

National Company Law Appellate Tribunal
Principal Bench

Company Appeal (AT) (Ins.) No. 543 of 2023

In the matter of

Jushya Realty Pvt. Ltd. ... Appellant
[CIN: U45202MH2010PTC206601]
Having its registered office at
1st Floor, B&C Block Trade Link,
Kamala Mills Compound,
Senapati Bapat Marg, Lower Parel,
Mumbai-400013.
Vs.

Ninety Properties Pvt. Ltd. ... Respondent
[CIN: U45202MH2008PTC188982]
Having its registered office at
6th Floor – 3rd Plot, 298/316 B,
Dhun Building,
Dr. dadasaheb Bhadkamar Marg,
Grant Road, Mumbai-400007.

Present:

For Appellant: Mr. Shatadru Chakraborty, Ms. Sonia Dube, Ms. Kanchan Yadav, Ms. Saumya Sharma, Advocates

For Respondent: Mr. Raghenth Basant, Ms. Anne Mathew, Ms. Prerna Acharya, Advocates.

Judgment
(Hybrid Mode)
(Date: 2.2.2024)

[Per.: Dr. Alok Srivastava, Member (Technical)]

In the present appeal, filed under section 61 of the Insolvency & Bankruptcy Code, 2016 (in short 'IBC'), the Appellant *Company Appeal (AT) (Ins.) No. 543 of 2023*

has challenged an order dated February 3, 2023 (hereinafter called “Impugned Order”) passed by the National Company Law Tribunal, Mumbai Bench-IV (in short “NCLT”) in CP (IB) 949/MB-IV (Jushya Reality Pvt. Ltd. vs. Ninety Properties Pvt. Ltd.) whereby Learned NCLT has dismissed the petition filed by the Appellant under section 7 of the IBC by observing that the amount in default is not financial debt and Appellant is not a financial creditor under the provisions of IBC.

2. The facts of the case are that in December 2014, Shri Shabir Nirban, director shareholder and promoter of the Respondent Company approached the Appellant and offered to sell the Appellant 100% shares held with the Respondent along with all assets and liabilities of the Respondent by executing a share purchase agreement. The Appellant has further stated that based on the representations, undertakings and assurances provided by the director of the Respondent, the Appellant agreed to acquire all assets and liabilities of the Respondent as per its audited balance sheet dated March 31, 2013, after carrying out valuation of the shares of the Respondent, for a lump sum consideration of Rs.4,50,00,000/-.

3. The Appellant has further stated that it made an advance payment of Rs.1,25,00,000/- on 17.12.2014 out of the total amount of Rs.4,50,00,000/- to the Respondent and the said payment was made subject to execution of the share purchase agreement after due diligence to be carried out by the Appellant regarding the assets, financial data and compliances of the Respondent. The Respondent had, at the time, agreed to provide all documents to the Appellant, and according to him, the debt stands acknowledged as the same was reflected in the balance sheets of both the appellant and the Respondent.

4. The Appellant has further stated that the Respondent did not take necessary steps as agreed between the parties, despite receiving a payment of Rs.1,25,00,000/- in accordance with the promised agreement. In view of such a situation, the Appellant wrote many letters/reminders to the Respondent calling upon it to forward the title documents for due diligence and to also execute Share Purchase Agreement without any delay, but no steps were taken by the Respondent despite repeated reminders and hence, the Appellant asked the Respondent to refund the amounts paid by him along with interest @ 18% p.a. The Appellant has added that when the said amount was not refunded, the Appellant filed a petition before Hon'ble NCLT under section 7 of the IBC.

5. The Appellant has submitted that the Learned NCLT, by the Impugned Order, has dismissed the section 7 petition holding that the amount in default is not a financial debt, without giving any reasoning.

6. The main issue that arises for adjudication in this appeal is whether the amount of Rs. 1.25 crores paid by the Appellant to Shri Shabir Nirban, ex-Director of the Respondent Company constitute a financial debt as defined in IBC and whether the section 7 application filed regarding the purported financial debt deserved to be admitted.

7. We heard the oral arguments advanced by the Learned Counsels for both the parties and perused the record.

8. The Learned Counsel for Appellant submitted that the Appellant had contended in the section 7 application that a sum of Rs. 1.25 crores was advanced against the purchase of shares of the Respondent Company. He has further argued that this advance paid by the Appellant is reflected and admitted in the balance sheets of the Respondent for the financial years 2014-15, 2015-16, 2016-17, 2017-18 and 2018-2019 and the advance has

also been admitted in the pleading of this Appellate Tribunal. He has also submitted that the Respondent, in its reply before the Adjudicating Authority, admitted that the transaction was made to purchase real estate owned by the Respondent.

9. The Learned Counsel for Appellant has further submitted that insofar as the Section 7 application being in limitation is concerned, the petition was filed on 28.7.2021, which was well within three years of admission made in the balance sheet for the financial year ending 31.3.2019 and therefore, section 7 application is within limitation in accordance with section 18 of the Limitation Act, 1963.

