



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

CP (IB)-76/(PB)/2022

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

Synergy Ventures.

Registered Office at:
having their office at:
CK-58/12, Narain Katra,
Nichi Bag, Varanasi

...Petitioner/Financial Creditor

Versus

M/s. Rudra Buildwell Projects Pvt. Ltd.

Registered Office at:
D-53, Okhla, Phase-I,
New Delhi-110020

...Respondent/Corporate Debtor



CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER

(JUDICIAL)

SHRI. RAHUL BHATNAGAR, HON'BLE MEMBER

(TECHNICAL)

Counsel for Applicant/ Financial Creditor: Mr. Uday Chandani, Mr. Saurabh Pandey and Mr. Shivam Kumar, Advs.

Counsel for Respondent/ Corporate Debtor: Mr. Sunil Fernandes, Mr. Akshat Gupta, Ms. Sakshi Tikmany and Ms. Diksha Dadu, Advs.

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

Date 19.10.2023

1. This Petition is filed by Synergy Ventures (stated to be an AOP) to initiate Corporate Insolvency Resolution Process ("CIRP") under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code") against the Respondent M/s. Rudra Buildwell Projects Pvt. Ltd. for the alleged default on the



part of the Respondent in clearing the debt of Rs. 2,85,43,387/- as on 30.06.2021.

2. That the Corporate Debtor had sent a business proposal through its Managing Director, Mukesh Khurana to the Petitioner and after considering the proposal, the Petitioner came to a Memorandum of Understanding with the Corporate Debtor on 27.03.2014, in which it was agreed that the Petitioner will provide Rs. 1 crore financial assistance to the Corporate Debtor bearing an interest at the rate of 24% per annum payable on quarterly basis on the terms that if the Corporate Debtor fails to repay the Petitioner, then the Petitioner will have full right to forfeit the two residential units of the Corporate Debtor, which was provided as a security for the amount invested. The Corporate Debtor failed to repay the aforesaid amount. The Petitioner waited for the response of the Corporate Debtor but when there was no heed paid by Corporate Debtor to the correspondence through email, the Petitioner filed the present petition to initiate the CIRP against the Corporate Debtor.



3. The Counsel for the Corporate Debtor raised preliminary objection as to the maintainability of the present application filed under Section 7 of IB Code 2016 on the ground that the Applicant is an Association of persons (AOP) and does not fall under any of the categories envisaged under Section 3(23) read with Section 5(7) of the Code. Therefore, the matter was reserved on maintainability and the parties were directed to file written submissions in the matter.
4. The submissions of the Financial Creditors are as under: -
 - i. That the Synergy Venture is a Proprietor and not an Association of Persons and a proprietor is legally entitled to invoke Insolvency Proceedings.
 - ii. That Section 2 (d) and (g) of the Insolvency and Bankruptcy Code, 2016 clearly provides that the provisions of this Code shall apply to such other body incorporated under any law as well as the partnership firm and proprietorship firms and individuals other than persons referred to in clause (e) and the financial creditor do fall under the category of a proprietor as at



the date of filing of the Insolvency Petition the financial creditor has disclosed himself as a Proprietor

- iii. That section 3 (10) of the Code defines the word "creditor" and the same means any person to whom the debt is owed and includes the financial creditors and other category and it is not in dispute that the amount in question is to be repaid by the corporate debtor.
- iv. That Section 3 (11) and 3 (12) of the Code defines the word "debt and default" and the case of the financial creditor do establish that there is a legally enforceable debt and the default is established from the documentary evidence on record.
- v. That Section 3 (23) of the Code defines the word "person" includes an individual, Hindu undivided family, company, trust, partnership, limited liable partnership and any other entity established under a statute. In the present case the first agreement dated 27.03.2014 was executed between the AOP and corporate debtor and thereafter, one of the members of



AOP expired on 07.11.2014 after which the second agreement was executed on 16.01.2015 between the financial creditor and corporate debtor as a proprietorship concern as the individual PAN of the proprietor Rajat Mohan Pathak was used for rendering the financial assistance and all the TDS were deposited in the individual PAN of Rajat Mohan Pathak bearing no.ADZPP4008P and the bank Manager has also informed that the Synergy Ventures is being operated after the death of the father of Rajat Mohan Pathak as a proprietorship concern as the same was duly informed to the corporate debtor on 17.03.2015. That another memorandum of understanding was executed between the Proprietor and the CD.

- vi. That it is relevant to point out that there are two legally enforceable contracts in existence and the Financial Creditor has a right to file the present petition.
- vii. That after the death of one of the members of AOP, the AOP was converted into a proprietorship concern and



at the time of filing the petition it was clearly mentioned that the financial creditor is a proprietor of Synergy Ventures.

viii. That in view of the facts and circumstances, as stated above, the present proceeding may be declared as maintainable by this Tribunal and necessary orders may be passed in the interest of justice

5. The submissions of the Corporate Debtor are as under: -

- i. That the captioned Petition under Section 7 IBC has been filed by “Synergy Ventures” as the Financial Creditor, which is an “Association of Persons”/ AOP
- ii. Under the IBC, a financial creditor cannot be an “Association of Persons”, since an Association of persons is not included within the definition of “person” under Section 3(23) of the IBC. Section 3(23)(g) only incorporates “any other entity established under a statute” in the definition of “person”.
- iii. AOP is not a separate legal entity and has no independent juristic personality, except for the purposes of assessment of tax in terms of Section 4



r/w Section 2(31) of the Income Tax Act, 1961. It is not established under any statute. An AOP cannot 'sue' or 'be sued' in its own name, except unless specifically empowered to do so under a statute. While an AOP may have other remedies for recovery of monies, for instance under the Consumer Protection Act or the RERA Act, however, an AOP cannot invoke the jurisdiction under the IBC.

