

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 821 of 2021

(Arising out of Order dated 08.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in I.A. No. 1035 of 2021 in C.P. 2946/I&B/MB/2019)

IN THE MATTER OF:

1. Namdeo Ramchandra Patil

R/o Mauli Niwas,
Tadali Road, Hanuman Mandir,
Kamatghar, Bhiwandi, Thane,
Maharashtra.

2. Ravikant Ramchandra Patil

R/o Mauli Niwas,
Tadali Road, Hanuman Mandir,
Kamatghar, Bhiwandi, Thane,
Maharashtra.

...Appellant

Versus

1. Vishal Ghisulal Jain

Resolution Professional of Corporate Debtor
Having office address at
Plot No 25 & 26, Sector 30, Vashi
Navi Mumbai – 400 703.

2. Bank of India

Having address at
Panchpakhadi Branch
Vandana House, LBS Marg,
Thane W, Maharashtra.

...Respondents

Present:

For Appellant: Mr. Jitender Chaudhary and Ms. Shilpa Chohan, Advocates.

For Respondents: Mr. Krishnendu Datta, Sr. Advocate with Mr. Ravi Raghunath and Ms. Aakashi Lodha, Advocates for Respondent No.1

Mr. Parthiv J Mehta, Advocate for Respondent No.2.

With

Company Appeal (AT) (Insolvency) No. 940 of 2021

(Arising out of Order dated 08.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in I.A. No. 1035 of 2021 in C.P. 2946/I&B/MB/2019)

IN THE MATTER OF:

Vishal G. Jain

Resolution Professional of
Wadhwa Buildcon LLP
Office NO. 1003, Satra Plaza,
Sector 19D, Vashi,
Navi Mumbai – 400 703.

...Appellant

Versus

Bank of India

Star House, C-5, G-Block,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051.

...Respondent

Present:

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Ravi Raghunath and Ms. Aakashi Lodha, Advocates.

For Respondents: Mr. Parthiv J Mehta, Advocate.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeals have been filed against the same order dated 08.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No.5 by which order I.A. No. 1035 of

2021 filed by the Landowners/ Intervenors has been rejected. The brief facts of the case necessary to be noticed for deciding these Appeals are:

- (i) The Corporate Debtor – ‘M/s Wadhwa Buildcon LLP’ is a real estate company. A Development Agreement dated 23.01.2006 was entered between M/s Wadhwa Buildcon LLP and the Landowners including the Appellants – ‘Namdeo Ramchandra Patil’ and ‘Ravikant Ramchandra Patil’ for development of a parcel of land belonging to the Landowners including the Appellants. As a consideration for the development rights given by the Landowners, Corporate Debtor had agreed to give 45% of the constructed area out of the total construction to the Landowners. Area sharing between the parties was in the ratio of 45:55. In pursuance of the Development Agreement, development was carried out by the Corporate Debtor.
- (ii) On an application filed by Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) an order was passed by the Adjudicating Authority on 28.07.2020 initiating insolvency resolution process against the Corporate Debtor.
- (iii) The Corporate Debtor had issued allotment letter in favour of the Appellants allotting a number of 117 Flats and 20 Commercial Shops. In the insolvency resolution process, the

Appellants alongwith four co-owners filed a claim as Financial Creditor for a sum of Rs.129,98,09,612.57/- which included the total value of flats and commercial shops alongwith interest on delayed possession.

- (iv) The Resolution Professional admitted the claim of the Appellants as a Financial Creditor and Appellants were invited to participate in the 6th CoC Meeting as Financial Creditors. The Bank of India, Financial Creditor objected to the inclusion of Appellants – Landowners in the CoC in the 7th CoC Meeting held on 29.04.2021.
- (v) An application – I.A. No. 1035/MB/2021 was filed by the Bank of India against the inclusion of Appellants as Financial Creditors in the CoC. The Appellants – Landowners were not party to I.A. No. 1035 of 2021, hence, they filed I.A. No. 1450 of 2021 to intervene in the said I.A. No. 1035 of 2021. The Adjudicating Authority heard the parties as well as Resolution Professional and by impugned order dated 08.09.2021 allowed the I.A. No. 1035 of 2021 filed by the Bank of India and dismissed the I.A. No. 1450 of 2021 filed for intervention by the Landowners/Appellants.

