

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(INS) NO.425/2021

(Arising out of judgement and order dated 06.11.2020 passed in IA-3665/2020 in CP No.IB-1771(ND)/2016 by National Company Law Tribunal, New Delhi Court III)

In the matter of:

Sanjay Jain,
A-604, Antriksh Nature,
Plot No.A-110,
Near Community Centre,
Sector 52,
Noida 201301

Appellant

Vs

Mr. Nilesh Sharma,
Resolution Professional
Dream Procon Pvt Ltd,
N-101/B, Munshi Lal Building,
Connaught Circus,
New Delhi-110001

Respondent

For Appellant: Mr. Pawan Shree Agrawal, Ms Shubhangi Negi, Ms Soumya Dhankani, Advocates.

For Respondent: Mr. Alok Dhir, Ms Varsha Banerjee, Ms Anushka Sarkar, Advocates.

JUDGEMENT
(2nd August, 2023)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

The present appeal has been preferred under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to

as IBC) against an order dated 06.11.2020 passed by Learned National Company Law Appellate Tribunal, New Delhi Court III (hereinafter referred to as Adjudicating Authority). By the said order learned Adjudicating Authority has rejected the IA No.3665/2020 which was filed under Section 60(5) of IBC. The appellant before the Adjudicating Authority had claimed Rs.5.20 crores. However, the RP had reduced the claim for Rs.5.20 crores to Rs.30 lakhs.

2. The short fact of the case is that by order dated 6.9.2019, 15.10.2019 the Adjudicating Authority initiated Corporate Insolvency Resolution Process (hereinafter referred to as CIRP) in a case bearing No.IB-1771/ND/2018 against the company namely Dream Procon Pvt Ltd. (hereinafter referred to as Corporate Debtor) The case was initiated on the application filed by the financial creditor. It is the case of the appellant that after the initiation of the CIRP public announcement was made by the IRP whereafter the appellant submitted his claim to the IRP for unit bearing No.D2-0001, D2-0701, A1-2502, B1-501, B1-502, D2-302, A1-1202, A1-2503, A1-2505 and A1-2506 at the Project. Initially the said claim was acknowledged by the IRP. It is further case of the appellant that the appellant's name appeared in the list of

creditors. However, at later stage on 21.3.2020 when list of creditors were published in the same list the RP transferred the claim from the category of admitted claim to the claim under review. On the same date the RP sought clarification from the appellant which, according to the appellant, was clarified. Since despite various follow up action by the appellant the RP failed to change the status of the claim of the appellant, he filed an application vide IA 3665/2020 in CP No. IB/1771(ND)/2018 under Section 60(5) of the IBC. However, by the impugned order Learned Adjudicating Authority has rejected the same. At this juncture we feel it appropriate to reproduce the impugned order dated 06.11.2020 as follows:

1. The Counsel for the Applicant is present. The Ld. Counsel for the RP is present. Heard the final submissions made by the Learned Counsels on behalf of the rival parties.

2. The challenge under the Application is with regard to the reduction of the claim of the Applicant from Rs. 5.20 Crores (Rupees Five Crores Twenty Lakhs) to Rs. 30 Lakhs (Rupees Thirty Lakhs). The Counsel for the Applicant submitted that the claim of the Applicant is based on the Letters) of Allotment/MoUs dated 07.06.2017, 01.10.2017, 01.7.2018 and 01.10.2018 (Two MoUs). In other words, five MoUs were entered into between the Applicant and the CD.

3. In relation to MOU dated 01.10.2017, two units were allotted and one more unit was allotted in relation to the MoU dated 01.10.2018 to the Applicant as one set of arrangement. The second set of arrangement is with regard to MoUs dated 07.06.2017 and 01.07.2018 where under four units were allotted by the CD to the applicant. The third set of arrangement is with regard to MoU dated 01.10.2018 where under three units were allotted in favour of the Applicant by the CD. In total ten units

were allotted to the applicant as collateral security against principal sum, which was to be paid by the CD to the applicant.

