

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 665 of 2021

[Arising out of order dated 17.03.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench, Court No. IV in IA No. 456 of 2019 in C.P.(IB)No. 1059/ND/2018]

IN THE MATTER OF:

Axis Bank Limited

.... Appellant

Versus

**1. Shubhkamna Buildtech Private Limited & Anr.
Through Shri Anand Sonbhadra,
197-E, Pocket-IV, Mayur Vihar, Phase-1
Delhi – 110091.**

.... Respondent No.1

**2. Represented by
Mr. Anand Sonbhadra,
E-10A, Kailash Colony, Greater Kailashi-1,
New Delhi – 110014.
(Mr. S.K. Singhal & Mr. S.K. Bansal)**

....Respondent No.2

Present:

For Appellant:- Mr. Sharad Tyagi, Ms. K. Gayatri, Advocates.

For Respondent:- Mr. Abhishek Anand, Mr. Nipun Gautam, Mr. Pathik Choudhury, Advocates.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (**‘IBC’** in short) by the Appellant, arises out of order
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dated 17.03.2021 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench-Court No. IV) in IA No. 456/2019 in CP (IB) No. 1059/ND/2018. By the Impugned Order, the Adjudicating Authority rejected the application filed by the Appellant seeking directions against the Resolution Professional of Corporate Debtor, M/s Shubhkamna Buildtech Private Ltd. for admitting his claim in the Resolution Plan and to be treated as secured Financial Creditor. Aggrieved by the said Impugned Order, the present appeal has been preferred.

2. The Learned Counsel for the Appellant has also filed I.A. No. 1748/2021 in Company Appeal (AT)(Ins.) No. 665/2021 seeking condonation of 60 days delay in filing this Appeal. The Hon'ble Supreme Court in *Suo Motu Writ Petition (Civil) No. 3/2020* vide order dated 10.01.2022 extended the prescribed period of limitation and passed certain directions and as per Clause III of the said direction in cases where limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have limitation period of 90 days from 01.03.2022. In this Appeal, the prescribed period of limitation of 30 days expired on April, 24, 2021 i.e. between 15.03.2020 and 28.02.2022. Thus, the Appellant has limitation period of 90 days from 01.03.2022 and hence, the Appeal is within limitation.

3. The facts of the case, as stated and argued by the Learned Counsel for the Appellant Bank i.e. Axis Bank Limited is that the said Bank provided loan aggregating Rs. 30,58,22,625/- (Rupees Thirty Crore Fifty-Eight Lakh Twenty-Two Thousand Six Hundred and Twenty-Five Only) to certain Homebuyers/allottees under the housing project of the Corporate Debtor. It has also been submitted that Corporate Insolvency Resolution Process (**'CIRP'** in short) of the Corporate Debtor, a real estate infrastructure company, was admitted on 26.11.2018 following which the Interim Resolution Professional (**'IRP'** in short) made the Public announcement and invited claims of the creditors for constituting the Committee of Creditors (**'CoC'** in short) and fixed the last date of filing claim as 12.01.2019.

4. It has been further submitted by the Learned Counsel for the Appellant that it filed its claim in Form C on 31.12.2018 and sent the same to the IRP by e-mail, which date was clearly before the last date of submission of claim and followed it by a reminder e-mail on 07.01.2019 seeking acknowledgement from the IRP. Another email was sent on 19.01.2019 to the IRP intimating that supporting documents have also been submitted through google drive and acknowledgement was sought again from the IRP in this regard. Admitting that the IRP responded on 03.02.2019 by e-mail, the Appellant has pointed out that the IRP requested that related documents be submitted in hard copies though as per public announcement made, the claim and supporting documents were to be submitted by electronic mode only. It has been further stated that the IRP, Company Appeal (AT)(Insolvency) No. 665 of 2021

however, refused to accept the hard copies of the said documents which the Appellant had endeavoured to submit by visiting the office of the IRP and that the Appellant sent an email to the IRP on 05.02.2019 stating this position.

