

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 1383 of 2019

IN THE MATTER OF:

Rishabh Jain

Managing Director,
HOMES CONNECT Private Limited
A-19, Second Floor, Sector-64,
NOIDA

...Appellant

Vs

1. S.S. Enterprises

Through Its Proprietor
Ranjan Kumar Bajaj,
C-289, Sector-10
NOIDA,
Uttar Pradesh-201 301

2. M/s Home Connect Developers Pvt. Ltd,

Through IRP Mr. Ranjeet Kumar Verma,
Sector-53, 1F, Ansal Plaza, Sector-1
Vaishali, Ghaziabad, UP- 201 010

....Respondents

Present:

For Appellant: Mr. Saurabh Jain, Advocate.

For Respondents: Mr. Ritesh Agrawal, Mr. Teejas Bhatia and Mr. Aishwarya Adlokha, Advocates for Respondent No. 1

Mr. Shailendra Singh, Advocate for Respondent No. 2

ORDER

27.01.2020 The Appellant is Managing Director of 2nd Respondent M/s Home Connect Developers Pvt. Ltd.- the Corporate Debtor. Mr. Ranjan Kumar Bajaj, Proprietor of 1st Respondent- S.S. Enterprise filed Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') before the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) vide (IB)-1094/ND/2019. The Application has been admitted by Impugned Order dated 25.10.2019 and thus the present Appeal.

2. The Appellant is trying to state that the transaction between the parties could not be said to be a Financial Debt but that Respondent No. 1 (Respondent in short) should have been treated as Operational Creditor.

3. Respondent-Financial Creditor claimed before the Adjudicating Authority that Corporate Debtor is in the business of construction and proposed to develop a project “Galactic City” in Greater NOIDA. The Financial Creditor claimed that it was also in business in carrying out civil contract in the name of S.S. Enterprises. It is stated that Corporate Debtor contacted Financial Creditor for grant of financial assistance and a loan of Rs. 50 lakhs were given with interest @ 1% per month. This happened on 05.09.2017 when a Memorandum of Understanding (in short ‘**MoU**’) was executed (page-61). It is stated that the parties again entered into 2nd MoU on 12.09.2017 when the Financial Creditor gave a further deposit of Rs. 40 Lakhs. According to the Financial Creditor, the Corporate Debtor had agreed to grant a construction contract worth Rs. 10 Crores to the Financial Creditor. Financial Creditor claimed that by yet another third MoU dated 03.11.2017 (page-69), two earlier MoUs were superseded where the Corporate Debtor acknowledged deposit of Rs. 90 lakhs and agreed to repay the same with 2% interest per month with a lock in period of 11 months. Both the parties agreed to this. The lock in period was agreed between the parties after which the Financial Creditor could demand back the deposit by giving one month’s notice. Financial Creditor claimed that the Corporate Debtor even executed and delivered two post-dated cheques guaranteeing the repayment. Financial Creditor claimed that after 11 months, he demanded back the deposit and as it was not paid back, the

cheques were presented but they got dishonoured. Financial Creditor claims that a Legal Notice was sent to the Corporate Debtor and then Section 7 Application was moved.

4. The Appellant claims that the matter is a case of cross security deposit by virtue of which, both the parties were secured and in the event of failure of compliance of the execution of the construction contract and in the event of complete disregard to the admitted position of the construction, there was protection in terms of cross Security Deposit by allotment of four plots which the Corporate Debtor claimed it had allotted. The Appellant for Corporate Debtor claims that the MoU provides that in the event of non-payment of Security Deposit, the Corporate Debtor shall not claim back four plots as agreed in the MoU.

5. Parties have argued on the above lines as per Appeal and Reply and referred to the three MoUs which we have referred above. Learned Counsel for the Appellant states that in the notice dated 27.11.2018 which was sent by the Financial Creditor in paragraph-11 it was stated that the Company had allotted villa 1, 2, 17 and 18. According to the learned Counsel, the plots had been allotted and considering the wordings of third MoU, the Financial Creditor was protected. According to the Counsel, considering MoUs, the transaction should not have been treated as that of a Financial Debt but it should be treated as an Operational debt.

6. We have gone through three MoUs referred above. In first two MoUs dated 05.09.2017 (Page 61) and 12.09.2017 (Page 67) there was reference to

the amount being given as Security Deposit against construction contract and it was specifically mentioned that the Corporate Debtor will pay interest @ 1 % per month and also provided for return of Security Deposit. The fact remains that the parties did not go into execution of any construction contract and entered into third MoU dated 13.09.2017(page 69). The contents of the third MoU may be reproduced. In it, Corporate Debtor is “First Party” and Respondent No. 1, Financial Creditor, S.S. Enterprise is ‘Second Party’. It states:

...