4. Based on these letters) of allotment/MoUs, the claim to the tune of Rs.5.20 Crores (Rupees Five Crore Twenty Lakhs) were filed on 28th Oct, 2019 by the applicant before the IRP and the claim was admitted by the IRP on 6th Nov.2019, but at that point of time the IP had no advantage of having record of the CD. However, when the RP has been appointed, the claim was reviewed based on the available record of the CD and restricted to Rs.30 Lakhs only (Rupees Thirty Lakhs Only), which reflects from stake holders list dated 07.09.2020.

5. It reflects from the record of the CD that on 06.06.2017, an amount of Rs.5.00 lakhs (Rupees Five Lakhs) and on 26.09.2017 an amount of Rs.25.00 Lakhs (Rupees Twenty-Five Lakhs) were paid by the Applicant to the CD. The CD issued cheques to the Applicant with the stipulation that if the principal amount is not paid within one year then the cheques would be presented. As per the submissions of the Counsel for the Applicant, the cheques were presented and dishonored. The counsel for the applicant has pleaded that as per the Allotment Letter(s)/ MoUs the amounts) towards Consultancy and liaising services rendered by the applicant to the CD and its group companies was adjusted. In short, the counsel for the applicant heavily relied upon the Allotment Letter(s) / MoUs and cheques issued to prove the claim amounting to Rs 5.20 Crores (Rupees Five Crore Twenty Lakhs).

6, The Counsel for the IP submitted that on 21.03.2020 a communication was sent to the Applicant for seeking clarifications and providing the documentary evidence to verify his claim, to which a reply has been received on 27.03.2020 whereby it has been stated that towards the Consultancy and liaising services, the invoices were raised and the original invoice were given to the CD. However, no record was produced in order to establish the fact about any agreement between the Applicant and the CD with regard to the Consultancy and liaising services. It is further brought to our notice by the Counsel for the RP that when invoices are raised payments towards Service Tax is to be made and duplicates are retained. But applicant failed to provide the duplicate and proof of payment of Service Tax. It is further submitted by the counsel for the RP that the invoices are stated to have been raised at the instance of the Petitioner and he cannot deny the existence of the duplicate invoices and the payment of Service Tax.

7. During the course of hearing, this Authority has raised the query as to whether the Petitioner is a proprietor of any firm through which the services of Consultancy and liaising were provided to the CD and its group companies. The answer given by the Ld. Counsel for the Petitioner was in negative, he stated that the Applicant is an individual.

8. It is noted that the verification of claim carried out by the RP about the claim of the Applicant on the basis of the record of the CD is correct, as the payment made by the Applicant to the CD is Rs.30 Lakhs only (Rupees Thirty Lakhs Only), which is mentioned in preceding paragraphs. The Allotment Letter(s)/MOUs, and cheques under which 10 units seem to have been allotted to the Applicant have no basis at all. One cannot imagine that there can be a claim of Rs 5.20 Crores (Rupees Five Crore Twenty Lakhs) in lieu of the amount of Rs.30 Lakhs (Rupees Thirty Lakhs) advanced by the Petitioner to the CD. It is further noted that the allotment letters) /MOUs provide for 27% interest per annum on the principal sum for which there does not appear any agreement.

The whole process of these Allotment Letters)/MOUs appears to be fraud and such transactions have no legal backing, as no admissible documentary evidence is placed on record to prove the transactions. Even, there is no record of duplicate invoices and payment of Service Tax. Therefore, the Application is devoid of merits and is rejected.

9. The order is dictated and pronounced through virtual hearings.

3. The appellant in the Memo of Appeal before this Tribunal has claimed that he had provided Corporate Debtor with liaison and consultancy service for various collective services with different departments for which invoices were raised by the appellant on the Corporate Debtor. Upon payment having become due the Corporate Debtor had cited lack of funds as the reason for failure to repay. The appellant herein thereafter was offered flats in lieu of payment due and payable with the condition that in case CD was unable to pay the appellant outstanding amount due to it within a period of one year the said units would be allotted in the name of the appellant. It has further been claimed that in terms

of arrangement the CD entered into various Memorandum of Understanding and builder buyer agreements with the appellant. In sum and substance it has been claimed that on the basis of MOUs the units/flats were allotted to the appellant. The appellant had basically raised his claim on the basis of MOU/agreements and also allotment letters on the strength as if he had rendered services of liaison to the CD.

