

National Company Law Appellate Tribunal, New Delhi

COMPANY APPEAL (AT) (Insolvency) No. 550 of 2020

(Arising out of Order dated 16th January, 2020 passed by National Company Law Tribunal, New Delhi Bench-II in Company Petition IB-1017/ND/2018)

IN THE MATTER OF:

M/s. Vipul Limited
Unit No. 201, C-50, Malviya Nagar
New Delhi - 110017

Also, at: Vipul Techsquare,
Golf Course Road, Sector – 43
Gurugram, Haryana – 122009
Represented by Mr. Rakesh Sharma

.....Appellant

Versus

M/s. Solitaire Buildmart Pvt. Ltd.
Regd. Office at S-38,
Greater Kailash - II, New Delhi – 110048

Also, at: 112-113,
Charmwood Plaza Eros Garden,
Suraj Kund Road, Faridabad,
Haryana - 121009

....Respondent

For Appellant: Mr. Ritin Rai, Sr. Advocate with Mr. Rajnish Sinha.
For Respondent: Mr. Rakesh Sharma, Mr. Ashish Mohan, Mr. Sanjiv Ahuja and Ms. Divya Agarwal, Advocate.

J U D G M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 16.01.2020, passed by the Adjudicating Authority (NCLT) New Delhi Bench-II (IB) No.1017/ND/2018, M/s. Vipul Limited preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC for Short). By the Impugned Order, the Adjudicating

Authority has dismissed the Section 7 Application observing as follows;

‘4. The Respondents have further submitted that vide clause 3.1 of the MDA, whereby the Petitioners have duly acknowledged payment of Rs. 17,51,10,000/- from them towards the cost of components i.e. (Residential Plots, Group Housing, Commercial, EWS & Institutional Land) no allocation has been made by the petitioner so far. On payment of the acknowledged amount the Respondent was immediately entitled to all rights, title and interest in various project components allocated as its share detailed in the Annexure ‘VI’ to the MDA. Having paid this amount, the Respondents have been repeatedly asked the petitioners for compliance of their obligations. It is pointed out that the request for the same had been last made vide their letter dated 09.4.2018 and to counter this request, the Petitioner issued the demand notice U/s 8 of IBC on 17.04.2018, culminating in the present Petition.

5. Learned Counsel for the Respondent has argued that to enable a Financial Creditor trigger section 7 of the Code for initiating CIRP of the Corporate debtor, the default should be in respect of a “Financial debt’ owed to any financial creditor, the essential requisites of which includes:

- There must be a disbursal of loan amount;*
- Such disbursal should be made against the consideration for time value and money; and*
- A default should have arisen either in the payment of interest or in the payment of Principal Amount or both on the part of the Corporate Debtor.*

8. In view of aforementioned facts and circumstances, this Bench is of the opinion that the issue involved herein arises out of breach of a Contract and therefore initiation of CIRP against the Respondent is not justified. The Petition is devoid of the essential ingredients of the Section 5(8) of IBC, 2016 and is therefore Rejected. It is however being made clear that

these observation shall in no way preclude the Financial Creditor from invoking any other legal right accruing in their favor.'

2. Succinctly put, the facts in the case are that both the parties with a specific purpose of developing an Integrated Township in Ludhiana had entered into various Agreements briefly enumerated as follows;

- Buyer's Agreement dated 19.11.2005.
- Floor Space Index (FSI) Purchase Agreement dated 09.12.2005.
- Joint Development Agreement dated 25.01.2006, (hereinafter referred to as JDA).
- Master Development Agreement dated 12.04.2011, (hereinafter referred to as MDA).
- Addendum dated 13.04.2011 to the MDA.

