

(FIT FOR INDEXING)

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

CA- 1084(PB)/2018 in
C.P. NO.IB-297(PB)/2018

IN THE MATTER OF:

Col. Sanjeev Dalal (Retd.)

....Financial Creditor

vs.

International Recreation & Amusement Limited

....Corporate Debtor

AND IN THE MATTER OF:

Mr. Pramod Kumar Sharma

Resolution Professional

..... Applicant

For International Recreation & Amusement Limited

**SECTION: Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016**

Order delivered on: 13.05.2019

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

SHRI S.K. MOHAPATRA
Hon'ble Member (Technical)

PRESENTS:

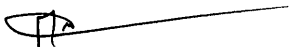
For the Applicant : Mr.Mohd. Nazim Khan & Mr. Sanyam
Goel, Practicing Company Secretary
Mr. Mohtashim Kibriya & Mr. Deepak Motla,
Advs.

Amicus Curiae : Mr. Sumant Batra with Ms. Srishti Kapoor
& Mr. Akshit Singh, Advs.

ORDER
M.M.KUMAR, PRESIDENT

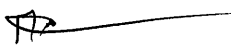
1. This is an application filed by the Resolution Professional under Section - 60(5) of the Insolvency and Bankruptcy Code, 2016 with prayer to provide a clarification with regard to rate of penal interest which is to be paid by the Corporate debtor in respect of the various claims filed.

2. On 03.08.2018, this Tribunal was passed an order initiating insolvency resolution process in respect of the Corporate Debtor under the provisions of the Code. Mr. Pramod Kumar Sharma, Insolvency Professional was appointed as an Interim Resolution Professional by this Tribunal, who was later confirmed as the Resolution Professional by the Committee of Creditors. He made a public announcement in accordance with Section - 15 of the Code read with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016.



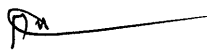
3. Pursuant to the public announcement made by him, various creditors submitted their claims. On verification of the claims received, the RP identified two other classes of creditors, one comprising of allottees of real estate project whose MoU have been registered as a sub-lease deed with the Sub-Registrar office Gurugram (Form C investors) and another comprising of allottees of real estate project whose units are not yet registered (Form CA investors). The Form C investors are treated as 'Financial Creditors' and Form CA investors are treated as 'Class of Creditors'. An Authorised Representative for both the classes are yet to be appointed.

4. It is pertinent to mention that in the memorandum of understanding for retail/shopping facility (hereinafter, "MOU") entered into with the allottees of real estate, no rate of interest is payable to the allottees in the event of default on the part of the Corporate Debtor under the MOU. Whereas the allottees are entitled to pay interest at the rate of 24 % for a period of 6 months if they fail to pay the additional consideration (as provided in MOU) within 15



days of intimation. Non payment of additional consideration would attract cancellation of allotment and refund of amount without interest. The standard Clause 4 from one of the MOUs irrelevant in this regard reads thus:

Clause 4. *That the Company shall also inform the Applicant about the location and actual super area of the Unit, after approval by the Competent Authority of the building plans of the Project, and would call for the payment of Additional Consideration, once the building plans of the Project are approved by the competent authority and the location/super area of the Commercial Unit is established/determined in the Project by the Company. The applicant shall inform the Company of the availment of the Unit as intimated by the Company within 15 days of intimated by the Company by the Company and would tender along with such acceptance the amount of the Additional Consideration, failing which the Company would be entitled to the charge interest @ 24 % on daily rest of the period for another 6 months, and if the default is not redressed by the Applicant within 6 months of such communication, then*



the Company would not be under an obligation to provide the Unit and this MOU will stand cancelled, however, the amount of Consideration tendered by the Applicant, would be refunded to the Applicant, without any interest, only after the completion of the Project. The right to accept the Applicant's request and granting the preferred location shall be the sole prerogative of the Company. If the Applicant does not accepts the Unit as intimated by the Company aforesaid within 15 days of such intimation by the Company, then the Company would not be under an obligation to provide the Unit and this MOU will stand cancelled, and the Company would refund the amount of consideration to the Applicant, as rendered till that time by the Applicant, without any interest, only after completion of the Project.

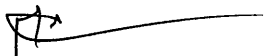
5. However, in Form C or Form CA, as the case may be, filed by the various creditors of the Corporate Debtor, the allottees have claimed interest at different rates on the amount paid by them. Some have claimed 24 %, whereas others have asked for 18 % or 12 % or 8 % rate of interest.



Still further some others have not claimed any interest at all. Samples of such Forms have been placed on record (Annexure - 6).

6. For the purposes of assigning voting share of the allottees in the various Classes claiming interest, relying on sub-regulation (7) of regulation 16A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter, "CIRP Regulations"), the RP applied a common rate of interest of 8 % irrespective of the rate of interest claimed by the allottees in Form C or Form CA, as the case may be. Sub-regulation (7) of regulation 16A of the CIRP Regulations is reproduced below:

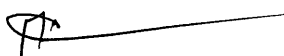
Regulation 16A.(7) - *The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.*



7. Further it is submitted by the applicant that in the first meeting of Committee of Creditors held on 11.09.2018, the issue regarding penal interest was hotly discussed and disputed by various members of the CoC. Consequently the CoC directed the IRP to file an application before the Tribunal for clarification on the same. The minutes of the said meeting is placed on record (Annexure-8).