2. Company Appeal (AT) (Ins.) No. 821 of 2021 has been filed by the two out of six landowners who had filed the claim before the Resolution

Professional. Company Appeal (AT) (Ins.) No. 940 of 2021 has been filed by 'Vishal G. Jain, Resolution Professional'. In these appeals following prayers have been made:-

Prayers made in Company Appeal (AT) (Ins.) No. 821 of 2021:

“INTERIM PRAYERS:

- i. The Hon’ble Appellate Tribunal may be pleased to stay the operation of the order dated 08.09.2021 whereby the Ld. Tribunal directed the Resolution Professional to reconstitute the CoC with one week from passing of the Order and also to Convey Meeting accordingly;*
- ii. The Hon’ble Tribunal may be pleased to pass such further or other order(s) as may deem fit and proper in the facts and circumstances of the case.*

FINAL PRAYERS:

- i. The Hon’ble Appellate Tribunal may be pleased to set aside the common order dated 08.09.2021 passed in IA-1450/2021 AND IA-1035/2021 In Company Petition no. 2946/MB/2019 in the matter of Bank of India V/s M/S Wadhwa Buildcon LLP passed by the Ld. Adjudicating Authority and reject the IA – 1035/2021 filed by the Bank of India challenging the inclusion of Appellants as Financial Creditors.*

ii. *The Hon'ble Appellate Tribunal may be pleased to pass any such further or other order(s) as this Hon'ble Appellate Tribunal may deem fit and proper in the facts and circumstances of the case to grant justice to the appellants and the company.*"

Prayers made in Company Appeal (AT) (Ins.) No. 940 of 2021:

"A. Set aside Clause 30, 31 and 32(ii) of the Impugned Order dated 8th September 2021 Hon'ble National Company Law Tribunal (NCLT), Mumbai Bench in CP No. 2946/I&B/2019 titled as Bank of India Vs Vishal G Jain;

Alternatively

B. Omit/ modify/ expunge the unsubstantiated allegations / adverse remarks/observations and directions made against the Appellant in para 30, 31 and 32(ii) of the impugned order dated 8th September 2021;

C. Pass any other order as this Hon'ble Tribunal may deem fit in the fact and circumstances of this case and in the interest of justice"

3. We have heard Shri Jitender Chaudhary, learned counsel for the Landowners, Mr. Krishnendu Datta, learned senior counsel appearing for the Resolution Professional and Shri Parthiv J. Mehta, learned counsel for Bank of India.

4. Learned counsel for the Appellants in Company Appeal (AT) (Ins.) No. 821 of 2021 challenging the order of the Adjudicating Authority submits that the claim filed by the Appellant as Financial Creditor was rightly admitted by the Resolution Professional. The Appellants have been allotted 117 flats and 20 commercial shops which allotment was made consequent to the Development Agreement entered between the parties dated 23.01.2006. It is submitted that Appellants are 'allottee' within the meaning of the Real Estate (Regulation and Development) Act, 2016. Hence, they are also 'Financial Creditors' within the meaning of Section 5 Sub-section (8) of the I&B Code, 2016. The Adjudicating Authority committed error in holding the Appellants as not Financial Creditors.

5. Shri Krishnendu Datta, learned senior counsel appearing for the Appellant in Company Appeal (AT) (Ins.) No. 940 of 2021 submits that even if the decision of the Resolution Professional admitting the claim of the landowners as Financial Creditors was an error of judgment, there is no malafide on part of the Resolution Professional so as to send a copy of the order to the IBBI. Observations made by the Adjudicating Authority in Para 31 and directions in Para 32(iii) ought to be expunged.

6. Learned counsel appearing for the Bank of India refuting the submissions of learned counsel for the Appellant contended that Resolution Professional committed serious error in admitting the claim of Landowners as Financial Creditors whereas they were joint venture

partners in the Development Agreement having right to share the developed area. It is submitted that by wrongful inclusion of the Appellants/ Landowners in the CoC, the vote share of the Bank of India (Financial Creditor) has come down from 98.37% to 20.31%. In spite of objection raised to the Resolution Professional by the Bank of India, the Resolution Professional did not correct his decision and has also contested the claim of the Bank before the Adjudicating Authority. It is submitted that the allotment of flats and commercial shops consequent to the Development Agreement does not make the claim of the Appellant as Financial Debt.

7. We have considered submissions of learned counsel for the parties and perused the record.

8. The relevant facts including the Development Agreement dated 23.01.2006 entered between the parties i.e. the Corporate Debtor and the Landowners are captured in Para 22 of the order of the Adjudicating Authority, which is useful to extract. Para 22 is as follows:-

“22. The Bench notes that the Corporate Debtor Company i.e., M/s Wadhwa Buildcon LLP, is a Real Estate Company against which Corporate Insolvency Resolution Process had commenced on 28.07.2020. The real estate Project undertaken by the Corporate Debtor are in the nature of joint venture project viz. Wadhwa Rhodesia has been undertaken by the Corporate Debtor on a parcel

of land belonging to the 6 land owners viz. Mr. Namdeo Patil, Mr. Parshuram Patil, Mr. Ashok Patil, Mr. Vinayak Patil, Mr. Nana Patil, Mr. Ravikant Patil. As a consideration for the development rights, the Corporate Debtor has agreed to pay, as per the Development Agreement dated 23.01.2006, 45% of the constructed area out of the total construction. Thereby, the Corporate Debtor had an area sharing arrangement in the ratio of 45:55. In addition, the Landowners also received from the Corporate Debtor a refundable security deposit of Rs.1.75 crores which was to be returned to the Landowners after when the constructed developed area is handed over by the Corporate Debtor to the Landowners. A copy of the Development Agreement has been duly attached by the Applicant, i.e., Bank of India, to the Application.”