10. The Learned Counsel for Appellant has also submitted that section 5(8) of the IBC covers any amount paid in respect of Share Purchase Agreement and the definition is quite exhaustive. He has claimed that this reason seemingly given by the Adjudicating Authority does not appear to be a valid ground in rejecting the section 7 application. Furthermore, he has argued that whether the said transaction of Rs. 1.25 crores had commercial effect of borrowing was also required to be considered by the Adjudicating Authority to arrive at a conclusion. But since it was not reasoned out in the Impugned Order, the Impugned Order may be set aside,

and the matter remanded for fresh consideration by the Adjudicating Authority.

11. The Learned Counsel for Appellant has cited the judgment of this Tribunal in the matter of **Sanjay D. Kakade vs. HDFC Ventures Trustee Company Ltd. and Others (2023 SCC Online NCLAT 2241)**.

12. In reply, the Learned Counsel for Respondent company has argued that the section 7 application as filed by the Appellant does not make out the existence of any debt or default in its repayment. Furthermore, he has argued that there is no agreement, written or oral, between the parties regarding the debt and therefore, the Learned Adjudicating Authority has given a correct finding that the amount claimed as purported debt is not a financial debt and dismissed the section 7 application. He has further argued that the Respondent has, in its detailed report before the Learned Adjudicating Authority, brought out the correct facts with regard to the transaction and has not made any admission regarding the debt. In this connection, the Learned Counsel has referred to section 3(11), 3(12) and section 5(8) of the IBC to explain that the purported transaction between the Appellate and the Respondent

is not covered under the definition of 'financial debt' nor there is any 'default' in repayment of the debt.

13. Clarifying about the nature of transaction between the Appellate and Respondent in regard to Rs. 1.25 crores, the Learned Counsel for Respondent has stated that the petitioner is the owner of the immovable property being land bearing C.S. 1/118 of Malabar and Cumbala Hill division admeasuring 3042 sq. ft. with a building comprising of tenanted premises. The property is situated at Teen Batti, Walkeshwar Road, Mumbai, very close to the Governor of Mumbai's bungalow near the seafront. The building is capable of redevelopment under the provision of Development Control Regulation 33(7) under which old tenanted buildings are permitted to be redeveloped with incentive FSI and the real value of the property given its development potential is more than Rs. 15 crores.

14. The Learned Counsel for Respondent has further submitted that as per the Scheme of Redevelopment under provision of Development Control Regulation 33(7), an existing tenant could get upto 35% additional area on ownership basis in the new building to be constructed in place of the old building and with a view to encash on this opportunity the petitioners approached Mr. Sabir

Nirban, ex-director and ex-shareholder of Respondent Company to acquire tenancy rights of Flat No. 6 on the third floor of A wing in the building. He has further argued that with a view to acquire the tenancy rights, the Petitioner deposited a sum of Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lakhs only) "as advance" out of the total consideration of Rs. 4,50,00,000/- (Rupees Four Crores Fifty Lakhs only) in December 2014. He has submitted that it is for this reason, the amount of Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lakhs only) is shown as "Advance from Debtors" in the balance sheet of the Respondent Company. He has added that thereafter, the Petitioner made no further payments and hence it is not entitled to make any claim against the Respondent, in view of its own default. He has also argued that the value of the tenanted premises is actually much more than Rs. 4,50,00,000/- as the Petitioner would become entitled to receive an ownership flat with sea view of an area of minimum 950 sq. ft. carpet on Walkeshwar Road, Mumbai and, therefore, the story peddled by the Appellant is a falsehood.

15. The Learned Counsel for Respondent has further submitted that even if, at the highest argument, it is considered that the purported oral agreement existed between Shri Shabir Nirban, ex-Director and ex-shareholder of the Respondent Company and the

Appellant to purchase the entire shareholding of the Respondent in December, 2014, the Appellant has ought to have sought enforcement and specific performance of the same oral agreement within the three years i.e. before the December, 2017. Admittedly, the Appellant requested the Respondent for the first time in June 2018 to execute the Share Purchase Agreement and even if, one was to accept the argument the Appellant regarding the existence of oral agreement regarding execution of Share Purchase agreement is accepted, the said claim is barred by the limitation.

16. The Learned Counsel for Respondent has further argued that the Appellant is using the section 7 petition as a tool for recovery of this time-barred debt which is not a financial debt, and certainly IBC is not meant to recovery of such debt. Therefore, even on this ground, the petition under section 7 was correctly dismissed.

