

Housing Development Finance ... vs Rhc Holding Pvt. Ltd on 10 July, 2019

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NATIONAL COMPANY LAW APPELLANT TRIBUNAL
NEW DELHI
COMPANY APPEAL (AT)(INSOLVENCY) NO.26 OF 2019

(Arising out of Order dated 6.12.2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No.(IB)-738(PB)/2018).

In the matter of:
Housing Development Finance Corporation Ltd,
Ramon House, HT Parekh Marg,
169 Backbay Reclamation, Churchgate,
Mumbai 400020

Also at:
The Capital Court, Olof Palme Marg,
New Delhi-110067

Appellant

Versus

RHC Holding Private Ltd,
Prius Platinum, Ground Floor,
D3, District Center, Saket,
New Delhi-110017

Also at

RHC Holding Pvt Ltd,
G-16, Marina Arcade,
Connaught Circus,
New Delhi-110001

Respondent

Present:

Mr. Amit Singh Chadha, Senior Advocate with Ms Amrita Singh and Ms Srishti Govil, Advocates for Appellant.

Mr. Aditya Dewan, Advocate for Respondent.

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JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J The appellant, Housing Development Finance Corporation Ltd (HDFC Ltd), financial creditor, filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) against M/s RHC Holding Pvt Ltd (Corporate Debtor) which has been rejected by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 6.12.2018 giving rise to the present appeal.

2. The Adjudicating Authority held that the Respondent Company being a non-banking financial institution rendering 'financial service' is out of the purview of the I&B Code.

3. Learned counsel appearing on behalf of the appellant submitted that the Respondent is not a 'financial service provider'. According to the appellant the intent and the purpose of the legislature is to specifically carve out a set of institutions that provide set of identified financial services. The exclusion cannot be beyond what has been contemplated by the I&B Code. The I&B Code is applicable to all entities other than those which are specifically engaged in business of providing "financial services" listed in Section 3(16). Reliance has been placed on the definition of the 'financial service provider' covered under Section 3(17) to suggest that it must be engaged in the business of providing financial service.

4. Learned counsel appearing for the Respondent submitted that the Adjudicating Authority has rightly rejected the application of the appellant since the Respondent is a 'financial service provider' and is excluded from the Company Appeal (AT)(Insolvency) No.26 of 2019 definition of Corporate Person as per Section 3(7) of I&B Code. The reliance has also been placed on this Appellate Tribunal's decision Randhiraj Thakur Vs M/s Jindal Saxena Financial Services, Company Appeal (AT)(Insolvency) No.32 and 50 of 2018 wherein this Appellate Tribunal held that the application filed by financial creditor under Section 7 of the I&B Code is not maintainable against the company which has been granted a certificate of Registration under the Reserve Bank of India Act, 1934 giving status of a "Non-Banking Financial Institution."

5. Learned counsel appearing on behalf of the Appellant referred to reply filed by the respondent wherein it has pleaded:

"It is an admitted position that the Respondent is a holding company, which invests in shares, bonds, debentures, debts or loans in group companies and gives guarantees on behalf of group companies. Being a holding company, the Respondent is a separate entity altogether and hence the services being provided by the Respondent constitutes offering and managing assets consisting of financial products belonging to another person."

Referring the aforesaid pleadings, it was submitted that the respondent itself has admitted that it is not a financial service provider.

6. The Adjudicating Authority has noticed the Certificate of Registration issued by the Reserve Bank of India, Department of Non-Banking Supervision, New Delhi Regional Office in exercise of the powers conferred on Company Appeal (AT)(Insolvency) No.26 of 2019 the Reserve Bank of India by Section 45 IA of the Reserve Bank of India Act, 1934, which is as follows:-

"RESERVE BANK OF INDIA DEPARTMENT OF NON-BANKING SUPERVISION
NEW DELHI REGIONAL OFFICE CERTIFICATE OF REGISTRATION (Not valid for
accepting Public Deposits) No.N-14.03142 In exercise of the powers conferred on the
Reserve Bank of India by Section 45 IA of the Reserve Bank of India Act, 1934.

RHC HOLDING PRIVATE LIMITED (FORMERLY SOLARIES FINANCE PRIVATE
LIMITED) Is hereby granted Certificate of Registration To commence/carry on the
business of non-banking financial without accepting public deposits subject to the
conditions given on the reverse. Given under my hand at this 3rd day of April, Two
thousand Eight.

