

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No.150 of 2019

(Arising out of Judgement dated 11.12.2018 passed by the Adjudicating Authority, National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP(IB) No.273/CHD/HP/2018)

IN THE MATTER OF:

**M/s Jagbasera Infratech Private Ltd,
C/o Shri Kushal Vir Rana,
L-298, Sector Delta-II
Greater Noida 201306**

...Appellant

Versus

**Rawal Variety Construction Ltd,
R/o Minhas Cottage,
Near Chhaju Ram Mohar Singh,
Kather Bye Pass,
Solani Tehsil
Solani District
H.P.**

...Respondent

For Appellant:

**Dr. Sumant Bharadwaj, Mr. Vedant Bharadwaj
and Mr Mridula Ray Bharadwaj, Advocates.**

For Respondent No. 1:

Mr. Arihant Goyal, Advocate for R-1.

J U D G E M E N T

(Per: Shreesha Merla, Member (T))

1. Challenge in this Appeal under Section 61(3) of the Insolvency and Bankruptcy Code, 2016 (herein referred to as the Code) is to the Impugned Order dated 11.12.2018 passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in CP(IB) No.273/CHD/HP/2018. By the Impugned Order, the Adjudicating Authority has dismissed the Petition preferred under Section 7 of the Code by M/s Jagbasera Infratech Privatge Ltd, the Appellant herein, for initiating the

Insolvency Resolution Process against M/s Rawal Variety Construction Ltd./Respondent Company and has observed as hereunder:-

“17. In the present case there is no such term of the assured return of any agreement which may amount to the repayment for the time value of money. Simply because the petitioner has invested the money for the project being a Promoter would not fall within the definition of term ‘Financial Creditor’ under any circumstances. This was not a case of a forward sale or purchase agreement having effect of borrowing rather the petitioner was equally interested in the project to be marked for sale.

18. The learned counsel for the petitioner however laid emphasis to the word ‘other transaction’ as provided in sub-clause (f) of Section 5(8) of the Code. The term ‘Transaction’ is defined in sub-section (33) of Section 3 of the Code which includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor. We are unable to accept the contention of the learned counsel for the petition because the main requirement of the provision that the amount was disbursed against the consideration of time value of money has not been established.

19. However, to fortify his contention, learned counsel referred to the explanation of sub-clause (f) of Section 5(8) of the Code as brought by way of amendment. It says that any amount raised from allottee in real estate project shall be deemed to be an amount having a commercial effect of the borrowing. The fact that project is real estate project as defined in sub-clause (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (RERA) cannot be doubted but the question here is whether the petitioner can be treated as an Allottee for taking advantage of the explanation to sub-clause (f) of Section 5(8) of the Code.

20. The term ‘Allottee’ is defined in Clause (d) of Section 2 of RERA Act. It says that allottee in relation to a real estate project means the person to whom a plot, apartment or buildings, as the case may be has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by⁷ the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or

building, as the case may be, is given on rent. We find that under the circumstances the petitioner can be considered an allottee under RERA Act. As a Promoter, the petitioner is equally interested in the completion of the project to be marked for the purpose of the business and cannot be an allottee at all.”

(Emphasis Supplied)

2. Submissions of the Appellant:

- The Learned Counsel for the Appellant submitted that the Appellant is a ‘Financial Creditor’ who entered into a Memorandum of Understanding with Respondent/Corporate Debtor on 28.09.2011 and Joint Venture Agreement on 27.02.2012,’
- Between the period 21.10.2011 to 14.05.2018 the Appellant paid an amount of rs.4,21,37,850/- to the ‘Corporate Debtor’ who defaulted in returning the said amount and hence the same falls within the definition of ‘financial debt’ under Section 5(8) of the Code.
- It is contended that the Project is a Real Estate Project; That the Appellant is a ‘Promoter’ and interested in forward sale of furnished studio flats in the Real Estate Project of the Respondent/Developer.
- That the investment by the Appellant was for a forward sale or purchase agreement having the commercial effect of borrowing.
- That the amount was disbursed against consideration for time value of money and that the Appellant fulfils all the essential characteristics which falls within the definition of ‘Financial Creditor’ under section 5(7) of the Code.
- The Project ought to have been completed on or before 31.12.2013 and as there is an admitted default, the Respondent company owes

the amount lent to it which has become due and payable after the date of default on 31.12.2013.

3. Submissions of the Respondent:

- The Learned Counsel for the Respondent submitted that as per terms of the Memorandum of Understanding dated 28.9.2011 the Appellant has to bear the cost of land. The plot measuring 21.70 bighas is owned by Smt Krishna Devi, who has placed her land in the common pool to be treated as part and parcel of the Project as per Agreement dated 27.02.2012.
- The Appellant is engaged in the business of forward sale through purchase agreement and have invested a sum of Rs.4,21,37,850/- in its capacity as a 'Promoter' only.
- The Learned Counsel for the respondent strenuously contended that as the Appellant is admittedly a 'Promoter', the Appellant does not fall within the definition of 'Financial Creditor' as defined under Section 5(7) of the code and the Adjudicating Authority has rightly dismissed the Petition filed by them.

Analysis:

4. The brief point that falls for consideration is that whether the Appellant who has invested in the Real Estate Joint Venture Project in the capacity of a 'Promoter', can fall within the ambit of the definition of 'Financial Creditor' as defined under Section 5(7) of the IBC.

