IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

C.P.(IB)-598(MB)/2022

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Jagson Colorchem Limited

Having registered office at: Plot No. 5601/4, Phase-II, GIDC Estate Vatva, Ahmedabad 382445.

……Applicant/Financial Creditor

Vs

Jayapushpam Investments and Trading Private Limited

(CIN: U70100MH1997PTC109749)

Registered office at: 504, Niharika Gen A K Vaidyamarg, Film City Road, Goregaon East, Mumbai 400063.

……. Corporate Debtor

Reserved for order on: **27.01.2023**

Order pronounced on: **21.03.2023**

Coram:

Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Madhu Sinha, Member (Technical)

For the Applicant: Mr. Shyam Kapadia, Mr. Jayesh Rathod, Advocate

For the Respondent: Mr. Gaurav Joshi, Sr. Advocate

Per: Shri. H.V. Subba Rao, Member (Judicial)

1. The above Company Petition is filed by **Jagson Colorchem Limited** hereinafter called as Financial Creditor seeking to initiate of Corporate Insolvency Resolution Process (CIRP) against **Jayapushpam Investments and Trading Private Limited** called as Corporate Debtor by invoking the provisions of Section 7 Insolvency and Bankruptcy code (hereinafter called "Code" read with rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of total Financial Debt of Rs. 4,00,00,000/-

2. The Corporate Debtor filed affidavit in reply of the Authorised Signatory Mr. K. Sivaraj opposing the above petition. The following are the important Paras of the affidavit in reply filed by the Corporate Debtor:

5) At the further outset, it is submitted that the present Application filed under Section 7 of the Code is not maintainable in law or facts. It is a sheer abuse of process of law and deserves to be dismissed with exemplary costs for suppression of material facts. The relevant facts to the case are set out below:-

(a) The disbursement to the Corporate Debtor was under an Agreement to Sell. It was neither a Loan Agreement nor a Financial Instrument.

(b) The actual disbursement which is vital for maintainability of a Section 7 Application, has been only Rs. 10 Lakhs. The same being below the statutory threshold of Rs. 1 Crore, the present Application is not maintainable under the Code.

(c) The Applicant actually lent money to their related party for the benefit of the Related Party and claims the money from the Corporate Debtor. The Applicant and Labh Capital Services Pvt. Ltd. are related Parties.

(d) The Applicant is a Party related to one Labh Capital Services Pvt Ltd (hereinafter referred to as LCS for brevity). The Directors of the said Labh Capital Services Pvt Ltd are Gaurav Rakesh Agarwal and Saurav Rakesh Agarwal.

The Director of the Applicant Company is one Dinesh Jagnani, who is the father-in-law of the said Gaurav Rakesh Agarwal.

The wife of the said Gaurav Rakesh Agarwal is Smt. Vidhi Agarwal who is the Authorised Signatory of the Applicant and is a Director along with her father (Director of the Applicant Company Dinesh Jagnani) in one J & A Realtech Private Limited.

To sum up, the Applicant and Labh Capital Services Pvt Ltd are Related Party entities within the meaning of Section 5 (24) of the Code as well as Section 2 (76) of the Companies Act, 2013.

(e) The Agreement relied upon by the Applicant is a collusive commercial contrivance between the Applicant and its Related Party in which the Corporate Debtor has been cheated. The present proceedings are nothing but a further manifestation of such blatant acts of fraud in which the colluding LCS and Applicant have indulged.

All the above facts have been suppressed before this Hon'ble Tribunal and therefore the Application lacks *bona fides*.

The Application is not in accordance with Form-1 of the Application to Adjudicating Authority Rules, 2016.

2) The Applicant is not a Creditor at all, much less a Financial Creditor.

3) The Agreement dated 04.04.2021 is not a Financial Debt

A. The said alleged Agreement is for sale of the schedule property owned by the Corporate Debtor to the Purchaser for a consideration of Rs. 33 Crores. The Purchaser who is the Applicant herein is a Related Party of the Beneficiary. In effect, the Agreement seeks to fasten an undisbursed amount as liability for a sale which is contingent on acceptance of a Scheme of Arrangement submitted by such Beneficiary for no benefit whatsoever to the Corporate Debtor. The Agreement dated 04.04.2021 does not record any quid pro quo between the Beneficiary - Labh Capital Services Pvt Ltd and the Corporate Debtor. The Agreement is a sham and a sheer commercial contrivance.

