NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.4
IA/329(MP)2023
in
C.P.(IB)/56(MP)2021

Proceedings under Section 60(5) r.w. Rule 11

IN THE MATTER OF:

M/s Rajasthan Patrika Pvt Ltd ....**Applicant**
V/s
Chaya Gupta, RP of JSM Devcons Pvt Ltd ....**Respondent**

Order delivered on 05/04/2024

Coram:

P. Mohan Raj, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

IA/329(MP)2023

The case is fixed for pronouncement of the order.

The order is pronounced in open Court *vide* separate sheet.

Sd/- Sd/-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

P. MOHAN RAJ
MEMBER (JUDICIAL)

Rohit

ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
BENCH AT INDORE

IA/329(MP)2023
in
C.P.(IB)/56(MP)2021

IA/329(MP)2023
[*An application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 11 of the NCLT Rules, 2016]*

M/s Rajasthan Patrika Private Limited
CIN No. U22121RJ1974PTC001600,
Mr. Amit Vyas
Reg Off.: Kesargarh, JLN Marg,
Jaipur (Rajasthan)
Off: also at: 07,07 A, 08, 09 C-6th Floor Central Mail,
RNT Marg, Indore (M.P.)
Email: compliance.patrika@gmail.com .... **Applicant**

Vs.

Chaya Gupta
Resolution Professional
of JSM Devcons Pvt Ltd
911, Apollo Premier, Near
Vijay Nagar Square,
Indore, Madhya Pradesh-452010
Email-cirp.jsm@gmail.com ...... **Respondent**

In the main matter of: C.P.(IB)/56(MP)2021

[An application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016]

Motel Rahans Private Limited
Chatak Arch, F-1, 1st Floor, 7 MG Road,
Indore, Madhya Pradesh-452001 ......**Financial Creditor**

Vs.

JSM Devcons Pvt Ltd
306, Orbit Mall, Scheme No. 54,
A.B. Road, Indore-Madhya Pradesh-452001 ....**Corporate Debtor**

Coram: P. Mohan Raj, Hon'ble Member (J)
Kaushalendra Kumar Singh, Hon'ble Member (T)

Appearance:

For Applicant : Ld. Adv. Mr. Shantanu Shrivastava
For the Respondent/RP : Ld. Adv. Mr. Sumesh Dhawan a.w.
Ld. Adv. Mr. Abhishek Naik &
Ms. Chaya Gupta (in-person)
For the SRA : Ld. Sr. Adv. Mr. Vikram Nankani a.w.
Ld. Adv. Mr. Kunal Kanungo

Order Pronounced On 05.04.2024

O R D E R

1. The present application has been filed by the applicant **M/s Rajasthan Patrika Private Limited** for acceptance of its claim in totality as financial creditor instead as operational creditor.

2. Admittedly, the facts of the case are that the applicant had undertaken to work for media coverage of the Real Estate Projects of the corporate debtor under the Barter Agreement dated 30.09.2014. As per the agreement the applicant was to provide media coverage [publishing advertisements] to the tune of Rs 94,50,000/- from 01.10.2014 to 30.09.2016 and in consideration thereof the corporate debtor agreed to provide flats No.1606 and 1607 in premium tower No. 2 of "Pinnacle D Dreams" at Indore to the applicant. The case of the applicant is that they had published the advertisements of the corporate debtor worth Rs 71,65,000/- in its newspaper from 01.10.2014 to 27.01.2017; and in consideration thereof the corporate debtor had to allot the said two flats; that after follow up and issuance of legal notice dated 14.08.2017, the corporate debtor had issued the possession letters for those flats confirming the delivery of the vacant and on the spot possession. It has been stated that applicant, however, has not received physical possession till date; and that on the initiation of the CIRP against the corporate debtor vide order dated 17.03.2022 in the matter of Section 7 application filed by Motal Rahans Private Limited against the Corporate Debtor, the applicant had submitted its claim in Form No. CA (which is meant for financial creditor in a class that is home buyers) to the erstwhile Insolvency Resolution Professional (IRP), Mr. Sanjay Kumar Singh. However, the then IRP did not accept his claim as of 'home buyers' and rather admitted the claim as of 'operational creditor'.

