

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

IA (IBC)/343/KOB/2023

IN

CP (IBC)/33/KOB/2021

(Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules 2016)

Memo of Parties

Mr Jossy Steephen Kattur

Resolution Professional of Kerala Chamber of Commerce and Industries,
Skyline Imperial Gardens,
Next to IMA house, Kaloor,
Kochi - 682025

...Applicant/Resolution Professional

Versus

1. Phoenix ARC Private Limited

5th Floor, Dani Corporate Park,
158, CST Road, Kalina,
SantaCruz (E), Mumbai-400098

2. CA P.R Rajendran

Authorized Representative for Class of Home Buyers of Kerala Chamber of Commerce and Industry Padinjareparippil,
Kulayettikara P.O,
Kanjiramattom, Ernakulam - 6823 17

3. Kerala Trade Centre Owners Association

Kerala Trade Centre Building,
Marine Drive, Kochi - 682031

Represented by its Secretary

...Respondents

In the matter of:

Phoenix ARC Private Limited : Operational
Creditor

Versus

Kerala Chamber of Commerce: Corporate
and Industries Debtor

Order delivered on: 19.03.2024

Coram:

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Shri. Shyam Babu Gautam

TMT. (Retd.) Justice T Krishna Valli

Appearances:

For the Applicant : Mr. Akhil Suresh, Advocate

For the Respondent : Mr. Suresh Dutt Dobhal, Advocate

ORDER

Per: Coram

1. The present application is filed by the Resolution Professional, Mr Jossy Steephen Kattur of Kerala Chamber of Commerce and Industries (hereinafter referred to as the 'Corporate Debtor'), under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (hereinafter

referred to as the 'Code') and Rule 11 of NCLT Rules, 2016 for the following reliefs;

- a. To reclassify the claims pertaining to arbitration awards from 'other creditors to "Financial Creditors' and correspondingly revise the voting share of the CoC members as tabulated in Annexure A-5.*
 - b. To reclassify the Claims pertaining to operational creditors from 'other creditors' to operational creditors'.*
 - c. To reconstitute the CoC as tabulated in Annexure A-5.*
 - d. Pass such other order as the Hon'ble Tribunal deems fit and proper*
2. The facts as narrated in the application and explained by the learned counsel for the applicant are summarised hereunder:
- i. The 1st Respondent/ Financial Creditor, M/s Phoenix ARC Private Limited had filed the underlying CP(IBC)/33/KOB/2021 for initiation of the Corporate Insolvency Resolution Process (hereinafter referred to as the 'CIRP') under section 7 of the Code against the Kerala Chamber of Commerce and Industries, the Corporate Debtor herein, which was admitted by this Tribunal vide order dated 21.02.2022. Mr. K. Parameswaram Nair was initially appointed as the Interim Resolution Professional and later confirmed as the Resolution Professional during the 1st CoC meeting. Subsequently, during the 10th CoC meeting, an agenda was proposed and approved to replace the

Resolution Professional. Consequently, the Tribunal, through an order dated 17.03.2023 in IA (IBC)/108/KOB/2023, appointed Mr. Jossy Steephen Kattur, the Applicant, as the new Resolution Professional.

- ii. On 27.03.2023 the newly appointed Resolution Professional took control of the assets of the Corporate Debtor but the CIRP period came to an end on 20.03.2023. As per the order in IA (IBC)/144/KOB/2023, an application for exclusion of the CIRP period was allowed from 03.10.2022 to 20.03.2023.
- iii. During the 14th CoC meeting convened on May 15, 2023, on receipt of letters from the home buyers, concerns were raised regarding the wrong classification of arbitration awards of the home buyer class under the category of "Other than financial and operational creditors" by the former Resolution Professional. In response, the Applicant sought legal opinion from Adv. Nipun Singhvi to address the matter, as deliberated within the CoC. As per the legal opinion received by the Applicant, the underlying nature of the claim from a claimant may be the determining factor for classifying the arbitration awards received by such claimants.
- iv. The revised financial creditor's admitted claims amount /voting share of the CoC members will be as under:

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*IA(IBC)/343/KOB/2023 in CP(IBC)/33/KOB/2021
In re Jossy Stephan Kattur (RP) v Pheonix ARC Private Limited & Ors*

