

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1179 of 2019

IN THE MATTER OF:

Dilip Singh Sisodiya

...Appellant

Versus

Ramchandra D. Choudhary

...Respondent

For Appellant: Shri Raghavendra Mohan Bajaj, Shri Uday Bedi, Shri Jaitegan Singh and Shri Agnish Aditya, Advocates

For Respondent: Ms. Bhawna Jhorar and Shri Shivanshu Kumar, Advocates

ORDER

13.12.2019 Heard Counsel for the Appellant and the learned Counsel for Respondent – Resolution Professional. This Appeal has been filed by the Appellant against rejection of I.A. No. 388 of 2019 in CP(IB) No.127 of 2017 filed by the Appellant before the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad). The learned Counsel for the Appellant states that the Appeal is filed as the Appellant had, in the CIRP process initiated against the Neesa Leisure Limited – Corporate Debtor (NLL in short), submitted Form claiming to be Financial Creditor and that the Appellant was relying on time share membership which was granted by the Corporate Debtor. The argument of the learned Counsel is that the Resolution Professional had initially included the name of the Appellant in the list of Financial Creditors on the basis of time share membership regarding which first report was placed by the IRP before the Committee of Creditors (COC). The document is pointed out at Page – 70 of the Appeal and the Counsel

referred to Annexure - I of the Report (Page – 70 @ Page – 101) to show that the Appellant along with other similar time share members was categorized as a class in Financial Creditor. The argument is that as per the Regulations 12 and 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulation – in short), it was the duty of the IRP to verify the claim and prepare list of Creditors. According to the Counsel, the IRP could not have shown in Para – 13 of the Report that it was summary of claims received and provisionally admitted. According to the Counsel, if Code and Regulations require particular act to be done in a particular manner, it had to be done in that manner only. It is stated that the IRP did not invite the Appellant in the first COC meeting regarding which the Report was put up. Later on, the IRP sent e-mail dated 10th June, 2019 (Page – 125) informing the Appellant that he would not be treated as a Financial Creditor giving various reasons in the e-mail. The Counsel submits that the IRP had no right to remove the name of the Appellant from being Financial Creditor and calling upon the Appellant to submit claim as an Operational Creditor.

2. The learned Counsel further referred to the Impugned Order to submit that the Adjudicating Authority wrongly rejected the Application filed treating the Appellant as Operational Creditor and accepting acts done by the IRP which, according to the Counsel, were not as per the provisions of IBC.

3. The learned Counsel submitted that in the matter of **“Nikhil Mehta and Sons Vs AMR Infrastructure Ltd.”** in Company Appeal (AT) (Insolvency) No. 07 of 2017 by the Judgement dated 21st July, 2017, this Court had with approval referred to the observations of Adjudicating Authority in that matter

and in para – 17 reproduced portions of the Judgement of Adjudicating Authority in that case, which read as under:-

“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".”

[Relevant portion]

4. Relying on above observations, it is tried to submit that time share membership is a membership which is given to the Appellant by the Corporate Debtor with a condition that for given period of years, every year for seven

days, the Appellant will be entitled to enjoy the benefits of stay at given apartments and resorts. According to the Counsel, such benefit must be counted as a benefit against time value of money and if the above observations which were accepted by this Tribunal are kept in view, present relationship also should have been treated as that of a Financial Creditor.

5. The learned Counsel further submitted that allottees of real estate have been recognized as Financial Creditors by amendment in the provision of IBC and with regard to such allottees, the Hon'ble Supreme Court in the matter of **“Pioneer Urban Land and Infrastructure Limited and another vs. Union of India and others”** in (2019) 8 SCC 416 observed in para – 42 as follows:-

“42. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by learned counsel on behalf of the Petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund

together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services.”

6. Referring to the above paragraph also, the learned Counsel submitted that even the present relationship of the Appellant has to be treated in the nature of being Financial Creditor.

