreement, irrevocable Power of Attorney by Home Buyers in favour of the Appellant and other documents executed by the respective Home Buyers in favour of the Appellant.

14. The Learned Counsel for the Appellant refers to the definition of Financial Creditor as per Section 5(7) of the I&B Code meaning '*any person*

to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to' and also adverts to the definition of 'transfer' which includes '*sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien*'.

15. The Learned Counsel for the Appellant proceeds to points out that 'subrogation' is an 'Equitable Assignment' and in fact the terms 'subrogation' means substitution of one person for another, i.e. one person is allowed to stand in the shoes of another and assert that person's rights against the defendant.

16. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the Appellant holds a Decree/Recovery Certificate in its favour passed by the Debt Recovery Tribunal against 1 allottee as well as the 'Corporate Debtor' and rests of the applications are sub-judice before the Debt Recovery Tribunal. Furthermore, in terms of the definition of the 'creditor', a decree holder is also a creditor and that the 'Corporate Debtor' was part of the proceedings pending before the Debt Recovery Tribunal.

17. It is the contention of the Learned Counsel for the Appellant that the Resolution Professional/Liquidator cannot overlook the Recovery Certificate already issued by the Debt Recovery Tribunal and in four cases, the Appellant had recalled the loan by exercising its rights under the loan documents and the outstanding dues would be recovered out of the sale of the flats/units by means of Recovery Certificate issued by the Debt Recovery Tribunal.

18. The Learned Counsel for the Appellant contends that the public funds are disbursed to the Corporate Debtor on behalf of the Home Buyers/allottees.

To secure the loan numerous rights were given by the allottees/Home Buyers and the Corporate Debtor in favour of the Appellant under the loan/transaction documents.

19. The Learned Counsel for the Appellant submits that the Appellant had given the details of 13 allottees who had availed loan from the Appellant and that the Liquidator had submitted the details of only 10 allottees whose claims were accepted by him.

20. The Learned Counsel for the Appellant adverts to the fact that the Appellant had disbursed a substantial sum to those Allottees against the security of flats/units and it has a right to recover its money out of the sale of such flats/units. Therefore, it is the plea of the Appellant that in case of unattended claim, the claim filed by the Appellant should be considered. Otherwise, the 'Appellant' would neither be recovering its loan sum nor security protecting its rights and interests under the 'Tripartite Loan Transaction'.

21. The Learned Counsel for the 'Appellant' contends that the allottees/Home Buyers of the Flats/Units donot have absolute rights over the said flats/units as substantial money was paid by the Appellant to the Corporate Debtor directly on behalf of the said allottees against the security of flats/units. The said allottees cannot deal with their flats/units freely bearing in mind the security interest enjoyed with Appellant and due to the provisions of the Tripartite Agreement and other transaction documents.

22. The Learned Counsel for the Appellant points out that the 'liquidation' is an extra ordinary event and under liquidation, the assets of the 'Corporate

Debtor' would be auctioned including the flats/units financed by the Appellant which it enjoys a security interest upon realisation of the amount, out of the assets of the Corporate Debtor, the same would be distributed to the 'creditors' as per Section 53 of the Code.

23. The Learned Counsel for the Appellant submits that in terms of the provisions of the Tripartite Agreement and the security interest created to and in favour of the Appellant, the money is to be paid to the allottees/Home buyers of the flats/units shall firstly be utilised to pay off the Appellant's dues.

24. The Learned Counsel for the Appellant refers to the order of the Hon'ble High Court of Karnataka in the matter of Mr. Chinnaswamy Vs The Official Liquidator of M/s Karnataka Ball Bearings Corporation Ltd (vide CA No.172/2013 dated 31.01.2013) passed by the Hon'ble High Court of Karnataka wherein a delay of 593 days was condoned in filing of the claim.

25. The Learned Counsel for the Appellant refers to the order dated 10.04.2019 in MA 1098/2021 in CP No.82/IBC/NCLT/MB/MAH/2017 between Natwar Lal Shamaldas & Co (applicant)in the matter of Asmi Enterprises (Operational Creditor) Vs Yog Industries Ltd (Corporate Debtor) and in the matter of UCO Bank Vs Nicco Corporation Ltd (in Liquidation) (CA(IB)No.31/KB/2018) as per order dated 14.02.2018 wherein it was held till the liquidation proceedings are to be finalised, no prejudice will be caused if the claim of the claimant is adjudicated and admitted.

