

National Company Law Appellate Tribunal, New Delhi

Company Appeal (AT) (Ins) No. 97 of 2020

IN THE MATTER OF:

K.S. Sreenivasan,

No. 47/1, Sadullah Street,

T. Nagar, Chennai - 600017

...Appellant

Vs.

Landmark Housing Projects (India) Pvt. Ltd.

No. 7, Saravana Street, T. Nagar,

Chennai - 600017

...Respondent

Present:

For Appellant: Mr. Kumar Anurag Singh, Mr. DeveshTripathi, Ms. Anasuya Choudhury, Advocates

For Respondent: Mr. R. Balasubramaniam, Senior Advocate. Mr. Kumar Dushyant Singh and Mr. Mukul Lather, Advocates.

J U D G E M E N T

Jarat Kumar Jain. J:

The Appellant, Mr. K.S. Sreenivasan has preferred the instant Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (In Short I&B Code) against the impugned order of dismissal of the Application under Section 7 of the I&B Code, filed by him, claiming to be a Financial Creditor.

2.1 The Corporate Debtor (Respondent herein) Landmark Housing Projects (India) Pvt. Ltd. is engaged in the business of Real Estate Development. The Corporate Debtor and the Financial Creditor (Appellant herein) entered into an agreement for sale on 03.04.2015. The Corporate

Debtor has agreed to sell 1,89,299 sq. ft. of saleable area in Schedule 'A' property described in Schedule 'B' (in short saleable area) @ pre-launch price of Rs. 3,000/- per sq. ft. at the time of signing of this agreement, the Financial Creditor has paid a sum of Rs. 5 lacs by way of cheque dated 03.04.2015 and freeze saleable area. The Financial Creditor agreed to pay the balance amount in stages together with other charges to the Corporate Debtor as per the progress of the project namely TORRENCE. It is also agreed between the parties that the Corporate Debtor shall repurchase the entire saleable area @ of Rs. 4,535/- per sq. ft. at any time as may be desired by the Financial Creditor. The schedule for payment payable by the Corporate Debtor to the Financial Creditor on buy back shall be as follows:-

Sl. No.	Buy-back amount in Rs.	On or before date	Surrendering extent in sq. ft.	Schedule property
1.	10,01,98,660.00	22.02.2016	65276.00	B
2.	10,01,76,645.00	22.08.2016	65276.00	B
3.	9,01,76,645.00	22.02.2017	58747.00	B
	29,05,73,965.00			

2.2 It is also agreed that ones the Financial Creditor desires that the Corporate Debtor shall buy back the entire saleable area all the obligations of the Financial Creditor for any further stage payments under this agreement shall cease. As per the agreement, the Financial Creditor has absolute right to assign, sell, dispose off or alienate saleable area to any third party/parties at any price.

2.3 The Corporate Debtor subsequently issued three cheques for the differential amount i.e. Rs. 1,535 per sq. ft. corresponding to each buy back date 22.02.2016, 22.08.2016 and 22.02.2017 respectively for the amount of Rs. 10,01,98,660/-, 10,01,98,660/- and 9,01,76,645. It is alleged that the Corporate Debtor made repeated requests not to deposit the cheques and trust him to repay the entire amount in due time. However, the Corporate Debtor has not made any payment.

2.4 Thereafter, the Financial Creditor issued a legal notice dated 13.02.2019 to the Corporate Debtor demanding the financial debt which was due and payable. After a prolonged discussion between the Corporate Debtor and the Financial Creditor, the Corporate Debtor vide letter dated 07.02.2019 acknowledged the total debt amount of Rs. 29,05,73,965/-. Even though the Corporate Debtor has not paid the outstanding amount to the Financial Creditor. Therefore, for the financial debt of Rs. 29,05,73,965/- with interest @ 12.5% per annum, the Financial Creditor has filed an Application under Section 7 of the I&B Code, for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

3. The Corporate Debtor has resisted the Application and contended that the Financial Creditor has not paid the balance price of saleable area amounting to Rs. 56,73,97,000/- to the Corporate Debtor. The Financial Creditor has admittedly paid only a sum of Rs. 5 lacs. The Financial Creditor has claimed Rs. 29,05,73,965/- as financial debt. Such amount

never disbursed to the Corporate Debtor. Therefore, in the Application no date of disbursement as well as date of default is mentioned.

