

[2020] 116 taxmann.com 213 (NCLT - Ahd.)[07-02-2020]

IBC : Where in CIRP of corporate debtor, applicant claimed to have paid an amount to corporate debtor as earnest money against purchase of land of corporate debtor had also submitted his claim, however, there was no document, as such, where from it could be deduce that amounts were paid against agreement for sale and purchase of land of corporate debtor, instant application filed by applicant to direct IRP of corporate debtor to adjudicate his claim was to be dismissed

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[2020] 116 taxmann.com 213 (NCLT - Ahd.)

NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH

G.K. Ganapathy Reddy and Associates

v.

Parag Sheth

MS. MANORAMA KUMARI, JUDICIAL MEMBER

I.A. NO. 802 OF 2019

CP(IB) NO. 594 OF 2018

FEBRUARY 7, 2020

Section 3(6) of the Insolvency and Bankruptcy Code, 2016 - Claim - Corporate Insolvency Resolution Process (CIRP) was initiated against corporate debtor - Applicant claimed to have paid an amount to corporate debtor against purchase of land of corporate debtor as earnest money had also submitted his claim - To prove his claim, applicant had annexed e-receipt of transfer of funds as well as few counter foil showing transfer of amount in account of corporate debtor - However, apart from these documents no other documents were annexed where from it could be deduce that amounts were paid against agreement for sale and purchase of land of corporate debtor - Further, there was no agreement, as such, with regard to sale and purchase between corporate debtor and applicant - Applicant had also failed to produce any letter from side of corporate debtor to prove that corporate debtor had agreed to sell said land - Whether thus, applicant had failed to produce any document to show his bonafide as 'financial debt' so as to stand in footing of financial creditor and, therefore, instant application filed by applicant to direct RP of corporate debtor to adjudicate his claim was to be dismissed - Held, yes [Paras 11, 14 and 20]

CASES REFERRED TO

J.K. Industries Ltd. v. Mohan Investments & Properties (P.) Ltd. AIR 1992 Delhi 305 (para 7).

Ms. Rachna Pastore, Ms. Natasha D. Shah, Ms. Manasi Trivedi and Pratik Thakkar, Advs. for Appearing Parties.

ORDER

1. The instant application is filed by the Applicant, G. K. Ganapathy Reddy and Associates, with following prayers;

- (A) To admit the present application under section 60(5) of the Insolvency & Bankruptcy Code, 2016;
- (B) To direct the Respondent herein to adjudicate the claim of the Applicant as per the provisions of

sub-section 8(f) of the section 5 of the Insolvency & Bankruptcy Code, 2016;

- (C) To direct the Respondent to ratify the list of creditors of the company and also to declare the Applicant to be a member of the Committee of Creditors constituted for the purpose of initiation of CIRP proceedings against the Corporate Debtor;
- (D) Cost of the present application;
- (E) Such other and further reliefs as this Hon'ble Tribunal may deem fit in the interest of justice.

2. The brief facts of the case are as under:

2.1 Applicant claim to have paid Rs. 2 crores as earnest money towards the purchase of land of the Corporate Debtor. To that effect, the Applicant has filed proof of RTGS as well as account transfer receipt. It is submitted by the Applicant that in response to the advertisement made by the IRP, that he has submitted his claim as per prescribed Form-F *i.e.* submission of claim by the creditor (other than Financial Creditor and Operational Creditor) under regulation 9-A of the Insolvency & Bankruptcy Board of India (Insolvency Regulation Process of Corporate Person) Regulation, 2016 *vide* application dated 21.05.2019, being unaware of the technicalities of Law.

2.2 It is further submitted that the Applicant later-on realizing that the Applicant's claim falls under the provision of regulation-8 of the Insolvency & Bankruptcy Board of India (Insolvency Regulation Process of Corporate Person) Regulation, 2016 and subsequently, revised his claim by filing the prescribed "Form-C" *i.e.* submission of claim by Financial Creditor under the regulation-8 of the Insolvency & Bankruptcy Board of India (Insolvency Regulation Process of Corporate Person) Regulation, 2016 *vide* application dated 3.07.2019.

2.3 The Applicant further submitted that the Respondent acknowledged the receipt of revised claim and *vide* E-mail dated 10.07.2019, called for certain documents in support of the applicant's claim. However, *vide* E-mail dated 26.07.2019, the Respondent No. 1 intimated the Applicant that they are unable to confirm/accept the claim of the Applicant citing the reason that the debt due from the Corporate Debtor is in the nature of interest free advance. Hence, it does not fall in the definition of financial claim as per section 5(8)(f) of the Insolvency & Bankruptcy Code, 2016. Hence, filed this application for appropriate direction from this Bench for considering the Applicant as financial creditor.