26. While rounding up, the Learned Counsel for the Appellant prays for considering the claim filed by the Appellant with a Liquidator as a distribution

out of the assets of the 'Corporate Debtor' is yet to be made and no person ought to be deprived of its legal right, if no prejudice will be caused.

APPELLANT DECISIONS

27. The Learned Counsel for the Appellant seeks in aid of the order passed by the Adjudicating Authority/NCLT Chennai Bench in Mangalam Cotton Industries V. GV Ravikumar Liquidator of Thirupur Surya Textiles Pvt Ltd (Manu)/NC/0770/2021

15. It must be borne in mind that the IBC treats the CIRP and Liquidation process as two separate stages and the proof of claim is to be filed separately at each stage and hence the submissions of the Learned Counsel for the Applicant that claims filed during CIRP should be treated as the Claim filed during the Liquidation process would render the CIRP and Liquidation Process as envisaged under the provisions of IBC, 2016 as nugatory.

"13. It is to be noted here that the provisions of IBC, 2016 mandates that the Claimants are required to submit the claim to the Liquidator in such form and in such manner along with such supporting documents as specified by the Board. Thereafter, upon submission of the claim, the Liquidator is required to verify the claims within the time limits specified by the Board and in this connection referring to the relevant Regulations namely, IBBI (Liquidation Process) Regulations, 2016 and more specifically under Regulation 30, the Liquidator is required to verify the claim submitted within a period of 30 days from the last date of receipt

of the claims and may either admit or reject in whole or part as the case may be of such claim.”

28. The Learned Counsel for the Appellant points out the Regulation 16 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 which enjoins any person who claims to be a stakeholder, shall submit its claim, or update its claim submitted during CIRP including creation of security interest, if any, before the last date of submission of Claim as mentioned in the Public Announcement. Furthermore, it is projected on the side of the Appellant that on applying the doctrine of ‘literal interpretation’ on the said Regulations, 2016, it is clear that a person has an option to again file their claim before the Liquidator.

RESPONDENT’S SUBMISSIONS:

29. The Learned Counsel for the Respondent contends that the Applicant/Appellant is challenging the decision of the Liquidator dated 05.09.2020 and that no ‘Appeal’ is preferred by the Appellant/applicant as per Section 42 of the I&B Code. But the Appellant before the ‘Adjudicating Authority’ had filed IA 416/2020 in CP(IB)No.189/BB/2018 which is impermissible in Law.

30. It is the submission of the Learned Counsel for the Respondent that in the instant case, ‘the allottees’ had approached the Appellant/Applicant for financial assistance and that the Appellant/Applicant had disbursed the loan sum to the respective ‘allottees’ which then was disbursed by the ‘allottee’ to the Corporate Debtor.

31. The Learned Counsel for the Respondent points out that the Appellant/Applicant to stake a claim as 'Financial Creditor' is to exhibit that the money which it is claiming was disbursed to the 'Corporate Debtor' for 'time value of money'.

32. The Learned Counsel for the Respondent takes a stand that the Liquidator after verification of claims may either admit or reject the claim, in whole or part and Section 35 of the Code deals with 'powers and duties of liquidator', Section 38 of the Code pertains to 'consolidation of claims, Section 39 of the Code provides for 'verification of claims' and Section 40 of the Code speaks of admission or rejection of a claim by the Liquidator.

33. The Learned Counsel for the Respondent submits that the Allottees and the 'Corporate Debtor' had entered into an agreement to Sell wherein it was mentioned that the 'Allottees' will pay the consideration to the 'Corporate Debtor' and that the 'Corporate Debtor' shall construct and deliver the property to the respective Allottees.

34. The Learned Counsel for the Respondent refers to the Clauses of the 'Agreement to Sell' which runs as under:-

"3. The Purchaser's shall pay a sum of Rs.1,05,45,000/- (Rupees One Crore five lakhs forty five thousand only) towards the cost of Schedule 'C' property which amount exclude the cost of Schedule 'B' property. The same shall be payable by the PURHASER'S to DEVELOPER as per the payment of schedule agreed under the agreement. Further, it is agreed that apart from the aforesaid amount shall also pay the additional

cost/deposit/fees/charges/expense as more fully states at para 15 of this agreement.

4. That the DEVELOPER shall construct and deliver the SCHEDULE 'C' PROPERTY to the PURHASER'S in accordance with the specific contained in the Schedule 'D' here to or equivalent thereof. The DEVELOPER agree to deliver the Schedule 'C' property to the PURHASER' on or before 3 months from the date of the agreement with a grace period to the one month subject to force major conditions. The DEVELOPER also contemplates to complete the development of the layout in the project any delay in providing the facilities will not constitute as a breach of this agreement or the part of DEVELOPER subject to clause 18 hereunder.

