

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 780 of 2020

(Arising out of Order dated 10th July, 2020 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, Court-2, in IA 752 of 2019, in C.P. (IB) No.- 178/NCLT/AHM/2018).

IN THE MATTER OF:

**Mukesh N. Desai
Shree Darshan Society,
Nr. Jamna Nagar Bus Stand,
Raam Chauk, Ghod Dhod Road,
Surat, Athwaliness, Surat-395001.**

...Appellant

Versus

**1. Piyush Patel
60, Adarsh Society,
Athwalines, Surat-395001.**

...Respondent No. 1

**2. M/s. Shipraj Developers Private Limited
60, Adarsh Society, Athwalines,
Surat-395007.
Email: shreyamcocunut@gmail.com**

...Respondent No. 2

**3. Sunil Kumar Agarwal
(Resolution Professional)
Tower 6/603, Devanandan Heights,
Nr. Poddar School, New CG Road,
Chandkheda, Ahmedabad – 383424,
Email: anil91111@hotmail.com**

...Respondent No. 3

**4. Dhiren R. Dave
(Company Secretary)
Having Office at: B-103, ICC Building (1st
Floor),
Near Kadiwala School, Majura Gate,
Ring Road, Surat-395002 (Gujarat)
Email: drd@drdcs.net**

...Respondent No. 4

For Appellant: Mr. Rajendra Beniwal and Sajal Jain, Advocates.

For Respondent No. 1 to 2: PCS Dhiren R. Dave, Advocate for R-1 to R-2.

For Respondent No. 3: Mr. Pratik Thakkar and Mr. Sumit Kansal, Advocates for R-3.

For Respondent: Mr. Sunil Kumar Agarwal, Advocate for Ex-RP.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this *Company Appeal (AT) (Insolvency) No. 840 of 2020* is to the Impugned Order dated 10/07/2020 in I.A. No. 752 of 2019 in C.P. (IB) No. 178/NCLT/AHM/2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, Court-2), by which Order, the Adjudicating Authority has allowed the Application preferred by *Mr. Piyush Patel* one of the Promoters of *M/s. Shipraj Developers Private Limited/* the ‘Corporate Debtor’ who prayed *inter alia* for the following directions:

“a. Interim Prayer

i. Stay be granted on the process of CIRP until outcome of this Application as practically there is no claim and Corporate Debtor has enough liquidity to pay the claim of original applicant. Number of days this IA remain pending be excluded from the threshold limits to conclude the CIRP.

b. Prayers

i. R-2 Mukesh Desai’s claim as Financial Creditor as admitted by the R-1 be cancelled.

ii. On cancellation of claim of R-2 as Financial Creditor, COC constitution be declared as cancelled.

iii. R-3 being original applicant be paid from the current account of the Company having enough balance.

iv. No other creditor remains and CIRP commenced may be declared as stopped as there being no claim by creditors as R-3 only creditor is being paid and no grievance remains on their part.

v. Cost may be imposed on R-1 IRP for doing such acts against the code in conspiracy with R-2.

vi. R-1's action may be declared as suspicious and matter may please be referred to IBBI for necessary action.

vii. For costs.”

2. Facts in brief are that an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘the Code’) was filed by *M/s. Nuvoco Vistas Corporation Limited*, which was admitted on 24/07/2019 and an IRP was appointed. During the pendency of CIRP, I.A. 752 of 2019 was preferred by the ‘Corporate Debtor’ with the aforementioned prayers. The first Meeting was convened on 16/09/2019 wherein, Mr. Mukesh Desai, the Appellant herein was the sole Member of the constituted CoC. The ‘Corporate Debtor’ objected to the inclusion of Mr. Mukesh Desai as the ‘Financial Creditor’/Member of CoC on the ground that ‘he is a partner in the Project of the ‘Corporate Debtor’, having an ownership of 25% shares in the land meant for the Project’ ‘Coconut’ Mr. Desai is said to have made a payment of Rs.12,57,42,071/- towards 25% of the ownership; that an MoU was entered into between Mr. Desai and the ‘Corporate Debtor’ on 26/05/2014 whereby it was decided to transfer 25% of the land to him and therefore being a partner of the Project, Mr. Mukesh Desai cannot be termed as a ‘Financial Creditor’.

3. While allowing the Application, the Adjudicating Authority observed as follows:

“19. It is also evident and a matter of record that public announcement has been made but not a single claimant has put forward their claim before the RP. Under such situation it can be presumed that the Corporate Debtor is a going concern and sound company and he has no creditor in the market.

