

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1076(ND)/2019

IN THE MATTER OF:

Lavkash Verma

.....Financial Creditor/Petitioner

v.

M/s. Vigneshwara Developers Pvt. Ltd.

.....Corporate Debtor/Respondent

SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 10.10.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA

HON'BLE MEMBER (T)

PRESENT:

For the Petitioner:

Mr. Teejas Bhatia & Mr. Ritesh Agarwal,
Advocates

For the Respondent:

Mr. Dushyant Manocha & Ms. Anannya
Ghosh, Advocates for Ex-Promoters

M.M. KUMAR, PRESIDENT

JUDGMENT

Mr. Lavkash Verma claiming himself to be a 'financial creditor' has filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of

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respondent company, M/s. Vigneshwara Developers Private Limited, who is stated to be the corporate debtor.

2. The Petitioner is an allottee of a real estate project. The petitioner is ex-facie financial creditor in terms of the provisions of Section 5(8)(f) and explanation inserted by the Second Amendment Act, 2018 w.e.f. 06.06.2018. The challenge to the aforesaid amendment has been repelled by Hon'ble the Supreme Court in the judgment rendered in the case of Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019, decided on 09.08.2019). Therefore, no doubt is left that the petitioner is Financial Creditor.

3. The Respondent company-the Corporate Debtor, M/s. Vigneshwara Developers Private Limited (CIN U45201DL2005PTC142779) was incorporated on 21.11.2005 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at D-16/C, Bhagwani House, Hauz Khas, New Delhi, South Delhi-110016.

4. The Financial Creditor has proposed the name of Resolution Professional, Mr. Sunder Khatri with the address GF-124 & 113, World Trade Centre, Lalit Hotel, Babar Road, New Delhi-110001.



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His registration number is IBBI/IPA-002/IP-N00437/2017-18/11191. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

5. The precise case of the Petitioner is that he has entered into a Developer-Anchor Unit Agreement dated 11.08.2010 (Annexure-A1) with the Respondent for purchase of a 250 sq. ft. Commercial Technology Unit under the project namely "Technology Park" at Manesar, Gurgaon which was being developed by and promoted by the Corporate Debtor for the total consideration of Rs.18,00,000/- The petitioner has paid a total amount of Rs. 18,00,000/- by two cheques bearing No. 153886 & 153881 as per receipt (Annexure A-2) issued by the Respondent. The said unit was purchased by the Petitioner under the 'Assured Return/Monthly Rent'. According to clause 2.1 of the Developer-Anchor Unit Agreement, the Respondent Company undertook to complete the construction of the space and hand over the possession of the same to the petitioner within sixty months. The relevant term dealing with the payment of 'Assured Return' as well as handing over possession

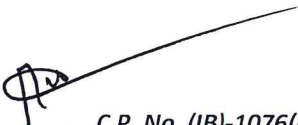


from the aforesaid agreement executed between the Petitioner and the Respondent-Corporate Debtor reads as under: -

“2.1 The Anchor unit has made investment on the assurance by the Developer to provide him an assured return of maximum Rs. 75/- (Rupees Seventy Five only) per sq.ft. per month basis only of super area (250) sq. ft. on the investment amount for maximum period of sixty month. Since the space would be completed and handed over by Sixty Months. The developer hereby undertakes to make a payment of Rs. 75/- (Rupees Seventy-Five Only) per sq.ft. per month basis of super area (250) sq. ft. to the Anchor unit as committed return during construction period which the anchor unit accept.”

6. It is submitted by the petitioner that the cheques [Annexure A-3 (colly)] given by the Respondent in pursuance of assured returns, were dishonoured upon presentation. In May, 2018 the petitioner met with the Respondent in the mediation proceedings initiated in light of the order passed by Hon'ble Delhi High Court to amicably settle their disputes, but the same resulted in failure.

7. However even after expiry of sufficient long time yet the possession of the said Unit has not been delivered nor any payment



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of assured returns has been made. The petitioner has landed before Adjudicating Authority-NCLT.

8. It is claimed that the Respondent is liable to pay an amount of Rs. 29,25,000/- to the petitioner along with 18% rate of interest.

9. After service of notice when the matter came up for consideration on 10.06.2019 learned counsel for the Ex-Promoters stated that Provisional Liquidator with respect to the respondent Company was appointed by the Hon'ble Delhi High Court and sought time to place on record the order.