4. After hearing Learned Counsel for the parties, the Adjudicating Authority held that the Financial Creditor has disbursed only a sum of Rs. 5 lacs as against the agreed sum to be disbursed under the buyback agreement i.e. Rs. 56,78,97,000/-. However, the Financial Creditor has claimed for a sum of Rs. 29,05,73,965/- which was never disbursed to the Corporate Debtor. The Financial Creditor has not fulfilled his obligation under the agreement to disburse a balance sum of Rs. 56,73,97,000/- to the Corporate Debtor, therefore, the Corporate Debtor is not obliged to perform his reciprocal promise of buying back the saleable area from the Financial Creditor. Thus, the Financial Creditor has failed to satisfy that a sum of Rs. 29,05,73,965/- can be considered as a financial debt. Being aggrieved with this order the Financial Creditor has filed this Appeal.

5. Learned Counsel for the Appellant submitted that under the agreement for sale dated 03.04.2015, the Appellant acquired two options but not the obligation. Option 'A' the right but not the obligation to buy the saleable area at a pre-launch price of Rs. 3,000 per sq. ft. and Option 'B' the right but not the obligation to sell back the saleable area to the Respondent @ Rs. 4,535 per sq. ft. The Appellant invoked Option 'B'. Clauses 9&10 of the said agreement for sale are non-obstante clauses, therefore, these clauses have overriding effect on clause 2 of the agreement, that to purchase saleable area @ 3,000 per sq. ft.

6. Learned Counsel for the Appellant submitted that the Appellant has acquired absolute right to sell the saleable area to any party at any price. Taking advantage of upside fluctuation in the market price, the Appellant sold and the Respondent bought the said rights from the Appellant and promise to pay in three instalments a differential price (Rs. 4535 - Rs. 3,000) Rs. 1,535 per sq. ft. x 1,89,299 sq. ft. = 29,05,73,965/- . Thus, the financial debt of Rs. 29,05,73,965/- was due and payable to the Appellant by the Respondent. For the same, the Respondent issued three cheques dated 22.02.2016, 22.08.2016 and 22.02.2017 for the total sum of Rs. 29,05,73,965/-. The Respondent vide its letters dated 22.02.2017 & 07.02.2019 categorically acknowledged the liability, such transaction constitutes a financial debt under Section 5 (8) (g) of the I&B Code. An acknowledgement of liability must involve an admission of subsisting jural relationship between the parties. A conscious affirmation of an intention of continuing such relationship in regard to an existing liability. For this purpose, placed reliance on the Judgment of the Hon'ble Supreme Court in the case of J.C.Budhraja Vs. Chairman Orisha Mining Corporation Ltd. (2008) 2 SCC 444.

7. Learned Counsel for the Appellant further submitted that the Respondent had issued aforesaid three cheques that itself is an admission on the part of the Respondent of the debt owed towards the Appellant and as per the Section 118 of the Negotiable Instrument Act, until the contrary is proved, there shall be a presumption that negotiable instrument was drawn for consideration. Moreover, in terms of Section

139 of the NI Act, it shall be presumed unless the contrary is proved that the holder of cheque, received the cheque for the discharge in whole or in part of any debt or liability. The Respondent has not produced any documentary evidence against these presumptions.

8. Learned Counsel for the Appellant submitted that under the sale agreement dated 03.04.2015, the Appellant has initially paid Rs. 5 lacs to the Respondent and thereby fulfilled the obligation of payment and admittedly, there is disbursement of money. The Adjudicating Authority erroneously entered into deciding the quantum of debt which is beyond the scope of Section 7 of the I&B Code. For this he placed reliance on the Judgment of this Appellate Tribunal in the Case of Mr. Gouri Prasad Goenka Vs. PNB Company Appeal (AT) (Ins) No. 28 of 2019. This Appellate Tribunal in the case of Dr. B.V.S. Lakshmi Vs. Geometrics Laser Solutions Pvt. Ltd. Company Appeal (AT) (Ins) No. 38 of 2017 held that it is not necessary to show that an amount has been actually disbursed to the Corporate Debtor. The disbursement against the consideration for the time value of money is the main factor. Thus, a financial debt arose out of a derivative transaction benefiting from fluctuation in market price, in terms of Section 5 (8) (g) of the I&B Code. Thus, in the instant case the transaction is a financial debt as defined under Section 5(8) (g) of the I&B Code.