Sl No	Name of the CoC member	Amount of Claim admitted(Rs)	Existing Voting share %	Revised Amount of claim together with Arbitration Awards	Revised Voting share %
1	Dr Ashok Cheriyan	1,17,88,685	2.75 %	1,17,88,685	1.89%
2	M/s R1 International	2,20,00,000	5.13%	5,06,70,463	8.11 %
3	Adv. Tom K Thomas	-	0%	7,32,625	0.12%
4	M/s Davidroots LLP	6,31,18,721	14.72 %	16,54,74,852	26.49%
5	MrPokerhaji	78,61,175	1.83%	78,61,175	1.26%
6	MrV. Narayanankutty	1,41,33,452	3.3%	1,42,58,452	2.28%
7	MsM. U Vijayalakshmi	60,64,361	1.41%	63,52,311	1.02%
8	MrMK Alikoya	-	0%	5,73,39,000	9.18%
9	MrLalu Samuel	11,59,83096	27.04%	12,17,33,096	19.49%

10	MsSoudhaShoukath Ali	86,74,521	2.02%	86,74,521	1.39%
11	MrS. Sanakan	82,22,959	1.92%	82,22,959	1.32%
12	Maj. PM Mathews	1,13,78,488	2.65%	1,13,78,488	1.82%
13	MrXavi Mano Mathew	10,00,000	0.23%	10,00,000	0.16%
14	MrThomas Mattathil&MsMarykutty	1,46,41,604	3.41%	1,51,36,979	2.42%
15	MrJim Jose	45,58,751	1.06%	45,58,751	0.73%
16	MrSebastian George	25,98,740	0.61%	26,73,740	0.43%
17	MrsAnnammaCheriyan	41,558,76	0.97%	41,558,76	0.67%
18	MrShibuPrabhakaran	(78,12,000)	0%	(78,12,000)	0%
19	MrKM Abdullah	(52,46,488)	0%	(52,46,488)	0%
	Total Home Buyer Class in CoC	29,61,80,427	69.06 %	49,2011,971	78.76%
20	M/s Phoenix ARC	13,26,77,441	30.94	13,26,77,441	21.24%
	Total	42,88,57,868	100%	62,468,9412	100%

- v. Furthermore, it was submitted that the claim amount of Rs 52,85,024/- awarded to Schindler India Pvt Ltd (a lift manufacturing company) in arbitration may now be classified as that of an operational creditor, rather than being grouped under 'other creditors.'

- vi. The Applicant further submits that the underlying nature of the claim from a claimant will determine the position/ classification category of the Arbitration Awards from the claimant. Accordingly, allottees falling under Section 5(8)(f) may be categorized as financial creditors and Arbitration Awards in favour of operational creditors may fall under the category of Operational creditor and added that the Applicant has duty under Section 25(e) R/w 13(l)(d) of the regulations to file updated claims with this Tribunal.
- vii. Respondent No 1 filed reply stating that this application is an ill-intended attempt on the part of Resolution Professional to deprive Respondent no 1 of its legal right of having due representation/voting share in the CoC by reducing the voting share from the current 30.94% to 21.24%.
- viii. It is stated that various arbitration petitions were filed by various Allottees and arbitral awards were passed in favour of the Allottees and against Corporate Debtor. The said arbitral awards directed the Corporate Debtor to pay the Allottees various amounts under the following categories:
 - i. Repayment of consideration money.
 - ii. Interest on consideration money.
 - iii. Loss of Rent/Income.
 - iv. Cost of Arbitration/Damages.
- ix. Respondent No. 1 further stated that the initial 180 days of CIRP lapsed on 20.08.2022. Consequently, on 26.08.2022, this

Tribunal upon application granted an extension of 90 days, i.e. till 18.11.2022. Following this, on 23.11.2022, upon application, this Tribunal further extended the period by 60 days, until 17.01.2023. Subsequently, on 25.01.2023, this Tribunal once more extended to 60 days, till 20.03.2023. On 19.04.2023, the Tribunal excluded the CIRP period from 03.10.2022 to 23.03.2023. However, it was only on 30.07.2023 that the Resolution Professional belatedly filed this application seeking the reclassification of claims of Allottees.