New Delhi Sd/-

General Manager"

A bare perusal of the aforesaid Certificate issued by the Reserve Bank of India clearly shows that the Respondent company has been registered as a 'non- banking financial company' but has not been allowed to accept public deposit.

7. Section 3(8) defines 'corporate debtor' means a corporate person who Company Appeal (AT)(Insolvency) No.26 of 2019 owes a debt to any person. Section 3(7) defines 'corporate person' which means:-

Section 3-Definitions-In this Code, unless the context otherwise requires,-

"(7) "corporate person" means a company as defined in clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-

section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider."

From the aforesaid provisions it is clear that 'corporate person' donot include any Financial Service Provider.

8. "Financial Service providers" is defined in Section 3(17) means:-

Section 3-Definitions- In this Code, unless the context otherwise requires,-

"(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;"

9. "Financial service" has been defined under Section 3(16) as follows:-

"Section 3-Definitions- In this Code, unless the context otherwise requires,-

Company Appeal (AT)(Insolvency) No.26 of 2019 (16) financial service" includes any of the following services, namely-

- (a) Accepting of deposits;
- (b) Safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
- (c) Effecting contracts of insurance;
- (d) Offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
- (e) Rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of-
 - (i) Buying, selling or subscribing to, a financial product;
 - (ii) Availing a financial service; or
 - (iii) Exercising any right associated with a financial product or financial service;
- (f) Establishing or operating an investment scheme;
- (g) Maintaining or transferring records of ownership of a financial product;
- (h) Underwriting the issuance or subscription of a financial product; or
- (i) Selling, providing, or issuing stored value or payment instruments or providing payment services;"

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10. The definition of "financial service" if read with definition of "financial service provider", it is clear that it is not necessary that the "financial service providers" must accept the deposits. If any of the activity as defined in Section 3(16) of the I&B Code such as safeguarding and administering

assets consisting of financial products belonging to another person, or agreeing to do so; effecting contracts of insurance; Offering, managing or agreeing to manage assets consisting of financial products belonging to another person; rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of- buying, selling or subscribing to, a financial product; availing a financial service etc., they also come within the definition of "financial service provider".

11. Learned counsel appearing on behalf of the appellant submitted that each of the 9 financial services as shown in Section 3(16) shows that the Respondent is not rendering any of the aforesaid services; the details of the chart given by counsel for appellant is as follows:

Clause of Section Examples of Whether 3(16) financial services applicable to covered under this the clause Respondent a. Accepting of NBFCs accepting NO deposits deposits in terms of authorisation from RBI b. Safeguarding and Debenture Trustees No administering assets consisting of financial products, belonging to another person, or agreeing to do so Company Appeal (AT)(Insolvency) No.26 of 2019 c. Effecting Insurance No contracts of Companies as per insurance IRDA d. Offering, Asset Management No managing or Companies and agreeing to Depository manage assets Participants consisting of financial products belonging to another person e. Rendering or Stock Brokers, SEBI No agreeing, for registered Merchant consideration, to Bankers, SEBI render advice on registered Venture or soliciting for Capitalists the purposes of

(i) Buying, selling or subscribing to a financial product;

- (ii) Availing a financial service, or
- (iii) Exercising any right associated with financial product or financial services;
- f. Establishing or SEBI approved No operating an investment schemes such as REIT investment scheme
- g. Maintaining or Registrar and No transferring records or Transfer Agents ownership of a financial product
- h. Underwriting the Underwriters No issuance or subscription of a financial product

Company Appeal (AT)(Insolvency) No.26 of 2019 i. Selling providing Payment Banks such No. or issuing stored as PAYTM value or payment instruments or providing payment services

12. Learned counsel for the appellant further submits that the Respondent has pleaded to claim "financial service provider" as follows:-

"It is the case of the Respondent, as pleaded in paragraph 8 of their Reply to Section 7 Petition (@Pg 398 of Appeal Paper Book) that they are a 'financial service provider' because "That the Respondent is primarily in the business of investment in shares, bonds, debentures, debts or loans in group companies, money market instruments including money market mutual funds and giving guarantees on behalf of group companies and is hence providing 'financial services'. The Respondent is, therefore, a 'financial service provider' and being a 'financial service provider' cannot be termed as a 'corporate person'."

