

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.923 of 2023

(Arising out of Order dated 31.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-I in IA No.721/MB/C-I/2023 in CP (IB) No.1633/MB/C-I/2019)

IN THE MATTER OF:

D S Kulkarni & Associates,
DSK House, 1187/60, J M Road,
Shivajinagar Pune 411005

... Appellant

Vs

Manoj Kumar Aggarwal
Resolution Professional of
D S Kulkarni Developers Ltd.
1187/90, J M Road,
Shivajinagar Pune 411005

AND

Office No.4 1st Floor, Pride Plaza,
B/H Ambedkar Statute, Pimpri Chowk,
Pimpri, Pune-411018.

... Respondent

Present:

**For Appellant: Mr. Sandeep Bajaj, Ms. Aakanksha Nehra, Mr.
 Naman Tandon and Adya Singh, Advocates.**

**For Respondents: Mr. Abhijeet Sinha, Mr. Varun Kalra and Mr.
 Saikat Sarkar, Advocate for R-1**

**Mr. Arvind Nayar, Sr. Advocate with Mr. Puneet
Singh Bindra, Mr. Akshay Sharma, Akshay
Doctor, Ms. Simran Jeet, Mr. Rishabh Gupta, Mr.
Sameer Sethi, Advocates for SRA.**

With

Company Appeal (AT) (Insolvency) No.924 of 2023

(Arising out of Order dated 31.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-I in IA No.722/MB/C-I/2023 in CP (IB) No.1633/MB/C-I/2019)

IN THE MATTER OF:

D S Kulkarni & Company,
DSK House, 1187/60, J M Road,
Shivajinagar Pune 411005

... Appellant

Vs

Manoj Kumar Aggarwal
Resolution Professional of
D S Kulkarni Developers Ltd.
1187/90, J M Road,
Shivajinagar Pune 411005
AND

Office No.4 1st Floor, Pride Plaza,
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Pimpri, Pune-411018.

... Respondent

Present:

For Appellant: Mr. Sandeep Bajaj, Ms. Aakanksha Nehra, Mr. Naman Tandon and Adya Singh, Advocates.

For Respondents: Mr. Abhijeet Sinha, Mr. Varun Kalra and Mr. Saikat Sarkar, Advocate for R-1

Mr. Puneet Singh Bindra, Mr. Akshay Sharma, Akshay Doctor, Ms. Simran Jeet, Mr. Rishabh Gupta, Mr. Sameer Sethi, Advocates for SRA.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeals have been filed challenging order dated 31.03.2023 passed by National Company Law Tribunal, Mumbai Bench-I, by which IA Nos.721 of 2023 and IA No.722 of 2023 filed by the Appellant(s) seeking a direction to admit their claim have been rejected.

2. Brief facts giving rise to these two Appeal(s) are:

- (i) By an order dated 26.09.2019 passed on an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) by Bank of Maharashtra,

Corporate Insolvency Resolution Process (“**CIRP**”) commenced against the Corporate Debtor - D S Kulkarni Developers Ltd. The Respondent invited claims from the creditors on or before 09.10.2019.

- (ii) A Claim in Form CA (Submission of claim by Financial Creditors in a Class) for an amount of Rs.166,74,48,579/- and another Claim in Form-F for an amount of Rs.59,000/- was filed by D.S. Kulkarni & Associates.
- (iii) The Resolution Professional (“**RP**”) vide his email dated 14.10.2019 asked the Appellant D.S. Kulkarni & Associates to provide for documents to substantiate their claim. The RP sent reminder dated 13.11.2019. On 03.05.2021, the authorised representative of the Appellant again resubmitted the same Claim Forms on behalf of D.S. Kulkarni & Associates. On 28.05.2021, the RP again asked the D.S. Kulkarni & Associates to provide relevant supporting documents to substantiate their Claim. No documents having been provided the Claim was rejected.
- (iv) The Claim on behalf of D.S. Kulkarni & Company (Appellant in Company Appeal (AT) (Ins.) No.924 of 2023) was filed on 07.10.2019 in Form-CA for an amount of Rs.464,19,99,032/- and other Claim in Form-F was filed for an amount of Rs.27,78,80,000/-.

- (v) The RP vide email dated 14.10.2019 asked the D.S. Kulkarni & Company to submit documents to substantiate their claim. On 03.03.2021 D.S. Kulkarni & Company again submitted claim, to which the RP vide email dated 28.05.2021 again asked to provide all relevant and supporting documents in respect of the claim.
- (vi) The Resolution Plan submitted by the Resolution Applicant was approved by the Committee of Creditors (“CoC”) on 13.08.2021 and on 24.08.2021, the RP filed IA No.1950 of 2021 for approval of the Resolution Plan. On 22.02.2023, Plan approval Application was heard and orders were reserved.
- (vii) In February 2023, IA No.721 of 2023 was filed by D.S. Kulkarni & Associates seeking a direction to admit their Claim. Similarly, IA No.722 of 2023 was filed by D.S. Kulkarni & Company seeking a direction to admit their claim. In IA Nos. 721 and 722 of 2023, the RP filed its reply. The RP in its reply affidavit stated that no documents having been submitted by the Applicant(s) to substantiate their claim, the claims were rejected. It is submitted that the Resolution Plan was approved on 13.08.2021 and the Applications being IA Nos.721 and 722 of 2023 have been filed in February 2023, which is nothing but an attempt to cause hinderance in CIRP of the Corporate Debtor. The RP pleaded that Applicant(s), i.e., D.S. Kulkarni & Associates and D.S. Kulkarni & Company are

‘related party’ to the Corporate Debtor and there have been various fraudulent, undervalued, preferential and exorbitant transactions undertaken by the Corporate Debtor for which an Application-IA No.2022 of 2021 has been filed for avoiding the transaction. It is stated that various proceedings were initiated against the Corporate Debtor and its ‘related party’ by different Authorities. Due to the actions of the Corporate Debtor, the Directors were also lodged in Jail.

(viii) The Adjudicating Authority after hearing the parties, by the impugned order dated 31.03.2023 rejected IA No.721 of 2023. The Adjudicating Authority held that CIRP order was passed on 26.09.2019, the Resolution Plan was duly approved by the CoC on 13.08.2021 and the Application has been filed with delay. The Adjudicating Authority held that the RP did not commit any illegality or irregularity in rejecting the Claim of the Appellant. IA No.722 of 2023 was also rejected by the Adjudicating Authority, by making similar observations.

(ix) These two Appeal(s) have been filed challenging the order dated 31.03.2023 passed respectively in IA Nos.721 and 722 of 2023.

3. We have heard Shri Sandeep Bajaj, learned Counsel appearing for the Appellant(s); Shri Abhijeet Sinha, learned Counsel appearing for the RP; and Shri Arvind Nayar, learned Senior Advocate and Shri Puneet Singh

Bindra, learned Counsel appearing for Successful Resolution Applicant (**“SRA”**).

4. The learned Counsel for the Appellant challenging the order submits that Claims were filed by the Appellant on 09.10.2019, i.e., within the time as published by the RP. It is submitted that along with the Claim Form, the Appellant has also filed respective Memorandum of Understanding (**“MoU”**) as well as Ledger extracts, which prove that amounts were advanced by the Appellant to Corporate Debtor. Ms. Hemanti Kulkarani, Authorised representative with other Directors of D.S. Kulkarni Group were in Jail till they got the bail on 18.11.2022, hence, the relevant documents could not be filed. It is submitted that additional affidavit was filed by the Appellant(s) before the Adjudicating Authority, where Ledger statements and Bank statements were filed, proving the advance made by the Appellant to the Corporate Debtor. It is submitted that on the basis of MoU and Ledger extract, which were annexed with the Claim Form, the RP ought to have admitted the claims. It is submitted that the Adjudicating Authority committed error in rejecting Application filed by the Appellant(s) being IA Nos.721 and 722 of 2023, although sufficient materials were filed to indicate that amounts were advanced to the Corporate Debtor by Appellant(s), which were reflected in the Ledger extracts as well as in the Bank statements. In the Appeal, the learned Counsel has also referred to IA No.5941 of 2023 filed in Company Appeal (AT) (Ins.) No.923 of 2023 where the balance sheet of the Corporate Debtor for the years 2013-14, 2014-15, 2015-16 and 2016-17 have been brought on record, which also

reflect the advance made by Appellant to the Corporate Debtor. Similarly in Company Appeal (AT) (Ins.) No.924 of 2023, balance sheet for the same period have been filed reflecting the amount advanced by the Appellant. The learned Counsel submits that in view of the above materials, the claim of the Appellant(s) deserved to be admitted.

5. The learned Counsel for the RP, refuting the submissions of learned Counsel for the Appellant(s) submits that claims were filed before the RP on 09.10.2019. It was incumbent upon the Appellant(s) to submit relevant documents as requested by the RP vide his email dated 14.10.2019 and reminder on 13.11.2019. In spite of the RP demanding the supporting documents from the Appellant(s) to substantiate their claim, no documents were submitted, hence, the RP has no option except to reject the claim. It is submitted that MoU and Ledger extract, which were filed along with the claim Form in no manner prove the financial debt as was claimed by the Appellant(s). It is submitted that Resolution Plan was approved by the CoC on 13.08.2021 and the fact that Application(s) – IA Nos.721 and 722 of 2023 were filed in February 2023 indicate that the Adjudicating Authority has been approached by the Appellant(s) with inordinate delay, i.e., after more than one and a half year from the approval of the Plan by the CoC. It is submitted that Plan having already been approved by the CoC, the Application(s) submitted by the Appellant(s) were rightly been rejected by the Adjudicating Authority. It is submitted that both the Appellant(s) are ‘related party’ to the Corporate Debtor and various fraudulent, undervalued and frivolous transactions were done by them with regard to which RP has

also filed avoidance application in the year 2021, which are pending consideration. The Corporate Debtor and its related group entities, indulged in various fraudulent transactions with regard to which Promoters are facing several proceedings. It is submitted that documents which were submitted along with claim Form were insufficient to accept the claim and RP has rightly rejected the claim of the Appellant(s).

6. The learned Counsel for SRA also adopted the submission of learned Counsel for RP and submits that Plan having been approved by the CoC and subsequently by the Adjudicating Authority in June 2023, and the order approving the Resolution Plan dated 23.06.2023 has not been challenged by the Appellant, both the Appeal(s) deserve to be dismissed. No relief can be granted to the Appellant(s) and Appeal(s) can be dismissed on this ground alone.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. We need to notice the Form-CA dated 07.10.2019, which was filed by the Appellant - D.S. Kulkarni & Associates as well as D.S. Kulkarni & Company before the RP. The Item Nos.4 and 5 in the Claim Form are as follows:

4.	Total amount of claim (in Rs.)	1) Outstanding amt for advances against tenements, rent etc. Rs.141,30,92,016/- 2) Interest : Rs.25,43,56,563 Total : Rs.166,74,48,579/-
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5.	Details of documents by reference to which the debt can be substantiated	1. Ledger Extract 2. MOU Copy
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9. Only two documents were filed along with the Claim Form, i.e., Ledger extract and MoU. The RP vide his emails and reminders asked the Appellant to submit documents to substantiate their claim. On 03.11.2019, the RP sent the following email to the Appellant:

“Dear Sir,

We have not yet received any supporting documents from your side to substantiate your claims. Please send the same.

On Mon, Oct 14, 2019 at 07:40 PM CIRP DSK Developers Ltd. ip.dskdl@gmail.com wrote:

Please provide all the documents to support your claims made. Documents attached are insufficient to substantiate the claims made.”

10. No response was given to the emails by the Appellant. On 03.10.2021, claim was again submitted on behalf of the Appellant, which was replied on 28.05.2021 by the RP to the following effect:

“Dear Sir,

As already communicated to your earlier too, request you to please provide all relevant supporting documents to substantiate the claims submitted. You have just submitted various claim forms and tally ledger statements of either the CD or the claimants. However various other documents are required to be submitted to properly substantiate your claims. We cannot admit your

claims for lack of proper and complete documents to substantiate the claims.

Thanks & Regards,

*For, M/s. D S Kulkarni Developers Limited
Manoj Kumar Agarwal
Resolution Professional”*

11. In spite of RP requesting the Appellant(s) to file documents to substantiate their claim, no reply was given to the RP and the claim consequently was rejected by the RP.

12. We need to also consider as to whether on the basis of MoU and Ledger extract, which were filed by the Appellant(s) before the RP, it can be proved that there was any financial debt. The MoU dated 01.01.2011 has been brought on record along with the Appeal as Annexure-A2. The MoU entered between the Corporate Debtor and M/s D.S. Kulkarni & Associates indicate that the Second Party, D.S. Kulkarni & Associates approached the Corporate Debtor for purchasing or jointly develop the properties. The MoU mentions the immovable properties, which is claimed to be owned by the Corporate Debtor for which the Second Party is the Appellant. We need to notice Clause 6 and Clause 11 of the MoU, which are as follows:

“6. The Party of the word part approached the Party of the First Part and informed that the Party Of The second Part is interested in purchasing and or jointly developing the properties and around Balewadi area in Pune under residential zone.

11. The parties after negotiations fixed the final consideration to Rs.1,11,00,00,000/- (One

Hundred and Eleven Cr. Only). It is further agreed that the said consideration shall be paid in the manner mentioned hereinafter. The parties further admit that in the event of parties choose to execute the joint venture, the said consideration amount shall be considered as share/ investment brought by the party of the Second Part. It is further agreed that the terms of joint venture shall be decided mutually. It is also agreed that, the interest paid as per clause 8 shall be adjusted against the share in joint venture profit of the party of the second part.”

13. The MoU stated that the Appellant approached the Corporate Debtor for **purchasing and or jointly developing** the properties. Further, Clause 11 indicates that parties may chose to execute the joint venture and the said consideration amount shall be considered as share/ investment brought by the party of the Second Part. The MoU, which is the basic document submitted by the Appellant to prove financial debt, does not indicate that transactions are covered by Section 5, sub-section (8) of the Code. The consideration according to the MoU was paid either for purchasing the property or for entering into joint venture, where the consideration was to be treated as investment. Joint venture profit has also been captured in Clause 11. The Ledger extract, which has been filed also cannot make the transaction as financial debt.

14. We have looked into the aforesaid MoU and claim of Ledger extract to satisfy ourselves as to whether RP was obliged to admit the claim as

financial debt on the basis of said documents. We are of the view that RP has rightly communicated to the Appellant that documents submitted are insufficient to accept their claim as financial debt and no error has been committed.

15. Now, we also look into the MoU dated 13.04.2013, which is relied in Company Appeal (AT) (Ins.) No.924 of 2023 by D.S. Kulkarni & Company. In the aforesaid case, claim was also filed in Form-CA, i.e., Claim by Financial Creditor. The Claim Form refers to MoU and the Ledger extract. MoU has been filed as Annexure-A2. MoU was entered between the Corporate Debtor and D.S. Kulkarni & Company. In Clauses D, E and F, following have been stated:

“D. The party of the second Part had come to know that the Party of the First Part is developing and constructing large Township at Fursungi Ie. Property described in Schedule – I written hereunder, therefore Party of the Second Part was desirous to purchase various units/ commercial complex in proposed township to be developed by Party of the First Part.

