NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 528 of 2020

[Arising out of Order dated 16th January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi in Company Petition (IB) No.775(ND)/2019]

IN THE MATTER OF:

Arenja Enterprises Private Limited
Through its Director Braham Arenja
Having their Registered Office at:
Suite-212, E-564, Greater Kailash-II
New Delhi – 110048 **Appellant**

Versus

Edward Keventer (Successors) Private Limited
Having its registered office at:
1-E, Jhandewalan Extension
Naaz Cinema Complex
New Delhi – 110055 **Respondent**

Present:

For Appellant : Mr Piyush Singh and Mr Akshay Srivastava, Advocates

For Respondent : Mr Rajiv Nayar, Senior Advocate with Mr Kartik Nayar, Mr Dheeraj P. Rao and Ms Meghna Mishra, Advocates

J U D G M E N T

[Per; V.P.Singh, Member (T)]

1. This Appeal emanates from the Order dated 16th January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi in CP (IB) No.775 (ND)/2019, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (from now on referred to as "**I&B Code**"). The parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case are as follows:

The Applicant and its Associates entered into Memorandum of Understanding/Collaboration agreement about the land followed by two other supplementary MOU's dated 20th November 1989 and 22nd November 1989. During the year 1992, some dispute arose between the parties. The Applicant, alongwith its associates filed a Civil Suit for specific performance along with other reliefs against the Corporate Debtor, before the Hon'ble High Court of Delhi bearing CS (OS) No.1744 of 1992. Based on an amicable settled entered into between the parties, the Civil Suit was decreed on 10th April 1996.

3. As per the settlement filed before the Hon'ble High Court, the Corporate Debtor had agreed to develop a Group-Housing Complex on a plot of land admeasuring 22.95 acres. Out of this area, the Applicant, alongwith another, was entitled to only 34,000 sq. ft. residential covered/built-up area alongwith proportionate super area. Given the terms of settlement if the sanction of plans is not obtained within a maximum period of 3 years from the date of signing of the settlement, in that event, the Corporate Debtor and M/s Dalmia Promoters and Developers Pvt Ltd, agreed to give the further built-up area of 1700 sq. ft., after the lapse of 3 years from the date of settlement and the liability of addition of 700 sq. ft. built-up area per annum, would be for a maximum of 3 years, after the expiry of first three years from the date of settlement, and will cease thereafter.

4. As per the settlement arrived at between the Financial Creditor alongwith its associates and the Corporate Debtor, the building plans were

to be got sanctioned by the Corporate Debtor within a maximum period of 3 years from the date of the decree passed in Civil Suit with a further extended period of 3 years.

5. The Financial Creditor further contended that original amount of debt on 10th April 1996 was 34,000 sq. ft. built up area in the housing project with an additional amount of 5100 sq. ft. added to the debt on 10th April 2002 on account of penalty for delay in getting a sanction of plans in terms of Clause (J) of the Consent Decree, making the total amount of debt to the Financial Creditor and its associates for 39100 sq. ft. with the proportionate super area.

6. The Applicant contends that by virtue of decree passed by the Civil Court on 10th April 1996, and in consideration of services provided by Financial Creditor and its associates 34,000 sq. ft. of a built-up residential area with the proportionate super area in 48, Keventer, Sardar Patel Marg, New Delhi were admittedly sold to Financial Creditor and its associates by the Corporate Debtor and the said transaction has the effect of borrowing by the terms of I&B Code, 2016.

7. The Corporate Debtor admitted the fact pertaining to the consent decree passed by the Hon'ble High Court on 10th April 1996. It is further contended that the Financial Creditor alongwith its associates, had filed Execution Application No.77 of 2008 before the District Court which was rejected, thereafter challenged before the Hon'ble High Court of Delhi.

8. The Corporate Debtor contends that the 'debt' as alleged by the Financial Creditor is not a 'financial debt' as defined under sub Clause (8) of Section 5 I&B Code, 2016. Because no sum has been raised from an allottee under the Real Estate Project. The Financial Creditor and its associates have not paid any money towards the allotment of built-up area. Given the terms of settlement Financial Creditor and its associates entitled to 34000 sq. ft. residential covered/built-up, alongwith proportionate super area, and in case of delay in getting the sanction of plans, the penalty in the shape of additional built-up area in favour of Financial Creditor and its associates was to be allotted. In other words, nothing is paid in terms of money to the Financial Creditor and its associates in the light of the 'consent decree and settlement terms'. The Corporate Debtor has not raised any money from the Financial Creditor in terms of the explanation provided to sub-clause (8) of Section 5 of I&B Code, 2016.

