

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT-I
KOLKATA**

CP (IB) No. 1239/KB/2020

In the matter of:

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Meehika Buildcon LLP
[LLPIN: AAC-2003]

...Financial Creditor

Versus

City Star Infrastructures Limited
[CIN: U70101WB1991PLC052250]

...Corporate Debtor

Date of pronouncement: 20/10/2023

Coram:

Rohit Kapoor : **Member (Judicial)**
Balraj Joshi : **Member (Technical)**

Appearances (through video conferencing):

For the Financial Creditor : Mr. NPS Chawla, Advocate
Ms. Swapna Choubey, Advocate
Mr. Amarnath Choudhary, Advocate

For the Corporate Debtor : Mr. Joy Saha, Senior Advocate
Mr. Nilay Sengupta, Advocate
Mr. Sujit Banerjee, Advocate
Ms. Pushpa Mishra, Advocate

ORDER

Per Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.

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2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 by Meehika Buildcon LLP, represented by **Shri Dinesh Sharma**, being the Authorised Representative of the Financial Creditor authorized *vide* a Board Resolution¹ seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against City Star Infrastructures Limited (“Corporate Debtor”).
3. It is submitted that Part –I of this petition contains particulars of the Financial Creditor. Part-II of this petition contains particulars of the Corporate Debtor.
4. Part –IV of the Petition contains details Financial debt for an amount of **Rs.2,77,98,630/- (Rupees Two Crore Seventy Seven Lakh Ninety Eight Thousand Six Hundred and Thirty only)**.
5. The Corporate Debtor was incorporated on 9 July 1991, having CIN: U70101WB1991PLC052250, under the Companies Act, 1956. It’s registered office is at 5 Gorky Terrace, 2nd Floor, Kolkata-700017. Therefore, this Bench has jurisdiction to deal with this petition.
6. The present petition was filed on 10th November 2020 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of **Rs.2,77,98,630/- (Rupees Two Crore Seventy Seven Lakh Ninety Eight Thousand Six Hundred and Thirty only)**.

Arguments advanced by the Ld. Counsel appearing for the Financial Creditor:

7. The Ld. Counsel appearing for the Financial Creditor submitted that the Term Sheet was entered between the parties in May 2014 in terms of which the Financial Creditor had paid an amount of Rs. 2.5 crores to the

¹ Annexure-B, Pg.11 of the Petition

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Corporate Debtor as a Security Deposit which was to be refunded in a time bound manner if the Financial Creditor terminated the agreement due to the title of the underlying land being defective and incurable in nature.

8. It is submitted that the Corporate Debtor took steps to perform its obligations under the Term Sheet and establish its title. The Corporate Debtor performed mutation with Block Land Reforms Office, Sonarpur on 28.11.2016 and conversion of the land was done on 15.09.2017. It however, failed to get the mutation done with Rajpur, Sonarpur Municipality till 2020 and as a result, the Financial Creditor terminated the said Term Sheet vide a letter dated 17.02.2020 and demanded refund of the same.
9. It was further submitted that the debt became repayable on the 16th day from the date of termination of the said Term Sheet. The cause of action for instituting the present application is not failure to obtain mutation but default in repayment triggered by termination dated 17.02.2020. Hence, limitation shall be counted from the date of termination of the said Term Sheet.
10. It was submitted that clause 6.6 of the said Term Sheet provides that a Formal Joint Venture Agreement shall be entered into by the parties subject to the complete satisfaction of the Second Party with regard to the title of the First Party. No investment has been made by the Financial Creditor in the Joint Venture Agreement till the time the title of the land is clear, failing which the Security Deposit given by Financial Creditor was supposed to be returned with 18% interest.
11. The Ld. Counsel has also relied upon some case laws which includes:-
 - a. *Sach Marketing Pvt Ltd. v. Resolution Professional of Mount Shivalik Industries, C.A. (AT) (Insolvency) No. 180/2021(para*

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18,19), *Rishabh Jain v. S.S. Enterprises & Company Appeal (AT) (Insolvency) No. 1383/2019 (para 7,8), Sundaram Finance Ltd. v. State of Kerala & Ors., AIR 1966 SC 1178(para 10)* etc. , that the true effect of the transaction has to be determined in terms of the Agreement and in light of facts and circumstances of the case.

b. Further, the *Sach Marketing judgment (supra)* specifically deals with a similar situation of Security Deposit being considered as a financial debt.

12. The Ld. Counsel also submitted that the judgments relied upon by the Corporate Debtor do not apply to the facts and circumstances of the present case and therefore cannot be said to be applicable.

13. It was also submitted that the Corporate Debtor used the deposited amount for fulfilling the obligations under the said Term Sheet and that the Corporate Debtor instead of borrowing the money from a third party or a bank or financial institution instead borrowed and utilized the amount advanced by the Financial Creditor for fulfilling its commercial obligations.