3. It is submitted by the Appellant that as per clause 2 of the MDA sharing ratio in Project Development between the Appellant and the Respondent in the Project was 75% and 25% respectively. It is stated that as per clauses 5 and 6 of the MDA, payments of statutory dues and project costs incurred by the Appellant was to be paid by the Respondent to the Appellant equivalent to its share in the Project. It is averred that as per clauses of the MDA 6.7 and 14, it is the liability of the Respondent to make certain payments to the Appellant which are due and payable as on 16.07.2010 and that the MDA supersedes all previous Agreements and

communications. It is submitted that as per clauses 6.2 of the MDA as on 16.01.2010, the Appellant had incurred an amount of Rs. 1,37,34,904/- towards the Respondent's share of the cost in the Project, out of which the Respondent had paid only an amount of Rs. 26,10,211/- and the balance amount of Rs. 1,11,24,693/- was to be reimbursed by the Respondent to the Appellant. It is pleaded that the provision of interest payment at the rate of 18% p.a. categorizes the nature of the transaction to be a commercial transaction against consideration of time value of money, having an effect of borrowing and constitutes a financial debt under the provision of 5(8)f and h of IBC.

4. The Learned Counsel for the Appellant placed reliance on the following clauses of the MDA which are reproduced as hereunder for better understanding of the case;

'7.9.2. The terms of the MDA and Addendum to MDA have categorically envisaged the position of the Respondent as a collaborator and participating entity. The relevant clauses substantiating the nature and role of Respondent as collaborator are being reproduced hereunder for ready reference.

'Clause 3.1 of the MDA:

"3.1. Parties agree that in consideration of aggregate amount of Rs. 17,51,10,000/- (Rupees Seventeen Crores Fifty One lacs Ten Thousand only) paid by Solitaire to Vipul, receipt of which is hereby acknowledged by Vipul and in lieu of the participation, obligation and rights of Solitaire in development and proceeds the project and the Project Land under the JDA. Solitaire shall be entitled to the rights, title and interest in various projects components of project and have obligations in respect of the project as provided in the agreement. The aforesaid agreement amount of Rs. 17,51,10,000 (Rupees Seventeen

Crores Fifty One lacs Ten Thousand only) has only been apportioned to various project components allocated to Solitaire under this agreement in the manner provided in Annexure VI.”

(emphasis added)

b) Clause 3.2.12 of MDA:

“3.2.12. Solitaire shall continue to remain liable for performance of all solitaire’s performance under this agreement qua Solitaire’s Residential Plots, even after transfer of such Solitaire’s Residential Plots in favor of any allottee/third party purchaser.” (emphasis added)

c) Clause 4 of the Addendum to MDA:

“4. The parties agree that notwithstanding anything provided in the Agreement, the parties shall jointly sell, transfer the Balance Acquired land and shall be entitled to allocation of the proceeds therefrom (‘Balance Acquired Land Proceeds’) in proportion of their entitlement to the Balance Acquired Land i.e. in proportion to the area of 5.07 acres for Solitaire and 11.79 acres for Vipul. The Parties also agree that the Balance Acquired Land Proceeds shall be utilized as provided in the clause 5 of thus Addendum.”

Further; the parties agree that the Balance Acquired Land Proceeds shall be deposited in an account opened for this purpose by Vipul and jointly by authorized representatives of both Solitaire and Vipul. The parties also agree that the Balance Acquired Land Proceeds shall be utilized as provided in the Clause 5 of this Addendum.” (emphasis added)

d) Clause 3.4.9 of the MDA:

“3.4.9. Notwithstanding any transfer/assignment of Solitaire’s SCO units to any third party, Solitaire shall continue to be liable and responsible for payment of the agreed cost for construction and development of SCO units as provided in Clause 3.4.2.”

e) Clause 20 of the MDA:

“20. Solitaire shall ensure and shall take all necessary steps for completion of transfer title of Solitaire’s share of Project components either in favour of Solitaire or its nominee at Solitaire’s

cost and expense within period of seven (7) year from the Execution Date.”

f) Clause 8 of the Addendum of MDA:

“8. Notwithstanding anything contained hereinabove, in the event (i) Solitaire makes the payment of its share of Government charges towards external development charges for PAPRA Exemption Phase I and pays the Vipul the current Solitaire’s Dues prior to sale of School Site and Balance Acquired Land or (ii) sale of School Site and/or Balance Acquired Land have not been concluded pursuant to clause 3, 4 and 5 of this Addendum even on the expiry of twelve months from Execution Date, then Clauses 3, 4 and 5 of this Addendum shall not be applicable and School Site and/or Balance Acquired Land (as shall have remained unsold) shall be dealt with in the manner provided in this Agreement.”