9. Learned Counsel for the Appellant also submitted that the Learned Adjudicating Authority has fallen into error in holding that the agreement to sell is a reciprocal contract or a contingent contract. The transaction

under the agreement is not a transaction to purchase saleable area and hence, fulfilment of reciprocal promises does not arise. It is further submitted that the Adjudicating Authority or this Appellate Tribunal under the I&B Code will not go into the aspects of the veracity of the agreement, It's breach, void or voidable etc. The Adjudicating Authority is not a Civil Court to decide the breach of contract between the parties. As held by this Appellate Tribunal in the case of M/s Saregama India Ltd. Vs. M/s Om Movie Makers Pvt. Ltd. Company Appeal (AT) (Ins) NO. 359 of 2019.

10. It is also submitted that the Appellant has satisfied that the transaction is a financial debt and the Appellant is a Financial Creditor and has also satisfied that there is a debt payable in law and a default on the part of the Respondent (Corporate Debtor). In such a situation, the Adjudicating Authority is left with no option but to admit Application under Section 7 of the I&B Code, for initiation of CIRP. For this purpose, placed reliance on the Judgment of this Appellate Tribunal in the case of Ranveer Ranjit Vs. M/s Vijay R. Vakharia and Ors. Company Appeal (AT) (Ins) No. 646 of 2018.

11. *Per contra* learned counsel for the Respondent submitted that clause 2 of the agreement for sale provides that the Appellant shall have to purchase the saleable area @ of Rs. 3,000 per sq. ft. amounting to Rs. 56,78,97,000/- once the amount is paid to the Respondent then the Respondent by exercising, the option of repurchase has to pay @ Rs. 4,535 per sq. ft. amounting to Rs. 85,84,70,965/-. The Appellant has

admittedly paid only a sum of Rs. 5 lacs and he has not paid balance price of the saleable area. The Appellant is claiming a financial debt amounting to Rs. 29,05,73,965/- however, in the Application, date of disbursement of a financial debt as well as the date of default is not disclosed as this amount was never disbursed to the Respondent. The Adjudicating Authority has rightly held that under the buyback agreement, the Appellant ought to have fulfilled his promise at first and since, he has not fulfilled his promise, the Respondent is not obliged to perform his reciprocal promise of buy back saleable area.

12. It is further submitted on behalf of the Respondent that for securing the differential amount between the pre-launch price and buy back price amounting to Rs. 29,05,73,965/-. The Respondent gave three cheques to the Appellant. Thus, this amount is not a financial debt.

13. It is also contended on behalf of the Respondent that this agreement does not reflect the real transaction between the parties and the Appellant is guilty of suppression of material facts. The Appellant and the Respondent have had commercial relationship from the year 2006. The agreement for sale in question and several other agreements which have been filed by the Respondent are suppressed by the Appellant.

14. Learned Counsel for the Respondent submitted that this Appellate Tribunal in the case of M/s Saregama India Ltd. Vs. M/s Om Movie Makers Pvt. Ltd. Company Appeal (AT) (Ins) No. 359 of 2019 held that the Adjudicating Authority has a duty to inquire as to whether the debt is payable in law or in fact. There is no statutory presumption in favour of

a Financial Creditor, whereby, on a mere presentation of an Application under Section 7 of the I&B Code, the CIRP can be initiated. In the present case, the Appellant has failed to satisfy the Adjudicating Authority about the existence of financial debt, date of disbursement and so also date of default. Therefore, the Appeal is liable to be dismissed.

15. After hearing Learned Counsel for the parties we have perused the record, following issues are crop up for our consideration.

(i) Whether the agreement to sell is not a reciprocal or contingent contract?

(ii) Whether the differential amount between the pre-launch price and buy back price amounting to Rs. 29,05,73,965/- is a financial debt under Section 5(8) (g) of the I&B Code?

(iii) Whether the Adjudicating Authority cannot consider the disbursement and the quantum of the debt?

Issue No. 1

Whether the agreement to sell is not a reciprocal or contingent contract?

16. The Appellant and the Respondent entered into agreement to sell on 03.04.2015, this is an admitted document. According to the Appellant as per clause 4 of the agreement the Appellant paid Rs. 5 lacs and under clause 9 of the agreement acquired the absolute right to assign, sell, dispose off or alienate the saleable area to any 3rd party at any price. According to the Appellant the clauses 9 and 10th of the agreement have

overriding effect on clause 2 of the agreement that to purchase saleable area @ of Rs. 3,000 per sq. ft. and the agreement stipulates two options 'A' the right but not the obligation to buy saleable area at a pre-launch price of Rs. 3,000 per sq. ft. and option 'B' the right but not the obligation to sell back the saleable area to the Respondent @ of Rs. 4,535/- per sq. ft. The Appellant opted option 'B'. Thus, the Appellant has no obligation under the agreement.