14. The Financial Creditor has placed the following documents on record which includes:

- a. A copy of the Loan Agreement dated 30.03.2019 [**Annexure A @ Pgs. 42-119 of the Company Petition**]
- b. A copy of the Deed of Hypothecation dated 30.03.2019 [**Annexure B @ Pgs. 120-147 of the Company Petition**]
- c. A copy of the Declaration dated 03.04.2019 given by Mr. Mahesh Kumar Nagwan for creation of mortgage by deposit of title deeds [**Annexure C @ Pgs. 148-155 of the Company Petition**]

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- d. A copy of the registration of charge in respect of the charge created in favour of the Financial Creditor to secure the Loan Agreement [**Annexure D @ Pg. 156 of the Company Petition**]
- e. A copy of the letter dated 14.06.2021 issued by the Corporate Debtor requesting grant of NOC/foreclosure of the Loan facility [**Annexure E @ Pgs. 157-161 of the Company Petition**]
- f. A copy of the NOC dated 12.07.2021 issued by the Financial Creditor upon the Corporate Debtor for sale of the Mortgaged property and reduction of the Loan Facility amount [**Annexure F @ Pgs. 162-163 of the Company Petition**]
- g. A copy of the demand notice dated 29.06.2022 issued by the Financial Creditor for repayment of dues [**Annexure G @ Pgs. 164-166 of the Company Petition**]
- h. A copy of the recall notice dated 12.07.2022 issued by the Financial Creditor to the Corporate Debtor in respect of recall of the loan agreements [**Annexure H @ Pgs. 167-170 of the Company Petition**]
- i. A copy of the CIBIL report dated 27.06.2022 [**Annexure I @ Pgs. 171-175 of the Company Petition**]
- j. A copy of the Tabular Statement of Accounts [**Annexure J @ Pgs. 176-178 of the Company Petition**]

Contents of Reply Affidavit filed by the Corporate Debtor are summarized as hereunder:

- 15. The Corporate Debtor has contended that the present application is not maintainable and is liable to be dismissed as it is not in the prescribed form as specified under section 7 of the IBC, 2016. The application is also time barred.
- 16. It contended that from the purported term sheet dated 5th May 2014, it is clear that, the alleged money was deposited to proceed with a joint venture for development of a land of the Corporate Debtor, situated at 352.28

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decimal, more or less at Mouza Badehoogly, Mahinagar, within ward no - 22 (Formerly) of Rajpur Sonarpur Municipality. The corresponding responsibilities of the Parties, to develop the said landed property were specifically defined thereto in the said term sheet.

17. It was assessed between the parties that some preliminary works like (i). Mutation, (ii).removal of bargadar and (iii). Conversion of the character of the land, was to be done and a minimum sum of Rs. 2,50,00,000/- would be required for the same. It was decided that the Corporate Debtor will take all the aforesaid three steps and the Financial Creditor will fund for the same. The funded amount was to be treated as Security Deposit and the same shall be adjusted with the share of the Respondent, in the joint venture of the project.
18. It was agreed that the Financial Creditor would provide a security deposit of Rs.3,51.00,000/- and the same shall be adjusted in terms of clause 6.14² of the said term sheet.
19. The Corporate Debtor, on or about 17th November 2014, took steps for mutation of the said property in its name and also settled with the bargadars and got the property further cleared, in terms of the terms sheet. Thereafter, the Corporate Debtor also applied for conversion of land and the same was also completed after incurring huge expenses.
20. The Corporate Debtor in para 5 of the Reply Affidavit contends that the Financial Creditor did not any plan for sanction with the appropriate authority in terms of clause 6.8 and they also did not commence the construction within 4 months in terms of clause 6.10 of the term sheet. Therefore the cause of action would have commenced on 05.07.2014 but the present petition is filed only after 19.10.2020, therefore the petition is time barred.

² Page 17-18 of the petition

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21. The Corporate Debtor contends that the Financial Creditor had by a letter dated 17.02.2020 unilaterally cancelled the contract without disclosing any cogent reasons, just by saying that the Corporate Debtor has defective title in the said property. The Corporate Debtor acted upon on the basis of the assurances and recommendation of the Financial Creditor and used the deposited amount for fulfilling the obligations of the said term sheet.
22. Clause 9 of the term sheet provides that *'Neither of the Parties shall be liable to cancel this Agreement or opt out from the Project, save and except the circumstances mentioned herein'*. Clause 11 of the Term sheet provides that *'All disputes and differences by and between the Parties hereto in any way touching this Term Sheet or relating hereto or arising out herefrom shall be referred by the Parties to the arbitration in accordance with the Arbitration & Conciliation Act 1996 with all modifications thereof made from time to time....'* The Corporate Debtor further contended that the claim of the petitioner is highly disputed and shall be dismissed for the ends of justice.