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23. On perusal of the record, it is amply clear that amount so paid by the Respondent No. 2 has no time value of money by way of interest or repayable along with interest, as is also admitted by the Respondent No. 2 himself that the same is paid towards development and construction of the project and he has to get 25% from the net profit, as reflected in MOU and its various covenants/terms and conditions. Further, even if its is assumed that amount is paid as a loan, but admittedly it was paid in 2014 and as such is barred by limitation.

24. It is needless to mention herein that the very object of the Code is resolution, as evident from the long title of the Code, which reads as under:

“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate person, partnership firms and individual in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alternation in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India...”

The Hon’ble NCLAT, in the matter of Binani Industries Limited Vs. Bank of Baroda & Anr. clarified the objectives of the Code as under:

“The first order objective is “resolution”. The second order objective is “maximisation of value of assets of the “Corporate Debtor” and the third order objective is “promoting entrepreneurship, availability of credit and balancing the interest”. This order of objective is sacrosanct.

Thus, when the Company is sound and going concern and looking to the object of the IB Code, it would not be prudent to bring the Company under liquidation for some vested interest.

25. Under the facts and circumstances as narrated herein above is sequel, the status of the Respondent No. 2 (Mr. Mukesh Desai) cannot be taken as Financial Creditor. Hence, the COC so constituted by the RP is void ab initio. Further, the Operational Creditor have liberty to file his application through RP and RP shall make all endeavour to file Form F.A., so filed by the Operational Creditor for withdrawal of the CIRP before this Adjudicating Authority. Accordingly, the instant Application is allowed with the above directions.”

(Emphasis Supplied)

4. The main issue which arises in this Appeal is:

- Whether a landowner intending to share profits emanating from the agreed venture, by way of an MoU, would fall within the ambit of the definition of ‘Financial Creditor’ as defined under Section 5 of the Code.
- Whether the Adjudicating Authority in the event of an Application being filed under Section 9 of the Code and the ‘Corporate Debtor’ having settled with the ‘Operational Creditor’, can close the CIRP Proceedings on the ground that the sole Member of the CoC does not fall within the ambit of definition of ‘Financial Creditor’, as defined under the Code.

5. **Submissions of the Learned Counsel appearing on behalf of the**

Appellant:

- It is submitted by the Learned Counsel for the Appellant that during the period 22/05/2014 to 25/08/2014, an amount of

Rs.4,41,82,071/- was extended to the 'Corporate Debtor' by way of a loan vide cheque payment and the same is also reflected in the Balance Sheet dated 31/03/2019 under the heading 'Long Term Borrowings'. In support of his argument that the amount lent and reflected in the Audited Balance Sheet as 'Long Term Borrowings', ought to be treated as a 'Financial Debt', the Learned Counsel relied on the ratio of the Judgement of this Tribunal in '*M/s. Mahabir Cold Storage*' Vs. '*CIT Patna*', 1991 Supp (1) SCC 402.

- Learned Counsel also relied on the Judgement of the Hon'ble Supreme Court in '*Orator Marketing Private Limited*' Vs. '*Samtex Desinz Private Limited*', 2021 SCC OnLine SC 513, to buttress his argument that the amount paid by the Appellant does have time value of money and interest is not *sine qua non* for the amount to fall within the definition of the 'Financial Debt' as defined under Section 5(8) of the Code.
- Learned Counsel also contended that even if the Appellant is considered to be a partner in the Real Estate Project which was to be developed, he is a 'Financial Creditor' and placed reliance on the Judgement of this Tribunal in '*Macksoft Tech Private Limited & Ors.*' Vs. '*Quinn Logistics Indian Limited*', Company Appeal (AT) (Insolvency) No. 143, 175 & 176 of 2017, dated 21/05/2018 wherein this Tribunal observed that '*grant of loan and to get benefit of development is object of the Respondent- (Financial Creditor), as apparent from their Memorandum of Association*'. Thus, we find that there is a '*disbursement made by the Respondent – (Financial Creditor) against*

the ‘consideration for the value of money’. The investment was made to derive benefit of development of ‘Q-City’, which is the consideration for time value for money. Thus, we find that the Respondent- (‘Financial Creditor’) come within the meaning of ‘Financial Creditor’ and is eligible to file an application under Section 7, there being a ‘debt’ and ‘default’ on the part of ‘Corporate Debtor’.

- Merely because the Appellant is a partner in the said Project it does not create any embargo *per se* for the Appellant to not to be considered as a ‘Financial Creditor’. Further, any ‘person’ as mentioned under Section 5(7) of the Code, r/w Section 3(23)(e) includes ‘partnership’, hence a partner is also a ‘Financial Creditor’ as enshrined under the Code.