8. The PURCHASER'S shall make the payment to the DEVELOPER as per the PAYMENT SCHEDULE DESCRIBED HEREUNDER.

a) Rs.10,00,000/- (Rupees Ten Lakhs only(paid as advance at the time of booking by way of cheque bearing No.072626 dated 03/06/2016 drawn on Yes Bank.

b) Rs.21,63,500/- (Rupees Twenty one Lakh Sixty Three Thousand Five Hundred only) as on signing of the agreement.

c) Rs.6854250/- (Rupees Sixty Eight Lakhs Fifty Four Thousand Two Hundred and Fifty Only) within 30 days of signing this Agreement.

d) Rs.5,27,250/- (Rupees Five Lakhs Twenty Seven Thousand Two Hundred and Fifty Only) at the time of possession of the unit.

b) The Applicant upon being approached by the respective Allottees entered and executed a Loan Agreement. In terms of the Loan Agreement as per Clause 2 of the Loan Agreement provides for Bank's Agreement to lend and Borrowers Agreement to borrow. Clause 2.1(b) stipulates the following as reproduced hereinunder.

"The relationship between the Bank and the Borrower, as lender and borrower, shall commence from the date of the Loan Agreement and subsist until all monies due and payable by the Borrower to the Bank under the Loan Agreement and under all other documents pursuant thereto shall have been fully paid to and received by the Bank."

c) That the Clause 2.5 of the Loan Agreement provides for repayment of loan and stipulates the following as reproduced hereunder.

a) The Borrower shall repay to the Bank the amount equated in terms of monthly instalments each by the first day or as per dates set out in the Loan Agreement of each calendar month or such part thereof as shall remain due and owing to the bank. The equated monthly instalment includes interest component.

d) That Clause 7.2 of the Loan Agreement provides for consequences of occurrence of Event of Default. The Clause 7.2 of the Loan Agreement is reproduced hereunder for reference.

“1)The Bank, upon the occurrence of an Event of Default, may by written notice to the Borrower, declare all sums outstanding under the Loan (including the principal, interest, charge, expenses) to become due and payable forthwith and exercise any or all of the following rights in addition to statutory rights that may be available to the Bank from time to time.”

and puts forward a plea that the amount was disbursed by the Bank to the respective allottees based on the Loan Agreement and a time value of money relating to instalment is in respect of ‘Borrower Allottee’ and not the ‘Corporate Debtor’.

35. The Learned Counsel for the Respondent adverts to the following clause in respect of a Tripartite Agreement executed between the Bank, Allottee and the Corporate Debtor and the same is as follows:

“In consideration of BUILDER and the Borrower’s performing their obligation under the agreement executed between them, the third party i.e. Bank has agreed to give a loan of Rs.....(Rupees.....only) to the Borrower in terms of the loan sanction letter dated..../..../2016 and on payment of interest, processing fee, administration fee etc on agreed contractual.”

36. The Learned Counsel for the Respondent submits that a cumulative reading of the 'Agreement to Sell', 'Loan Agreement' and the 'Tripartite Agreement' shows that the contingencies mentioned under the Agreement for the sum to be due and payable towards the Applicant Bank and Default had not arisen and hence no claim of the Appellant/Bank is maintainable against the 'Corporate Debtor'.

37. The Learned Counsel for the Respondent contends that the amount raised from an 'Allottee' under a 'Real Estate Project' must be deemed to be an amount having the commercial effect of borrowing and hence the individual allottee will be a 'financial creditor' as per Section 5(8)(f) of the Code, because of the fact that the amounts were raised by the Corporate Debtor from the Individual Allottees and not from the Appellant/Applicant. As such, a plea is raised on behalf of the Respondent that the Appellant/Applicant's claims are not to be admitted against the Corporate Debtor as a 'Financial Creditor'.

38. The Learned Counsel for the Respondent brings it to the notice of the Tribunal that the Individual Allottees had submitted their claims against the Corporate Debtor with the Respondent which was verified and admitted in terms of the ingredients of the Code and, therefore, the Appellant/Applicant's claims will be a duplicate claim against the Corporate Debtor which is impermissible under the Code.

39. Continuing further, the Learned Counsel for the Respondent points out that during the 'CIRP' of the Corporate Debtor, the Appellant/Applicant filed its claim against the Corporate Debtor before the Resolution Professional

through email dated 23.1.2020 and that the said claim of the Appellant/Applicant was rejected by the 'Resolution Professional' and that the Appellant had not challenged the said rejection of Resolution Professional before the Adjudicating Authority.