17. We peruse the definitions relating to “debt” and “default” as well as “financial debt” under the IBC. The relevant provisions are reproduced below:-

“3. Definitions. – *In this Code, unless the context otherwise requires, -*

(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

(12) “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 1 [paid] by the debtor or the corporate debtor, as the case may be;

xx xx xx xx

5. Definitions. – In this Part, unless the context otherwise requires, –

(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 dematerialised 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 (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-clause (a) to (h) of this clause;”

18. We now look at the transaction that took place between the Appellant and Shri Shabir Nirban, ex-Director of the Respondent Company of an amount Rs.1.25 crores. The Appellant has stated that in or about December, 2014, Shri Shabir Nirban approached the Appellant and offered to sell him 100% shares held in Respondent Company alongwith all the assets and liabilities of the Respondent, and based on the representations, undertakings and assurances provided by the director of the Respondent Company, the Appellant agreed to pay a lump sum consideration of Rs. 4.50 crores after carrying out valuation of the shares of the Respondent. The appellant has further stated that in accordance with the oral agreement, he paid an advance of Rs. 1.25 crores on December 17, 2014 by means of cheque bearing No. 766042 drawn on HDFC Bank, Tirupati Apartment, B.D. Road, Mumbai Branch. He has further stated that the promised Share Purchase Agreement was not executed regarding which he sent a reminder to the Respondent in January, 2018.

19. Quite clearly the Appellant has not annexed any document relating to the promised Share Purchase Agreement, and only relied on the existence of the transaction of Rs. 1.25 crores in balance sheets of various years as proof of financial debt. Therefore, the Appellant has been able to establish, that the said transaction of Rs. 1.25 crores was made with regard to the future execution of Share Purchase Agreement. The only argument that the Appellant makes in his favour regarding the Share Purchase Agreement is that he sent a reminder in January, 2018 to the Respondent to execute the Share Purchase Agreement. Such a communication made after a passage of over four years, and that too, regarding a promise made in 2014 cannot be taken as a conclusive proof of any oral agreement made in the year 2013 or 2014 for execution of Share Purchase Agreement

20. Moreover, the definition of “financial debt” as enumerated in section 5(8) of the IBC is quite exhaustive and covers ‘debts which were made along with interest disbursed against the consideration for the time value of money’. Clauses (a) to (i) under section 5(8) of the IBC do not state oral purchase agreement explicitly, but clause (f) states that any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing could be considered as a financial

debt. In the present case, neither section 7 petition nor any pleadings or documents submitted by the Appellant, have any document to show that there was a Share Purchase Agreement to be signed nor any covered fact of the borrowing have been evidenced. In such a situation, it is difficult to accept the contention of the Appellant that the transaction of Rs.1.25 cores was in fact repayment of a 'financial debt'.

21. Further, we note from the definition of 'debt' and 'default' as enumerated in section 3(11) and 3(12) of the IBC that the financial debt had to be in the shape of liability and non-payment of such liability in the given time would cause default. In the present situation again, no date of default is made out and so we find that neither the said transaction is in the shape of a financial debt or in commercial effect of borrowing is evidenced and no default is also made out.

22. As argued by the Learned Counsel for Respondent, and also admitted by the Learned Counsel for Appellant, the said transaction of Rs. 1.25 crores was ostensibly against the purchase of the property situated at Teen Batti, Walkeshwar Road, Mumbai, which was capable of redevelopment under the provision of the Development Control Regulation 33(7) and the value of property in

view of this development potential was more than Rs. 15 crores. Therefore, a total consideration as claimed by the Appellant as about Rs.4.5 crores does not appear to constitute a tenable argument as a total amount of Rs. 4.5 crores would not be sufficient consideration for acquisition of the said property.

23. Therefore, and also because it is necessary under the IBC to go into the nature of contract to see if it is a financial and operational debt. We do not consider it necessary to go any further into the nature of the contract, whether written or otherwise between the two parties suffice to say that if transaction was made in December, 2014 against the purchase of a specific property, the Appellant should have asserted its right within the stipulated period of three years being the specific purchase of the contract to try to enforce such contract through IBC does not appear to be correct legal course of action.

24. We also peruse the judgment in the matter of **Sanjay D. Kakade vs. HDFC Ventures Trustee Company Ltd. and Others (supra)** cited by the Learned Counsel of Appellant in support of his contention that the Share Purchase Agreement and any amount transacted vis-a-vis such purported Share Purchase Agreement would constitute a financial debt. We note that in this judgment,

this Tribunal has considered a written Share Subscription and Shareholders Agreement between the shareholders as proof of financial debt. Quite obviously there is a delay in signing of shareholder subscription agreement, which was in consideration in the said appeal. We, therefore, find the ratio laid down in the matter of **Sanjay D. Kakade vs. HDFC Ventures Trustee Company Ltd. and Others (supra)** does not apply in the facts and circumstances of the present case.

25. In view of the detailed discussion as outlined above, we do not think that the Adjudicating Authority has committed any error in dismissing the section 7 application. We conclude that the appeal is devoid of merit and consequently it is dismissed. No order as to costs.

(Justice M. Venugopal)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
2nd February, 2024

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