B. It is pertinent to state that it has been held by the Hon'ble Supreme Court in *Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd.* (2021) 3 SCC 475 as under:-

Paragraph "48. The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent. A transaction which is sham *or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. In other words, the real agreement between the parties is something other than advancing a financial debt. A useful elaboration of "sham transactions" can be found in the opinion of Diplock, L.J. in Snook v. London & West Riding Investments Ltd. [Snook v. London & West Riding Investments Ltd., (1967) 2 QB 786: (1967) 2 WLR 1020 (CA)]: (QB p. 802)*

"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

4) <u>The Agreement dated 04.04.2021 is a contingent Agreement and as such unenforceable:-</u>

A) The term "Debt" has been held to be a lawfully payable "Debt". The Agreement dated 04.04.2021 is a contingent Agreement and no lawful debt is due and payable under such a contingent Agreement.

B) Because the Agreement dated 04.04.2021 sets out future performance by the Applicant in Clause 2 (c) for part payment of Rs. 3,96,00,000/- (Rupees Three Crores Ninety-Six Lakhs Only) to the said LCS on or before 06.04.2021 on behalf of the Corporate Debtor.

The Agreement further stipulates that the balance amount of Rs. 25 Crores is also to be paid in future within 5 days of a Certificate from the Scheme Proponents of ADPL confirming approval of the Scheme of Arrangement by the Hon'ble Adjudicating Authority and subsequent authorisation to the Liquidator of ADPL to register UDS and built-up area made available to the Corporate Debtor. The entire stipulation of payment is thus based on a contingency viz. confirmation of Scheme of Arrangement which is yet to be completed. No actual performance has happened and therefore, no payment has also been made under this Clause. It is pertinent to state that the Chennai Bench of the Hon'ble National Company Law Appellate Tribunal has stayed the Meeting called in respect of the Scheme of Arrangement submitted by the said Gaurav & Anu Agrawal. The same amply shows that the Agreement dated 04.04.2021 is a Contingent Agreement and no right in presentae arises therefrom. Besides, the Agreement itself is void for reason of being a Wager.

C) More so when the Applicant and the related Party to the Applicant have not performed under the Agreement dated 04.04.2021. The entire Sale Consideration has not been tendered. The Applicant is not a genuine Real Estate Allottee and is rather a speculative Investor. The Applicant has no semblance of the rights of a Financial Creditor.

3. In the light of the above rival contentions in the pleadings of both sides, the following issues are framed for determination:

i. Whether the amount claimed by the "Financial Creditor" is a "Financial Debt" within the meaning of the Code?

ii. Whether the parties to a contract by consent convert any debt as "financial debt" and invoke the jurisdiction of NCLT?

iii. Whether the Financial Creditor can be treated as home buyer within the meaning of Section 7 of the Code?

4. Heard the submissions of Mr. Shyam Kapadia, counsel appearing for the Financial Creditor and Mr. Gaurav Joshi, Sr. counsel appearing for the Corporate Debtor.

5. The counsel appearing for the Financial Creditor submitted his arguments in the light of his pleadings and argued that the amount claimed by the Financial Creditor arises out of an agreement to sale dated 04.04.2021 entered into between the parties for purchasing commercial space in the real estate project undertaken by Corporate Debtor and therefore the advance paid by the Financial Creditor falls within the definition of "financial debt" and the Petitioner acquires the status of "Financial Creditor" as defined under the Code and prayed for admission. He has further argued that the parties agreed to treat the above advance amount as secured financial debt and permitted Financial Creditor to approach NCLT in case of default under the agreement and therefore the above petition is maintainable. In order to buttress his argument, he has relied upon the law laid down by the Hon'ble Supreme Court in *Pioneer Urban Land and Infrastructure Limited Vs. Union of India* to demonstrate

that the advance amount paid by purchasers in a real estate project is a "financial debt" within the definition.

6. The Ld. Sr. Counsel Mr. Gaurav Joshi appearing for the Corporate Debtor vehemently opposed for admission of the above Company Petition on the ground that the amount claimed by the Financial Creditor does not fall within the definition of "financial debt" and no amount has been paid to the Corporate Debtor under the agreement to sale and the above Company Petition is not maintainable for non-joinder of necessary party Labh Capital Services Pvt. Ltd. who has purportedly received the amount under the agreement. He further contends that the performance of the above agreement is depending upon so many contingencies and therefore the remedy of the Financial Creditor is only to seek specific performance of the contract by approaching a Civil Court and not through the IBC route. He further contends that the Financial Creditor having knowledge about the said legal lacuna already invoked arbitration proceedings and the above Company Petition is filed against the Corporate Debtor purposefully to pressurise the Corporate Debtor for repayment of the amount.

7. In order to appreciate the arguments of both sides and in order to find out the exact underlying transaction that had taken place between the parties, it is important to read the following terms and conditions of the agreement to sale dated 04.04.2021:

Unnumbered Para No. 4 at Page-2:

And whereas, the Hon'ble National Company Law Tribunal, Chennai ("NCLT"), through its order dated June 6, 2018, admitted the application for initiation of Corporate Insolvency Resolution Process ('CIRP') filed by one of the Financial Creditors, M/s Asset Reconstruction Company (India) Limited ('ARCIL'), in respect of ADPL in accordance with Section 7 of the Code. Pursuant to the Order, Mr. Gopal Krishna Raju was appointed as the Resolution Professional ('RP' or 'Resolution Professional') for ADPL by the committee of creditors of the Company ('COC' or 'Committee of Creditors'). ADPL went into liquidation vide Hon'ble NCLT order dated February 11, 2020 and Ms. Santhanam Rajashree was appointed as liquidator of ADPL ('Liquidator') by Hon'ble NCLT.

<u>Unnumbered Para Nos. 1 & 4 at Page 3:-</u>

*And whereas ADPL as Developer is currently developing a project "Matrix Mall" under a "**Joint Development Agreement**" dated 21st June 2012 entered into between ADPL, BPDPL, JITPL and various other parties for the development of land and construction of Matrix-Mall as detailed in the said AGREEMENT TO SALE which would house a retail bazaar, shopping mall, Commercial Complex, dedicated multi-level car parking, services & utilities building and a swimming pool over a land area of 81 grounds and a built-up area of approximately 4.9 lakh square feet (excluding service and dedicated parking and utility area) at New No. 45 & 47, Old No. 17 & 18, Arcot Road, Saligramam, Chennai ('the Matrix Mall Project').*

*And whereas Gaurav Rakesh Agarwal and Anu Rakesh Agarwal (herein after referred to "**Confirming Party**") have submitted a Scheme of Arrangement and Compromise between ADPL and its shareholders and creditors pursuant to Section 230, and other* *applicable provisions of the Companies Act, 2013 read with Insolvency and Bankruptcy Code, 2016 and its related regulations.*

NOW THEREFORE THIS AGREEMENT TO SALE WITNESSETH and it is hereby agreed by and between the parties hereto as under:

Para-2 (e), (f) & (g) at Page No. 5 & 6:

e. Balance amount of Rs. 25,00,00,000/- (Rupees twenty five crores only) as full and final payment will be paid by the Purchasers within 5 days of a certificate from the "Confirming Party that "Scheme of Arrangement" submitted by them has been approved by the Stake Holders Consultation Committee and also the same has been duly approved by the Hon'ble Adjudicating Authority together with a Certified Copy of such Order and consequently that the Confirming Party/Liquidator has been duly authorised to register UDS and built-up area made available to JITPL under ***Joint Development Agreement*** *upon payment of balance amount as provided in this AGREEMENT TO SALE*

f. The amount of Rs. 8,00,00,000/- (Rupees eight crores only), received by Vendors or their Nominees from Purchasers will be not liable for interest/servicing/charges/ claims, etc in any manner except as provided in this AGREEMENT TO SALE.

g. Vendors acknowledges that they have received deposit as provided under said Lease Deed from Lessee which shall be refundable by Purchasers at the end of Lease period. Therefore the Purchaser shall deduct the amount of deposit from balance amount of Rs.25,00,00,000/- (Rupees twenty five crores only) payable to Vendors.