2.4 Learned Lawyer appearing on behalf of the Respondent is present and a copy of the said application is already served upon them. He has fairly submitted that they do not wish to file any reply against the application as the claim of the Applicant has been considered in the category of other Creditor. Accordingly, Form-F which is filed by the Applicant earlier has been accepted. In view of that, nothing remained in the application so filed by the Applicant. Hence, it may be disposed-off.

2.5 On the other hand, the Applicant pressing hard to file an affidavit and/or written submission alleging, *inter alia*, that Respondent is changing their statement time and again as reflected from the order-sheet and so far, no intimation has been given with regard to acceptance of claim by the RP in the category of Other Creditors.

FINDINGS:

3. Heard the Applicant as well as Learned Lawyer for the RP at length. Also seen the records and day-to-day order sheets of the proceedings.

Before deciding the application, it is needless to mention herein that the order sheet contains the details of day-to-day proceedings to keep the track/continuity in the matter and those are not final order based on merit of the case. Hence, the allegations by the Applicant's lawyer that the Respondent lawyer is changing the statement every day is baseless.

4. The Applicant claim himself to be the Financial Creditor as he has claimed to have paid an amount to the Corporate Debtor against the purchase of the assets of the Corporate Debtor as earnest money. On perusal of the record, it is found that there is no agreement, as such, with regard to the sale and purchase between the Corporate Debtor and Applicant. In support of the contention, the Applicant has annexed a letter dated 27.02.2019 as Annexure-B purported to be issued in the name of Corporate Debtor and E-receipt of transfer of funds showing transfer of the amount in the account of beneficiary *viz.* Digjam Ltd. (Corporate Debtor).

Apart from these documents, no other document(s) is/are annexed, where from it can be deduced that the amounts are paid against the agreement for the sale of assets of Corporate Debtor.

5. Further, one document *i.e.* Annexure-B at Page No. 12 dated 27.02.2019 claimed to be issued in the name of Digjam Ltd. by the Applicant with regard to the offer/proposal for purchase of surplus land available at Mills Premises in Jamnagar of the Corporate Debtor. In the said offer, there are as many as 4 conditions. For the sake of convenience, those conditions are reproduced herein below;

- ◆ Rate: Rs. 2,25,00,000/- (Rupees Two Crores Twenty-Five Lakhs only) per acre, plus value for building and other assets, for land area approximately 10 Acres together with structures thereon on "as is where is" basis;
- ◆ Title of the land must be clear and free from all encumbrances and litigations;
- ◆ Sale consideration will be paid in instalments as maybe mutually agreed over a period of 12 months; and
- ◆ Formal Agreement to Sell in this regard will be entered into in consultation with the legal team of both the parties.

6. On perusal of the said conditions, *prima facie*, it reflects that it is based on certain condition. Only on the fulfilment of those conditions, which are contingent in nature, the Applicant is agreeable for the purchase of assets of Digjam Ltd. (Corporate Debtor). However, the Applicant has failed to show any acceptance letter from the side of the Corporate Debtor. That itself shows that, if any amount is transferred in the account of the Corporate Debtor, it will be a voluntary action from the side of the Applicant without any acceptance from the Corporate Debtor and/or without any fulfilment of the conditions, so offered by the Applicant. Admittedly, the said amount as reflected in the letter dated 27.02.2019 (Annexure-B) of the Applicant shows that the amount is remitted in the account by way of RTGS as interest free advance. That shows that applicant has volunteered to take the risk, without any acceptance from the side of the Offeree/Corporate Debtor. It is also pertinent to note that applicant has not filed any proof of service of the letter and/or proof of receipt by the Corporate Debtor.

As per section 4 of Contract Act, 1872 offer cannot be completed unless and until there is acceptance from the side of the seller. Thus, under such circumstances, if any amount is being deposited and/or transferred in the account of seller voluntarily without acceptance, then for the said Act, liability cannot be imposed/shifted upon other side.

7. A contract comes into existence only when all the terms and conditions have been accepted and finalized between parties. If the facts of a particular case show that execution of a written contract was a condition precedent for coming into force of the contract between the parties, then it cannot be said that any concluded contract in absence of a written contract being executed has come into force between the parties, as observed in the *J.K. Industries Ltd. v. Mohan Investments & Properties (P.) Ltd.* AIR 1992 Delhi 305. Cardinal principle in the light of section 7 of the Act, is that the offer and acceptance of an offer must be absolute without giving any room of doubt.

8. It is well settled that the offer and acceptance must be based or founded on three components - certainty, commitment and communication. If any one of the three components is lacking either in the offer or in the acceptance, there cannot be a valid contract.

9. Applicant in this case totally failed to produce any document in support of his claim which would make the Applicant even entitled in the category of other "stakeholder." Even if it is assumed for the time, that the alleged letter dated 27.02.2019 of the Applicant is received by the Corporate Debtor, then even law does not cast a duty on the person to whom a proposal is made to reply to that proposal and hence acceptance cannot be inferred from the silence of the offeree and as a general rule, a proposal is not accepted by mere silence on the part of the offeree.