- iv. Further, during the course of the hearing on 30.08.2023, in order to get around the objections raised by the CD, the FC has relied on page 40 of the Petition to contend that the Petition has been filed by Rajat Mohan Pathak in his capacity as Proprietor of Synergy Ventures. This contention is untenable as the Petition has clearly been filed by Synergy Ventures as an AOP. The same is also contrary to the stand taken by the FC in its Rejoinder filed on 01.05.2023 that the AOP is still in existence



- v. Therefore, these instant petitions, having been filed by a legally nonexistent AOP, are defective and invalid and thus, not maintainable.
6. We have heard the Ld. Counsels for the Petitioner, Respondent and also the pleadings of both the parties and documents filed in support of pleadings.
7. The Petitioner has filed this petition and in the memo itself it is mentioned that the petition has been filed by Synergy Ventures, having their office at Narain Katra, Nichi Bag, Varanasi and not by Proprietor. Relevant extracts of the petition are stated as under: -

In the Synopsis and list of dates, it is stated as under: -

“The financial Creditor is having an agreement of Association of persons named as “Synergy Ventures”. The purpose of incorporation of the said AOP was to invest in the pre/post sanction of the project of sale and purchase of real estate in residential and commercial likewise, such as Flats, Offices, Lands, Shops, Houses etc.”

8. Further as pointed out by the Corporate Debtor that in the Rejoinder the filed by the Petitioner, it is stated in para 4 as under: -



4. That an agreement of association of persons was entered on 31st of January, 2014 between Rajat Mohan Pathak and Rajendra Mohan Pathak in the name and style of Synergy Ventures and the same is in existence till today even though the father of Rajat Mohan Pathak namely Rajendra Mohan Pathak died due to ill health on 7th November 2014.

The Memorandum of Understanding between the parties as filed as “Annexure 1” is signed by the Applicant in the capacity of member of Authorised Representative of AOP, it is written as *“on and behalf of Synergy Ventures”*

9. The Petitioner has also placed on record the copy of incorporation of AOP agreement dated 31.01.2014 in which it is clearly stated that Synergy Ventures is an AOP incorporated on 31.01.2014.
10. It appears that the Petitioner is intriguingly going back and forth on the fact that the petition is filed by AOP or as Proprietor. The Petitioner himself has stated that the petition is filed by Synergy Ventures and in the Rejoinder, it is clearly stated that Synergy Ventures is an Association of Persons and nowhere in the Code, there is provision of filing of petition by Association of Persons. As per IBC, 2016, a



petition under section 7 can be filed by a “Financial Creditor”. The term Financial Creditor is defined under section 5(7) of the Code which is as under: -

5. Definitions. -

...

(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;

The term “Person” is defined under section 3(23) of the Code which is stated as under: -

3. Definition

...

(23) “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;

11. The present petition is filed by Synergy Ventures (stated to be an Association of persons). A mere reading of the definition as stated above, makes it clear that an Association of Person neither falls in the definition of



person, nor covered within the meaning of term entity established by a statute.

12. The contention of the Petitioner that the Petitioner is a Proprietorship Firm also does not give any benefit as the Proprietorship Firm is not a legal entity which can sue or be sued. In this regard, we can refer to the judgement of Division Bench of Hon'ble Delhi High Court in *Miraj Marketing Corporation v. Vishaka Engineering and Anr.* 2004 SCC OnLine Del 1047 wherein the Hon'ble High Court in para 11 stated as under: -

"11. A sole proprietorship firm is not a legal entity which can sue or be sued in its own name. Such suit relating to or against the affairs or claims of a proprietorship concern has to be brought or made against the person who is the sole proprietor of the firm."

13. Support can also be taken from *Shakti Dyeing Works vs. Berawala Textiles Pvt. Ltd.* Order dt. 25.01.2021 passed by Hon'ble NCLT, Ahmedabad in C.P. No. (IB) 854/9/NCLT/AHM/2019 wherein the Tribunal dismissed



the petition filed by proprietorship firms, holding that a proprietorship is not a judicial person and cannot initiate CIRP in view of Section 3(23) of the IBC.

14. We are also of the view that a Proprietor can file a case but not the Proprietorship firm. The present case has been filed in the name of an entity namely Synergy Ventures (AOP), which as per the provisions contained in the IBC, 2016 does not fall within the meaning of person.
15. In view of the above, the petition filed by Petitioner is dismissed. However, the claim under any other law, if permissible, can be pursued by the Petitioner as prescribed under that law.

SD/-
Rahul Bhatnagar)
Member (Technical)

SD/-
Mahendra Khandelwal
Member (Judicial)