7.9.3. That, based on the conjoint reading of the aforesaid clauses, it is substantiated beyond doubt that the Appellant and Respondent were collaborators for the purposes of joint development of the Project based on the terms and conditions of MDA and Addendum to MDA.
(Emphasis Supplied)

5. Learned Counsel for the Appellant argued that based on the conjoint reading of the aforesaid clauses it is proved that the Appellant and the Respondent were collaborators for the purpose of Joint Development Agreement and therefore the Appellant is a ‘Financial Creditor’; as the amounts due and payable fall within the definition of ‘Financial Debt’.
6. In short, it is the case of the Appellant that as per clauses 5 and 6 of the MDA payments of statutory dues and Project cost is to be paid by the Respondent, that as per clause 6.7 of MDA, the liability of the Respondent to make the payments falls due on 16.07.2010; that clause 14 supersedes all Agreements; that

clause 11 of the Addendum to MDA provides for security for the performance of Respondent, that the nature of relationship between the Appellant and the Respondent is that of **Joint Development Project**; that the debt is a Financial debt as a Respondent has made a part payment of Rs. 26,10,211/- and the balance amount of Rs. 1,11,24,693/- is due and payable; with a collective reading of clause 6.2, 6.7 of MDA read with clause 1 of the Addendum proves that there is a provision of interest at 18% p.a. categorizing the transaction to be a Financial transaction against the consideration of time value of money; that the Hon'ble supreme Court in **Pioneer Urban Land and Infrastructure and Anr. V/s. Union of India and Ors. (2019) 8 SCC 416** and in **Anuj Jain V/s. Axis Bank Ltd. 2020 SCC OnLine SC 237 (205)** has observed that the essential elements of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it can be treated as Financial debt within the meaning of Section 5(8) of the Code and in the present case the factum of both 'disbursal' and against the 'time value of money' has been admitted by the Respondent.

7. Learned Counsel for the Respondent submitted that the Learned Adjudicating Authority was right in observing that the Appellant does not fall within the definition of 'Financial Creditor' as envisaged by the Code, that the contract should be read as a whole and as per the nature of Agreement, the

Appellant is an 'Investor' and not a 'Financial Creditor'; that the MDA dated 12.04.2011 comprised of several reciprocal promises in as much as the Respondent was to pay various amounts towards cost of components, that is Residential Plots, Group Housing, Commercial etc., and in return the Appellant was obligated to deliver such components and further on making of such payments, the Respondent was immediately entitled to all rights, title and interest in the Project components and since the Appellant failed to comply with these obligations, it committed a breach of the MDA and hence no amounts are due and payable by the Respondent. He further contended that the MDA was executed by the Respondent in its capacity as an 'Investor' and hence the underlying nature of MDA was that of the 'Works Contract'. He placed reliance on clauses 2.1, 2.3, 3.1, 3.2.3, 3.2.4 and 3.2.5, 3.5.4 and 3.7.8 of the MDA together with clauses 6.1, 6.6, 6.7 and 6.8 of MDA read together with clauses 1, 1(a), 2 and 11 of the Addendum, to establish his case.