“1. *The Second party has given security deposit against the construction contract in Galactic City project of Rs. 90,00,000/- (Rupees Ninety Lakh only) to the First Party and the First Party has received the same.*

a. (In the First Separate MOU dated 05.09.2017 for Rs. 50 lakh agreed and signed between the parties on stamp paper no. DR229835 & 36 (two copies) one copy kept by each party) and

b. (In the Second Separate MOU dated 12-09-2017 for Rs. 40 lakh as agreed and signed between the parties on stamp paper no. DR300853 & 54 (two copies one copy kept by each party).

2. *The First Party will pay additional interest @ 2% per month (@ two % per month) on monthly basis to the second Party.*

3. *There will be a lock in period of 11 months from the date of this MOU according to which the Second Party will not demand the security deposit back from the First Party and vice-versa the First Party cannot return or repay the security deposit before 11 months. However in case of urgency/exception in lock in period if the First party want to repay and vice-versa the Second Party needs his Security Deposit amount back than he can do so by giving one month notice and within notice period the First party will return the loan amount along with interest as mentioned above in Para no. 2.*

4. *The First Party hereby allot to the Second Party its Villa Plot bearing Unit No. 1,2,17 and 18 situated at Galactic City, Plot No. 6, Knowledge Park-V, Greater Noida (west), measuring total Area of 100 sq. yd. each unit as a guarantee of security deposit.*

5. *In order to assure the second party and to secure the repayment of security deposit and interest of the second party, the following post dated cheque has been issued by the First Party.*

A Cheque No. 000179 to 000189 for Rs. 1,80,000/- each (Rs. One lakh Eight Thousand only), drawn on Andhra Bank, for interest payable as mentioned in Para No. 2 above.

6. *After 11 months of this MOU the Second party can demand its Security Deposit back from the First Party by giving him one months' prior notice and within said notice period the Frist Party will return the loan along with interest, as mentioned above in Para no. 2 and the Second Party will return the aforesaid units, as mentioned in Para no. 4 above, the First Party.*

7. *In case of any default in the repayment of the security deposit amount by the first party, in that case the first party will not claim back these plots, as mentioned in Para no. 4 above, given as guarantee from the second party.*

8. *This agreement/MOU is signed in two original copies and one copy kept by each party.*

7. It is apparent from the wordings of this MoU dated 13.09.2017 that the return of the amount was being assured with an allotment of plots and issuance of cheques. The amount was referred as loan at more than one place. As regards allotment, paragraph-11 of the Notice dated 27.11.2018 (Annexure-A9) appears to be more in the context of wording of the MoU where it is stated that First Party allots certain plots. There is nothing that actual allotment letters were issued, or possession handed over. The intent of the parties in all the MoUs appear to be of extending Financial Debt.

8. The Adjudicating Authority in paragraph-9 observes as under:

..

“9. The Corporate Debtor tends to seek benefit of the word ‘security deposit. While the MoU may have been worded as such, one has to go to the intent of the parties which clearly gives rise to the surmise that same was given by way of financial assistance attracting interest payable thereon. The fact that the amount was secured, not only by cheques but also by allotment of plots, would not change the nature of the financial claim. Reliance is sought to be made on the terms of the MoU which provides that in the event of default, the petitioner would be entitled to the 4 plots. Admittedly the possession of these plots was never offered and the same is more by way of an option to secure the debt. As per the terms and conditions the amount was payable on demand. The Corporate Debtor’s failure to return the same has given rise to a default. Under such circumstances, where the claim of Rs. 90 lakhs and the interest due thereon remains unpaid, the financial creditor is entitled to the prayer made herein.”

..

9. Considering the reasonings recorded by the Adjudicating Authority and examining the wordings of the third MoU, as produced above and taking

conspectus of the whole matter, we do not find any reason to interfere with the Impugned Order of the Adjudicating Authority. The Adjudicating Authority has found it to be Financial debt outstanding and admitted the Section 7 Application. We do not differ from the Adjudicating Authority. (The words “Operational Creditor” used in paragraph-11 of the Impugned Order by the Adjudicating Authority appears to be typing/clerical error).

10. There is no substance in the Appeal. The Appeal is dismissed. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

Akc/Md