IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI BENCH-III

IB/775/ND/2019 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of ***M/s. Edward Koeventer (Successors) Private Limited.***

M/s Arenja Enterprises

... Financial Creditor

Versus

M/s. Edward Keventer (Successors) Private Limited

... Corporate Debtor

Order delivered on 16th of January, 2020.

CORAM :

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)
K.K. VOHRA, MEMBER (TECHNICAL)

For Financial Creditor: *Mr. Piyush Singh, Mr. Aditya Parolia*
For Corporate Debtor : *Mr. Rajiv Nayra, Sr. Adv. Mr. Kartik Nayar*

ORDER

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

1. Under adjudication is IB/775/ND/2019 that has been filed by **M/s Arenja Enterprises Pvt., Ltd.** (hereinafter referred to as '**Financial Creditor'**) under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **M/s. Edward Keventer (Successors) Private Limited** (hereinafter referred to as '**Corporate Debtor**'). The prayer made is

to admit the Application to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional (IRP).

2. Heard the Counsels for the Financial Creditor and the Corporate Debtor, and perused the Application along with the records placed on the file.

3. The brief facts of the case are that the applicant and its associates entered into Memorandum of Understanding/ Collaboration agreement pertaining to the land followed by two other supplementary MOU dated 20.11.1989 and 22.11.1989. During the year 1992, some dispute arose between the parties and the applicant along with its associates filed a civil suit for specific performance with other relief against the corporate debtor, before the Hon'ble High Court of Delhi bearing CS (OS) No. 1744 of 1992. Based on an amicable settlement entered into between the parties, the civil suit was decreed on 10.4.1996,

4. As per the settlement filed before the Hon'ble High Court, the CD had agreed to develop a group-housing complex on plot of land admeasuring 22.95 acres. Out of this area, the applicant along with another was entitled to only 34,000 sq. ft. residential covered/ build up area along with proportionate super area. It was stipulated in the settlement that if the sanction of plans is not obtained within maximum period of 3 years from the date of signing of the settlement. In that event, the CD and M/s. Dalmia promoters and Developers Pvt., Ltd., agreed to give further build up area of 1700 sq. ft., i.e., 8.50 sq. ft. each to the applicant and its associates for each completed year of 365 days, after the lapse of 3 years from the date of the settlement and the liability of 700 sq. ft. per annum would be for a maximum of 3 years after the expiry of first 3 years from the date of settlement and will cease thereafter. It was further stipulated that the applicant alongwith its associates would not

be entitled for any increase in any area, if the delay were less than 365 days in any of the subsequent years after the expiry of initial period of 3 years.

5. Before proceeding further, it is worthwhile to mention that on 4th of January 1995, an order came to be passed by the Hon'ble High Court of Delhi in FAO(OS) 6/93 & C.Ms 18, 3471/93 & 2474, 3955/94, titled Dalmia Promoters and Developers Pvt. Ltd. & Others, whereby an amount of Rs 2 Crores being the security deposit with the CD was refunded to the bankers of FC, consequently no money of the FC was left with the CD.

6. As per the settlement arrived at between the FC along with its associates and the CD along its associates, the building plans were to be got sanctioned by the CD within a maximum period of 3 years from the date of decree passed in Civil Suit with a further extended period of 3 years.

7. The FC contends that it had written a letter to the CD to hand over 39,100 sq. ft. builds up area to the FC and its associates as per the consent decree dated 10.4.1996. It is noted that the FC and others filed an execution petition before the civil court against the CD for completion of its obligations in accordance with the terms of the decree dated 10.4.1996.

8. It is alleged by the FC that the CD has mortgaged property and raised loans over the same since 2009, thereby getting financial benefits by utilizing the land rather than completing its admitted obligations as per the decree passed by the court on 10.04.1996.

9. The FC further contended that original amount of debt on 10th of April 1996 was 36,000 sq. ft. and an additional amount of 5100 sq. ft. was added to the debt on 10th of April 2002 on account of penalty for delay in getting sanction of plans in terms of Clause (J) of the consent decree, making the total amount of debt to the FC and its associates for 39100 sq. ft. with proportionate super areas. The FC further stated that the default is

continuing as the CD failed to give possession of the undivided admitted share of FC and its other co- allottes.

10. The FC has recorded in the application that by virtue of the decree passed in the civil suit on 10th of April 1996, and in consideration of services provided by the FC and its associates 34,000 sq. ft., of buildup residential area with proportionate super area in 48, Keventer, Sardar Patel Marg, New Delhi were admittedly sold to FC and its associates by the CD and the said transaction has the effect of raising an amount equivalent to the value of services provided by the applicant and its associates value at rupees 1 Cr in the civil suit which has the effect of borrowing in accordance with the terms of IBC,2016. Based on these submissions the applicant prayed to admit the application, initiate CIR process against the CD and appoint the IRP.

11. The CD has filed **reply** and admitted the fact pertaining to the consent decree passed by the Hon'ble High Court of Delhi on 10th of April 1996. The CD has contended that the FC along with its associates have filed execution petition under No. 77/2008 before the District Court. The CD has filed an application in the said execution petition seeking to keep the execution proceedings in abeyance till the commencement of the construction, as the execution proceedings are premature. However, the District Court has rejected the application and CD has preferred an appeal before the Hon'ble High Court of Delhi. The Hon'ble High Court vide its order dated 6th of August 2019 passed in Ex. F.A. 32/2019 has stayed the execution proceedings by accepting the position that the same is premature.