8. The counsel for the Respondent submitted that the obligation to pay Rs. 1.11 Crores was due after a period of 90 days of the execution date whereas the components on the other hand were to be transferred within 30 days of the execution date; the components have not been transferred in favor of the Appellant and therefore, the Respondent is not liable to pay any amounts; that Agreement pertains to mutual rights and

obligations and as per Section 51 to 54 of the Indian Contract Act, 1872, which provides for 'Performance of Reciprocal Performance' no promisor needs to perform his promise unless the reciprocal promises fixed by the Contract are performed and that the Appellant is in default and not the Respondent; that the nature of transaction is purely in relation to Goods and Services and that the referred components are shown as inventories under the said 'Current Assets Loans and Defences' in the Balance Sheet of the Corporate Debtor.

9. He further contended that as per clause 5 of the Addendum the sale proceeds of the school plot and balance acquired land were to be utilized first towards payment of Government charges and within current Solitaire dues and accordingly the Respondent vide letter dated 15.05.2012, had offered to utilize the sale proceeds towards payment of Government charges and current Solitaire dues which was refused by the Appellant vide letter dated 23.05.2012. It is submitted that a letter was written by the Respondent on 09.04.2018 calling upon the Appellant to convey the components and the Appellant instead of replying to the same, as a counter blast, issued the demand notice dated 17.04.2018 and filed this present Application under Section 7 seeking initiation of CIRP on account of alleged Financial debt of Rs. 1,11,24,693/-.
10. Heard both sides. The brief point that falls for consideration in this Appeal is whether the amount claimed by the Appellant

can be construed as a 'Financial debt' as defined under Section 5 (8) of the IBC and if the Appellant falls within the ambit of the definition of 'Financial Creditor' as defined under Section 5 (7) of the Code.

11. Sections 5 (7) and 5 (8) read as follows;

'(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;

(8) "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 de-materialized 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-clauses (a) to (h) of this clause;’

12. At the outset, it is pertinent to note that the demand notice dated 17.04.2018 issued by the Appellant is under Section 8 of the IBC, wherein the Appellant had addressed itself as an ‘Operational Creditor’ and called upon the Respondent to pay the **‘unpaid Operational debt’**. In the demand notice, it is stated that the Operational Creditor and Corporate Debtor have executed the JDA on 25.01.2006, inter-alia for conversion of Corporate Debtor allowed in project from ownership of FSI to write off ownership and collaboration to the extent of 25% in the project and in the project land. In the entire body of the notice the Appellant has addressed the principal amount as ‘Operational debt’.

13. The contention of the Learned Counsel appearing for the Appellant is that the terms of the MDA and Addendum to MDA categorically prove that the Corporate Debtor is only a 'Collaborator' and not an 'Investor', in the light of the contractual relationship which is evidenced from the MDA and its Addendum. For better understanding of the case, clause 6.7 of the MDA, based on which clause, the Appellant is claiming a debt of Rs. 1,11,24,693/- is detailed as here under;

'6.7 The following amounts aggregating to Rs. 4,68,31,394/- (Rupees four crores sixty eight lacs thirty one thousand three hundred and ninety four only) as detailed in a statement annexed hereto as Annexure-XIV shall be paid by Solitaire to Vipul within 45 days (with a grace period of 15 days) from the Execution Date ('Current Solitaire's Dues'):

- (a) An amount of Rs. 1,11,24,693/- (Rupees one crore eleven lacs twenty four thousand six hundred and ninety three only) towards part of Solitaire's Share of Cost as set out in Clause 6.2 above;*
- (b) An amount of Rs. 3,57,06,701/- (Rupees three crores fifty seven lacs six thousand seven hundred and one only), incurred by Vipul as on 16.01.2010 on behalf of Solitaire's towards Government Charges, which is in addition to Solitaire's Share of Cost and Solitaire's Lump sump Cost.*

Any delay in payment of Current Solitaire's Dues beyond 60 days (including the grace period) shall attract interest at the rate of 18% p.a. till such payment (including interest thereon) is discharged by Solitaire.'

14. At this Juncture, we find it significant to reproduce to the legal definition of "Joint Venture".

Joint Venture

An association of two or more individuals or companies engaged in a solidary business enterprise for Profit without actual partnership or incorporation.