17. we have examined the terms and conditions of the agreement to know the intention of the parties. When we read the agreement as a whole it is manifestly clear that the agreement is a buy back agreement. Buy back means first the Appellant buy the saleable area as per clause 2 of the agreement and pay price as per clause 4 and 5 then the Respondent shall buy back the saleable area as per clause 6. The Respondent assured the Appellant that Respondent will repurchase the entire saleable area at a higher price of Rs. 1,535/- per sq. ft. i.e. assured return amounting to Rs. 29,05,73,965/-. For securing this amount the Respondent issued three cheques in favour of the Appellant.

18. We are unable to convince with the argument of the learned counsel for the Appellant that after payment of Rs. 5 lacs the Appellant acquired the absolute right to assign, sell, alienate the saleable area to any 3rd party to any price. This agreement does not stipulate two options that without paying the balance price as per clause 5 the Appellant acquired the right to sell back the saleable area to the Respondent @ of Rs. 4535/- per sq. ft. it cannot be said that clauses 9 and 10 have

overriding effect on such a manner that clause No. 2, 3 and 5 became redundant. Thus, we hold that the agreement consists of reciprocal promises and the Appellant has not fulfilled his obligation under the agreement.

Issue No. 2

Whether the differential amount Rs. 29,05,73,965/- is a financial debt?

19. In the Application, the Appellant has shown financial debt Rs. 29,05,73,965/-, however, the Appellant has not disclosed the date of disbursement of the amount and the date of default.

20. According to the Appellant, the Respondent has issued three cheques for the amount of Rs. 29,05,73,965/-, and acknowledged the debt in letters dated 22.02.2017 and 07.02.2019. Thus, this amount is financial debt. To show that there is a debt due which was disbursed against the consideration for time value of money, it is not necessary to show that an amount has been disbursed to the Corporate Debtor. A person can show that the disbursement has been made against the consideration for time value of money through any instrument. Thus, a financial debt arose out of a derivative transaction benefiting from fluctuation in the market price, hence, this amount is financial debt under Section 5(8) (g) of the I&B Code. For this purpose, cited the Judgment of this Appellate Tribunal in the Case of Dr. BVS Lakshmi (Supra)

21. We have considered the submissions of Learned Counsel for the Appellant in the light of the Judgment of this Appellate Tribunal in the case of Dr. B.V.S Lakshmi (Supra) in para 29 of this Tribunal held as under:-

“For coming within the definition of financial debt as defined under sub-section (8) of section 5, the claimant is required to show that there is a debt alongwith interest, if any which has been disbursement and such disbursement has been made against the consideration for the time value of money. Thereby, if the claimant claims to be Financial Creditor he will have to show that debt is due which he has disbursed against the consideration for the time value of money and that the borrower has raised the amount directly or through other modes like credit facility or its dematerialised equivalent, note purchase facility or the issue of bonds, notes debentures, loan stock or any other similar instrument. The amount of any liability in respect of any lease or higher purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other Accounting Standards can also be referred to buy the creditor to claim that there is a financial debt due even which has been disbursed against the consideration for the time value of the money.

“To show that there is debt due which was disbursed against the consideration for the time value of money, it is not necessary to show that an amount has been disbursed to the Corporate Debtor. A person can show that the disbursement has been made against the consideration for the time value of money through any instrument. For example, for any derivative transaction entered into in connection with protection against or benefit from fluctuation if any rate or price and for calculating the value of any derivative transaction for which only the market value of such transaction shall be taken into account, it is not necessary to show that amount has been disbursed. The disbursement against the consideration for the time value of money is the main factor.”

22. In the present case, the Appellant has failed to bring on record any evidence to suggest that he disbursed Rs. 29,05,73,965/- to the Respondent which has been made against the consideration for the time

value of money. In the agreement, there is no such term or condition to infer that the transaction in question may be a derivative transaction. Thus, it cannot be held that the transaction is a financial debt as defined under Section 5 (8) (g) of the I&B Code. Admittedly, this is buy back transaction and as contemplated by Section 5 (8) (f) may or may not be regarded as financial transaction for this purpose, we would like to refer the decision of this Appellate Tribunal in Nikhil Mehta and Sons (HUF) Vs. AMR Infrastructure Ltd. C.A. (AT) (Ins) No. 7/2017 in which vide notice sub-Section (8) of Section 5 of the I&B Code observed: -

“17. The first question arises for consideration is as to who is a ‘Financial Creditor’. Learned Adjudicating Authority, for determination of the aforesaid issue examined the definition provided in Section 5 (7) and 5(8) and in the impugned judgement rightly observed: - “12. A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor', the requirements of expression 'financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore, the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time

Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section-5 (8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier." (See Taxman's Law Relating to IBC, 2016.) (Emphasis supplied)

23. In the present case, the Appellant has not fulfilled his obligation under the agreement, therefore, the amount claimed cannot be termed as financial debt as defined under Section 5(8)(f) of the I&B Code.