4. Mr. Pawan Shree Agrawal, learned counsel for the appellant at the time of argument has taken us to dates and events which has been mentioned at Page 7 of the Memorandum of Appeal to show the sequence as to how initially his claim was admitted by IRP. However, subsequently even though the claim was admitted, the said claim of the appellant was put under the category of claim for verification. Learned counsel for the Appellant to strengthen his aforesaid submissions has also taken us to running page 226, 227 and 230 to show that in the modified list of creditors (financial debt) home buyers dated 19.3.2020 of Dream Procon Pvt Ltd (CD) units/flats in respect of appellant were incorporated. According to the learned counsel for the appellant the agreements/MOUs were sufficient to accept the claim of the appellant. However, ignoring those things the RP has reduced the claim from Rs.5.20 crores to

Rs.30 lakhs which has incorrectly been not approved by the Adjudicating Authority and erroneously the application filed under Section 60(5) was rejected. Learned counsel for the appellant has also drawn our attention to some of the MOUs particularly running page 68, 78, 127 and other copy of MOUs which have been placed alongwith the Memo of Appeal in Volume I. He has further shown running page 74 Volume I of Memo of Appeal i.e. copy of receipt dated 1.10.2017 which reflects as if Rs. 95 lakhs was received by the CD from the appellant towards payment against Unit No.D2-0001 and D2-0701 of 2295 sq ft each in Victory Ace situated at Plot No.GH-02, Sector -143B Expressway, Gautam Budh Nagar, Noida. However, at the time of argument it was admitted by the learned counsel for appellant that since actual payment was not received no GST was paid by the appellant and accordingly in the receipt the GST was not reflected. He has also shown running page 46 i.e. allotment letter in respect of Flat D2-0001.

5. Besides making oral submissions in the present appeal the appellant has filed rejoinder to the reply/counter affidavit filed on behalf of Respondent No.1. On behalf of appellant notes of written submission has also been filed by the appellant which is reproduced hereinbelow:

1. That the facts of the present case are that the appellant herein had provided the Corporate Debtor with liaison and consultancy services with different departments for which invoices had been raised by the Appellant on the Corporate Debtor.

(Invoices are at pages 306-308)

2. That it is undisputed that Corporate Debtor and the Appellant entered into various Memorandums of Understanding and Builder Buyer Agreements for allotting unit numbers D2-0001, D2-0701, A12502, B1-501, B1-502, D2-302, A1-1202, A1- 2503, A1-2505 & A1-2506 in their project Victory Ace situated at Plot No. GH-02, Sector 143, Noida in favor of the Appellant.

a) Allotment letter for Unit D2-0001 Pages 45-58, Allotment letter for D2-0701 at Pages 59-66, 1st MOU dated 01.10.2017 at Pages 68-75, 2nd MOU dated 01.10.2018 due to further default of payment at pages 76-87. Kindly note the cheques for payment are at Pages 84-87.

b) Allotment letter for Unit B1-0501 Pages 100-113, Allotment letter for B1-0502 at Pages 114-125, MOU dated 07.06.2017 at Pages 127-134, MOU dated 01.07.2018 due to further default of payment at pages 135-144, 149, 153. Kindly note the cheques for payment are at Pages 141-144, 149, 153.

c) Allotment letter for Unit A1-2503 Pages 160-173, Allotment letter for A1-2505 at Pages 174-177, Allotment letter for A1-2506 at Pages 178-181, MOU dated 01.10.2018 at Pages 183-194. Kindly note the cheques for payment are at Pages 191-194.

3. That the Corporate Debtor in the terms of the MoU had assured the Appellant that the abovementioned flats shall be allotted in the favor of the Appellant in case the Corporate Debtor failed to pay the outstanding amount due and payable by it to the Appellant after a period of one year. The relevant clause is quoted:

“1. That the company has taken the services of Mr. Sanjay Jain for consultancy and liasoning for various projects for which the company has to pay an amount of Rs. 95,00,000/- (Rs. Ninety-Five Lakhs only). Balance amount Rs. 25,00,000/- is being paid by cheque as details given below:-

.....