10. The Hon'ble Delhi High Court in a winding up petition namely Company Petition No. 534/2015 titled as Shri Naresh Chand Gupta & Anr. v. Vigneshwara Developers Private Limited (Corporate Debtor) vide its order dated 22.07.2016 had already appointed Official Liquidator as Provisional Liquidator and the orders have been reserved on 10.07.2019 and the judgment was awaited. The operative part of the said order dated 22.07.2016 reads as under:-

“Consequently, the petition is admitted and the Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of



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accounts and records of the company forthwith. The citations be published in the Delhi editions of the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing. The cost of publication is to be borne by the petitioner who shall tentatively deposit a sum of 75,000/- with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets. Consequently, the petition is admitted and the Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of accounts and records of the company forthwith. The citations be published in the Delhi editions of the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing. The cost of publication is to be borne by



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the petitioner who shall tentatively deposit a sum of 75,000/- with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the company.

In addition, the directors of the respondent company shall file their statement of affairs within 21 days from today before the Provisional Liquidator. The respondent-company, as well its directors, are restrained from alienating, encumbering, or otherwise parting with possession of the assets of the company without the leave of Court.”

11. The issue concerning maintainability of a petition under Section 7 of the Code during the pendency of a winding up petition before the High Court even after admission and appointment of Official Liquidator, is no longer *res integra*. Hon’ble the Supreme



Court in the case of **M/s. Forech India Limited v. Edelweiss Assets Reconstruction Company Limited** (Civil Appeal No. 818 of 2018 decided on 22.02.2019) has clarified the aforesaid position by approving the views of Bombay High Court in **Ashok Commercial Enterprises v. Parekh Aluminex Limited**, (2017) 4 Bom. CR 653 in the following paras:

“19. Mr. Sen also referred us to a judgment of the learned Single Judge of the High Court of Bombay reported, in (2018) 2 AIR Bom R 350 in PSL Limited vs. Jotun India Private Limited. The Learned Single Judge, after referring to the self-same provisions of the Code and subordinate legislation made thereunder, held as follows:-

“93. The fact that post notice winding up petitions continue to be governed by the Companies Act, 1956, only means – that to those proceedings it will be the Companies Act, 1956 which will apply. It does not, however, mean that if, in a post-notice winding up petition a new proceeding is filed under IBC, and where orders are passed by NCLT, including under Section 14 of IBC, the consequences provided for under IBC will not apply to post notice proceeding, whatever their stage may be.

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98. Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC, vis-a-vis the company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation. This is contrary to the plain language of IBC. If the contentions of petitioner were to be accepted,



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it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator appointed, provisions of IBC can never apply to such companies for all times to come.

xxx xxx xxx

100. The mere fact that post notice winding up proceedings are to be “dealt with” in accordance with the provisions of the Companies Act, 1956, does not bar the applicability of the provisions of IBC in general to proceedings validly instituted under IBC, [nor] does it mean that such proceeding can be suspended.”

20. This judgment was upheld by a Division Bench of the Bombay High Court. We may hasten to add that the law declared by this judgment has our approval.”

It is patent from the aforesaid paras that the Code would prevail and the Official Liquidator would answer all the queries of the Resolution Professional who is to take over the process. He is subjected to all the directions of the NCLT and Resolution Professional. It is for that reason we had issued notice to the Official Liquidator as well who has preferred not to appear. Therefore, it cannot be said that a petition is not maintainable merely because Official Liquidator has been appointed.

12. According to the learned counsel there is no resistance nor the claim of the Financial Creditor in respect of ‘unpaid debt’ has



been controverted. It must therefore be considered to have been admitted.

13. Learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditors stand fulfilled and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It is further submitted that the details of default along with its dates have been clearly stated in part IV along with all the minute details. There is overwhelming evidence to prove default. The name of the resolution professional has also been specified.

14. We may now examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-

“Initiation of corporate insolvency resolution process by financial creditor.

7 (1)

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3)

7 (4)

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b)"

15. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of the Code. We are satisfied that a default amounting to lacs of rupees has occurred. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2

of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

16. As a sequel to the above discussion, this petition is admitted and Mr. Sunder Khatri is appointed as an Interim Resolution Professional.

17. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

18. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including



execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

19. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These

would include supply of water, electricity and similar other services or supplies as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else the Interim Resolution Professional/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution

Professional/Resolution Professional shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

21. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

22. We direct the Financial Creditors to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditors. The amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.



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23. Before parting we must notice the complaint made against Financial Creditors in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditors as it is only fair to do so.

24. The office is directed to communicate a copy of the order to the Financial Creditors, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

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(M.M.KUMAR)
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

10.10.2019
(VINEET)

Pronounced today under Rule 151 of the NCLT Rules 2016 as Hon'ble Member (T), Shri S.K. Mohapatra is not holding Court today.

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(NIRMALA VINCENT)
COURT OFFICER