24. Now, we have considered the letters dated 22.02.2017 and 07.02.2019. The Respondent had issued a cheque amounting to Rs. 9,01,76,645/- and vide letter dated 22.02.2017 sent to the Appellant. Thereafter, on 07.02.2019 the Respondent sent a letter to the Appellant

stating that the Respondent had issued three cheques towards compensation for surrender of right of purchase of the Appellant.

25. Bare reading of this letter it is clear that the Respondent has issued three cheques towards the compensation for surrender of right of purchase amounting to Rs. 29,05,73,965/-. This amount was not disbursed against the consideration for the time value of money. Therefore, cannot be considered as a financial debt as defined under Section 5 (8) of the I&B Code.

26. There is no quarrel with the proposition as held by this Appellate Tribunal in the case of Ranveer Ranjit (Supra) that once the Financial Creditor is able to satisfy the Adjudicating Authority that there is a debt payable in law and a default on the part of the Corporate Debtor, whether from record of default recorded with the information utility or other evidence, the Adjudicating Authority is left with no option but to admit the Application under Section 7 of the I&B Code. In the present Case, the Appellant has failed to satisfy the Adjudicating Authority that there is a financial debt payable in law or in fact and also failed to satisfy a default on the part of the Respondent (Corporate Debtor).

27. This Appellate Tribunal in the case of Anil Kumar Vs. Rakesh CA (AT) (Ins) No. 35 of 2019 held that if an allottee does not pay the full amount, cannot allege default on the part of the Corporate Debtor. We can say with this analogy that if the Financial Creditor under the buyback agreement does not pay the full agreed consideration to the Corporate Debtor cannot allege default on the part of the Corporate Debtor.

Issue No. 3

Whether the Adjudicating Authority cannot consider the disbursement and the quantum of debt?

28. Learned Counsel for the Appellant cited the Judgment of this Appellate Tribunal in the case of Dr. BVS Lakshmi (Supra) and submitted that it is not necessary to show that an amount has been disbursed to the Corporate Debtor.

29. In the case of Dr. BVS Lakshmi (Supra) in para 29 (Please see Para 21 of the Judgment) it is held that disbursement of the amount is not necessarily made to the Corporate Debtor but it may be shown that the disbursement has been made against the consideration for the time value of money through any instrument. It is also held that the disbursement against the consideration for the time value of money is main factor. Thus, the observations made in aforesaid Judgment is not helpful to the Appellant.

30. Learned Counsel for the Appellant placed reliance on the observations made by this Appellate Tribunal in the case of Gouri Prasad Gowenka (Supra) in which it is held that “in so far as joining of issue by the Corporate Debtor qua the quantum of payable debt is concerned, same does not fall for consideration of the Adjudicating Authority at the stage of admission of the Application under Section 7 of the I&B Code.”

31. In Gouri Prasad Goenka’s case: - there was no controversy as regards facts qua advancement of loan and allied financial facilities to the Corporate Debtor falling within the purview of the financial debt, the

status of parties before the Adjudicating Authority as Financial Creditor and Corporate Debtor besides the admitted position as regards default in clearing the outstanding amount of debt, which according to the Financial Creditor stood at Rs. 273,09,68,793/- as on 31.03.2018. In the instant case, it is not admitted fact that the amount claimed in the Application under Section 7 of the I&B Code is a financial debt and the Respondent committed default. The Adjudicating Authority has not decided the quantum of payable debt. Thus, the finding of Gouri Prasad Goenka (Supra) case is not helpful to the Appellant.

32. With the aforesaid, the Appellant is miserably failed to prove that any financial debt is due and payable in law or in fact and the Respondent committed the default. We agree with the findings of the Learned Adjudicating Authority and affirmed the impugned order.

Accordingly, the Appeal is dismissed. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

[V.P.Singh]
Member (Technical)

New Delhi
24th November, 2020.
SC