NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1034 of 2022 & I.A. No. 2993 of 2022

IN THE MATTER OF:

Ambika Enclave Pvt. Ltd. &Ors. ...Appellants

Versus

Shreesai Baba Infra Projects Pvt. Ltd.

...Respondents

Present:

For Appellants : Mr. Alok Tripathi, Adv.
For Respondent : Mr. Abhishek Anand, Ms. Komal, Adv.

O R D E R

Per: Justice Rakesh Kumar Jain:

16.05.2024: M/s Ambika Enclave Pvt. Ltd., M/s Siddhant Diagnostic Pvt. Ltd. and M/s Divya Tie-Up Pvt. Ltd. (Financial Creditors) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') against Shree Sai Baba Infra Projects Pvt. Ltd. (Corporate Debtor) bearing CP No. (IB) – 32/Ald/2021 before the National Company Law Tribunal, Allahabad Bench (in short 'Tribunal') has been dismissed on that ground that there is no relationship of financial creditor and the corporate debtor and there was no transaction in the nature of financial debt between the parties but liberty was granted to take recourse to their other remedies in accordance with law if so advised.

2. In brief, the Appellants advanced a loan of more than 16 Cr. to Proplarity Group, namely, M/s Proplarity Homes Pvt. Ltd. (now Sparkspell Homes Pvt. Ltd.) under a loan agreement dated 13.10.2016. M/s Proplarity Homes Pvt. Ltd. (PHPL) (Vendor) entered into a deed of sale (sale deed) with Shree Sai Baba Infra Projects Pvt. Ltd. (Vendee) for the sale of Block A, B, C, D & F, in the project named as 'Pratham' located at Lucknow. The sale deed was to be executed for a sum of Rs. 3.90 Cr. and in clause 35 of the sale deed it was mentioned that "as per the direction of Vendor payment/consideration has been received from confirming party. Confirming party is involved in Deed for the payment receiving of Sale Consideration because unsecured loan was born by Vendor by the Confirming party, so the Confirming Party is receiving the Sale Consideration. Vendor hereby confirm that he has received payment from the Confirming party and confirming party hereby declare that he has no objection about this sale deed".

3. Case of the Appellants is that PHPL came under CIRP and the IRP, namely, Anuj Kumar Tiwari of M/s Sparkspell Homes Pvt. Ltd. (Earlier known as Proplarity Homes Pvt. Ltd.) issued a demand notice dated 15.09.2020 to the Corporate Debtor asking for the sale consideration. It is alleged that Respondent in his reply dated 01.10.2020 admitted and acknowledged that cheques

mentioned in the sale deed dated 01.05.2017, drawn in favour of the Appellants.

4. It is submitted that despite repeated requests, the payment was not made, the Appellants issued legal notice on 19.03.2023 but despite receipt of notice, the payment was still not made, therefore, Section 7 of the Code was filed.

5. It is submitted that the Appellants are entitled to the amount in terms of clause 35 of the sale deed but the Tribunal has erred in dismissing the application. In this regard, he has referred to the findings recorded by the Tribunal which read as under:-

> "15. We have considered the submissions made by both sides and perused material on record. At the very outset, it is noted that the amount of loan has been disbursed to Sparkspell Homes Pvt. Ltd which was earlier known as Proplarity Home Pvt. Ltd. (PHPL). In this arrangement, the respondent herein is neither a party in any capacity nor any reference to the respondent appears therein. Thus, based on such loan agreement, it can safely be concluded that this arrangement does not establish privity of contract between the Financial Creditors and respondent herein. The role of respondent, herein, arises only in terms of sale deed dated 1st May, 2017, where the vendor being receiver of loan from the Financial Creditors, entered into sale agreement with the respondent and wherein Financial Creditors are a confirming party.
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> 16. We have carefully perused the terms and conditions of Clause 35 also and we have got no hesitation in holding that even on this basis, no legal obligation can be said to have arisen on the part of the respondent to repay the loan, which was taken by the vendor from the

applicants herein. In our view, this Clause simply provides that confirming party is to receive the sale consideration from the vendor and vendor has also confirmed that he has received the payment from the confirming party (Applicant herein) and who have also said that they had no objection as regard to this sale deed. From the perusal of other clauses and specifically schedule of payment, it is noted that the four cheques of sale consideration were handed over to the vendor who in tum was liable to give the same to the applicant. In our view, in case of any failure by the vendor to do so, also does not result into a situation whereby such liability is to be met by the respondent herein. We have also perused all other emails in correspondence between the respondent herein and the Resolution Professional of Sparkspell Homes Pvt. Ltd which was earlier known as Proplarity Home Pvt. Ltd. (PHPL) and in our view this letter also cannot be considered as creating a legal obligation to repay the loan which was taken by the vendor.

17. As regard the amount being given by the Financial Creditors to the respondent herein, it is noted that it has been given on 29.04.2017 just a day prior to the execution of sale deed dated 1st May, 2017, which fact lends credence to the claims made by the respondent that such money was· given to the respondent to execute the sale deed.