9. Learned Counsel for the Financial Creditor submits that MoU's dated 26th June 1989, 20th November 1989 and 22nd November 1989 entered into between the Financial Creditor and the Corporate Debtor for allotment of the built area to the Financial Creditor. In addition to this, the Financial Creditor had paid an amount of Rs.2 Crores to the Corporate Debtor in September 1989. As per MoU dated 20th November 1989, MoU dated 22nd June 1989 was cancelled. As per terms of MoU Dt. 20th November 1989 the amount of Rs. 2 Crores was to be refunded to Financial Creditor latest by 28th February 1990. The Corporate Debtor did not reinstate the MoU dated 22nd June 1989 hence it became void. But the amount of Rs.2 Crore was not

refunded by the Corporate Debtor till 28th February 1990 as per the terms of MoU. Therefore, the Financial Creditor filed a suit before Delhi High Court in 1992 and on the direction of the Hon'ble High Court the Corporate Debtor returned principal amount to the Financial Creditor in January 1995. The Financial Creditor and Corporate Debtor entered into a settlement agreement dated 10th April 1996 whereby the Financial Creditor/Applicant/ Appellant was allotted 34000 sq. ft. area of built-up area. It was also agreed upon that in case the project is delayed, the Financial Creditor would get an additional 5100 sq. ft area of built-up area.

10. Financial Creditor contends that the allotment as per settlement agreement to the Financial Creditor was in lieu of claim of Financial Creditor against the Corporate Debtor for utilization of Rs.2 Crores beyond the due date. The allotment was therefore made in lieu of monetary compensation for interest-free utilization of Rs.2 Crores for five years beyond the due date of 28th February 1990.

11. The Appellant Financial Creditor further contends that debt Rs.2 Crores was not given as a loan nor as equity payment for the purchase of flats. It had the commercial effect of borrowing from 28th February 1990 till 1995.

12. Appellant further contends that the amount of Rs.2 Crores which had been given to the Corporate Debtor, had the commercial effect of borrowing, after the due date, i.e. from 28th February 1990 till its refund in 1995. The debt due to the Financial Creditor was something equivalent to

compensation, for interest-free utilization of Rs.2 Crores for five years beyond the due date, i.e. .28th February 1990.

13. The Appellant further contends that the default occurred on 09th August 2018, when the change of land use happened and three years was granted as per Clause 2(J) of the consent decree for approval of building plans and further three years with delay penalty.

14. The Respondent/Corporate Debtor contended that the Appellant and the Ashoka Builders were initially co-developers in the said plot. Thus, Civil Suit No.1744 of 1992 for Specific Performance was filed against the Respondent/Corporate Debtor before the Delhi High Court. The parties entered into an amicable settlement, as the result of which the Civil Suit between the parties was decreed. The consent terms entered into the parties was made part of the judgment and decree of Court. As per terms of the settlement, the Corporate Debtor had agreed to provide 34000 sq. ft. of the built-up residential area and proportionate super area to the Plaintiff in the Group Housing Complex to be developed on a plot of land measuring 22.95 acres situated at Block 48, Keventer Lane, Sardar Patel Marg, New Delhi.

15. By order of the Hon'ble High Court dated 04th January 1995 in FAO (OS) No. 6/93 titled Dalmia Promoters and Developers Pvt Ltd & Others (arising from the aforesaid Civil Suit) an amount of Rs.2 Crores being the interest-free security deposit with the Respondent Corporate Debtor was refunded to the Appellant. Thus, no money of the Appellant is left with the

Respondent. Hon'ble High Court of Delhi by order dated 06th August 2019 in Ex. FA No.32/2019 passed an order for staying the execution proceeding.

16. The Corporate Debtor further contends that debt, as alleged by the Appellant, is not a 'financial debt' as defined under Clause (8)(f) of Section 5 of the Code, as no sums were raised from/paid by the Appellant. The Corporate Debtor further contended that original amount of debt on 10th April 1996 was 34000 sq. ft. built-up residential area and an additional amount of 5100 sq. ft. was added to the debt on 10th April 2002 on account of penalty for delay in sanction of plans, as per Clause (J) of the Consent Decree. It is argued that the financial debt can only be money raised and paid and not for any other claims.