40. According to the Learned Counsel for the Respondent, consequent to the rejection of the 'Resolution Plan' by the Members of the Committee of Creditors and in view of the CIRP period coming to an end on 17.02.2020, the Resolution Professional preferred IA No.116/2020 as per Section 33(1) of the Code, seeking liquidation of the Corporate Debtor and that the 'Adjudicating Authority' on 13.03.2020 passed an order of liquidating the Respondent/Corporate Debtor as per Chapter III (Liquidation Process) Part II of the Code and appointed the Resolution Professional/Applicant as the Liquidator of the 'Corporate Debtor'.

41. The Learned Counsel for the Respondent proceeds to point out that the Liquidator pursuant to his appointment made public announcement in Form B of Schedule II and because of the Covid 19 pandemic and by virtue of the insertion of Regulation 47 A in the Liquidation Regulations, the time for filing claims against the 'Corporate Debtor' before the 'Liquidation' was extended till 22.06.2020 by the Liquidator.

42. The Learned Counsel for the Respondent submits that the Appellant/Applicant through its Email dated 21.05.2020 furnished its claim before the Liquidator in Form B as a Financial Creditor of the 'Corporate Debtor' and after verification of claims submitted by the Appellant/Applicant etc the claim of the Appellant was rejected and the same rejection of claim

filed by the Appellant against the Corporate Debtor was communicated through Email 2.9.2020 and 5.9.2020.

43. The Learned Counsel for the Respondent submits that the Application in IA 416/2020 in CP (IB) No.189/BB/2018 before the Adjudicating Authority (NCLT Bengaluru Bench) is a misconceived one besides the same being untenable in Law and hence the impugned order of adjudicating authority in dismissing the aforesaid IA 416/2020 in CP(IB) No.189/BB/2018 requires no interference in 'Appeal' by this Tribunal.

RESPONDENT'S CITATIONS

44. The Learned Counsel for the Respondent refers to the order of the 'Adjudicating Authority' in Indiabulls Housing Finance Ltd. V. Rudra Buildwell Projects Pvt Ltd (Vide Company Petition No.(IB) 784(BB)/2018 dated 30.11.2018) wherein at paragraph 33, 35, 36, 40, 41 it is observed as under:-

"33. The aforementioned clauses stipulates refund by builder directly to the applicant lender only in the event of aforesaid three contingencies. None of the three contingencies have since occurred. Therefore, before cancellation (including other eventualities) refund by respondent builder directly to the applicant IHFL does not arise.

35.Under this clause borrower agrees for valid discharge of payment of cancellation amount directly made from builder to applicant lender only in the event of cancellation of allotment in favour of IHFL.

36. Needless to say, that all the clauses of the Tripartite Agreement dated 6th April, 2015 have to be read together. A conjoint reading of the several clauses of the tripartite agreement envisages that direct payment from builder to the applicant arises only on fulfilment of three exigencies including cancellation of allotment at a precondition. A debt may not be due if it not payable in law or in fact. In the present case as the admitted fact remains that allotment has not been cancelled, direct payment from builder to applicant on behalf of borrower does not arise. Consequently, it can be said that default in payment of cancelled amount directly to applicant by the builder arises only after cancellation of allotment.

40. Admittedly in the present case the allotment in question has not been cancelled. Accordingly, determination of cancellation amount due to the borrower and refund thereof by respondent builder directly to the applicant lender does not arise at this stage, before cancellation of the allotment.

41. As a sequel to the above discussion the application stands dismissed.”

45. The Learned Counsel for the Respondent relies on the judgement of this Tribunal dated 14.05.2019 in the matter of Indiabulls Housing Finance Ltd V. Rudra Buildwell Projects Pvt Ltd (Vide Comp App (AT)(Ins) No.172/2019) wherein at paragraph 5 to 7 it is observed as under:-

“5. In terms of Clause 5(8) of I&B Code, if disbursement is made for consideration of time value of money, a person can claim to be a financial creditor with regard to amount paid.

6. Admittedly the appellant, IHFL, has disbursed the amount for consideration of time value of money in favour of borrower, Mr. Devender Singh and not to the builder. Therefore, the Adjudicating Authority has rightly held that Rudra Buildwell Projects Pvt Ltd is not the corporate debtor of the appellant and the application under Section 7 of I&B Code is not maintainable.