18. In this regard, we may further add that the Financial Creditors have not been able to controvert the claim made on behalf of the respondent that such money was given as assurance money nor any documentary evidence has been produced to show that this money was in fact a loan, which was to be returned by the respondent. Further, in the absence of any agreement to this effect as well as no recall notice or other documentary evidence, we are of the view that even the facts of the amount being due and payable, cannot be ascertained, hence, there arises no question of default.

19. In view of the above discussion, we hold that in the present case, there is no relationship of Financial

> Creditors and Corporate Debtor between the applicants herein and the respondent. We further hold that there is no transaction of the nature of financial debt between the parties within the meaning of provision Section 5(8) of IBC, 2016. Consequently, this application is liable to be rejected.
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> 20. Accordingly, CP (IB) No.32/ALD/2021 shall stand dismissed. We also make it clear that such dismissal of application is circumscribed by the provision of law as prescribed in 18C, 2016. Therefore, any appropriate action for recovery of the said impugned sum can be taken by the applicants herein, in accordance with any other law, if so advised."

6. On the other hand, Counsel for Respondent has submitted that the application filed under Section 7 was not maintainable against Respondent because there was no privity of contract between the parties. As per Appellants, the loan was advanced by it to PHPL. It is further submitted that since PHPL was unable to pay the debts to the Appellants, therefore, it decided to sell part of the project, namely, Pratham to Respondent and the consideration of amount of the sale was agreed to be paid to the Appellants and not to PHPL. It is submitted that the allegation of the Appellants is that the said money has not been paid by Respondent to the Appellants whereas, according to Respondent, the money was received which is so recorded in clause 35 of the sale deed. He has also submitted that for the purpose of establishing a relationship of a financial creditor with the Corporate Debtor, it is necessary to prove the existence of debt

between the parties which is conspicuous by its absence in the present case because no money was advanced by the Appellants to Respondent as the same was disbursed to PHPL. In this regard, he has referred to the definition of financial debt contained in Section 5(8) of the Code and contended that it is disbursal of debt alongwith consideration for the time value of money and includes money borrowed against the payment of interest. In this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of Anuj Jain IRP of JIL Vs. Axis Bank Ltd. & Ors., Civil Appeal No. 8512-18527 of 2019 and has referred to Para 44 to 46 which are reproduced as under:-

> "44. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.
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> 45. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.
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> 46. Expounding yet further, in our view, the peculiar elements of these expressions "financial creditor" and " financial debt", as occurring in Sections 5(7) and 5(8),

> when visualised and compared with the generic expressions "creditor" and "debt" respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a 'financial creditor', a 'secured creditor', an 'unsecured creditor', an 'operational creditor', and a 'decree-holder'. Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a 'financial debt' and an 'operational debt'."

7. He has further submitted that the findings recorded by the Tribunal in paras 15 to 20 does not call for any interference because, firstly, there is no privity of contract, secondly, there was no disbursal of loan to Respondent and thirdly, clause 35 of the sale deed categorically says that the sale consideration was paid by Respondent. It is thus submitted that it was for the vendor to have paid the money to the Appellants. It is also submitted that the Tribunal has also protected the rights of the Appellant by observing in para 20 of the impugned order that the Appellants may pursue any other remedy for recovery of the amount which is stated to have not been paid by PHPL by resorting to its remedy in accordance with law but for invoking the provisions of the Code.

8. We have heard Counsel for the parties and perused the record with their able assistance.

9. It is not in dispute that the Appellants had advanced the loan to PHPL and not to Respondent. There is no privity of contract between the parties. PHPL failed to return the money taken as loan from the Appellants. It decided to generate the money by way of sale of its immovable property at Lucknow. Sale deed was executed in which besides vendor and vendee the Appellants were made the confirming party. It was provided in clause 35 of the sale deed that the vendee shall pay to the confirming party and it is mentioned in so many words in the sale deed that the money has already been paid by the vendee to the confirming party but the allegation of the Appellants is that the said money has not been paid to them by the vendor.

10. In such circumstances, it is not a case which would fall within the provisions of the Code to trigger CIRP, invoking Section 7 of the Code and therefore, the Tribunal has rightly dismissed the application, however, liberty has been granted to the Appellants to pursue his other remedy for the purpose of recovery. It would also be not out of place to mention that the regime of the Code is not for recovery but for the resolution of debt by maximisation of the asset and to bring the CD on its own feet. Therefore, not only Respondent was dragged in the litigation at the instance of the Appellants before the Tribunal but also in this appeal in which no case is made out at all. Hence, the

present appeal is hereby dismissed and since Respondent has been dragged in this litigation unnecessarily by the Appellants up to this Court, therefore, the Appellants are saddled with costs of Rs. 1 Lac. which shall be paid by them jointly in equal proportion to Respondent by way of bank draft within a period of one month from the date of passing of this order.

11. It is also made clear that in case the cost is not paid, as directed, Respondent shall be free to file an application/contempt petition before this Tribunal for the purpose of compliance of this order.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Indevar Pandey]
Member (Technical)

Sheetal/Ravi