6. Submissions of the Learned Counsel appearing on behalf of first and second Respondent/‘Corporate Debtor’:

- Learned Counsel for the Respondent vehemently submitted that the Appellant is a partner in the Real Estate Project of the ‘Corporate Debtor’, having invested in 25% of the land cost.
- Appellant has not contributed even the entire amount in compliance of the terms of the Agreement. The said matter is still pending before the Arbitrator.
- The Appellant is not a ‘Financial Creditor’, and nowhere is it mentioned that any interest has been paid to the Appellant even as per the terms of the MoU.

- It is stated in the MoU dated 26/05/2014 that the Appellant is a 25% partner in the Project and has not proved by way of any documents that the amount given under the MoU is for time value of money.

7. Submissions of the Learned Counsel appearing on behalf of Respondent No. 3/Resolution Professional:

- The IRP made a Public Announcement dated 30/07/2019 inviting the claims from Creditors under provisions of Section 15 of the Code and admitted the claim of one 'Financial Creditor' Mr. Mukesh Desai/ the Appellant to the tune of Rs.4,41,82,701/- and three 'Operational Creditors' i.e., Nuvoco Vistas Corporation Limited, Kunjal Dalal and Income Tax Officer, Surat. The claim of the 'Operational Creditor' amounted to Rs.1,60,14,829/-. The claim of the IT Department amounting to Rs.1,45,00,000/- was transferred to them and the other 'Operational Creditor' Nuvoco Vistas Corporation Limited withdrew their claim vide Application dated 24/03/2020 exercised under Section 12-A of the Code. As a result of this, the claim of only one 'Financial Creditor' was pending and outstanding.
- During the course of Final Hearing, the Learned Counsel submitted that he neither supports nor opposes the Appellant.

Assessment:

8. To understand the nature of relationship between the Appellant herein and the 'Corporate Debtor', it is significant to reproduce the relevant terms of the MoU entered into between the parties on 26/05/2014, wherein the

party of the second part Mr. Mukesh Desai and party of the first part 'the Corporate Debtor' arrayed as the tenth party, agreed as follows:

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AND...

MUKESHBHAI NANUBHAI DESAI, Aged Adult, Occupation :
Business, Residing at 1, Shridarshan Society, Near Jamna Nagar
Bus Stand, Ghod Dod Road, Surat.

PARTY OF THE SECOND PART.

(Hereinafter in this memorandum of mutual understanding referred to as "Party of the second Part" and in meaning thereof, party of the second part himself and his legal heirs all are considered as included).



Whereas this Memorandum Of Mutual Understanding was in force between the parties since 01/04/2013 in oral form. Hence it is executed between the parties today.



That price of non-agriculture land mentioned hereunder is mutually decided between the parties. It is decided that said lands will be developed and construction of residence / commercial type will be done therein by party of the first part and one development agreement is also executed between parties of the first part. As party of the second part is also interested in this development, so entered in developing procedure under this agreement. In this project, parties of the second part becomes partner of 25 percent share, so parties of the second part shall pay cost of land and construction in project according to said partnership share to party of the first part. Therefore it is decided to transfer 25% percent land to parties of the second part from said lands mentioned hereunder in schedule. Land which is decided to transfer by party of the first part to parties of the second part, it's price decided mutually. Therefore, this memorandum of mutual understanding is executed between the parties. Its main conditions are as under.

// CONDITIONS //

- [1] Parties of the second part has paid sum of **Rs.7,62,50,000/- Rupees Seven Crores Sixty Two Lakhs Fifty thousand only** to Castle Construction Company, a partnership firm as per oral

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agreement and as per Instruction of Piyushbhai Lavjibhai Patel, towards construction of project. Now Castle Construction Company, a partnership firm shall transfer this amount to party of the first part Shilprai Developers Pvt. Ltd. company.

- [3] Construction plan is sanctioned regarding said land. Accordingly, there are parking on ground floor and first floor. Thereafter construction plan sanctioned for residential flats above said floors. Name of said project is COCONUT.
- [4] Party of the second part shall pay cost of construction to Shilpraj Developers Pvt. Ltd. towards construction of said project upto sample flat in the said project. Out of that, party of the second part has paid sum of **Rs.7,62,50,000/- Rupees Seven Crores Sixty Two Lakhs Fifty thousand only**. The parties have to start booking of flat after getting sample flat ready in the said project and remaining construction work shall be completed from booking amount. Both the parties have rights to book flats and the parties have to get mutual consent of each mutual.
- [5] Party of the first part shall maintain all accounts of project and shall show accounts to party of the second part time to time. Party of the second part shall obtain clarification from party of the first part by showing such accounts every month to party of the second part or person as direct by the second part.
- [6] After completion of construction, whatever income earn from the flat purchasers, deduct price of land shown hereunder in schedule, construction cost, brokerage, corporation expenses, service tax, vat tax, income tax and all other expenses, whatever amount (net profit) remain, its 25% amount shall be paid to party of the second part by party of the first part towards profit. Apart from that, amount paid by party of the second part towards project and 25% amount of profit share of the second part shall be adjusted / deducted by party of the first part.