E. Thus, Party of the Second part approached to party of the First with intention to purchase proposed units in township at Fursungi, to be constructed in DSKDI. i.e. Party of the First Part.

F. The parties after negotiations agreed that, Party of the First Part will allot various Units to be constructed in the township Adm. About 5,00,000/- Sq. ft. built up rate of Rs.6,000/- per sq. ft. thus, the final consideration will be Rs.300,00,00,000/- (Rupees Three Hundred Crores only).”

16. The Claim Form mentions the Appellant as Financial Creditor. We may refer to Section 5, sub-section (8), Explanation (i) and (ii), which was inserted by Act No.26 of 2018 with regard to real estate allottees. The Appellant cannot be treated as a real estate allottees on the basis of MoU, as per the definition of Section 5 (8)(f) Explanation.

17. We have looked into the MoU only to satisfy ourselves whether RP decision with regard to documents submitted by the Appellant were insufficient to accept their Claim as Financial Creditor was correct or not and we are satisfied that no error was committed by the RP in not accepting the Claim of the Appellant(s) as Financial Creditor.

18. As noted above, the Resolution Plan of the Corporate Debtor was approved by the CoC on 13.08.2021 and the Applications/ IA Nos.721 and 722 of 2023 were filed by the Appellant(s) in February 2023, i.e., more than one and a half year after approval of the Resolution Plan. The Adjudicating Authority has rightly taken the view that no good reasons have been explained by the Appellant(s) in filing the Application(s) with great delay of more than one and a half year. Resolution Plan having been approved by the CoC on 13.08.2021, the Adjudicating Authority rightly rejected the Application(s). The Adjudicating Authority has relied on the judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) No.1050 of 2020 in the matter of Mukul Kumar Vs. M/s RPS Infrastructure Ltd.***, which judgment has also been approved by the Hon'ble Supreme Court in M/s. RPS Infrastructure Ltd. vs. Mukul Kumar. The mere fact that Application

for approval of Resolution Plan is pending for consideration by the Adjudicating Authority does not entitle the Appellant(s) to file an Application for acceptance of their Claim after more than one and a half year of the approval of the Resolution Plan by the CoC.

19. As noted above, the Resolution Plan of the Corporate Debtor, which was approved by the CoC on 13.08.2021 has now been approved by the Adjudicating Authority by order dated 23.06.2023, as has been pleaded by the Appellant in his additional affidavit. The Resolution Plan having been approved, the order approving the Resolution Plan dated 23.06.2023 has also been brought on record as Annexure A7 in IA No.5941 of 2023 filed by the Appellant in Company Appeal (AT) (Ins.) No.923 of 2023. The Resolution Plan has already been approved, which order has also not been challenged by the Appellant. In any view of the matter, after considering the facts and the sequence of event in the present Appeal(s), we are of the view that Adjudicating Authority has rightly rejected IA Nos.721 and 722 of 2023, refusing to accept the prayer of the Appellant(s) to issue a direction to admit their claim. The Appellant(s) failed to submit relevant documents before the RP inspite of RP writing to the Appellant(s) to submit the documents to substantiate their claim, no error was committed by the RP in not admitting the claim.

20. Insofar as documents which have been brought on record by the Appellant(s) before the Adjudicating Authority by filing additional affidavit, suffice it to say that the basic documents relied by the Appellant(s) were

MoU and Ledger extract. The MoU, which is a basic document evidencing the transaction does not qualify as a financial debt and the RP has rightly taken the view that the documents filed, i.e. MoU and Ledger statement are insufficient to accept the Claim as financial debt.

21. In view of the foregoing discussions and conclusions, we are of the view that no grounds have been made out to interfere with the order dated 31.03.2023 passed by the Adjudicating Authority, rejecting IA Nos 721 and 722 of 2023. Both the Appeals are dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Arun Baroka]
Member (Technical)

NEW DELHI

3rd January, 2024

Ashwani