5. For better understanding of the relationship between the Appellant and the Respondent this Tribunal finds it relevant to reproduce the terms of MOU entered into between the parties on 28.09.2011:-

“MEMORANDUM OF UNDERSTANDING

*This Memorandum of Understanding is made and executed at Greater Noida on this day 28th September, 2011 with the purpose of finalizing a business agreement between M/s Rawal Variety Construction Ltd, a company incorporated under the companies Act, 1986 having its registered office at RVC Village Jatoli, Raigarh Road, Oachghat, Solan, Himachal Pradesh acting through its director Mr. Rajesh Raval **(hereinafter referred to as the Developer)** which expression shall mean and include, unless repugnant to the context or is otherwise excluded from the same, its successors-in-interest, administrators, authorised and legal representatives, being the party of the Developer.*

And

*M/s Jagbasera Infratech Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at G-83/106 Vijay Chowk, Laxmi Nagar, Delhi-110092 and corporate office at D-212, Second Floor, above Axis Bank, Krishna Apra Plaza, Alpha Commercial Belt, Alpha -1, Greater Noida, Uttar Pradesh 201306 acting through its director Mr. Gyanendra Singh **(hereinafter referred to as the Promoter)** which expression shall mean and include, unless repugnant to the context or is otherwise excluded from the same, its successors-in-interest, administrators, authorised and legal representatives, being the party of the Promoter.*

The understanding is being created with the mutual agreement that the Developer will partner with the Promoter, in Delhi/National Capital Region (NCR), for the purpose of booking and selling real estate properties, which are developed by Developer at Valley View Apartment.

Whereas the Developer is inter alia in the business of developing, planning, constructing and selling residential and commercial complexes in Himachal Pradesh, Punjab and other parts of North India and has the technical know-how and vast experience in developing and marketing residential and commercial projects.

And Whereas the Promoter is engaged in real estate business, including marketing and sale of residential plots/flats, industrial properties in different parts of India.

And Whereas the Promoter is interested in setting up a furnished studio apartment project at Solan in the State of Himachal Pradesh.

Xxx

NOW, THEREFORE, THIS MEMORANDUM OF UNDERSTANDING WITNESSETH AS UNDER:-

1. *The Developer has acquired area of land measuring 21.70 Bighas in the Mauza Nandoo, Tehsil Solan, District Solan, Himachal Pradesh on behalf of the Promoter. However, land already procured, to be procured and under the process of procurement, by the Developer, shall be treated as part and parcel of the Project and will be used for development as a property of the project by all means. The Developer will complete all necessary permission /licenses /procurement of land within the period of 3 (three) months in order to expedite process of the development of the project.*
2. *The Developer agrees to develop and raise construction on the said Project, the details of the project is enclosed as Annexure-I (in accordance with the rules, regulations and Bye-Laws framed by Himachal Pradesh Housing and Urban Development Authority) and undertake the development and construction of the said fully furnished studio apartment, residential units and other agreed facilities as per Annexure I) so raised on the said Plot.*
3. *The cost of land, its development and construction of the said residential studio units to be raised on the said Plot shall be borne by the Promoter as per Annexure II. The expenses shall include the cost of the architect, sanction of plans, construction of the built up spaces, installation of fire fighting systems as prescribed lifts, generator/individual investors for power back-up, electric sub-station, water storage tanks, installation of lighting equipment for common areas and provision for allied services (as per specification annexed hereto (as Annexure 1A).*

(Emphasis Supplied)

6. From the above noted Memorandum of Understanding it is crystal clear that the Appellant is classified as a 'Promoter' who seeks to develop the said Plot and construct the studio apartment, club, jogging track, shops,

dormitory, children park on the said plot and has entrusted the Project to the Respondent who is arrayed as the 'Developer' in the said Memorandum of Understanding. In fact, the Joint Venture Project in the name and style of 'Valley View Apartments Project' was to be launched and promoted in the name of Appellant herein.

7. At this juncture, this Tribunal finds it relevant to refer to the definition of 'Financial Creditor' as per Section 5(7) of the Code and the definition of 'Financial Debt' as per Section 5(8) of the Code. The same is being reproduced as under:-

“5(7) “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

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

8. Clause 15 of the Memorandum of Understanding specifies that ‘promoter’ shall be entitled to raise loans in its own name from banks/financial institutions for the project. There shall be no liability on the Developer for repayment of the loans or interest.” A careful perusal of the Memorandum of Understanding and also the Joint Venture Agreement entered into between the parties on 28.09.2011 and 27.02.2012 respectively shows that the relationship between the Appellant and Respondent is that of land owner and developer and furthermore viewed from any angle the amount invested by the Appellant towards the completion of the Project cannot be termed to be a ‘Financial Debt’ as defined under Section 5(8) of the Code. Having regard to the nature of the transactions between the Appellant and the Respondent this Tribunal is of the earnest view that the Appellant does not fall within the

definition of term 'Allottee'. This Tribunal in Company Appeal (AT)(Ins) No.780/2020 while dealing with a similar issue has observed as follows:-

“15. 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 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.”

9. Keeping in view the ratio of the aforementioned Judgement and having regard to the terms and conditions of the Memorandum of Understanding and the Joint Venture Agreement entered into between the parties, this Tribunal is of the considered view that the amount invested in the ‘Joint Venture Project’ by the Appellant herein in his capacity as a ‘Promotor’ and ‘Investor’ does not fall within the ambit of the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code.

10. For all the above noted reasons, this ‘Appeal’ is dismissed. No order as to costs.

(Justice Anant Bijay Singh)
Member (Judicial)

(Ms Shreesha Merla)
Member (Technical)

04th April, 2022
Bm