5. After the IRP was replaced by the Resolution Professional, Respondent No. 1 in the present case, the Learned Counsel for the Appellant has stated that the Appellant Bank enquired about the status of its claim as well as the CIRP proceedings by sending e-mail dated 01.07.2019 to which the Resolution Professional responded on the same date stating that it had not received any claim from the Appellant. The Appellant in response sent an e-mail to the Resolution Professional on 04.07.2019 stating that it had already submitted its claim on 31.12.2018 and that their claim be considered and the Appellant Bank be invited to CoC meetings. However, the Appellant has made a submission that inspite of these communications sent both to the IRP and Resolution Professional, their claim was not accepted and neither was the Appellant Bank included in the CoC, and that thereby the Respondent No. 1 contravened Sections 18(b), 21(1) and (2) of the IBC.

6. The Appellant Bank has further mentioned that a Tripartite Agreement was signed between the relevant Homebuyers/allottees, the Corporate Debtor and the Appellant Bank wherein the Homebuyers had subrogated their respective rights to the Appellant and that 'Permission to Mortgage' their relevant flat/units was given by the Corporate Debtor to protect the interests of the Company Appeal (AT)(Insolvency) No. 665 of 2021

Appellant. Further, it has been submitted by the Appellant that it has filed 24 applications before the Hon'ble Debt Recovery Tribunal, New Delhi ('**DRT**' in short) for recovery of its outstanding amount to be paid by the defaulting Homebuyers and/or the Corporate Debtor on behalf of such Homebuyers. It has been added that the DRT has already issued Debt Recovery Certificates ('**DRC**' in short) against 9 Homebuyers as well as the Corporate Debtor which authenticates the claim of the Appellant and establishes the Tripartite Agreement between the relevant Homebuyers, Corporate Debtor and the Appellant.

7. The Learned Counsel for the Appellant has therefore argued that there has been failure on the part of the Respondent No. 1/Resolution Professional to acknowledge the claim of the Appellant. Aggrieved by this unprofessional and unethical behaviour on the part of the Resolution Professional, the Learned Counsel for the Appellant has sought relief for being treated as a secured financial creditor and admittance of his claim in the Resolution Plan placed before the CoC for approval of the Adjudicating Authority.

8. The Learned Counsel for the Respondent refuting the submissions made by the Appellant has stated that the Appellant Bank never submitted its claim to the IRP alongwith supporting documents in the first go. IRP tried to access the supporting documents, submitted later through google drive by the Appellant, but it could not be opened. It has been further contended by the Company Appeal (AT)(Insolvency) No. 665 of 2021

Learned Counsel of the Respondent that despite written emails sent by the IRP, the Appellants still did not submit their claim properly and later the Resolution Professional also clarified to the Appellant Bank on 01.07.2019 that it never received any claim from the Appellant Bank and therefore not admitted as part of CoC. It has been further argued by the Learned Counsel of the Respondent that instead of providing timely clarifications to the queries raised by the IRP/Resolution Professional on the claim, the Appellant chose to sit over its rights during the CIRP of the Corporate Debtor and by belatedly seeking admittance of their claim now, it is an attempt to derail the CIRP process. It has also been argued that it was duty on the part of the Appellant to have submitted on time the clarificatory documents with respect to their claim before the Resolution Professional and that in the absence of such supporting documents, the Resolution Professional could not have processed and accepted the claim of the Appellant.

9. In respect of the Tripartite Agreement entered between the allottees/Homebuyers, Appellant Bank and the Corporate Debtor, the Learned Counsel for the Respondent while admitting that such agreement had actually been entered into, however, added that the Appellant was required to act upon the enforceable rights provided under the agreement and establish the claim which was not done by the Appellant. Moreover, it has been also contended that the title of the housing units was to be submitted to the Appellant Bank, as per the agreement, only after the units are registered and executed, which having not

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taken place, the claim of the Appellant Bank is without any basis. On the DRCs, given by DRT, it has been contended by the Respondent that the same have no legal sanctity in respect of those DRCs issued after the initiation of the CIRP process and that DRCs issued prior to CIRP have no relevance as they were not submitted by the Appellant Bank before the Resolution Professional as proof of their claim.

10. The Learned Counsel for the Respondent has further submitted that the successful Resolution Plan of the Corporate Debtor was passed by the CoC members with a voting percentage of 87.57% in favour following which the Resolution Plan Approval Application had been filed by the Resolution Professional in October 2019 with the Adjudicating Authority and thus nothing remains with regard to an undecided claim.

11. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

12. The two broad issues which arise for our consideration are:-

- (i) Whether the Appellant has shown due diligence in submitting the claim before the IRP/Resolution Professional and whether sufficient reasons/grounds exist to admit the claim at a*

time when the Resolution Plan has already been approved by the CoC and is pending consideration of the Adjudicating Authority.

(ii) Whether the Tripartite Agreement between the Appellant, Corporate Debtor and the borrowers/Homebuyers which has been validated by the Hon'ble DRT by issue of DRCs provides enforceable rights in favour of the Appellant Bank.

13. Coming first to the issue relating to submission of claim by the Appellant and whether due diligence was exercised, we notice that the IRP had made the public announcement in conformity with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**'CIRP Regulations'** in short) alongwith stipulation of the last date of submission of claim. It remains undisputed that the Appellant Bank submitted the claim on 31.12.2018 in Form C by e-mail to the IRP which was well before the last date of submission. However, admittedly it was not accompanied with supporting documents. The supporting documents were later submitted by the Appellant Bank on 07.01.2019 through google drive but not being able to access these documents sent through google drive, the IRP accordingly informed the Appellant Bank on 03.02.2019 and sought hard copies of the same. This request was again reiterated by IRP on 05.02.2019. The Appellant Bank thereafter sent an e-mail to the IRP on 05.02.2019 stating that documents in support have been sent through google drive and that hard

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copies of the same could also be arranged. However, hard copies were not submitted by the Appellant Bank to the IRP. It is also noticed that from 05.02.2019 onwards till 01.07.2019, there was no further correspondence made by the Appellant Bank with the IRP/Resolution Professional. Infact during this aforesaid period, the Appellant Bank did not remain in touch with the IRP or Resolution Professional and made no endeavours to remain updated about the status of the claims or the CIRP process.

14. It is, therefore, clear that the Appellant Bank did not submit the claim with supporting documents to the IRP. The logical corollary that follows therefore is that the IRP cannot be expected to process and verify the claims of a creditor without supporting documents. Moreover, from the exchange of e-mails which are placed at Appeal Paper Book (pg 160-174), it transpires that the Appellant Bank did not pay much heed to the difficulty being faced by the IRP in not being able to open the google drive and did not alternatively provide the IRP with hard copies of supporting document even after being prompted to do so. We are, therefore, of the view that the conduct of IRP in this regard therefore does not appear to be unreasonable or wanting in cooperation as has been argued by the Learned Counsel for the Appellant. There is no material before us to either believe that the IRP/Resolution Professional acted in a manner to hurriedly wrap up the CIRP proceedings or willfully tried to stall the claim of the Appellant.

15. On the other hand, the conduct of the Appellant Bank is found to be remiss as due diligence was not made to satisfy the prescriptive requirement of submitting supporting documents along with the claim. The Appellant Bank ought to have been more careful and vigilant particularly since the IRP had stated twice that electronic transmission of documents had failed and they were requested to submit hard copies. Moreover, for nearly five months since February, 2019, the Appellant Bank made no efforts to follow up with the IRP on the status of their claims. It has, therefore, been correctly observed by the Adjudicating Authority in the impugned order that the Appellant had sat on their unsubstantiated claim for long owing to which their claim could not be verified. In the light of the fact that the Appellant Bank remained slack and lackadaisical in submission of their claim, we are not persuaded to believe that there are any mitigating factors in their favour.

16. This brings us to the question as to whether at this belated stage there are sufficient grounds to admit the claim. From material on record, it is abundantly clear that a lot of time has lapsed since the date of issue of public announcement inviting claim. We also take cognizance of the fact that the time period allowed for submission of claim with proof is on or before the ninetieth day of insolvency commencement date as provided in Regulation 12(2) of CIRP Regulations and that this time period stands expired. The claim submitted by the Appellant Bank could not be verified by IRP as endeavours made by the Appellant Bank to electronically transmit supporting document did not fructify. More importantly,

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the Resolution Plan has already been approved by the CoC with 87.57% voting share and has been filed for approval before the Adjudicating Authority.

17. Given this background, the Adjudicating Authority while rejecting the plea of the Appellant Bank to admit the claim belatedly, has relied on the judgement of the Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Ors : 2019 SCC Online SC 1478** which held:

“107. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority / Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution Applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what

has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count”.

