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IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/993/2019

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of ***M/s. Color Home Developers Private Limited***

Nakoda Marbles
Rep. by its Sole proprietrix
Mrs. H. Vimala
102/2, Kali Amman Koil Street,
Virugambakkam,
Chennai – 600 092

... Operational Creditor

-Vs-

M/s. Color Home Developers Private Limited,
No.37, A-Block, 6th Street,
Anna Nagar East,
Chennai – 600 102 .

... Corporate Debtor

Order pronounced on 2nd September 2021

CORAM :

R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : C. Rekha Kumari, Advocate

For Corporate Debtor : B. Sarath Babu, Advocate

ORDER

***Per:* R. SUCHARITHA, MEMBER (JUDICIAL)**

This is an Application filed by **Nakoda Marbles** (hereinafter referred to as **"the Operational Creditor"**) against **M/s. Color**

Home Developers Private Limited (hereinafter referred to as **"the Corporate Debtor"**) under Section 9 of the Insolvency & Bankruptcy Code, 2016, seeking thereof to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. From Part-I of the Application, it is seen that the Operational Creditor is a Proprietorship firm. From Part-II of the Application, it is seen that the Corporate Debtor is a Private Limited Company incorporated on 28.05.2010 and the registered office address of the Corporate Debtor as per the Application is stated to be situated at No.37, A-Block, 6th Street, Anna Nagar East, Chennai – 600 102. From Part-III of the Application, it is seen that the Operational Creditor has not proposed the name of the Interim Resolution Professional and left it to the discretion of this Tribunal to appoint the IRP.

3. From Part-IV of the Application, it is seen that the Operational Creditor has claimed a sum of Rs.24,32,940/- which is due and payable by the Corporate Debtor . From Part-V of the Application, it is seen that the Operational Creditor has enclosed the list of invoices in order to prove the existence of the operational debt.

4. The Learned Counsel for the Operational Creditor submitted that the Operational Creditor has supplied marbles and granites to the Corporate Debtor for completion of their projects from various dates ranging from 08.02.2016 to 22.03.2017. It was submitted that the Corporate Debtor has not yet paid the sum which was outstanding as against the said invoices and hence the Operational Creditor had sent a Legal Notice dated 28.12.2018 to the Corporate Debtor demanding repayment of the outstanding dues to the Operational Creditor. However, it was submitted that there was no reply made by the Corporate Debtor to the said Legal Notice issued by the Operational Creditor.

5. It was submitted by the Learned Counsel for the Operational Creditor that since no payment was forthcoming from the Corporate Debtor, the Operational Creditor has issued a Demand Notice under Section 8 of IBC, 2016 to the Corporate Debtor on 22.04.2019, which was delivered to the Corporate Debtor on 26.04.2019. Further, the Operational Creditor has also filed an Affidavit as mandated under Section 9(3)(b) of IBC, 2016 stating that the Corporate Debtor after the receipt of the Demand Notice has failed to pay the unpaid 'operational debt' nor raised any dispute in relation to the same. Under such circumstances, the Operational Creditor has filed the present Application before this

Tribunal on 08.07.2019 seeking initiation of CIRP as against the Corporate Debtor.

6. The Corporate Debtor has filed counter and the Learned Counsel for the Corporate Debtor submitted that the present Application is not maintainable in view of the fact that the same has been filed in the name of a proprietorship concern and the same is not falling within the ambit of 'person' as defined under Section 3(23) of IBC, 2016. Further, it was submitted by the Learned Counsel for the Corporate Debtor that the Invoices No. 896, 790, 776, 687, 690, 684, 672, 670, 664, 657, 647 and 626 submitted by the Operational Creditor does not have the endorsement showing that the same materials have been received by the Corporate Debtor. Under such circumstances, the Learned Counsel for the Corporate Debtor prayed for the dismissal of the present Application.

7. Heard the submissions made by the Learned Counsel for both the parties. The first issue raised by the Learned Counsel for the Corporate Debtor that the proprietorship cannot file an Application seeking initiation of CIRP in relation to the Corporate Debtor has been answered by the Hon'ble NCLAT in the matter of **Neeta Saha, Member of Suspended Board of Palm Developers Pvt. Ltd. –Vs– Mr. Ram Niwas Gupta (Proprietor of Ram Niwas**

Gupta & sons) & Anr. in *Company Appeal(AT) (Insolvency) No. 321 of 2020,* wherein the Hon'ble NCLAT had opportunity to decide upon the issue as to whether a sole proprietor can initiate Corporate Insolvency Resolution Proceedings and the Hon'ble NCLAT had answered the above proposition in affirmative and said that sole proprietorship can file and initiate CIRP in relation to a Corporate Debtor and further held that Section 2 of IBC, 2016 will be applicable to a sole proprietorship and gave an expanded meaning to the expression "persons" defined under Section 3(23) of the Code. Thus, the defence raised by the Corporate Debtor in respect of the same is required to be brushed aside.

8. In relation to the issue raised by the Corporate Debtor that some of the Invoices were not endorsed by the Corporate Debtor, it is to be seen that the Corporate Debtor has filed a memo wherein they have stated that the aggregate of the invoices which does not bear any endorsement of the Corporate Debtor comes to the tune of Rs. 11,32,524/- and that the Corporate Debtor is ready to pay the balance amount of Rs.13,00,417/- to the Operational Creditor by way of Cheque / Demand Draft and hence sought for the dismissal of the present Application.

9. The very fact that the Corporate Debtor has admitted their liability to the tune of Rs.13,00,417/- proves that there is a

'default' on the part of the Corporate Debtor. Further, the said default is also in excess of a sum of Rs.1 Lakh, which was prevalent at the time of filing of the Application i.e. on 08.07.2019. Further, it is also pertinent to note that the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor also cannot seek shelter under Section 10A of IBC, 2016. Under the said circumstances, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

10. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between July 2021 – December 2021 appoints **MR. P. MOHAN SHANKAR,** with *Reg. No. IBBI/IPA-001/IP-P01508/2018-2019/12297 (email id:- mohanshankarp1959@gmail.com)* as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under

IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

11. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization 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 respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

12. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and mange the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

13. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

> (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:
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> Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

14. The Operational Creditor is directed to pay a sum of **Rs.1,00,000/-***(Rupees One Lakh Only)* to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

15. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond