



THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT III

IA – 767/2021
In
IB – 1771(ND)/2018

Under Section – 60 (5) of the IBC, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016.

IN THE MATTER OF:

PRIYANSHI ARORA

.....Financial Creditor

Versus

M/s. DREAM PROCON PRIVATE LIMITED

.....Respondent

ON BEHALF OF:

MONEYWISE FINANCIAL SERVICES PRIVATE LIMITEDApplicant

Order Pronounced On: 05.12.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS

HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI

HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Financial Creditor : Mr. Aditya Singh, Advocate

For the Resolution Professional : Ms. Varsha Banerjee, Advocate



ORDER

Per: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. The application has been filed under Section 60(5) of the Code, 2016 read with Rule 11 of the NCLT Rules, 2016 by Applicant seeking following prayers:-

a. To allow the present Application;

b. To direct the Respondent to admit the claim of the Applicant for Rs. 14,59,89,580/- filed in Form – C dated 20.10.2020

c. To pass any other orders as this Adjudicating Authority may deem fit under the facts and circumstances of the present case.

2. It is submitted by the Ld. Counsel appearing for the Applicant that, a Master Loan Agreement was executed between the Applicant and the Corporate Debtor. The Corporate Debtor stood as a guarantor for the loan facility availed by Indirapuram Habitat Center Private (IHCPL) Limited as per term sheet. IHCPL availed a term loan facility for a sum of Rs. 10 crore in the year 2016 from the Applicant.

3. It is further averred that, the Applicant being a financial creditor qua the Term Sheet whereby the Corporate Debtor stood as a guarantor submitted another claim as Financial Creditor in Form – C on 20.10.2020 with the Respondent for a total sum of Rs. 14,59,89,580/- which was due to the Applicant. The Applicant's claim was rejected by the Respondent.

4. It is further submitted by the Ld. Counsel appearing for the Applicant that, as per Term Sheet, the Applicants claim is based in its entirety in lieu of the unconditional and irrevocable guarantee provided by the Corporate Debtor to the Applicant for the loan availed by IHCPL. The liability of the surety is co-extensive with that of the principal borrower. Further, Financial Debt is



defined in Section – 5 of IBC, includes the amount of any liability in respect of any guarantee or indemnity. The deed of guarantee executed between the parties provides for in the event of any default on part of the guarantor in the event of any default on part of the guarantor the guarantor shall pay to the Applicant on demand without demur all part of the amounts payable by the Guarantor under the loan documents.

4. In response, the Ld. Counsel appearing for the Respondent submitted that, the Applicant has failed to establish itself as a Financial Creditor in terms of Section – 5 (8) (i) of IBC, 2016. Further, submitted that the claim of the Applicant is not supported by the alleged Deed of Guarantee containing the signatures of any authorised signatory of the Corporate Debtor. It is further, submitted that there is no Board Resolution placed on record by the Applicant to prove that the Board of the Corporate Debtor authorised the ex-promoters to execute the Guarantee on behalf of the Corporate Debtor.

5. It is further submitted that, the Applicant claim is premised on un-invoked Corporate Guarantee and it will have an adverse impact on Resolution Plan.

6. We have heard the arguments advanced by the Ld. counsel appearing for the Applicant as well as for the Resolution Professional.

7. As regards to the first issue raised by the Applicant that, the liability of the surety is co-extensive with that of the principal borrower. The Financial Debt is defined in Section – 5 of IBC and includes the amount of any liability in respect of any guarantee or indemnity and in the event of failure the guarantor shall pay to the Applicant but on the contrary, the Respondent submitted that the Applicant failed to satisfy the basic requirement of Section – 5(8) of IBC i.e., disbursal against consideration for the time value of money.



8. It is pertinent at this stage to refer the decision of Hon'ble Supreme Court in **Jaypee Infratech Limited Vs. Axis Bank Ltd. (2020 SCC online 237)**.

"The essentials for financial debt and financial creditor"

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 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 disbursement, 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 disbursement against consideration for the time value of money."*



Thus, from the perusal of the above mentioned judgement it is clear that the essential element of disbursal is of paramount importance against the consideration for time value of money, and it 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. We have perused the document available on records carefully and thus, we are of the considered view that the Applicant has failed to demonstrate how the disputed transaction falls within any sub clauses (a) to (h) of Section – 5(8).

9. It is also noted that, the Committee of Creditors (CoC) has approved the Resolution Plan by 90.66% and Application under 30(6) of IBC is pending before this Adjudicating Authority.

*“Hon’ble Supreme Court in recent Judgment in **M/s. R.P.S. Infrastructure Limited Vs. Mukul Kumar and Anr. (Civil Appeal No. 5590 of 2021)** has already taken the view that after approval of the plan by the CoC, the claims cannot be entertained. There is no dispute with the facts that the claim was filed by the Appellant after approval of the plan by the CoC. The Appellant has also not been able to show that claim of the Appellant was reflected in the records of the Corporate Debtor”.*

10. In the light of the above findings, IA – 767/2021 stands **dismissed**.

SD/-

ATUL CHATURVEDI
MEMBER (TECHNICAL)

SD/-

BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)