3. We have heard the learned counsels appearing for both the sides. We have also perused the relevant documents placed on record. As submitted by the learned counsel for the applicant, the claim ought to have been admitted in the category of home buyers on the strength of the allotment [Barter Agreement and the possession letter thereof]. The learned counsel for the RP, however, objected to its application saying that its claim has been correctly

considered in the category of 'operational creditor' as it had provided the services and published the advertisements relating to the Real Estate Project of the corporate debtor. The learned counsel for the RP also referred to the provision of Section 5(8) of the IBC where the financial debt has been defined to means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The learned counsel took a plea that in the case of the applicant there has been no disbursement and as such no money has flown from the applicant to the corporate debtor. The learned counsel has specially referred to the definition in Clause (f) of Section 5(8) of the Code whereby any amount raised under any other transactions, including any forward sale or purchase agreement, having the commercial effect of a borrowing is included in the financial debt and took the plea that in the case of the applicant no amount was raised by the corporate debtor from the applicant towards allotment of a real estate unit. For ready reference, the provision of Section 5(7) and 5(8) are reproduced below:-

"(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;

(8) "financial debt" means a debt alongwith 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 dematerialised 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;

3.1 The learned counsel for the Resolution Professional (RP) relied upon the decision of Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure & Anr. Vs. Union of India & Ors [(2019) 8 SCC 416]** while upholding the constitutional validity of inclusion of allottees as Financial Creditor under the Code. The relevant para of the judgment, is referred to by the learned counsel is reproduced hereinunder:-

"61. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th ed.) to mean:

"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the 'Dictionary of Banking Terms' (Second edition) by Thomas P. Fitch in which "time value for money" was defined thus:

"present value: *today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis."*

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

…

66. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing ……………………..

67. A perusal of these definitions would show that even though the Petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers. The "something equivalent" in these matters is obviously the Unit/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a Unit/apartment is *given back to the lender. Both parties have "commercial" interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the Unit/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act."*

3.2 The learned counsel for the RP submitted that the above ratio as laid down by Hon'ble Supreme Court makes it clear that the claimant can claim the status of the financial creditor in the class only to the extent of amount raised from him and used for a Real Estate Project which makes such amount having the commercial effect of borrowing. The learned counsel also referred to a judgment of Hon'ble NCLAT dated 16.01.2020 passed in **"Arenga Enterprises Private Limited Vs. Edward Keventer (Successors) Private Limited"** [Company Appeal (AT) (Insolvency) No. 528 of 2020] wherein the NCLAT has held as under :-

"24. Under Section 5(8)(f) of I&B Code, any amount raised from 'allottee' under a real estate project shall be deemed to be an amount having the 'commercial effect of borrowing' and thus, would be covered under the definition of 'Financial Creditor' as defined under Section 5(7) of the Code. It is thus, clear that the Appellant can claim a Financial debt as an 'allottee' only when the amount raised from it as an 'allottee' is used for a real estate project. In the facts and circumstances, the Appellant is neither an 'allottee' nor has any amount 'being raised' or 'raised' from it, that may be construed as to have the effect of borrowing."

The learned counsel accordingly pleaded that the applicant cannot be considered as the financial creditor in a class, in as much as no amount was disbursed by the applicant against the consideration for the prime value for money to the corporate debtor.

4. Having considered the submissions made by the both the sides and taken into account the relevant provisions of the Code as well as the decisions of the Hon'ble Supreme Court and the Hon'ble NCLAT, as referred to hereinabove we are of the view that the claim of the applicant has rightly been considered as that of 'operational creditor' as no amount was raised from the applicant by the corporate debtor towards the Real Estate Project. Rather the applicant had merely provided the services of publication of the advertisement in its newspaper and thereby would be treated as operational creditor as regards to the unpaid outstanding amount due from the corporate debtor. Normally, the payment could have been by way of cash, in that case funds would have flown from corporate debtor to the applicant towards the services so provided. However, in the facts of the case instead of making cash payment, the corporate debtor had agreed by way of the said Barter Agreement to pay it towards the services so provided by way of giving the possession over the said two flats in the project. By virtue of that Barter agreement, the applicant could have been the rightful owner of those two flats but in the case when the project has not been completed, the flats were not physically handover, and the CIRP has been initiated in the case of the Corporate Debtor, the only legitimate option available to the applicant could be by way of filing its claim as operational creditor only. The Barter Agreement by no stretch of imagination can convert the operational debt into the financial debt. The plea so taken by the applicant is misplaced and deserve to the rejected.

5. As a result, the application (**IA/329(MP)2023**) stands **dismissed.**

Sd/- Sd/-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

P. MOHAN RAJ
MEMBER (JUDICIAL)

Rohit