

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

IA NO.553/2023 IN CP (IB) NO.76/ALD/2019

*(Company Application under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 Read with Rule 11 of the NCLT Rules, 2016)*

IN THE MATTER OF:

Ms. Geeti Bhagat

D/o Man Mohan Bhagat,
1, Teen January Lane,
New Delhi-110011

..... Applicant

Versus

Mr. Anuj Kumar Tiwari,

Resolution Professional
(IBBI/IPA-002/IP-N00811/2019-2020/12555)
M/s Sparkspell Homes Pvt Ltd,
C-147, Raja Ji Puram,
Lucknow, U.P.-226017

.....Respondent

AND IN THE MATTER OF:

Deepak Gupta (HUF)

.....Financial Creditor

Versus

Sparkspell Homes Private Limited

.....Corporate Debtor

Order pronounced on 16th May, 2024

Coram:

Mr. Praveen Gupta. : Member (Judicial)
Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Yash Tandon, Adv. :For the Applicant/RP Sh. Anuj Kr. Tiwari present in person
Sh. Mrityunjay Mahendra, Adv. :For the Corporate Debtor

ORDER

1. This Application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code' 2016 (hereinafter referred to as the Code) read with rule 11 of the NCLT Rules' 2016 wherein the Applicant has sought the following reliefs: -
 - a. *Allow the present application and kindly set aside the impugned order dated 02.10.2023 passed by the Respondent Resolution Professional whereby the claim of the applicant as financial creditor being a homebuyer has been rejected and direct the Respondent Resolution Professional to admit the claim of the Applicant as financial creditor being a homebuyer or else the applicant shall suffer irreparable loss and injury*

b. Interim Order, if prayed for, pending final decision of the application, the applicant prays for the following interim relief: That this Hon'ble Tribunal in the interim may be pleased to not adjudicate upon the I.A. bearing diary number 0902109/007064/2023 filed with this Hon'ble Tribunal on 24th July 2023 by the Resolution Professional for approval of the resolution plan till the present application is adjudicated expeditiously.

2. The Applicant states that the Corporate Debtor launched a Group Housing Project known as "Pratham" located at Bijnor Road Lucknow and one Sri Deepak Gupta HUF through its Karta had filed an application under Section 7 of the Code who was subsequently admitted in Corporate Insolvency Resolution Process (CIRP) in terms of an order dated 28.08.2019 and accordingly, an Interim Resolution Professional (IRP) was also appointed which was later on replaced by another Resolution Professional as per the resolution passed by the Committee of Creditors.
3. Initially, the Applicant entered into an agreement on 31.3.2014 with the Corporate Debtor for acquiring 18 flats in the said project. As per Clause 5 of the agreement the

Corporate Debtor had undertaken to buy back the above 18 allotted flats on or before completion of 12 months from the commencement of the agreement with the stipulated total sum including the interest payable on monthly basis. In this regard, the Corporate Debtor had handed over 16 cheques to the applicant in order to buy back the above flats out of which one cheque was not honoured amounting to Rs. 5.0 crores.

4. Thereafter, Corporate Debtor issued a notice dated 22.06.2015 whereby agreement dated 31.03.2015 stood modified and Corporate Debtor requested the Applicant to make further payment of Rs. 75,00,000/- forming part of the sale consideration to a third company being sister concern of Corporate Debtor, which was originally not a party to the agreement dated 31.03.2015, namely M/s Proplarity Infratech Pvt Ltd (later known as M/s Sparkspell Homes Pvt. Ltd.). Accordingly, as per the request of the Corporate Debtor, the applicant made the payment of the last remaining instalment of Rs. 75,00,000/- for the said flats by way of RTGS to M/s Proplarity Infratech Pvt Ltd dated 23.06.2015. Thereby the Applicant full payment of sale consideration amount of Rs. 1,50,00,000/- to Corporate Debtor.

5. As per Clause 5 of the Agreement dated 31.03.2015, the Corporate Debtor gave unconditional guarantee to buy back above 18 allotted flats on proportionate basis on or before completion of 12 months from the date of execution of Agreement dated 31.03.2015 in the manner and on the details mentioned herein below, with the total being only Rs. 8,12,50,000/- which includes "PRINCIPAL AMOUNT" and "INTEREST AMOUNT" payable on monthly basis, which would be fully paid by the Corporate Debtor to the Applicant. Pursuant to this the Corporate Debtor issued cheques which again bounced. Due to this the Applicant filed five complaint cases under Negotiable Instrument Act for cheque bounce in Saket District Court, New Delhi against Corporate Debtor and its sister concerns and its directors.
6. The Applicant states that she submitted her claim on 10.03.2021 as a Financial Creditor in capacity of being a Homebuyer by submitting a FORM CA (under Regulation 8A of the IBC (Insolvency Resolution Process for Corporate Person) Regulations, 2016 with Respondent RP. The claim filed by the Applicant herein was for total financial debt

amount of Rs. 7,23,12,500/- consisting of Principal Amount Rs.80,00,000/ and interest component of Rs. 6,73,38,194/.