10. Further to consider as 'financial creditor', we need to look at the definition of "Financial Creditor" as claimed by the Applicant, by subsequently filing the revised Form, which is reproduced herein below;

"Section 5(7) "Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

5(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 de-materialized 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 maybe 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 purpose 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-clauses (a) to (h) of this clause;"

11. The Applicant is claiming himself in the category stated in clause (f) sub-section 8 of section 5 which speaks about "any amount raised under any other transaction, including any forward sell or purchase agreement having the commercial effect of borrowing".

In the instant matter, the Applicant has failed to produce any documents/purchase agreement to substantiate his claim and/or show his *bona fide* as 'financial debt' so as to stand in the footing of "Financial Creditor".

12. Not only this, there is also shadow of doubt on Annexure-B *i.e.* letter dated 27-2-2019 of the applicant upon which total claim is based as the claimant failed to produce proof of dispatch, claiming that applicant has paid the amount against the land of the Corporate Debtor as earnest money, the claim cannot be accepted in absence of any acceptance from the side of Corporate Debtor, so as to term it as valid contract. It maybe presumed to be a manufactured document as the applicant has failed to show his *bona fide*. Under such circumstances, his claim as other stakeholders is/are also clouded and needs thorough verification by RP.

13. The Applicant in the application pleaded that the amount is paid as earnest money. Basically, earnest money serves two purposes: it remains as a security or earnest for performance of the contract of sale but it becomes part of payment of the purchase money immediately on fulfilment of the contract, which is found absent in this case because of want of documents, such as, Contract Agreement for sale and purchase. Admittedly, there is no contract between the Applicant and Corporate Debtor.

In other words, earnest money is, more or less, a pledge for due performance of contract by the buyer. It indicates a solemn promise that the buyer will not back out from the contract. Rather, it is a guarantee on the part of the offeror/buyer for the fulfilment of the contract. Normally, seller retains some amount, so as to meet

the monetary damages he may suffer under the contract but the Applicant has totally failed to produce and/or substantiate by way of any document(s) that these are the earnest money and/or advance amount paid against the land of the Corporate Debtor and/or on which account the said amount is remitted, in absence of any evidence corroborating that the alleged letter dated 27.02.2019 is genuinely issued and being received by the Corporate Debtor, it is difficult to presume that offeree has accepted the offer. The action of the applicant is unilateral in absence of any cogent evidence.

14. Apart from the above, it is also found that the Applicant has annexed an authority letter dated 14.11.2019 which is issued in favour of G. K. Ganapathy proprietor of G. K. Ganapathy Reddy and Associates. Admittedly, the Applicant is the proprietor of G. K. Ganapathy Reddy and Associates. Thus, being a proprietor he cannot issue any such letter to self. That apart, in the letter it is written that the said letter is signed on behalf of proprietor of G. K. Ganapathy Reddy and Associates. It is pertinent to mention herein that a proprietor firm is not the legal person. A proprietor ordinarily means a person who carries on trade or business in a name other than his name. The law on this aspect is fairly well settled. No suit can be instituted by a sole proprietorship concern in its own name unless there are specific amendments stating that proprietorship sues through its proprietor. It has been recognised in number of decisions that a proprietorship concern unlike a company or a partnership is not a legal entity and therefore any proceeding initiated by it would be a nullity.

15. Some of the important decisions on this aspect are as under:

In *Miraj Advertising Corporation v. Vishaka Engineering* 115 (2004) DLT 471 it is held that:

"A proprietorship firm has no legal entity like registered firm. A suit cannot be initiated in the name of an unregistered proprietorship firm and the said suit is to be instituted in the name of proprietor"

16. Thus, a proprietorship firm is not a legal entity - it is only the proprietor of the firm who is a legal entity and as such the petition should have been filed by the sole proprietor in his name on behalf of his sole proprietorship firm.

17. Section 3 of sub-section (23) speaks about the definition of a person which read as under: —

"person" includes;

- (a) An individual;
- (b) A Hindu undivided family;
- (c) A company;
- (d) A trust;
- (e) A partnership;
- (f) A limited liability partnership; and
- (g) Any other entity established under a statute, and includes a person resident outside India

18. That apart, the documents so relied and/or annexed are not duly certified by the authorised representative or advocate filing the petition or application and further, documents so relied and/or annexed shall be duly verified from the original as per rule 23(2) of NCLT Rules 2016.

19. Under such circumstances, G. K. Ganapathy Reddy and Associates cannot issue any authority letter. In view of that also the Application is bad in eye of law.

20. Again, on perusal of the records, it is found that Form F at Page 29 of the application is incomplete. It does not contain any date and address of the executor of the form. In the Declaration Form, all the spaces are blank and no address is given. Under such circumstances, the genuinity of the document(s) is/are not only doubtful but it cannot be entertained in any manner.

21. Under the given circumstances stated in sequel hereinabove, the Application so filed by the Applicant has no merit and is dismissed in toto.