Contents of Rejoinder Affidavit filed by the Financial Creditor are summarized as hereinafter:

23. The Financial Creditor has stated that the very objective of the execution of the Term Sheet was for development of land measuring about 352.28 decimal of land at Mouza Bodehooghly and in Mouza Mahinagar both within ward No. 022 of Rajpur Sonarpur Municipality and not for outright purchase on the basis of terms as agreed between the parties.
24. It is stated that the Corporate Debtor has failed to fulfill its obligations, therefore obtaining sanction of plan cannot arise as till date the Corporate Debtor has failed to obtain mutation in the records of Rajpur-Sonarpur Municipality failing which, the Financial Creditor cannot proceed with the construction of the said property.

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25. It is further stated that as per the Termination Clause of the Term Sheet, the title of the land means and includes land free of all encumbrances and fit for development purpose and therefore the phrase "Defective Title" should be construed accordingly as the Corporate Debtor has till date failed to obtain mutation in the records of Rajpur-Sonapur Municipality and provided no documents to substantiate as to the manner in which the bargadars have been settled. Unless and until such assessment is carried out and record is updated in the said Municipality no plan will be sanctioned by the Municipality with respect to the said land.
26. The Financial Creditor has stated that as per Clause 6.6 of the Term Sheet, no formal joint venture agreement has been executed as the Financial Creditor could not accord complete satisfaction with regard to title of the land. Therefore a letter dated 17.02.2020 was issued in order to refund the money entire amount as advanced by the Financial Creditor with an interest of 15% within 15 days from the date of demand.
27. The Financial Creditor denies that as per clause 6.10 of the Term Sheet, that the Financial Creditor shall commence within 4 months of the sanction of plan and therefore if the sanction of plan was not possible due to fault of the Corporate Debtor in obtaining mutation from Rajpur-Sonapur Municipality the question of commencement of construction does not / could not arise.
28. It further denies that the cause of action arose on 05.09.2014 as claimed by the Corporate Debtor in the Reply Affidavit.
29. The Financial Creditor also denies the fact that it terminated the Term Sheet all of a sudden. It cancelled the Term Sheet as the title of the Corporate Debtor upon the said land appeared to be defective and incurable. It is stated that no reason is to be required to be provided by the Financial Creditor as to how the Corporate Debtor had defective title as

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non-adherence to the terms and conditions of said Term Sheet entitled the Financial Creditor to have the option of cancelling the Term Sheet.

30. It is further stated by the Financial Creditor that it was the responsibility of the Corporate Debtor to obtain such mutation and conversion and at no point of time it was agreed by the Financial Creditor that the expenses for obtaining the said mutation and conversion would be met from the security deposit as the deposit was adjustable against the owner's allocation in the proposed project to be developed by the Financial Creditor and if the Financial Creditor is prevented from proceeding with development due to fault on the part of the Corporate Debtor, the question of adjustment for such deposit does not/could not arise.

31. The Financial Creditor states that its claim falls within the definition of financial debt as defined under Section 5(8) of Insolvency and Bankruptcy Code 2016 and immediately on expiry of 15 days from the date of termination notice dated 17.02.2020 the said advance became a debt along with interest and was considered as issued/dispensed against the consideration for time value of money.

32. It also stated that the Term Sheet is not a binding contract as the formal joint venture agreement has not been executed and as a result, the question of enforceability of the Arbitration and Conciliation Clause in the Term Sheet is not a binding agreement as it has not been registered in accordance with applicable laws. In view of the above facts, the present petition shall be admitted and CIRP shall be initiated.

Submissions by the Ld. Counsel appearing on behalf of the Financial Creditor:

33. The Ld. Counsel appearing for the Financial Creditor submitted that the loan amount disbursed by the Financial Creditor is not in dispute. The Corporate Debtor failed to pay the interest amount due and payable on the

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disbursed loan for the quarter ending on January 2022 and the quarter ending on April, 2022.

34. The Ld. Counsel submitted that the Corporate Debtor has not denied the loan amount availed but has asked for a set off of certain amounts allegedly due and payable by a group company of the Financial Creditor. It submitted that according to Order VIII Rule 6 of the Code of Civil Procedure, set off can be claimed only in respect of certain sums of money legally recoverable between both parties filling the same character and by claiming the set-off, the Corporate Debtor has admitted both the debt and the default.

35. The Ld. Counsel further submitted that after the Financial Creditor was admitted to insolvency, the Administrator came across circumstances necessitating filing of application under Section 66 of the Code. Section 7 and 66 of the Code are two independent provisions. Since Section 66 of the Code, does not in any manner impede or contradict the purpose of resolution of corporate insolvency, it cannot be contended that the filing of an application under Section 66 must sound the death knell of an application filed under Section 7 of the Code.