4. In order to assure the second party and to secure the interest of the Second party, the following postdated cheque for Rs. 1,20,00,000/- (Rupees One Crore twenty lakh only) has been issued by the first party.

.....”

4. That the Corporate Debtor had also issued post-dated cheques for the interest amount in favor of the Appellant along with cheques of the principal amount. The said cheques were dishonored and hence the amount due was not settled. The corporate Debtor also availed additional payment from the Appellant in order to bridge the difference between the actual price of the units and the outstanding amount due and payable.

5. That an order dated 15.10.2019 was passed by the Hon'ble NCLT in (IB) 1771/ND/2018 for initiation of the insolvency process and the claims for the abovementioned units were filed by the Appellant. That the claims of the Appellant were admitted by the IRP and was also give voting rights, but later on, the claim of the appellant was kept under review and thereafter reduced to Rs. 30,00,000/- even after all the evidence was made available to the respondent. It is pertinent to mention that respondent relies upon the same agreement to consider allotment of flats against an amount of Rs. 30,00,000/- but disregard the other amount mentioned in the same agreement.

6. That in June 2020, an application under section 60(5) of the IBC Code was filed by the applicant before the Hon'ble NCLT which was dismissed by the Adjudicating authority without appreciating the true facts and circumstances of the case.

ISSUES:

1. Whether the impugned order of the Adjudicating Authority is liable to be set aside on the ground that it has failed to recognize that the claim of the Appellant is rejected by the RP even when sufficient proof has been submitted by the Appellant?
2. Whether the Adjudicating Authority has erroneously passed the impugned order without considering that the claims of the appellant were liable to be admitted in view of the legal and binding MoUs and Builder Buyer Agreements and the cheques which have been executed by the Corporate Debtor in favour of the Appellant?
3. Whether the Adjudicating Authority was gravely mistaken in dismissing the application of the Appellant on conjectures and surmises just because the Appellant could not file at that time the invoices relating to the said agreements, whose existence was not in dispute as they have been recognized in the MOU?
4. Whether the existence of cheque for the amount due as a security in itself is not an admission of debt or liability which is to be discharged by the Corporate Debtor and a sufficient proof of liability having a right of payment and legal remedy for breach?

SUBMISSIONS:

1. That it is humbly submitted that the Resolution Professional has fully relied upon the data maintained by the Corporate Debtor and has neglected all the reliable proofs submitted by the Appellant. It is pertinent to mention that if only books of accounts and tally data of the Corporate Debtor are significant, in that case the purpose of calling for claims from the creditors of the Corporate Debtor by making public announcement under section 12 of the code is pointless.
2. It is pertinent to mention that respondent has accepted certain claims of the creditors which were not reflected in the books of the Corporate Debtor and has applied discriminatory yardstick when the claim of the Appellant is to be considered.
3. It is also humbly submitted that all the documents that have been executed by the corporate debtor including the Memorandums of Understanding and Builder-Buyer Agreements have been placed on record by the appellant which significantly proves the claim of the appellant and there is no question of taking any other inference. It is submitted that these documents are undisputed.
4. It is undisputed that the corporate debtor has issued cheques in favour of the Appellant in discharge of his liability to secure the amount. Appellant humbly submits that as per section 139 of the Negotiable Instruments Act, 1881, it is presumed that whenever a cheque is issued it is in discharge of any debt or other liability. Section 139 reads as under: -

"139. Presumption in favour of the holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, in whole or in part, of any debt or other liability."

Thus, the amount claimed for which cheques were issued is a "debt". Reliance in this regard is placed on the judgment of Hon'ble Supreme Court in the case of **Goa Plast (P) Ltd. v. Chico Ursula D'souza reported in (2004) 2 SCC 235 and Sunil Todi & Ors. v. State of Gujarat & Anr. Criminal Appeal No. 1446 of 2021 decided on 03.12.2021.**

This also satisfy the definition of "debt" under section 3(11) of the IBC, 2016 and is a financial debt and also section 3(6) of the IBC, 2016 which is the definition of "claim".

