

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 130
(IB)-652(PB)/2019

IN THE MATTER OF:

M/s. Jones Lang Lasalle Building Operations Pvt Ltd. ... Applicant/Petitioner
Vs
M/s. Celebration City Projects Pvt Ltd. ... Respondent

Order under Section 9 of Insolvency & Bankruptcy Code, 2016, CIRP.

Order delivered on 26.09.2022

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH KUMAR SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant : Mr. Abhishek Anand, Mr. Viplav Acharya, Advs.
IA-3196/2022, IA-3739/2022 -Dr. Farrukh Khan and
Ridhima Goyal, Advs.
Mr. Vivek Kohli, Senior Advocate with Ms. Yeshi
Rinchhen and Ms. Nikita Maheshwari, Advocates
Ms. Ridhima Goyal, Mr. Anjali Prabhakar, Advs.
Mr. Abhishek Anand, Mr. Viplav Acharya, Mr. Karan
Kohli, Advs.
Mr. Namit Suri, Ms. Surabhi Sinha, Mr. Arjun Kaushal,
Advs. in IA 2158/2022
For Respondent : Mr. P. Nagesh Sr. Adv. with Mr. Akshay Sharma & Mr.
Shivam Wadhwa, Advs. for R3 to 5. 4205, 2240/2022
Mr. Sanjeev Kumar Dubey, Sr. Adv. Mr. Abhishek
Chaudhary, Mr. Sanchit Aggarwal, Ms. Niharika Dubey,
Advs.
For the RP : Mr. Pankaj Agarwal, Mr. Shashwat Srivastava, Advs.

ORDER

IA-2158/2022

The reliefs sought by the applicant is a follows:

"1. Direct the Respondent to recognize the status of the Applicant as a Financial Creditor in the class of allottees;

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2. Stay on convening the next CoC meeting until the status of the Applicant is finally adjudicated by this Hon'ble Tribunal;
3. Direct the Respondent to include the information about the claim of the Applicant and reflect the pendency of the present case in the Information Memorandum to be issued by the Respondent;
4. Direct the Respondent to allow the participation of the Applicant in the CoC meetings;
5. Any other or further relief as deemed fit and proper in the facts and circumstances of this case may also be granted in the interest of Justice."

This is an application filed by the real estate allottee to the Corporate Debtor, whose claim was rejected by the Resolution Professional on the ground that she ceases to be a real estate allottee on account of an arbitral award dated 25.10.2018 passed in her favor. The operative portion of the award\$ reads as follows:

"This has been reiterated by the Apex Court time and again and lastly in 2018 5SSC442:2018 in the judgment delivered in Fortune (now known as M/s Hitcon Infrastructure) and Another Vs. Trevor D'Lima and Ors. it had inter alia held as:

"The general principle for the assessment of damages is compensatory i.e. that the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed"

The aforesaid proposition remains to hold the field and has been applied consistently. This rule is more qualified when it comes to the real estate sector. If the seller wants to, limit their liability for breach of contract under the aforesaid rule, they have to portray that they have performed their obligation in a prudent manner. It may be noted that the onus is on the seller to show his best efforts and bona fides in discharging the obligation. It may be noted that even in the absence of fraud, mere unwillingness to carry

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out the due could constitute bad faith sufficient for the purchaser to claim damages."

The defence of the respondent has already been struck off. He has nothing to say in the matter.

The claimant has been able to prove his case. The claimant is accordingly entitled to following reliefs:

(a) The respondent is directed to deliver the possession of the said unit to the claimant (5000 sq. ft. of commercial space in the project at Red Mall) at Nehru Vikas Minar Commercial Project, GT Road Ghaziabad U.P. to the claimant within a period of two months from today. Alongwith the allotted unit the respondent is also liable to pay a penalty of Rs 3,58,750 per month on the delayed period i.e. w.e.f. 22.9.2009 upto the delivery of the said unit which amount up to 21.10.2018 is calculated Rs.3,91,03,750. The claimant is also entitled to interest on the afore noted amount which calculated for the afore noted period @ 9% per annum calculated to Rs.1,61,30,297 totalling a sum of Rs.5,52,34,047 (Rupees Five crore fifty two lac thirty eight thousand forty seven only),

b) In the alternate if prayer (a) is not adhered to by the respondent and the said unit is not handed over by the respondent to the claimant within the said period of two months the claimant will be entitled to the market value of the said unit which is calculated @ Rs.16,000 per sq. ft. By multiplying 5000 sq ft. @ Rs.16,000 per sq. ft. the market value of the unit is assessed at Rs.8,00,00,000 (Rupees eight crore only). This amount shall be paid by the respondent to the claimant within two months failing which the said amount shall carry interest at 12% per annum till the realization. Alongwith the respondent is also liable to pay a penalty of Rs.3,58,750 per month on the delayed period i.e. w.e.f. 22.9.2009 upto the delivery of the said unit which amount up to 21.10.2018 is calculated @ Rs.3,91,03,750. The claimant is also entitled to interest on the afore noted amount which calculated for the afore noted period @ 9% per annum calculated to Rs.1,61,30,297 totalling a sum of Rs.5,52,34,047 (Rupees

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Five crore fifty two lac thirty eight thousand forty seven only).

There is a clause in the award that the applicant in the award would be entitled to enforce the allotment of the unit within 60 days or in default to secure the same by way of a money decree.

On this premise, the claim was made before the Resolution Professional by the present applicant stating that she is a real estate allottee and therefore her claim should be treated in that class. However, this was declined by the Resolution Professional. In the alternative, the Resolution Professional had informed the Petitioner to file it as a financial creditor on the premise that the award was in the form of a decree and therefore she will be treated as a financial creditor.

The Ld. counsel for the petitioner, however, pleaded that the original claim of the petitioner as against the Corporate Debtor was in the nature of the real estate allottee, and on the failure of the Corporate Debtor to give the unit, she invoke the arbitral proceeding resulting in the award.

By the very nature of the original allotment, it could be seen that the applicant/petitioner is only a real estate allottee. The issue of decree should not stand in the way of the RP in admitting the claim of a real estate allottee in a class. To address this contention the Ld. Counsel has relied upon the decision of NCLAT in the matter *Mukul Agarwal Vs. Royale Resinex Private Limited in Company Appeal (AT) (Insolvency) No. 777 of 2020* and more particularly in para 11, 12, 13 and 14, which reads as follows.

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“11. Thus, the claim of the Operational Creditor was in respect of provisions of goods, that is, supply of poly propylene. The mere fact that when the Corporate Debtor did not pay the amount, suit for recovery was filed in the year 2016 by the Operational Creditor, which was also Decreed on 08.09.2016, does not in any manner effect the transaction out of which the amount fell due. The fact that amount was adjudicated and a Decree was passed, in no manner take away the nature of ‘operational debt’. We may notice that under Part-V of Form-3, in Item No.3 following has been mentioned:”

“3	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)	Judgement and Decree dated 08.09.2016 passed by Sh. Prashant Kumar, Ld., ADJ, Rohini Court in Civil Suit No. 149 of 2015 (New No. 575402 of 2016) titled M/s Royale Resinex Private Limited Vs. Greatech Telecom Technologies Private Limited Copy of Judgment and Decree date 08.09.2016 is annexed herewith and marked as ANNEXURE A-5”
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12. When the Form-3 itself contemplates about giving details of particular of an order of Court, the Decree of the Civil Court in favour of the Operational Creditor, it in no manner affects the maintainability of the Application filed by the Operational Creditor under Section 9 of the Code.

We, thus are fully satisfied that the Application filed by Respondent under Section 9 was fully maintainable and the claim of the Respondent was a claim of ‘operational debt’ and we do not find any merit in the submission of the learned Counsel for the Appellant that there was no ‘operational debt’.