18. We, therefore, agree that the ratio which emerges in the above-mentioned judgement is fully applicable in the present matter. Since the Resolution Plan has not only been accepted by the CoC but also placed before the Adjudicating Authority for approval, accepting any belated claim at this stage, will put paid to the efforts achieved so far by the Resolution Professional in completion of CIRP process. In IBC, where time-lines are well laid down, any indulgence shown by way of belated admittance of claim is likely to jeopardise the CIRP and set the clock back which certainly is not the intent and purpose of the IBC.

19. Coming to the second issue, we notice that the Appellant has claimed that the Homebuyers have already transferred their respective rights under the flat/unit in favour of the Appellant as substantive consideration amount for purchasing the flat has been paid by the Appellant Bank to the Corporate Debtor through the allottees/Homebuyers and that this position is also substantiated by the DRCs issued by Hon'ble DRT against respective Homebuyers and the Corporate Debtor. It has also been contended that Corporate Debtor had also issued 'Permission to Mortgage', pursuant to which,

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it has marked a lien in favour of the Appellant Bank on the flats financed by it. It has been urged that in a Tripartite Agreement, once an allottee/Homebuyer subrogates the rights under the asset in favour of a transferee, the Homebuyers as transferee is not entitled to file the claim and such right to file the claim can only be exercised by the transferee. The judgement of Hon'ble Supreme Court in the matter of **Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy & Ors. : (2021) 10 SCC 330** has also been relied upon to support the contention that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC.

20. There is a need to take a close look at the terms of the Tripartite Agreement whereby the Appellant Bank sanctioned and released housing loans to some allottees /Homebuyers for purchase of flats in the project floated by the Corporate Debtors. The first noteworthy feature is that the liability to repay the loans is on the individual Homebuyers. Secondly, the following excerpts of the Tripartite Agreement clearly reflects that the title of the unit shall be submitted to the Appellant Bank once the same is registered and executed as reflected in the Tripartite Agreement:

“Builder would deliver to the Bank the Sale Deed relating to the flat in question as and when executed and registered and shall also inform the Bank in writing at

least a week in advance regarding the time date & venue of registration so that Bank can send its representative to collect the original Sale deed on registration. The Borrowers expressly and irrevocably authorizes Builder and the Bank in this regard. Builder shall not deliver and/or cause to deliver the Sale Deed as and when executed and registered to the Borrower/s without the written consent of the Bank.”

21. Against the backdrop of these two salient features of the Tripartite Agreement, we find that the decision of this Tribunal in **Axis Bank Ltd. Vs. Value Infracon India Pvt. Ltd. & Ors. in Company Appeal (AT)(Ins.) No. 582 of 2020** which has been relied upon by the Learned Counsel for the Respondent wherein a similar Tripartite Agreement was signed and entered between the Homebuyers, Corporate Debtor and the Bank is fully attracted in the present case and the relevant portions extracted below:--

“10. It is clear from the principles laid down by the Hon’ble Supreme Court in ‘Pioneer Urban Lands & Infrastructure Ltd. & Anr.’ (Supra) that it is the Home Buyer who should be considered as ‘Financial Creditors’ of the ‘Corporate Debtor’ whether he has self-financed his flat or has

exercised his choice of taking a loan from the Bank.

11. Additionally, we are of the considered view that as per Section 77 of the Companies Act, 2013 every security interest has to be registered with the Registrar within 30 days of its creation and admittedly no 'charge' has been created against any of the property of the 'Corporate Debtor' in favour of the Appellant.

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17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a narrow compass. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximization of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite

Agreement does not change the character of the amount borrowed by the Home Buyer vis-à-vis the Bank and vis-à-vis the 'Corporate Debtor'.....”.

22. We find substance in the contention of the Learned Counsel for the Respondent that mere permission to mortgage is of no relevance in the absence of not having registered a charge. Furthermore, we also agree that being merely in possession of enforceable rights under Tripartite Agreement is not enough. The claimant was required to act upon those rights and establish the claim before the Resolution Professional which having not been done, nothing remains in respect of the undecided claim.

21. In the light of the above discussion, we are thus of the clear view that the Adjudicating Authority has committed no error in passing the Impugned Order. We find no cogent reason to interfere with the Impugned Order. The appeal being devoid of merit is dismissed. There is no order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Barun Mitra] Member
(Technical)

Place: New Delhi

Date: 30.08.2022

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