7. In absence of any merit, the appeal is dismissed. No costs.”

46. This Tribunal has heard the Learned Counsels appearing for the respective parties and noticed their contentions.

ASSESSMENT

47. It is to be pointed out that I&B Code, 2016 envisages a time frame for completion of the Insolvency Resolution Process in a time bound manner. The CIRP and the ‘Liquidation Process’ are to be completed within the specified time period. Further, in the instant case, the Appellant when it questions the determination of the Liquidator dated 05.09.2020 to the effect that the Appellant/Applicant is not a ‘Financial Creditor’, then, as per Section 42, in respect of the accepting or rejecting the claim, an ‘Appeal’ is to be preferred against the decision of the ‘Liquidator’ to the ‘Adjudicating Authority’ within 14 days of the receipt of such decision. However, the ‘Appellant’ has not availed the remedy of preferring an ‘Appeal’ against the decision of ‘Liquidator’

in terms of Section 42 of the I&B Code. The Liquidator had accepted the Allottees claim and in such an event, the Appellant/Applicant is not entitled to vary/modify the same especially when the Allottees were not parties to the IA No.416/2020 in CP (IB) No.189/BB/2018 before the Adjudicating Authority. In Law the Liquidator cannot brushed aside the decisions arrived at by the Interim Resolution Professional/‘Resolution Professional’ except for any subsequent development as arisen in respect of the claims.

48. More importantly, in regard to the very same ‘Debt’ in Law, two claims cannot be preferred. It is to be remembered that the Appellant was informed on 03.03.2020 that its claim was rejected and it was uploaded on the website.

TRIBUNAL’S POWERS

49. It is to be pointed that a ‘Tribunal’ has the power to look behind the judgement on which the ‘Creditor’ cements his proof with a view to decide whether the ‘Debt’ is really and truly due. A Liquidator has these powers, while functioning in a quasi, judicial status. As a matter of fact, the ‘Tribunal’ and the Liquidator may not look behind every decision/judgement ‘as a matter of routine’.

50. A ‘Tribunal’ can interfere where the Liquidator has not exercised his discretion in a bona fide manner or he was proposing to do an act which no reasonable or prudent person will do. A ‘Liquidator’ as an ‘Officer of the Tribunal’ is to act justly and fairly while dealing with an individual who has an adverse claim to his own and does not stand on his right either in equity or in Law, as opined by this Tribunal.

JURISDICTION OF ADJUDICATING AUTHORITY

51. Section 60(5) of the I&B Code is not an all pervasive one conferring jurisdiction to an 'Adjudicating Authority' to resolve any issue/question in relation to the Corporate Debtor. If no claim is made by or against the Corporate Debtor or there is no issue of priorities or question of law or facts pertaining to the Insolvency Resolution or Liquidation Proceedings, then an Adjudicating Authority has no jurisdiction to entertain and dispose off the application/petition under Section 60(5) of the Code. While determining the issue of priority, all questions of Law of facts arising out of an order pertaining to the Insolvency Resolution, an 'Adjudicating Authority' is to follow the procedural aspects mentioned in the numerous provisions of the Code, of course, depending on the issue which arises for its rumination.

52. In the present case, the rejection of the claim was duly communicated to the Appellant through Email dated 02.09.2020. The 'Appellant' had not questioned the rejection of the Resolution Professional in rejecting the claim of the 'Appellant'. It cannot be forgotten that in the case on hand the Allottees had approached the Appellant/Applicant for the financial assistance which was disbursed by the Appellant as Loan amounts to the respective Allottees which was then disbursed by the Allottees to the 'Corporate Debtor'. The Appellant has not subjectively satisfied this Tribunal that the money which it is claiming was disbursed to the 'Corporate Debtor' for time value of money as per Section 5(8) of the I&B Code. Undoubtedly, the Appellant in 'Law' has a valuable right to proceed against the Allottees in the light of numerous documents executed between them.

53. In view of the foregoing qualitative and quantitative reasons, this 'Tribunal' taking note of the facts and circumstances of the present case in an integral and holistic manner and also on going through the impugned order passed by the Adjudicating Authority in IA No.416/2020 in CP(IB)/189/BB/2018 dated 05.02.2021 comes to an irresistible and inescapable conclusion that the view taken by the 'Adjudicating Authority' in dismissing the aforesaid IA is free from any legal error. Resultantly the 'Appeal' fails.

RESULT

In fine, the instant Company Appeal (AT)(CH)(Insolvency) No.261/2021 is dismissed. No costs.

(Justice M. Venugopal)
Member (Judicial)

(Mr. Kanthi Narahari)
Member (Technical)

22nd February, 2022

Bm/akc