8. In order to deal with the issue raised in the present application we may first look into the powers and jurisdiction of the IBBI to frame Rules & Regulations under the Insolvency and Bankruptcy Code, 2016.

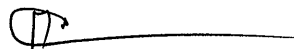
9. The IBBI derives its powers to frame regulations from sub-section (1) of section 240 of the Code which states that the IBBI “may, by notification, make any regulations consistent with this Code and the rules made thereunder, to carry out the provisions of the Code”. Sub-section (2) of section 240 states that “in particular, and without prejudice to the generality of the foregoing power, such regulations may



provide for all or any of the” matters provided under sub-section (2) of section 240. Thus there are a number of subjects given authorises IBBI to frame regulations.

10. Sub-section (7) of section 21 of the Code, which was inserted by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 with effect from 06.06.2018 (hereinafter, “Second Amendment”), provides that the IBBI “may specify the manner of voting share in respect of financial debts covered under sub-sections (6) and (6A). It is pertinent to mention that sections 6A and 6B were also inserted by the Second Amendment, to provide for the representative mechanism and deal with other issues relating to classes of creditors.

11. Sub-section (2) of section 240 was also amended by the Second Amendment and among others, clause (nc) was added to empower the IBBI to frame regulations to provide, “the manner of voting and determining the voting share in

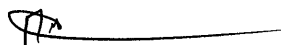


respect of financial debts under sub-section (7) of section 21.

12. A collective reading of sub-section (7) of section 21 and clause (nc) of sub-section (2) of section 240 makes it clear that the IBBI is empowered to frame regulations to provide, the manner of voting and determining the voting share in respect of financial debts under sub-section (7) of section 21.

13. The question which next arises for consideration is whether the power given to the IBBI under sub-section (7) of section 21 and clause (nc) of sub-section (2) of section 240 can be exercised to prescribe that the voting shares of a creditor in a class has to be in proportion to the financial debt which includes an interest at the rate of 8% rate per annum unless a different rate has been agreed to between the parties?

14. A reading of sub-section (1) and (2) of section 240 of the Code makes it abundantly clear that the regulations framed



by the IBBI under the Code must meet two tests. First, the regulations framed by the IBBI should be consistent with this Code and the rules made thereunder; and second, the objective behind the regulations framed by the IBBI must be to carry out the provisions of the Code.

15. Sub-section (7) of section 21 and clause (nc) of sub-section (2) of section 240 empower the IBBI to prescribe (i) the “manner” of voting share; and (ii) “determining” of the voting share”, in respect of financial debts covered under sub-sections (6) and (6A) of the Code.

16. The word “voting share” is defined in clause (28) of section (5) of the Code and reads as under:

Section 5(28) "voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor:

17. “Debt” is defined in clause (11) of Section 3 of the Code, as under:



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Section 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

18. *"Financial Debt" is defined under clause (8) of section 5 of the Code, as under:*

Section 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 dematerialised equivalent;

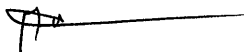
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(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 may be 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 purposes 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) (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-clause (a) to (h) of this clause.

19. A bare reading of the definition of "voting share" read with definitions of 'financial debt' and 'debt' makes it clear that it applies to all financial creditors in the committee of creditors and it is to be based on the proportion of the financial debt owed to such financial creditor in relation to



the financial debt owed by the corporate debtor. The converse of this is, the voting share cannot be disproportion of the financial debt owed to the financial creditor in relation to the financial debt owed by the corporate debtor.

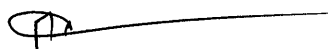
20. Sub-section (7) of section 21 and clause (nc) of sub-section (2) of section 240 empowers IBBI to determine voting share in respect of the financial debts covered under sub-sections (6) and (6A) of section 21 of the Code. The creditors falling under sub-sections (6) and (6A) of section 21 are also financial creditors to whom financial debt is owed by the corporate debtor. Sub-section (7) of section 21 does not exclude the applicability of the definition of voting share for the purpose of determining the voting share of creditors falling under sub-sections (6) and (6A) of section 21.

21. During the course of the arguments a reference was also made to the provisions of various other statutes including Real Estate (Regulation and Development) Act 2016. However, on account of the Non-obstante clause in Section 238 of the Code which is a provision of widest



amplitude, we feel that it would be unnecessary to notice such provision except the provisions of IBC.

22. This brings us to the conclusion that the IBBI draws its power from Section-240 of the Code to frame Rules and Regulations and is the competent authority to do so. The insolvency proceedings are to be carried out in accordance with the provisions of the Code along with the various Rules and Regulations. Regulation 16A.(7) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 stipulates a penal interest at the rate of eight percent per annum unless a different rate has been agreed to between the parties. In the ongoing CIRP it is settled that no specified penal rate of interest has been agreed to be payable by the Corporate debtor in the event of default committed by it. Therefore it would be appropriate to conclude that interest at the rate of 8% as specified by the Regulations must be upheld in respect of the claims submitted by Form CA and Form C investors. The Resolution Professional has correctly applied the regulation.



23. Before disposing of the application we express our gratitude to the learned amicus curiae Mr. Sumant Batra for his able assistance.

24. The application stands disposed of on above terms.

Sd/-

(M.M.KUMAR)
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

13.05.2019
(VIDYA)