(Emphasis Supplied)

From the aforementioned terms, it is clear that the Appellant herein is entitled for 25% of the net profit of the Project and the Appellant is shown as having ownership of 25% share in the Project titled 'Coconut', which is

Creditor’, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the Code’. The Hon’ble Apex Court held that the triggering for CIRP by a **‘Financial Creditor’** under Section 7 of the Code is the occurrence of a ‘default’ by the ‘Corporate Debtor’. The definition of ‘Financial Debt’ under Section 5(8) of the Code does not expressly, exclude ‘an interest free loan’. ‘Financial Debt’ would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

11. The facts in the attendant case are different as the amount is undisputedly given towards financing the Project ‘Coconut’, in which, the Appellant herein is a 25% partner, involved in profit sharing and therefore is a significant part of the ownership share. The said fact is not disputed by the Appellant, but contends that merely because the Appellant is sharing the profits, the same would not bar the Appellant from being termed as ‘Financial Creditor’ as defined under Section 5(7) of the Code.

12. The definition of ‘Financial Creditor’ under Section 5(7) of the Code is reads as hereunder:

“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;”

13. The definition of ‘Financial Debt’ under Section 5(8) of the Code is reads as under:

“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—

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised 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 non-recourse 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;”

14. In the instant case, on mutual Agreement, the ‘Corporate Debtor’ and other parties decided to transfer 25% of the land to the Appellant herein on a price decided jointly. As per Clause 4 of the MoU, the Appellant shall fund the cost of construction to the ‘Corporate Debtor’/developer, till the sample flat is ready. It was correlatively decided that ‘both parties have rights to book flats with mutual consent’. Clause 6 stipulates that ‘whatever income is earned from the sale of flats, the Appellant is entitled to 25% of the Net Profit’.

15. The MoU entered into is an Agreement of reciprocal rights and obligations. We are of the earnest view that both parties being ‘Joint Development Partners’ who entered into a consortium of sorts for developing the subject land and for any breach of terms of the contract, Section 7 Application filed under the Code would not be maintainable as the amount cannot be construed as ‘Financial Debt’ as there is no sum(s) i.e., owed, assigned or transferred to in compliance of the provisions of Section 5(8) of the Code. To reiterate, being a profit share owner, who in the event of the success of the Project would receive the residual gain, the amount invested in the land cannot be said to be a ‘Financial Debt’ as defined under Section 5(8) of the Code. Hence, the ratio of the Judgements relied upon by the Learned Counsel for the Appellant are not applicable to the facts of this case.

16. Keeping in view the peculiar facts of the attendant case on hand, wherein an Application under Section 12-A, the ‘Corporate Debtor’ has settled the claims of the ‘Operational Creditor’ and the sole Member of the CoC is the Appellant herein, whom we, for all the aforementioned reasons, are of the considered view is not a ‘Financial Creditor’, we do not find any illegality or infirmity in the Impugned Order, whereby the Adjudicating Authority has sought to close the CIRP proceedings against the ‘Corporate Debtor’. This Tribunal also took into consideration the observation by the Adjudicating Authority, that subsequent to the Public Announcement, not a single claimant had come forward to file their claims.

17. As regarding the observations made against the third Respondent i.e., the IRP, we note that vide Order dated 13.10.2020 in *Company Appeal (AT) (Insolvency) No. 862-863 of 2020*, this Tribunal passed the following Order:

“After hearing Mr. Pratik Thakkar, Advocate representing the Appellant and Mr. Dhiren R. Dave, PCS for R-1 & R-4, we find that CP (IB) 178/NCLT/AHM/2018 having been allowed to be withdrawn by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in terms of impugned order dated 31st August, 2020, there are no observations in regard to the conduct of Appellant – Resolution Professional which can be said to be casting any stigma on his conduct as Resolution Professional warranting consideration for expunction of such remarks. At this stage, learned counsel for the Appellant offered to withdraw the appeal. Same is permitted. Appeal is dismissed as withdrawn.”

18. Viewed in the above perspective, this Tribunal is not inclined to interfere with the well-reasoned Order of the Adjudicating Authority and hence the Appeal fails and is dismissed accordingly. No order as to costs.

19. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

**NEW DELHI
24th February, 2022**

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