12. The CD has contended that the FC and its associates knew that the land is allotted for dairy farming on which construction cannot take place, so the decree was not executable under law, and no fixed time is mentioned under the decree. The CD further stated that the consent decree was not a

money decree and does not contemplate sale of any property to the Decree holders, as the terms of settlement did not provide for the same, moreover the execution proceeding are premature as no plan has been prepared for construction of the property in question.

13. The CD has stated in its defence that the debt as alleged by the FC is not a financial debt as defined under sub clause (8) of Section 5 IBC,2016 as no sum has been raised from allotee under the real estate project, as the FC and its associates have not paid any money towards the allotment of build up area and the consent decree dated 10th of April 1996 is making the FC and its associates entitled to only 34000 sq. ft. residential covered/ built up area along with proportionate super area and for any delay with regard to sanction of plans the penalty is in the shape of additional 1700 sq. ft. in favour of FC and its associates. In other words nothing is to be paid in terms of money to the FC and its associates in the light of the consent decree and settlement arrived at, as the CD has not raised any money from the FC in terms of the explanation to sub-clause (f) of sub-clause (8) of Section 5 of IBC, 2016.

14. On perusal of the pleadings of the parties the issue that arises is as follows:

> *Whether the claim made by the petitioner falls within the purview of the definition of 'Financial Debt' as defined under sub-section (8)(f) of Section 5 of the IBC, 2016?*

15. Before we proceed to examine the issue raised herein above, it necessary to refer to the relevant expressions i.e., *"claim," "creditor," "debt," "default"* and *"financial debt"* used given in the IBC 2016. Sub clauses (6), (10), (11), (12) of Section 3 of IBC 2016 define the terms *"claim," "creditor," "debt," "default" as follows:*

> *(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;

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(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;*

(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 1 [paid] by the debtor or the corporate debtor, as the case may be.*

The term "financial debt" *is defined under sub clause (8) of Section 5 of the IBC 2016 as follows:*

"financial debt" *means a debt alongwith 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 dematerialised 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;

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);]

(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-clause (a) to (h) of this

clause. ***(Emphasis supplied)***

16. The perusal of the expressions mentioned above provide that claim means a right to payment and Financial Debt means a debt along with interest, if any, which is disbursed against consideration for the time value of money and includes any amount having a commercial effect of borrowing. Thus, it has become clear that the Financial Debt refers to ***non- payment of money***; which is due and payable and a default has occurred in paying the same. In connection with ***financial creditors falling in the category of home buyers, 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.***

17. The legal position stated above gives rise to another question i.e., whether any amount has been raised from FC and its associates by the CD under a real estate project? As can be inferred from the factual position recorded in the preceding paragraphs, the answer to this question is no. Thus, the claim of the FC as recorded under Para 8 of PART-IV of its Application i.e., *"by virtue of the* **decree** *passed in the civil suit on 10th of April 1996, and in* **consideration of services** *provided by the FC and its associates, 34,000 sq. ft., of buildup residential area with proportionate super area in 48, Keventer, Sardar Patel Marg, New Delhi were admittedly sold to FC and its associates by the CD and the said transaction has the effect of raising an amount," is misconceived; because the decree passed in the civil suit on 10th of April 1996, admittedly is* <u>*not*</u> *for 'payment of money'. Further, in case the arguments of the FC i.e., the buildup residential area was to be given in lieu of* ***services*** *provided by the FC and its associates to the CD, then the application filed under Section 7 of the IBC 2016 is not maintainable,* as this *Authority cannot assume the jurisdiction of the executing court to direct the CD to deliver* the possession of built-up total area of 39100 Sq. Ft. with proportionate

super area to the Financial Creditor and its associates as claimed. Accordingly, the issued framed under Para 14 herein above, is decided against the FC and in favour of the CD.

18. Apart from the above, it is on record that the FC along with its associates has filed execution petition under No. 77/2008 before the District Court. The CD has filed an application in the said execution petition by raising an objection that execution proceedings are premature and prayed to keep the same in abeyance till the commencement of the construction. The District Court had rejected the application and CD has preferred an appeal before the Hon'ble High Court of Delhi. The Hon'ble High Court vide its order dated 6th of August 2019 passed in Ex. F.A. 32/2019 has stayed the execution proceedings by accepting the legal position that the execution petition is premature. Therefore, even execution petition cannot be pressed to get the decree dated, 10.04.1996 executed by FC and its associates against the CD, as the same is premature. In the present circumstances it is a fit case to relegate the parties to the civil court for seeking appropriate legal remedies available under law. However, they are already before the Civil Court for getting the decree dated, *10th of April 1996,* executed against the CD and its associates.

19. In view of the discussion made above, the Petition stands dismissed without any cost. The order is pronounced in open court.

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(K.K.VOHRA)
MEMBER (TECHNICAL)

-S-d-

(CH. MOHD SHARIEF TARIQ)
MEMBER (JUDICIAL)