15. At the outset, we address ourselves to the relevant clauses of the Agreements entered into between both the parties to determine the nature of relationship and transactions, which is necessary to ascertain the nature of 'debt'.
16. For easy reference, the Appellant is hereinafter referred to as 'Vipul' as specified in the terms of the Agreement. Likewise the Respondent is referred to as 'Solitaire'. As per clause 2.1 of the MDA, *'the party shall share the compensation received pursuant to such acquisition or requisition in the ratio of 75% to Vipul and 25% to Solitaire'*. Clause 2.2 states *'the definition and other benefits and obligations provided under this Agreement are given effect to, in a manner that sharing interest revised Layout Plan between the parties remains in the ratio of 75% to Vipul and 25% to Solitaire'*. Clause 2.3 envisages that Vipul shall complete the integrated Town Ship Development within 12 months from the date of execution with a further grace of 90 days and in case of any delay pay compensation for such delay at Rs. 75 per month per square yard of the total area of Solitaire residential plots. It is an admitted fact that an aggregate amount of Rs. 17,51,10,000/- has been paid by Solitaire and acknowledged by Vipul. Clause 3.2.4 states that all cost, charges and expenses for execution, registration and

other incidental expenses shall be borne by Solitaire. Clause 3.2.5 envisages 'Vipul shall, at the request of discretion of Solitaire, make necessary transfers of plot buyers agreement/allotment letters in favor of any third Party.

17. It is relevant to mention that in the Addendum to the Master Development Agreement clause 4 states as follow;

'4. The parties agree that notwithstanding anything provided in the Agreement, the Parties shall jointly sell/transfer the Balance Acquired Land and shall be entitled to allocation of the proceeds therefrom ('Balance Acquired Land Proceeds') in proportion to their entitlement to the Balance Acquired Land i.e. in proportion to the are of 5.07 acres for Solitaire and 11.79 acres for Vipul.

Further, the Parties agree that the Balance Acquired Land Proceeds shall be deposited in an account opened for this purpose by Vipul and jointly operated by the authorized representatives of both Solitaire and Vipul. The Parties also agree that the Balance Acquired Land Proceeds shall be utilized as provided in Clause 5 of this Addendum.'

(Emphasis Supplied)

18. Clause 2.3 of the MDA emphasizes that the entire Integrated Township Development will be completed within 12 months with a grace period of 90 days, failing which, Vipul shall compensate, for such delay calculated at Rs. 75/- per month, per square yard of the total area Solitaire Residential Plots. Clause 3.2.5 specifies that Vipul shall, at the request of Solitaire and at the expense of Solitaire, make necessary transfers of Plot Buyers Agreement, allotment letters in favor of any third Party as nominated by Solitaire.

19. It is apparent from this clause that for sale of any plot belonging to Solitaire at the request of Solitaire, there is a tri-party Agreement between Vipul, Solitaire and the Plot Buyer. Clause 3.2.13(d) further specifies that Vipul shall sign such document for the limited purpose of transfer of ownership of land comprised in Solitaire Residential Plots. This further establishes that Vipul too is a signatory for transfer of ownership of land and therefore viewed from any angle the said Agreement can only be construed as a Joint Venture Agreement. Additionally, clauses 3.3.1 and 3.3.5 refer to 'Group Housing'. It is further stated that 2.48 acres out of the total Layout Plan is allocated to Solitaire and 7.47 acres is allocated to Vipul towards its share. Clause 3.3.5 specifies that Vipul shall, at the request of discretion of Solitaire, execute necessary documents for assignment of such Agreement to sell in respect of Solitaire Group Housing area in favor of any third Party as may be nominated by Solitaire in its discretion. Further, Vipul shall execute and deliver and co-operate for registration of sale deed for transfer of right, title and interest of Solitaire Group Housing area in favor of Solitaire/ its transferee. All payments, receivable, proceeds assigned from such sale/transferred to the exclusive account of Solitaire.
20. Clause 3.4 which refers to 'Shop Cum Offices' (SCO) once again reiterates that, subject to timely payment of share of cost of construction and development by Solitaire to Vipul, Vipul shall

construct and develop the SCO in accordance with the specification agreed to between the Parties. The cost of construction development shall be shared in the ratio of 75% and 25%. Clause 3.4.4 specifies that Solitaire shall be allocated 14 SCO Units towards its share and the balance will be allocated to Vipul. Clause 3.5 deals with Other Commercial Areas which also specifies the same terms.