5. As per Section 5(8) of IBC financial debts means any debt along with interest, if any, which is disbursed, and includes any amount raised from an allottee under a real estate project. Any amount that is raised, which in this case, the amount due upon the Corporate Debtor to be paid to the Appellant, for which flats were allotted to the Appellant herein, have made the said amount a financial debt, thereby making the Appellant a financial creditor.

6. That the Appellant has submitted all the documents as required under Regulation 8A of The Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for corporate persons) Regulations 2016. The sub-rule 2 of Regulation 8A reads as under:-

"(2) The existence of debt due to a creditor in a class may be proved on the basis of-

*(a) the records available with an information utility, if any; or
(b) other relevant documents, including any-*

- (i) agreement for sale*
- (ii) letter of allotment*
- (iii) receipt of payment made; or*
- (iv) such other document, evidencing existence of debt."*

7. That as per Regulation 14(2) of IBC the RP was to only collate and submit the claims based on evidence, and record of the Corporate Debtor or as filed by the Claimant/Appellant and not determine the claim. The claim of the Appellant could not have been rejected merely because the Appellant could not bring on record the invoices raised by him which was otherwise available in the records of the corporate debtor. In any case the same has been filed by the Appellant in the present appeal. Further any taxes has been paid or not cannot be the reason to reject the claim as that could not concern the respondent while collating the claim.

8. Revision of claims based on additional documents does not entail the power to adjudicate upon the claims, and such power has been wrongly exercised by the Resolution Professional.

9. The present case is nothing but an arbitrary and excessive usage of power on part of the Resolution Professional even when he was given all the proofsto substantiate the claim.

In **Mr. S. Rajendaran, Resolution Professional of PRC International Hotels Private Limited V/s Jonathan Muralidarane, CA (AT) (Ins)1018/2019**, the Hon'ble NCLAT held that "we are of the opinion that the 'Resolution Professional' had no jurisdiction to "determine" the claim as pleaded in the Appeal. He could have only "collated" the claim, based on evidence and the record of the 'Corporate Debtor' or as filed by Jonathan Muralidarane (Financial Creditor).

In **Mr. Navneet Kumar Gupta (RP of Monnet Power Company Limited) Vs. Bharat Heavy Electricals Limited (Company Appeal (AT) (Insolvency) No. 743 of 2018)** The Mumbai Bench of NCLT by impugned order dated 12th October 2018 held that the RP has wrongly disallowed the substantial claim in its entirety and directed the RP to re-examine the claim on the basis of the accounts and evidence of BHEL and if the evidence corroborated the claim, the same should also be taken into account while finalizing the total claim of BHEL. The RP being aggrieved preferred this appeal before the NCLAT. The Hon'ble NCLAT while deciding

the issue held that the RP is directed to act in accordance with the directions of the Adjudicating Authority.

10. That none of the legally binding documents or the execution of such has been disputed by the Corporate Debtor which itself proves that the fact that the invoices have not been placed on record by the Appellant is irrelevant.

11. It is also pertinent to mention that partial interest payment was also made by the Corporate Debtor in terms of the 1st legal and binding MoU and the remaining balance has to be settled in favor of the Appellants. That all such executions and admissions on part of the corporate debtor which has not been disputed by the respondent also evidently shows the acknowledgement of liability by the Corporate Debtor.

12. That in view of the aforesaid it is most respectfully submitted that the Resolution Professional may be directed to accept the claim submitted by the applicant in full along with interest.

Alongwith written submissions copy of judgements have also been enclosed. However, in view of peculiar facts and circumstances we are not referring or discussing those materials.

6. In the present appeal counter affidavit has also been filed on behalf of Respondent No.1 and in para 6 of its counter affidavit it has been indicated that for the first time the appellant has brought on record alleged three invoices amount to Rs.2.90 crores only whereas the appellant had claimed for Rs.4.8 crores. Certain allegations have also been made with indication as if the said invoices were self generated. It is apt to reproduce para 6 of the counter affidavit;