9. The present is a case where on the land which was offered by the landowners including the Appellants the development was proposed to be undertaken by the Corporate Debtor. A Development Agreement was entered between the parties where area sharing was in the ratio of 45:55 percent. The Landowners has also received a refundable security deposit of Rs.1.75 Crores from the Corporate Debtor. Learned counsel for the Appellants has much emphasized on the fact that as per the Development Agreement 117 flats and 20 commercial shops have been allotted to the landowners and they are allottee within the meaning of RERA Act, 2016.

It is submitted that when Appellants are allottees then they cannot be held to be Promoters as has been held by the Adjudicating Authority. It is submitted that by virtue of the allotment made by the Corporate Debtor, the Appellants are Financial Creditors within the meaning of Section 5(8) of the I&B Code.

10. Section 5(8) of the Code which is relevant for the present case, is as follows:-

“5(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 nonrecourse 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;”

11. We may now also notice the definition of ‘allottee’ under the RERA Act, 2016 as contained under Section 2(d):-

“2(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by 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;”

12. By an amendment made in the I&B Code by Act 26 of 2018, ‘allottees of real estate’ have also come within the definition of Financial Creditors. Explanation added in the Section 5(8)(f) is as follows:-

“[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);]”

13. When we look into the provision of Section 5(8)(f) Explanation (i) and (ii), it is clear that pre-condition for a debt being a Financial Debt is disbursement against the time value of money and when any amount is raised from an allotment under real estate such transaction is also covered under Section 5(8)(f). The pre-condition for application of Explanation (i) of Section 5(8)(f) is raising of an amount from allottee. The present is not a case where an amount has been raised from the Appellants – the Landowners. The submission of the Appellant that they are allottees within the meaning of Section 2(d) of RERA Act does not make their transaction as a Financial Debt within the meaning of Section 5(8)(f). It is relevant to notice that RERA Act itself has noticed the definition of ‘Promoter’ under Section 2(zk). When we look in the real nature of the transaction entered between the Corporate Debtor and the Appellants – Landowners, the landowners were entitled to share the constructed area in the ratio of 45:55 and allotment of flats and commercial units in lieu of their entitlement under the Development Agreement does not make the transaction of allotment a Financial Debt within the meaning of Section 5(8)(f). The Adjudicating Authority in the

impugned order has rightly relied on the judgment of Hon'ble Supreme Court in **“Pioneer Urban Land and Infrastructure Ltd. vs. Union of India, (2019) 8 SCC 416”**, where the term ‘disbursal’ was explained in Para 70 of judgment and following has been observed:-

“70. 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.”

14. We may also notice judgment of the Hon'ble Supreme Court in **“Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd. & Ors., (2020) 8 SCC 401”**, where Hon'ble Supreme Court while examining the definition under Section 5(8) of the I&B Code noticed the essentials for Financial Debt. In Para 46, the Hon'ble Supreme Court has again emphasised that essential element is disbursement against time value of the money. Para 46 of the judgment is as follows:-

“46. Applying the aforementioned fundamental principles to the definition occurring

in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause

or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.”

15. When we look into the facts of the present case and transaction entered by the Appellants – Landowners with the Corporate Debtor, we do not find any error in the decision of the Adjudicating Authority holding the Appellants-Landowners as not Financial Creditors. The Company Appeal (AT) (Ins.) No. 821 of 2021, thus, deserved to be dismissed.

16. Now coming to the Company Appeal (AT) (Ins.) No. 940 of 2021, certain observations have been made by the Adjudicating Authority in Para 31 of the order and directions has been issued to the Registry to forward the copy of the order to IBBI. Whether, on the strength of observations made by the Adjudicating Authority in Para 31, any proceeding is to be undertaken that question is to be considered by the IBBI. Observations made by the Adjudicating Authority were on the facts and sequence of events in the case. We only notice that there has been

no allegation against the Resolution Professional of any malafide or any ulterior motive.

17. In view of the foregoing discussion, both the Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Justice M. Satyanarayana Murthy]
Member (Judicial)

[Barun Mitra]
Member (Technical)

NEW DELHI

19th September, 2022

Archana