21. From clauses 3.6.1, 3.6.2, 3.6.3, 3.6.4 and 3.6.5, with respect to EWS Flats it is clear that both the parties would be jointly responsible for and participate in the construction of development. This further substantiates that it is a 'Joint Venture'. The terms and conditions with respect to institutional areas and common areas also reflect that the cost would be share between Vipul and Solitaire at the rate of 75% and 25% and therefore viewed from any angle, the Joint Development Agreement entered into between both the parties reflects a commercial transaction in the nature of a 'Joint Venture' wherein there is division of Profits and Costs.
22. It is pertinent to mention that the Appellant has admitted that it is a 'Joint Partnership Agreement'. This emphasizes that the parties have a mutual right to control the enterprise involving mutual duties and obligations. Further, this Tribunal while dealing with a Joint Venture in a real estate Project, in ***Mamatha V/s. AMB Infrabuild Pvt. Ltd. and Ors.*** dated 30.11.2018, has held as follows;

'14. If the two 'Corporate Debtors' collaborate and form an independent corporate unity entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one or other.'

23. In the light of this Principle, we observe that in such a kind of a Joint Venture Project, both the parties, if they are a Corporate should be jointly treated to be one for the purpose of initiation of CIRP and hence this Application under Section 7 is not maintainable.
24. Additionally, it is significant to mention herein that the letter dated 15.05.2012, addressed by Solitaire to Vipul specifies that subject to Vipul Ltd. completing its obligations as per clauses 3.3, 3.4, 3.5 and 3.7 and Recital I of the MDA for execution by Vipul in favor of Solitaire of the Agreement to sell for non-CLA Land, Group Housing Land & SCO's the schedule of payment is clearly specified including the period when the first installment would be received. It is stated in the letter that, the first installment of Rs. 75 Lacs towards part payment would be paid after receiving the pending documents from Vipul. Further, clause 11 of the Addendum to the Master Development Agreement specifies that the current Solitaire dues are to be paid towards Government charges.
25. The aforementioned letter evidences that, the Joint Development Agreement and the Master Development Agreement entered into between the Parties is a contract of reciprocal rights and

obligations. A bare reading of the aforementioned clauses evidences that the payments to be made by the Respondent to the Appellant are governed by certain obligations to be fulfilled by the Appellant herein and likewise compensation to be paid by the Appellant to the Respondent is also governed by the condition that the Appellant should complete the construction within a specified period of time.

26. To reiterate, the Applicant had issued notice to the Respondent under Section 8, terming it as an 'Operational debt'. Be that as it may, this Application seeking initiation of CIRP by one partner of JDA against the other, only jeopardizes the interests of the allottees. Apart from the fact that the Joint Development Agreement entered into, is a contract of reciprocal rights and obligations, both parties are admittedly 'Joint Development Partners', who entered into a consortium of sorts for developing an Integrated Township and for any breach of terms of contract, Section 7 Application is not maintainable as the amount cannot be construed as 'Financial Debt' as defined under Section 5(8) of the Code. Therefore, we are of the considered view that the Appellant cannot be termed to be a 'Financial Creditor' as envisaged under Section 5(7) of the IBC, 2016.

27. Hence, this Appeal fails and is accordingly dismissed.

**[Justice Jarat Kumar Jain
Member (Judicial)]**

**[Dr. Ashok Kumar Mishra]
Member (Technical)]**

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

**NEW DELHI
18th August, 2020**

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