7. It has been averred in the application that the Resolution Professional in compliance of the order dated 18.09.2023 passed by this Tribunal in I.A. 111 of 2022 and 201 of 2022 titled as Geeti Bhagat vs Anuj Tiwari in CP (18) No. 76/ALD/2019 has adjudicated upon the claim of the applicant filed as Homebuyer being a Financial Creditor, with the Respondent in the captioned petition but vide impugned order dated 02.10.2023 the Respondent has rejected the claim of the Applicant filed as Homebuyer.
8. The Applicant submitted in support of the claim that this Tribunal vide order dated 23.5.2022 has ordered the Respondent RP to admit the revised claim of one Ms. Indu Mittal therein (in IA 356/2020) as a financial creditor who had entered into a similar agreement with the Corporate Debtor just like the applicant herein whereby, she had paid a sum of Rs. 1.3 Crores to the CD as sale consideration for 5 flats with a covenant of guaranteed buy back of the allotted flats by the CD in return of payment of principal amount along with interest amount with postdated cheques issued by

CD in her favour. In that case the RP had duly admitted the claims without raising any objections while the claim of the Applicant, which is similar placed is being rejected.

9. The Applicant submitted that when the Corporate Debtor was making payments to the Applicant under the agreement dated 31.03.2014 and 31.03.2015, the same was wrongly deducting TDS under Section 194H of the Income Tax Act, 1961. The applicant had categorically requested the Corporate Debtor to rectify the incorrectly done TDS deduction and instead correctly deduct the same under Section 194A of the Income Tax Act, 1961. This was because it was the Interest which the applicant was receiving as per the agreement dated 31.03.2014 and 31.03.2015, and the applicant was showing the same as interest income in her income tax return under the head "Income from Other Sources". Further, the applicant was not issued Form 16A by the Corporate Debtor as prescribed and only the income tax department issued Form 26AS for FY. 2015-2016 i.e. AY 2016-2017 wherein it reflected that TDS was deducted under section 194H by Corporate Debtor and the same should not

be attributed to the Applicant herein as it beyond her control despite requesting the Corporate Debtor to make correction.

10. The Applicant submitted that the Respondent after being directed by this Tribunal to decide the claim of the Applicant passed the order dated 02.10.2023 whereby the Respondent rejected the entire claim of Rs. 7,23,12,500/- filed by the applicant as a financial creditor on the ground that the Applicant is a Broker providing brokerage services. This observation of the Respondent is based on the fact that the TDS which was deducted by the Corporate Debtor for the payments made by it to the Applicant for the Agreements dated 31.03.2014 and 31.03.2015 which was deducted under Section 194H of the Income Tax Act. Moreover, the income as interest received by Corporate Debtor under the agreement dated 31.03.2015 was not matching the Gross total income in the ITR for F.Y. 2015- 16 i.e. A.Y. 2016-17. The Respondent has categorised the Applicant as a brokerage service provider and based on this the Respondent has termed the Applicant as Operational Creditor instead of Financial Creditor and has further directed the Applicant to file fresh claim of Rs. 5,53,26,898/- as an Operational Creditor.

11. The Applicant contended that the money which was received by the applicant from Corporate Debtor under the agreement dated 31.03.2015 was in the nature of interest and same was offered as interest income under the head 'Income from Other Sources' in applicant's IT return. The Respondent on the basis of the computation of income of the applicant in her ITR-V for FY 2015-2016 i.e. AY 2016-2017, has incorrectly concluded that since TDS was being deducted under section 194H by the Corporate Debtor itself and not the applicant, therefore same is being treated as a commission and thus becomes an income by way of brokerage service. The applicant herself has never claimed that interest she was earning and receiving from Corporate Debtor as interest under the agreement dated 31.03.2015 was income from house property nor claimed it as brokerage service income.

12. The Respondent has filed a reply affidavit vide diary no. 325 on 23.1.2024 wherein it is contended that the details sought for collation of claims were sent to the RP in May 2023 and is a matter of record vide IA no. 111/2022. The details of the Applicant are not in conformity with the details furnished by Income Tax Department such as details of TDS for interest or

income from house property received from Sparkspell Homes Pvt. Ltd. have not been mentioned. The Profit and Loss Account prepared by the Applicant also does not show the nature of investment.