- x. The Resolution Professional has prayed that the part of claims made by Allottees was not admitted as financial debts by the Resolution Professional because the same were in respect of loss of rent and arbitration cost/damages, etc. and therefore, not financial debt and should now be treated as the financial debt. And submitted that there is no res integra that the Resolution Professional after collation of claims and formation of CoC is not entitled to review or change the category/status of creditors as updating the list of claims and reviewing the claims are entirely two different things.
- xi. Further stated that the claims were rightly admitted under the category of claims of other creditors i.e. other than financial creditors and operational creditors because those claims were for compensation towards loss of rent and damages for arbitration, which are not financial debts as they are neither debts which were 'disbursed against the consideration for the

time value of money' nor have any 'commercial effect of a borrowing'. Part of the claims which were of the nature of financial debts were admitted by Resolution Professional as financial debt and the said Allottees have been made financial creditors belonging to the class of creditors.

- xii. Further stated that only an aggrieved party has the right to seek redressal from a judicial forum. However, in the present case, the Resolution Professional has failed to show how the Resolution Professional is aggrieved by the alleged classification of claims of creditors.
- xiii. And stated that instead of acting and taking steps towards maximization of the value of assets of the Corporate Debtor, the Resolution Professional by way of this application is illegally trying to reduce the value of the assets. Furthermore, the Resolution Professional is only attempting to deprive Respondent no 1 of its legal rights as a financial creditor.
- xiv. The Applicant filed rejoinder stating that in no manner whatsoever affect the legal right of the 1st Respondent to get their claim satisfied for the fact that they are a 'Secured Financial Creditor' and they will have priority in payment in the event of a Resolution Plan or Liquidation over the Homebuyers who are unsecured financial creditors in terms of Section 53 of the Code. The 1st Respondent secured financial creditor is a minority stakeholder and does not enjoy majority voting rights,

hence, the reduction of the current minority voting share of the 1st Respondent does not make any difference at all.

- xv. The contention of the respondent is that the claims were for compensation towards loss of rent and damages which are not financial debts, in this regard the Applicant submits that it is a settled position in law that the underlying nature of the claim will determine the nature of arbitration awards and hence allottees being financial creditors in a class, the arbitration awards of allottees cannot be segregated or separated and put under a different category as “others.”
- xvi. The Applicant further submits that there are no objections which are made by the 1st Respondent in so far as prayer (b) of the application and the Applicant most humbly prays that the same may be treated as admitted.
3. We have heard the learned counsel for the Applicant and the 1st Respondent and perused the materials available on record. As far as the question of fact is concerned, we are going through the following relevant provisions

Section 3 (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3 (6) "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Section 3 (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

Section 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;

Section 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—

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

1 [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);]

4. In essence, to qualify as a "debt," there must exist a legal obligation concerning a "claim" that is currently due. In this context, a "claim" denotes the entitlement to payment resulting from a breach of contract. Subsequently, there's the concept of "default," which denotes the failure to repay a debt either in full or in part when it falls due. Section 5(8)(f) of the Code elucidates that when funds are obtained from an allottee in a real estate project, having the commercial effect of borrowing, and disbursed against the consideration for the time value of money, it constitutes a financial debt. Therefore, the right of home allottees to seek repayment of the amount of money invested by them towards the apartment or flat sought to be developed by the developer amounts to a claim against the developer. The repayment of such an amount of money is the liability of the developer towards the home allottees.
5. We are relying on Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India and Ors. (Writ Petition (Civil) No. 43 of 2019) the Hon'ble Supreme Court of India held that

86. We, therefore, hold that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

6. Hence, it is evident from judicial precedents that the Supreme Court affirmed that amounts raised from homebuyers through real estate agreements, primarily for profit, fall within the scope of 'financial debt' as defined in Section 5(8)(f) of the Code. Consequently, such home allottees are recognized as financial creditors.
7. Regarding the matter at hand, there is no question that the claim of breach of contract of home allottees falls within the realm of financial debt. However, the question here pertains to whether claims for 'loss of rent,' 'arbitration costs,' and 'damages' by home allottees would also be categorized as financial debt.
8. In this aspect we are placing emphasis on Jaypee Infratech Limited V Axis Bank Limited, Where the Hon'ble Apex Court held that

43. 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 disbursal against the consideration for time 152 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 subclauses (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.