Para Nos. 4 & 5 at Page-7:

4. *Both Purchasers and Vendors hereby agree and confirm that in case Purchasers chose to terminate this AGREEMENT TO SALE, Purchasers shall be entitled to terminate the AGREEMENT TO SALE provided such right is exercised by the Purchasers on or before the date of certificate as provided at Clause no 2(e) of this AGREEMENT TO SALE. In such case Vendor and/or LCSPL/Confirming Party (whoever is holding the money received) will be liable to refund Rs 3,00,00,000/- (Rupees three crores only) within a period of 90 days. Purchasers will also Reimburse the actual cost incurred on "Scheme of Arrangement" which shall be payable to the Confirming Party by Purchasers. Such rights shall not be available to Purchasers immediately after the date of certificate from the "Confirming Party" as provided at Clause no 2(e) and any intimation by Purchasers shall become null and void if such intimation was not backed with the payments to be made to Confirming Party.*
5. *Both Vendors and Purchasers hereby agree and confirm that in the event of termination of this* ***AGREEMENT TO SALE or event of defaults as provided in this AGREEMENT TO SALE,*** *the entire amount of* ***Rs. 3,96,00,000/- (Rupees three Crores ninety six lacs only)*** *received from Purchasers as part payment made in favour of the M/s. Labh Capital Services Private Limited on behalf of Vendors as provided at Clause no 2 (b) of this AGREEMENT TO SALE shall be forfeited and Vendors shall be liable to pay Rs.4,00,00,000/- (Rupees four crores only) in the manner agreed in this* ***AGREEMENT TO SALE.***

Para No. 8(c) at Page-9:

c. *In case of event of defaults, the Purchasers will be entitled to terminate this AGREEMENT TO SALE and claim the entire* *advance amount paid by the Purchasers to the Vendors, subject to Clause 5 or on behalf of the Vendors to LCPL within 30 days of the date of such Notice for termination of this AGREEMENT TO SALE. In case the Vendors are unable to make the payment on or before the end of Notice period, the Purchasers shall be entitled to recover the amount by initiating all kind of legal proceedings against the Vendors including proceedings under Insolvency And Bankruptcy code 2016 and this amount shall be treated as Secured Financial Credit of Purchasers balance payable by Vendors. Further till the entire amount along with cost is paid, Purchasers will deem to have first charge on the "Said Property owned by Vendors" and this AGREEMENT TO SALE shall deem to be the document which can be used by the Purchasers for creation of charges. Further Confirming Party and Vendors both shall not cause any encumbrance on "Said Property owned by Vendors" till entire amount is paid.*

8. The complete and plain reading of the above terms and conditions of the Agreement to Sale dated 04.04.2021 clearly establishes the following:

   i. It is not a plain simple bilateral agreement between an allottee of a real estate project with the Builder/Developer for allotment of a residential flat. It is a tri-partite agreement between the alleged Financial Creditor, Corporate Debtor and Confirming Parties namely Vidhi Agarwal and Gaurav Rakesh Agarwal.

   ii. The said Gaurav Rakesh Agarwal is a Director of Labh Capital Services Pvt. Ltd. to whom an amount of Rs. 3,96,00,000/- alleged to have been paid by the Financial Creditor under the Agreement to Sale dated 04.04.2021. The said Gaurav Rakesh Agarwal is the son-in-law of one Mr. Dinesh Jagnani who is the

Director of the Financial Creditor company and Smt. Vidhi Agarwal is the wife of Mr. Gaurav Rakesh Agarwal and daughter of Mr. Jagnani. Thus, they are all related parties.

iii. M/s Anandram Developers Pvt. Ltd. is the developer of the project "Matrix Mall" under a Joint Development Agreement dated 21.06.2012 entered into between ADPL, BPDPL, CD and various other parties and the developer ADPL is under liquidation in which a scheme of compromise was submitted by Mr. Gaurav Rakesh Agarwal and Smt. Vidhi Agarwal.

iv. The balance amount of Rs. 25,00,00,000/- is agreed to be paid by the Financial Creditor within 5 days after receiving a certificate from the Confirming Party approving the "Scheme of Arrangement" submitted by them has been approved by the Stakeholders Consultation Committee and also the same has been duly approved by the Hon'ble Adjudicating Authority viz NCLT.

v. Admittedly, the Confirming Party vide their letter dated 06.12.2021 informed both the Financial Creditor and the Corporate Debtor that they are not able to issue the certificate as provided at Clause 2(c) of the Agreement to Sale dated 04.04.2021 or facilitate registering the title deed in favour of the Financial Creditor.

vi. The Financial Creditor filed the present Company Petition claiming an amount of Rs. 4,00,00,000/- along with interest from 09.01.2022 by invoking Clause 8 (c), (d) & (e) of the Agreement to Sale dated 04.04.2021.

vii. The Agreement to Sale further confirms that the proportionate undivided share of the land pertaining to the built up area of the commercial space namely Schedule Property under the agreement is yet to be conveyed by the Confirming Party in favour of Corporate Debtor and thus the Financial Creditor is aware of the legal lacuna of the Corporate Debtor in not having bifurcation of land to convey the same to the Financial Creditor.