13. The Respondent contended, relying on documents submitted with the Regulators that the Applicant received income from investments as brokerage. No records of the Corporate Debtor are available. Further, the Applicant has not furnished any documents/communication in support of her claim that she requested the Corporate Debtor to make rectification of TDS under Section 194 A as against Section 194 H of the Income Tax Act.
14. We have considered the submissions of Learned Counsel for the parties and have perused the records.
15. The present application has been filed by the Applicant to set aside the impugned order dated 2.10.2023, passed by the Respondent RP. In this order, the claim of the Applicant, as a Financial Creditor, being a homebuyer, has been rejected. Instead, the Applicant has been categorized as an Operational Creditor. This categorization was done by the Respondent based on the perusal of the Income Tax Return

(ITR), wherein the amount received by the Applicant as interest from the Corporate Debtor has been interpreted as brokerage. Therefore, it has been placed under the definition of Operational Creditor, suggesting that the Applicant provided brokerage services to the Corporate Debtor.

16. After the initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor under Section 7 of the IBC, the Applicant submitted her claim of Rs. 7,23,12,500/- on 10.3.2021 with the Respondent and received acknowledgements. The Respondent raised certain queries and asked the Applicant to submit additional documents in this regard, which were duly provided by the Applicant. The Applicant also filed IA No.111 of 2022 in CP (IB) No. 76/ALD/2019, wherein the Applicant sought this Tribunal's direction to the Respondent to admit the Applicant's claim, and the same was passed in favor of the Applicant on 18.9.2023.
17. The Respondent, pursuant to the order dated 18.9.2023 of this Tribunal, rejected the entire claim of the Applicant via order dated 2.10.2023 on the ground that the Applicant is a broker providing brokerage services, and thus, the TDS with

respect to it has been deducted accordingly under Section 194H by the Corporate Debtor for the payments made by it to the Applicant under the agreements dated 31.3.2014 and 31.3.2015, treating it as commission/brokerage. Furthermore, the income as interest received by the Applicant under the agreement dated 31.3.2015 did not match the gross total income in the ITR for FY 2015-16, i.e., AY 2016-17.

18. The Applicant also contended that a revised claim of a very similar nature made by one Ms. Indu Mittal in IA 356/2020 was ordered to be admitted by this Tribunal vide order dated 23.5.2022, and no objections were raised by the Respondent RP in that case. Therefore, she is being unfairly discriminated against.

19. In light of the abovementioned grounds, we find that the Respondent RP has incorrectly interpreted and categorized the Applicant as an Operational Creditor instead of a Financial Creditor in capacity of Homebuyer. For better appreciation of this issue, we may take notice of the relevant statutory provisions of IBC in the context of operational debt. Operational Creditor is defined in Section 5(20) while

Operational Debt is defined in Section 5(21) as outlined below which is to the effect: Section 5 (20) - *"Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.*

"Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

From a plain reading of the above provisions, it is clear that the primary and operative requirement of Section 5(21) is that the claim must bear some nexus with the provision of goods or services, irrespective of who is to be the supplier or receiver. In the instant case, no goods or services have been supplied to the Corporate Debtor. The Applicant entered into an agreement with the Corporate Debtor for acquiring 18 flats in the "Pratham" project from an investment point of view.

20. Pursuant to the transactions with respect to the agreements, the Corporate Debtor incorrectly deducted the TDS under Section 194H of the Income Tax Act, despite requests of the

Applicant to do so under Section 194A, which pertains to the TDS under Interest, though no evidence has been put forward in support of this contention. Nevertheless, the wrong deduction of TDS by the Corporate Debtor led the Respondent to believe that the Applicant provided brokerage 'services', thereby attracting Section 5(20) and therefore resulting in the rejection of the Applicant's claim. The income of Rs 73,12,500/- was set off against interest liability payable to ICICI Bank, and the balance income from other sources was set off against business loss, with the remaining loss being adjusted against "Income from House Property" as per the provisions of Section 71 of the Income Tax Act'1961, leaving an income of Rs 32,74,788/- as Gross Taxable/Total Income of the applicant, which was further reduced by deductions available under chapter VI-A of Rs. 1,60,000/-. Finally, the Net taxable income of Rs 30,66,487/- was offered for tax.

21. It is also observed that the Respondent RP passed the impugned order without appreciating the facts of the case of the applicant and without affording any opportunity to the applicant to explain the incorrect understanding arrived at by the Respondent RP after perusing the ITR - V for FY 2015-

2016, i.e., AY 2016-2017, which is in complete violation of the principle of natural justice.

22. And since a claim of a similar nature of a financial creditor was previously admitted by the Respondent RP in IA 356/2020 on the direction of this Tribunal, it is only fair and reasonable to once again direct the Respondent to admit the claim of the Applicant as a Financial Creditor. Therefore, the impugned order dated 2.10.2023 passed by the Respondent is found to be flawed and is therefore set aside with a direction to admit the claim of the applicant as Financial Creditor.

23. Accordingly, IA No.553 of 2023 stands disposed off.

Sd/-

(Ashish Verma)
Member (Technical)

Date: 16th May, 2024

Sd/-

(Praveen Gupta)
Member (Judicial)