9. We are further relying on the decision of Hon'ble High Court of Madras in Cholamandalam Investment and Finance Company Ltd.

Vs. Navrang Roadlines Private Limited (O.S.A.(CAD) No.115 of 2022),

12. A mere perusal of the above observations of the Hon'ble Supreme Court in the decisions cited supra, shows that the liability in respect of a claim arising out of a recovery certificate issued by the DRT would be considered as "financial debt" within the ambit of Section 59(8) of Insolvency and Bankruptcy Code, 2016. It has also held that the underlying claim of the Bank/Claimant under the lending documents would have to be categorised as a "financial debt" under Insolvency and Bankruptcy Code, 2016. Therefore, a recovery certificate issued in respect of the same claim, which is essentially a crystallization of the claim through the process of adjudication, had also be classified as a "financial debt" under Insolvency and Bankruptcy Code, 2016. Consequently, the nature of the underlying claim of the creditor, would determine the categorisation of the amount payable under the final decree passed adjudication of the same claim. The liability arising out of an arbitral award or a court decree would be (IB)-856(ND)2022 Globe Capital Market Ltd. vs. Narayan Securities Ltd. Page 14 of 27 categorised as either financial or operational debt depending on the nature of the underlying claim which stands crystallised through the arbitral or court proceedings.

10. In the matter of Mukul Agarwal Vs Royale Resinex Pricate Limited in Company Appeal (AT) (Insolvency) No. 777 of 2020, Hon'ble NCLAT, held that,

In this case, the Hon'ble NCLAT had held that a decree of the civil court will not alter the basic nature of the transaction. The transaction prima facie has to be considered for the purpose of adjudicating the claim and the decree of the court is a measure of debt and that would be the manner in which it should be heard."

11. Hence it is clear from the judicial precedents that the characterization of the payment under a decree or arbitral award resulting from the adjudication of a creditor's claim hinges on the underlying nature of that claim. Whether the liability originates from an arbitral award or a court decree, it would be classified as either financial or operational debt, contingent upon the intrinsic nature of the underlying claim as determined by the arbitral or court proceedings.
12. Though it is a mandatory requirement that, for a debt to be classified as financial debt, it must be disbursed with consideration for the time value of money and have a commercial effect of borrowing. It has to satisfy the root requirements requirements of financial debt, such as 'disbursement' and 'consideration for the time value of money.
13. It's important to note that, in the context of home allottees, disbursement refers to the payment made by home allottees to the Real Estate Developer for the specific purpose of financing the real estate project, in exchange for which the home allottees are allocated their respective units. Also, it is worth noting that in the present scenario, the former Resolution Professional appropriately admitted

the claims made towards the consideration amount paid by the home allottees to the Corporate Debtor, including interest, as 'financial debts.' Thus, it is of no doubt that the underlying nature of the claim undisputedly satisfies the essential components of 'financial debt' as outlined in section 5(8) of the code. The categorization of creditors under the Code depends on understanding the fundamental nature of the transaction. Consequently, considering the underlying nature of claims of 'loss of rent,' 'cost of arbitration,' and 'damages', we find it right to reclassify these claims, as specified in Annexure 5, from 'other creditors' to "Financial Creditors."

14. Taking into account that the arbitral award concerning M/s Schindler India Private Limited stemmed from the non-payment related to the supply and installation of machinery, thus indicating the transaction's underlying nature as the supply of services and non-payment, it is deemed appropriate to reclassify M/s Schindler India Private Limited's claims from 'other creditors' to operational creditors.
15. The Resolution Professional is hereby directed to reconstitute the CoC in accordance with Annexure A5
16. This Application IA(IBC)/343/KOB/2023 is hereby **allowed** and disposed of accordingly.

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17. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.
18. Let the certified copy of the order be issued upon compliance with requisite formalities.
19. File be consigned to records.

**SHYAM BABU
GAUTAM** Digitally signed by
SHYAM BABU GAUTAM
Date: 2024.03.19 16:00:23
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**SHYAM BABU GAUTAM
(MEMBER TECHNICAL)**

**T.KRISHNAVAL
LI** Digitally signed by
T.KRISHNAVALLI
Date: 2024.03.19 15:59:48
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**T KRISHNA VALLI
(MEMBER JUDICIAL)**

Signed on this the 19th day of March, 2024.

Krishna