"It is an admitted position that the Respondent is a holding company, which invests in shares, bonds, debentures, debts or loans in group companies and gives guarantees on behalf of group companies. Being a holding company, the Respondent is a separate entity altogether and hence the services being provided by the Respondent constitutes offering and managing assets consisting of financial products belonging to another person."

Company Appeal (AT)(Insolvency) No.26 of 2019 Therefore, according to appellant the Respondent is investing in shares, bonds, debentures etc., none of them constitute providing and rendering financial services.

13. The definition of 'financial services' as defined in Section 3(16) of I&B Code is not limited to the 9 activities as shown at Clause (a) to (i) of Section 3(16). The aforesaid Clauses (a) to (i) are inclusive which means there are other services means there are other services which come within the meaning of "financial services".

14. The Registration of Certificate issue by RBI shows that it has granted certificate to commence/carry on business of "non-banking financial services". However, the Respondent has not been allowed to accept the public deposit and such certificate is condition to other conditions as provided in the back of the Certificate.

15. Chapter IIIB of The Reserve Bank of India Act, 1934 relates to "Provisions Relating to Non-Banking Institutions Receiving Deposits and Financial Institutions". It is not applicable to State Bank or a banking company as defined in Section 5 of the Banking Regulation Act, 1949 or a corresponding new bank as defined in clause (da) of Section 5 of the Act or Regional Rural Bank or a cooperative bank or a primary agricultural credit society or a primary credit society.

16. Section 45-I(a) defines-

"45-I Definition-In this Chapter, unless the context otherwise requires-

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(a) business of a non-banking financial institution' means carrying on the business of a financial institution referred to in clause (c) and includes business of a non-banking financial company referred to in clause (f) Xxx

17. Section 45-I(c) defines "financial institutions" means any non-banking institution which carries on as its business or part of its business any of the following activities-namely-

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own;

(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature;

(iii) Letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in Clause © of Section 2 of the Hire Purchase Act, 1972 (26 of 1972).

(iv) the carrying of any class of insurance business.

(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being in force in any State, or any business, which is similar thereto;

(vi) collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lump sum or otherwise, by way of Company Appeal (AT)(Insolvency) No.26 of 2019 subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies in any other way, to persons from whom monies are collected or to any other person, But does not include any institution, which carries on as its principal business,-

(a) Agricultural operations; or (aa) Industrial activity; or

(b) The purchase, or sale of any goods (other than securities) or the providing of any services; or

(c) The purchase, construction or sale of immovable property, so, however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales or immovable property by other persons.

Explanation-For the purposes of this clause, "industrial activity"

means any activity specified in sub-section (i) to (xviii) of Clause © of Section 2 of the Industrial Development Bank of India Act, 1964.

18. Section 45-I(f) defines 'non-banking financial company-

Section 45-I-Definition-In this chapter, unless the context otherwise requires

(j) "non-banking" financial company" means-

(i) A financial institution which is a company; Company Appeal (AT)(Insolvency) No.26 of 2019

(ii) A non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme of arrangement or in any other manner, or lending in any manner.

(iii) Such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

19. Therefore, it is clear that the Respondent, a non-banking financial institution is carrying on business of financial institution and thereby it being financial service provider do not come within the meaning of Corporate Person/Corporate Debtor.

20. So far as the allegation that the Respondent, Non-Banking Finance Company, is taking deposits from others in violation of conditions imposed by the Reserve Bank of India, such issue cannot be decided by the Adjudicating Authority while considering an Application under Section 7 or 9 of the I&B Code. Only on such ground the Adjudicating Authority cannot admit or reject an application under Section 7 or 9 of the I&B Code. If the terms and conditions imposed by Reserve Bank of India or there is violation of any of the provision of Reserve Bank of India, one may bring the same to the notice of Reserve Bank of India and not before the Adjudicating Authority. Company Appeal (AT)(Insolvency) No.26 of 2019

21. For the reasons aforesaid, we hold that the application under Section 7 of I&B Code is not maintainable. Therefore, the Adjudicating Authority rightly rejected the application. We find no merit in the appeal, it is accordingly dismissed. No costs.

(Justice S.J. Mukhopadhaya) Chairperson (Justice A.I.S.Cheema) Member (Judicial) Dated: 10th July, 2019 New Delhi bm Company Appeal (AT)(Insolvency) No.26 of 2019