

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 46 of 2023

IN THE MATTER OF:

Ashoka Hi-Tech Builders Pvt. Ltd.

...Appellant

Versus

Sanjay Kundra & Anr.

...Respondents

Present:

For Appellant: Appearance not marked.

For Respondent:

ORDER

18.01.2023: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed against the Order dated 03rd November, 2022 by which on an Application filed by the Home-Buyers, the Appellant has been removed from the Committee of Creditors.

3. Appellant's case is that Appellant was a land owner on which the development project was to be constructed and he had filed the claim before the Resolution Professional which was admitted and he was inducted in the Committee of Creditors however subsequently on an Application filed by the Home-Buyers, impugned Order has been passed removing the Appellant from the Committee of Creditors holding that he is not the financial creditor.

4. Learned Counsel for the Appellant challenging the Order referred to the Development Agreement between the parties that is filed as Annexure A-6. The

development agreement which was entered into between the parties on 01st April, 2009 clearly indicates that Appellant is an owner of 11.40 acres agriculture land on which development agreement, construction to be executed. The agreement further states that corporate debtor was to carry on the construction and the out of total saleable construction, 32% will be of the Appellant that is the first party and remaining 68% shall be owned by the second party, the Corporate Debtor.

5. Looking into the terms and conditions of the development agreement, the Adjudicating Authority has come to the conclusion that the Appellant was not a financial creditor since no amount was disbursed for the time value of money on the basis of which the Appellant can be held to be financial creditor.

6. The Adjudicating Authority has relied on the Judgement of this Tribunal in “Namdeo Ramchandra Patil and Ors. Vs. Vishal Ghisulal Jain” Company Appeal (AT) Ins. No. 821 and 930 of 2021 decided on 19.09.2022. This tribunal in the aforesaid case had occasion to consider the similar development agreement and in paragraph 13, 14 and 15, following has been laid down:

“13. When we look into the provision of Section 5(8)(f) Explanation (i) and (ii), it is clear that pre-condition for a debt being a Financial Debt is disbursement against the time value of money and when any amount is raised from an allotment under real estate such transaction is also covered under Section 5(8)(f). The pre-condition for application of Explanation (i) of Section 5(8)(f) is raising of an amount from allottee. The present is not a case where an amount has been raised from the Appellants – the Landowners. The submission of the Appellant that they are allottees within

the meaning of Section 2(d) of RERA Act does not make their transaction as a Financial Debt within the meaning of Section 5(8)(f). It is relevant to notice that RERA Act itself has noticed the definition of ‘Promoter’ under Section 2(zk). When we look in the real nature of the transaction entered between the Corporate Debtor and the Appellants – Landowners, the landowners were entitled to share the constructed area in the ratio of 45:55 and allotment of flats and commercial units in lieu of their entitlement under the Development Agreement does not make the transaction of allotment a Financial Debt within the meaning of Section 5(8)(f). The Adjudicating Authority in the impugned order has rightly relied on the judgment of Hon’ble Supreme Court in “Pioneer Urban Land and Infrastructure Ltd. vs. Union of India, (2019) 8 SCC 416”, where the term ‘disbursal’ was explained in Para 70 of judgment and following has been observed:-

“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 ed.) to mean:

“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.””

14. We may also notice judgment of the Hon’ble Supreme Court in “Anuj Jain, Interim Resolution Professional for

Jaypee Infratech Limited vs. Axis Bank Ltd. & Ors., (2020) 8 SCC 401”, where Hon’ble Supreme Court while examining the definition under Section 5(8) of the I&B Code noticed the essentials for Financial Debt. In Para 46, the Hon’ble Supreme Court has again emphasised that essential element is disbursement against time value of the money. Para 46 of the judgment is as follows:-

“46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of ‘disbursement’ against ‘the consideration for the time

value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub- clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element 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 may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

15. When we look into the facts of the present case and transaction entered by the Appellants – Landowners with the Corporate Debtor, we do not find any error in the decision of the Adjudicating Authority holding the Appellants-Landowners as not Financial Creditors. The Company Appeal (AT) (Ins.) No. 821 of 2021, thus, deserved to be dismissed."

7. We are of the view that Judgement of this Tribunal in Namdeo Ramchandra Patil & Ors. (supra) fully covers the issues and Adjudicating Authority has rightly referred to the Judgement holding that Appellant is not a financial creditor. The terms and conditions of development agreement entered

between the appellant and the corporate debtor, Annexure 6 makes it clear that the appellant was a collaborator in the development agreement and not a financial creditor. There was no disbursement for time value of money by the appellant within meaning of Section 5(8) of the IBC.

We do not find any error in the order impugned. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Basant/nn