7. Against this, the learned Counsel for the Respondent – Resolution Professional submits that what the RP had done was initially provisionally classified the time share membership persons as Financial Creditors in a particular class and had taken legal opinion and after taking legal opinion, he was able to decide that nature of relationship cannot be said to be that of Financial Creditor. The learned Counsel further submits that the Adjudicating Authority considered the necessary facts and also noticed that in the Balance Sheet of the Corporate Debtor – NLL, the time share membership fees was recognised as revenue income and this also shows that it was an operational debt.

8. We have gone through the Membership Certificates. The Appellant (surprisingly) has not filed copy of his Certificate. Some Certificates of others are at Page Nos.120 to 123. Dates of Commencement of Memberships are of 2010 or 2012 with Termination Dates of 2020/2022/2035. The Counsel referred to one of the Certificates at Page – 121. The relevant contents of the Certificate are as follows:-

“Neesa Leisure Ltd., a company registered in India with its office at Plot No. X-22, 23 & 24, GIDC, Electronic Estate, Section -25, Gandhinagar – 382044, Gujarat. (“the Company”) in pursuance of receipt of the Applicants Membership Application for membership of The Cambay Family Holidays Club scheme, HEREBY GRANTS to the Application stated below (who has paid the applicable Price to Neesa Leisure Ltd. or the duly appointed representative) the right of Occupation of the Apartment type in the Holiday Season described herein, subject only to the Company’s absolute right to substitute a different Apartment at Cambay Spa & Resort at Gandhinagar, Gujarat of similar or better standard to be observed by the applicant/s of the Terms & Conditions of the Membership Application including but without prejudice to the generally of the foregoing. The provisions relating to the payment of the annual maintenance fee and the observance of the rules of Occupation of the Scheme.

IN THE WITNESS WHEREOF the company has executed this Membership Certificate the day and the year below written.”

9. The Certificate has then a Schedule giving details of the name of member and other particulars like apartment, type, period of Commencement of Membership; and Termination, etc.

10. It is clear that Membership Application was filed and right of occupation as mentioned was granted. Apparently, the scheme which is being shown is that the person has to deposit particular money and gets entitled to benefit of occupation which we are told is 7 days in a year for given years. Nothing is shown that there is right to withdraw the money deposited or to terminate the contract after enjoying this benefit for say a couple of years. It is not that at the end of the period given in the Certificate, the property becomes of ownership of the member or that the money is going to come back with or without interest. The IRP has given various reasons why it is not

financial debt in the e-mail dated 10th June, 2019 which read as under:-

“Dear sir

It is to inform you that, the claim submitted by you in the matter of M/s Neesa leisure Limited (in CIRP) does not fall under the claim by financial creditor as there is no time value of money involved and according to section 5(8) of IBC, 2016 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-
No money has been borrowed against the payment of Interest

b. any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent:- **No such amount has been raised**

c. any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument:- **No amount has been raised pursuant to any purchase facility**

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:- **No such liability**

e. receivables sold or discounted other than any receivables sold on non-recourse basis:- **No receivables sold or discounted**

f. any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing:- **No such amount raised**

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:-
No derivative transaction

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:- **No counter-indemnity obligation**

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:- **No amount of liability”**

11. Considering the reasons given by the RP and the relationship also which is pointed out to us, we find that the Appellant cannot be classified as a Financial Creditor. The relationship is obviously of an operational debt where for the given money, you get the service of enjoying the property on given particular days every year. The money is not growing and neither is it coming back. We do not find that the Adjudicating Authority has committed any error in not accepting the claim made by the Appellant. We have gone through the observations relied on from Judgements, portions of which are reproduced (supra). We do not find that the Judgements relied on by the learned Counsel and the portions referred from them are helpful to the Appellant to establish that the relationship of the Appellant as seen in the present matter, is that of a Financial Creditor. On the facts of the matter, we find it was operational debt relating to service which Corporate Debtor was to provide over the years.

The Appeal is dismissed. No orders as to cost.

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

[V.P. Singh]
Member (Technical)

/rs/md