13. We may also notice the judgments of this Tribunal relied by learned Counsel for the Appellant in support of his submission that Application under Section 9 filed by Respondent was not maintainable. Learned Counsel for the Appellant has relief on judgment of this Tribunal in “International Asset Reconstruction Co. pvt. Ltd. V. Jayant

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Vitamins Ltd. – Company Appeal (AT) (Ins.) No. 1472 of 2019”. The above judgment was a case where Application filed by Operational Creditor was dismissed as barred by time. Paragraph 2 of the Judgment is as follows:

“2. The Corporate Debtor – ‘Jayant Vitamins Ltd.’ Committed default on 13th September, 1996. Thereafter, Appellant filed suit for recovery which was decreed on 17th October, 2005 and a case for execution is pending. Therefore, we find that the application under Section 7 was barred by limitation.”

The above judgment in no manner help the Appellant in the facts of the present case.

14. *The next judgment relief by learned Counsel for the Appellant is “HDFC Bank Ltd. V. Bhagwan Das Auto Finance Ltd.- Company Appeal (AT) (Ins.) No. 1329 of 2019”, which was a case filed under Section 7 by the HDFC Bank. In the above case, this Tribunal came to the conclusion that Application was filed with malicious intent and on the said finding, the Appeal was dismissed. In the present case, the Application filed by Respondent under Section 9 cannot be said to be filed with malicious intent, when inspite of Decreee passed by the Civil Court in favour of the Respondent, no payments were made to it. The Operational Creditor has every right to invoke the provision of Code. The mere fact that Execution Application filed by Operational Creditor is pending in Civil Court was no impediment for initiating proceedings under the Code.*

In this case, the Hon'ble NCLAT held that a decree of the civil court will not alter the basic nature of the transaction. The transaction prima facie has to be considered for the purpose of adjudicating the claim and the decree of the Court is a measure of debt and that would be the manner in which it should be heard.

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In view of the above position of law, we are inclined to hold that the present petitioner should be treated as the real estate allottee/creditor in class and dealt with accordingly.

Accordingly, the IA-2158/2022 is **allowed and stands disposed of.**

IA-3739/2022

Notice of the application be issued to the respondent/non-applicant returnable on 26.10.2022.

IA-4383/2022

This is an application for the following reliefs:

“a) appoint Mr. Pradeep Kumar Ray having IP No. IBBI/IPA-002/IPN01100/2021-2022/13648 as authorized representative of Creditor in class in place of Mr. Anuj Maheshwari having registration No. IBBI/IPA01/IP00577/2017-18/11018 to represent their interest wisely.

b) Pass any other or further order of any nature, direction as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case.”

In view of the submissions made by the Ld. Counsel and relying upon Para 6 and 7, which read as follows:

6. That from 4.00 P.M. 6th September, 2022 to 3.00 P.M. 8th September, 2022 voting lines were opened up for casting votes for selection and appointment of A.R. out of 273 total number of Real Estate Allottees 177 casted their vote.

7. That Mr. Pradeep Kumar Ray, Insolvency Professional having Registration. No: IBBI/IPA-002/IP-N01100/2021-2022/13648 received 129 votes representing 72.88 % of

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total vote in his favour out 177 total votes casted. Copy of Result of Voting is annexed herewith as ANNEXURE C.

In view of the contention raised by the applicant, we are inclined to appoint Mr. Pradeep Kumar Ray having registration No. No. IBBI/IPA-002/IPN01100/2021-2022/13648 as authorized representative of Creditor in class in place of Mr. Anuj Maheshwari having registration No. IBBI/IPA01/IP00577/2017-18/11018.

Application **allowed** and **disposed of**.

IA-4205/2022, IA-2956/2022, IA-2889/2022, IA-2240/2022, IA-3196/2022, IA-3227/2022, IA-3453/2022, A-3720/2022, A-3748/2022, IA-3686/2022, IA-4127/2022.

List the matter along with all other pending applications for a physical hearing **on 19.10.2022**.

Let the pleadings be completed and hard copies of the pleadings be filed before the next date of hearing.


(RAMALINGAM SUDHAKAR)
PRESIDENT


(AVINASH KUMAR SRIVASTAVA)
MEMBER (TECHNICAL)

DIPAK- 26.09.2022