9. Keeping the above observations in mind, let us decide the first issue as to whether the amount claimed by the Petitioner in the present Company Petition is a "financial debt" within the meaning of the Code?

10. As stated above an amount of Rs. 3,96,00,000/- is alleged to have been paid by the Financial Creditor to M/s Labh Capital Services Pvt. Ltd. which is another related entity of the Financial Creditor. As rightly contended by the Corporate Debtor the said amount was not paid to the Corporate Debtor directly and what was paid to Corporate Debtor is only an amount of Rs. 10,00,000/-. Therefore, as rightly contended by the Corporate Debtor in their reply, the above amount does not fall within the definition of "financial debt" as per the observations of the Hon'ble Supreme Court in *Phoenix ARC Pvt. Ltd. Vs. Spade Financial Services Pvt. Ltd.*

11. Admittedly, M/s Labh Capital Services Pvt. Ltd. is not a party to the present proceedings. The Financial Creditor is claiming the above amount

of Rs. 4,00,00,000/- with interest in view of the inability and the breach committed on the part of the Confirming Party in not able to issue the certificate due to non-approval of the scheme by the NCLT and not an account of any breach committed by Corporate Debtor and the Corporate Debtor was merely made liable to pay the above amount under the agreement. As rightly contended by the Corporate Debtor, the performance of the Agreement to Sale is depending on the contingency of approval of the scheme submitted by the Gaurav Rakesh Agarwal and others by NCLT.

12. Thus, the transaction and the status of the Financial Creditor are not in the nature of an allottee of a real estate project who has been allotted a residential flat in a real estate project to apply the ratio laid down in *Pioneer Urban Land and Infrastructure Limited Vs. Union of India.*

13. The alleged Agreement to Sale is entered into for purchasing a lavish commercial property situated in the heart of Chennai City which was duly completed and in the occupation of a lessee M/s Future Retail Ltd. The advance amount paid by an allottee in a real estate project was included under the definition of “financial debt” through explanation provided under Section 5 (8)(f) of the Code which was not there in the beginning when the Code was enacted. Therefore, after carefully examining the above facts in the light of the above explanation, this Bench is of the considered opinion that the above amount claimed by the Financial Creditor does not fall within the definition of the “financial debt” and the above Company Petition is not maintainable before the NCLT. As rightly

contended by the Corporate Debtor, the performance of the above agreement is depending on so many contingencies and therefore the remedy of the Financial Creditor is only to seek specific performance of the contract by approaching appropriate Civil Court or invoking arbitration as the case may be and not through this IBC route. Accordingly, the above issues 1 and 3 are answered in favour of the Corporate Debtor and against the Financial Creditor.

14. The next issue is whether the parties under an agreement confer jurisdiction on any Court or Tribunal which has no inherent jurisdiction? In this context it is appropriate to mention here that it is a well settled principle of law that the parties under an agreement confer jurisdiction on any one of the Courts and Tribunals when two or more Courts or Tribunals have jurisdiction. However, parties under an agreement cannot confer jurisdiction on any Court or Tribunal which has no inherent jurisdiction to try any particular case. As discussed above the NCLT has no jurisdiction to adjudicate the lis between the parties under the above Agreement to Sale because of its peculiar nature of transaction and therefore the parties by an agreement cannot confer jurisdiction on NCLT simply because it can be used as weapon against their opponent to recover the dues or it is convenient to them.

15. In view of the foregoing discussion, viewing from any angle, this Bench is of the considered opinion that the above Company Petition is nothing but a misuse and abuse of the process of the Court by the Financial Creditor

and this Tribunal shall not encourage this kind of applications and it is high time to dismiss this kind of applications by imposing costs.

16. Accordingly, the above Company Petition is dismissed by imposing cost of Rs. 2,00,000/- payable by the Financial Creditor to "Bharat Kosh" within two weeks from the date of uploading of the order.

17. The Financial Creditor shall file compliance affidavit regarding payment of cost failing which an appropriate action may be initiated by the Registrar of Companies for recovering the above cost as if it is a Government revenue recoverable from the Financial Creditor on production of this order either by the Corporate Debtor or by the Registrar of this Tribunal.

Sd/-
MADHU SINHA
MEMBER (TECHNICAL)

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)

//Shubham//