“6. It is submitted that Appellant for the very first time before this Hon’ble Appellate Tribunal has produced the alleged invoices and Form 26AS wherein it has been alleged that the Appellant was providing certain

consultancy services to the Corporate Debtor. However, the said invoices do not contain any stamp of the Corporate Debtor as a token of acknowledgement and seems to be self-generated invoices which were never submitted before the Ld. Adjudicating Authority or the Answering Respondent. Moreover, without prejudice, the Appellant has only produced 3 Invoices amounting to Rs.2.90 crores only when the total claim of the appellant as per MOUs executed between the Appellant and the Corporate Debtor is of Rs.4.8 crores. Further, the Appellant failed to produce any consultancy agreement executed or any request letter from the Corporate Debtor in that regard. MOUs executed between the Appellant and the Corporate Debtor has no mention of any invoices raised by Appellant. Without prejudice, the Appellant alleged that due to failure of the Corporate Debtor to make the payment towards the invoices raised, the Corporate Debtor agreed to allot the flats in lieu of the outstanding liability towards the Appellant, however, the same does not entitle the Appellant to claim the amount pending qua services from Answering Respondent in the capacity of Financial Creditor/Home buyer and that at the most in that case his claim could have been of an operational debtor. It is also submitted without prejudice that the Appellant has failed to produce any claimants, details etc. of the work alleged to have been done by him for the CD. He has also failed to give the details as to what liaising work he did for the CD, what disputes he helped in settling with customers.”

Of course rejoinder has also been filed but allegations regarding self generated invoices has not been specifically denied.

7. Mr. Alok Dhir, learned counsel for R1 has supported the impugned order and submits that there is no error in the impugned order warranting interference. He by way of referring para 6 of the impugned order at running page 36 has argued that on 21.3.2020 communication was sent to the appellant seeking clarification and providing documentary evidence for verification of its claim. In reply the appellant stated about consultancy and liaising services and stated that invoices were raised and original were given to the CD. However, no record was produced

in order to establish the fact about any agreement between the applicant and the CD with regard to consultancy and liaisonign services. Even though invoices were shown to be raised, however, no material was provided to show regarding payments towards service tax. He also, by way of referring to MOUs, has argued that the said MOU appears to be untrue particularly in view of the fact that MOU was signed by only one Director of the CD and the appellant. It was not even witnessed by anyone. No witness has put signature on the said agreement. He has also raised doubt on the veracity of allotment letters/agreements. All those documents were signed by only two persons i.e. one by only director and another by the appellant. In sum and substance he tried to persuade that MOU/agreements/allotments letters were not genuine.

8. Without going into the merit of the case we are of the opinion that since learned Adjudicating Authority in its impugned order has noticed that MOUs which were the basis for claim appears as forged documents, there is no reason to place reliance on such MOUs. Moreover, on record there is nothing to show as to whether for rendering services of liaisoning any agreement was entered in between the appellant or CD. It is unbelievable that the appellant

is claiming for more than Rs.4 crores as rendering services of liaisoning to the CD still on record there is no chit of paper as to on what terms and conditions the appellant was rendering liaison services to the CD or its unit. Moreover, once the Adjudicating Authority has noticed that MOUs which were brought on record before the NCLT by the appellant were forged one, in that event the whole claim of the appellant was required to be rejected and has rightly been rejected.

9. Considering the order impugned passed by the learned Adjudicating Authority wherein the MOUs placed on record by the appellant before the Adjudicating Authority were treated as if they were forged one, in normal course it was required on the part of the Adjudicating Authority to direct for conducting enquiry/investigation while exercising powers under Section 340 of Cr P. We are of the opinion that if any party brings on record any forged documents for getting unlawful benefit on the judicial side it would be necessary for the concerned Court to exercise its jurisdiction for examining the entire issue by entrusting same to investigating agency. In any event such act of either party may not get any lenient approach by the concerned Court.

10. While approving the impugned order passed by the learned Adjudicating Authority, we think it appropriate to remit back the matter to the Adjudicating Authority with request to exercise its jurisdiction under Section 340 of Cr PC in respect of alleged MOUs, regarding which observation has been given by the Adjudicating Authority as if those documents appeared to be fraudulent one.

11. With above observation the appeal stands dismissed.

12. Let a copy of this order be sent to the Adjudicating Authority/
National Company Law Tribunal, Court III, New Delhi.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

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