36. The Ld. Counsel submitted that apart from the fact that Section 66 application has not yet been heard or adjudicated, it is a settled law that a party is shackled to his pleadings and cannot seek to prove a case not pleaded by it. The Corporate Debtor acknowledged the debt and default and merely attempted to claim set off on account of alleged sums due and payable to the Corporate Debtor by a group company of the Financial Creditor. Therefore, the present petition must be admitted.

Arguments as advanced by the Ld. Senior Counsel appearing on behalf of the Corporate Debtor:

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37. The Ld. Senior Counsel for the Corporate Debtor submitted that the Term Sheet was meant for Joint Venture and Development of land having corresponding obligations of the parties. The Corporate Debtor took steps and removed the name of bargadars and completed mutation in its name. Conversion of the said land was also completed but before they would proceed with mutation of the land with Sonarpur Municipality, the Financial Creditor expressed its intention not to continue with the same.
38. The Ld. Senior Counsel for the Corporate Debtor submitted that it used the money for settling with the Bargadars, mutation with the office of the BL & LRO. As per clause 6.13 of the Term Sheet, the deposited amount needs to be adjusted first, and without such adjustment, the Financial Creditor cannot claim any amount from the Corporate Debtor.
39. It was further submitted that the amount advanced by the Financial Creditor does not come within the definition of financial debt and also no date of default is mentioned in the application. If the case of the petitioner is to be accepted, the same should have occurred after 3 months from the date of execution of the Term Sheet dated 05.05.2014 i.e., 05.08.2014.
40. The Ld. Senior Counsel further submitted that the Financial Creditor has failed to show any specific denial in their Rejoinder as regards the completion of obligations by the Corporate Debtor.
41. The Ld. Senior Counsel also relied upon various judgments to show that the claim of the Financial Creditor is time barred³, and that for the purpose of limitation, the relevant date is the date when the right to sue accrues which is the date of default⁴. It also relied upon a judgment wherein it was

³ (2022) 5 SCC 600

⁴ (2023) 2 SCC 531

held that time barred claims cannot be given new life and claim was duly dismissed.⁵

42. It was lastly submitted that the claim of the Financial Creditor is completely vague and hopelessly time barred, a highly disputed one and thus it is liable to be dismissed.

Analysis and Findings

43. Heard the Ld. Counsel appearing for both the parties and perused the documents on record alongwith the case laws cited by both the parties.

44. We refer to clause 6.9⁶ of the Term Sheet headed as ‘Allocation ’ which is reproduced hereinbelow:

“The First Party shall be allotted 30% of the total sanction area and the Second Party shall be allotted 70% of the total sanction area. The Parties shall mutually demarcate their allotted areas after obtaining the plan sanctioned. Each party shall be entitled to deal with their respective allocations”

45. Having considered the respective arguments of both the parties, we seek to refer to the judgment passed by the Hon’ble NCLAT in **Mukesh N. Desai Shree Darshan Society v. Piyush Patel and Others**⁷ in which it was held: -

“16. The MoU entered into is an Agreement of reciprocal rights and obligations. We are of the earnest view that both parties being ‘Joint Development Partners’ who entered into a consortium of sorts for developing the subject land and for any breach of terms of the contract, Section 7 Application filed under the Code would not be maintainable as the amount

⁵ (2019) 10 SCC 572

⁶ Page 16 of the Petition

⁷ 2022 SCC Online NCLAT 78, decided on 24.02.2022

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cannot be construed as 'Financial Debt' as there is no sum(s) i.e., owed, assigned or transferred to in compliance of the provisions of Section 5(8) of the Code. To reiterate, being a profit share owner, who in the event of the success of the Project would receive the residual gain, the amount invested in the land cannot be said to be a 'Financial Debt' as defined under Section 5(8) of the Code. Hence, the ratio of the Judgements relied upon by the Learned Counsel for the Appellant are not applicable to the facts of this case."

(emphasis applied)

46. In view of the foregoing paragraphs being para 44 and 45 as mentioned above, we find that the money advanced by the Financial Creditor to the Corporate Debtor does not amount to financial debt as envisaged under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 as upon the successful completion of the obligations contained in the said Term Sheet, the same would lead to execution of a Joint Development Agreement. On this ground alone, we find that the present petition is not maintainable and hence **C.P. (I.B.) No.1239/KB/2020** stands **rejected**. Needless to say, the Financial Creditor is free to pursue its remedies under any other law, and the dismissal of the present petition shall not stand in the way of such pursuit of remedies.

47. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member(Technical)

(Rohit Kapoor)
Member (Judicial)

This order is pronounced on the 20th day of October, 2023

FA_LRA