17. We have heard the arguments of the Learned Counsel for the parties and perused the record.

18. The question that arises for consideration is as follows:

a) Whether 'debt' as alleged by the Appellant/Applicant is a financial debt as defined under Clause (8)(f) of Section 5 of the I&B Code, 2016?

b) Whether Corporate Debtor committed 'default' by not allotting 39100 sq. ft. built-up area of land, in terms of Section 3(12) of the I&B Code, 2016?

19. The Appellant claims himself to a Financial Creditor in terms of Section 5(8)(f) of the I&B Code, 2016. Section 5(8)(f) of the Code is given below for ready reference;

Sec 5(8) of I&B *Code 2016*

"financial debt" means a debt along with 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;***

[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;]

20. The explanation attached to Section 5(8)(f) of the Code provides that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of borrowing. Explanation (ii) to Section 5(8)(f) provides that expressions' allottee' and 'real estate' project shall have the meanings respectively assigned to them in Real Estate (Regulation & Development) Act, 2016.

21. In this case, the Appellant is not an allottee under a 'real estate project'. In fact, the alleged allotment of 34000 sq. ft. of land with an additional 5100 sq. ft. land is on account of 'Consent Decree' passed by the Hon'ble High Court of Delhi dated 10th April 1996. Pursuant to the consent decree and as per Settlement Agreement allotment to the Financial Creditor was in lieu of claim of Financial Creditor against Corporate Debtor for utilization of Rs.2 Crore beyond the due date. Therefore, the allotment was made as monetary compensation for interest-free utilization of Rs.2 Crore for five years beyond the due date, i.e. 28th February 1990.

22. The Appellant contends that Section 2(b) of RERA, 2016 provides that 'allottee' in relation to 'real estate project', means the person to whom a plot, apartment or building as the case may be has been allotted, sold or otherwise transferred by the promoter and includes the person who

subsequently acquires by the said allotment to sale transfer or otherwise. But does not include a person to whom such plot, apartment or building, and the case may be is given on rent.

23. The Appellant contends that the alleged allotment by way of transfer by the promoter; therefore, the said allotment is covered under the definition of 'Allottee' provided in Section 2(d) of RERA, 2016. The Learned Counsel for the Appellant also placed reliance judgment of the Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Limited and Another Vs. Union of India & Others (2019) 8 SCC 416 has held that:

> ***"76.*** *Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:*
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> *"borrow.—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole: make sure you borrow enough."*
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> *"commercial.—adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television."*

77. *A perusal of these definitions would show that even though the petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender.* ***The expression "borrow" is wide enough to include an advance given by the homebuyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the homebuyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender.*** *Both parties have "commercial" interests in the same—the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the Explanation introduced by the Amendment Act."*

(emphasis in bold supplied)

24. Under Section 5(8)(f) of I&B Code, any amount raised from 'allottee' under a real estate project shall be deemed to be an amount having the 'commercial effect of borrowing' and thus, would be covered under the definition of 'Financial Creditor' as defined under Section 5(7) of the Code. It is thus, clear that the Appellant can claim a Financial debt as an 'allottee' only when the amount raised from it as an 'allottee' is used for a real estate project. In the facts and circumstances, the Appellant is neither an 'allottee' nor has any amount 'being raised' or 'raised' from it, that may be construed as to have the effect of borrowing.

25. Therefore, Appellant's Application as a Financial Creditor is not maintainable, and no amount has been paid by the Appellant to the Respondent. There is no financial debt in favour of the Appellant. It is pertinent to mention that Appellant's pleading is that the amounts have been paid by the Appellant to the Respondent and the consent decree itself is the debt for which Section 7 Application has been filed.

26. The Ld Counsel for the Respondent Corporate Debtor also placed reliance on paras 70 &71 of the Pioneer Urban Land and Infrastructure Ltd case(supra) which is mentioned below :

> ***"70.*** *The definition of "financial debt" in Section 5(8) then goes on to state that a "**debt" must be "disbursed**" **against the consideration for time value of money**. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:*
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> *"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable.*

2. The money so paid; an amount of money given for a particular purpose."

71. *In the present context, it is clear that the expression* ***"disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment.*** *The expression* ***"disbursed" refers to money which has been paid against consideration for the "time value of money"****. In short,* ***the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money****. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the Dictionary of Banking Terms (2nd Edn.) by Thomas P. Fitch in which "time value for money" was defined thus:*

> *"present value: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis."*
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> *(emphasis supplied)*

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction

of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).”

27. In this case, assuming that the consent decree is a debt, even then there is admittedly no 'default' of the Respondent as even the execution of the said decree has been held to be premature by the Hon'ble High Court, as such it cannot be said that there is a debt. There has been ‘default’ in terms of Code.

28. It is relevant to mention that Execution Petition No.77/2008 was filed by the decree holders based on the consent decree, wherein the Hon'ble High Court of Delhi passed an order dated 15th December 2016. The extracts of the order are reproduced as under:

- *Execution is a sought of a decree inter alia of* ***specific performance of an agreement of sale of immovable property by delivery of built up area in a multi-storeyed building behind Rashtrapati Bhawan and even construction whereof has still not commenced****.*
- ***Till the commencement of construction is a reality, no purpose will be served by doing so also****.*
- *Though attention is invited to para 2(I) of the compromise application in terms whereof decree was passed in this regard but the same is not found to mandate the judgment debtor to do any such thing as this stage.*

29. In the above case, Hon'ble High Court held that execution petition is premature and not maintainable till the construction is complete and becomes a reality.

30. It is relevant to note that on 19th July 2019 the Respondent filed an Application before the District Court in the Execution Petition No.77/2008, wherein a relief was sought for keeping the said execution proceedings in abeyance till the commencement of construction and as the execution proceedings are premature. District Court rejected the Application of the Respondent/Decree Holder, against which Appeal was preferred to vide Ex. FA 32/2019. The Hon'ble High Court considering that execution proceedings are premature vide order dated 06th August 2019, stayed the execution proceeding itself in relation to the consent decree.

31. In this case as per terms of MoU dated 20th November 1989 the amount of Rs. 2 Crores was to be refunded to Financial Creditor latest by 28th February 1990. The Corporate Debtor did not reinstate the MoU dated 22nd June 1989, hence it became void. But the amount of Rs.2 Crore was not refunded by the Corporate Debtor till 28th February 1990 as per the terms of MoU. Therefore, the Financial Creditor filed a suit before Delhi High Court in 1992 and on the direction of the Hon'ble High Court the Corporate Debtor returned principal amount, i.e. Rs two crores to the Financial Creditor in January 1995 and to compensate interest-free security of Rs two crores for five years,given the terms of the settlement, the Applicant and Corporate Debtor entered into an agreement dated 10th April 1996, whereby the Applicant/Appellant was allotted 34000 sq. ft. area of built-up area. It

was also agreed upon that in case the project is delayed; the Applicant would get an additional 5100 sq. ft area of built-up area. The 'debt' as alleged by the Financial Creditor is not a 'financial debt' as defined under sub Clause (8) of Section 5 I&B Code, 2016, because no sum has been raised from an allottee under the Real Estate Project. The Financial Creditor and its associates have not paid any money towards the allotment of built-up area. Given the terms of settlement Financial Creditor and its associates entitled to 34000 sq. ft. In other words, nothing is paid in terms of money to the Financial Creditor and its associates in the light of the 'consent decree and settlement terms'. The Corporate Debtor has not raised any money from the Financial Creditor in terms of the explanation provided to sub-clause (8) of Section 5 of I&B Code, 2016. Thus, it is clear that the alleged debt is not a 'financial debt' in terms of Sec 5(8)of the Code**.**

32. The Ld Counsel for the Respondent placed reliance on the requirement of conditions for triggering Insolvency Resolution process as laid down in case of ***Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17 : 2019 SCC OnLine SC 73 at page 76. In this case Hon'ble Supreme Court has held that;**

> ***'65.*** *In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:*
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> *"**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 paid by the debtor or the corporate debtor, as the case may be;"*

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 *and by operational creditors under Sections 8 and 9 of the Code becomes clear."*

(emphasis supplied)

33. In case of *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407: 2017 SCC OnLine SC 1025: (2018) 1 SCC (Civ) 356 at page 437 Hon'ble Supreme Court held:

"27. *The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial*

creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services."

Thus it cannot be said that there is any default by the Respondent under the Code, as the time for performance has not arrived yet and therefore in terms of various decisions of Hon'ble Supreme Court it is clear that even if the consent decree is a 'debt', even then there is no Default by the Respondent in terms of the Code.

34. Therefore, we are of the considered opinion that there is no reason for interference with the impugned order passed by the Adjudicating Authority. Hence Appeal is dismissed. No order as to costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V. P. Singh]
Member (Technical)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI
16th OCTOBER, 2020

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