

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V**

C.P. 848 OF 2021

Under Section 7 of the Insolvency and Bankruptcy Code,
2016 read with Rule 4 of the Insolvency and Bankruptcy
(Application to Adjudication Authority) Rule 2016)

In the matter of

ICICI Home Finance Company Limited

ICICI Bank towers, Bandra-Kurla Complex,
Mumbai- 400 051

..... Financial Creditor

V/s

Roxina Real Estate Private Limited

112-122, Hira Bhavan, Raja Ram Mohan Roy Road,
Prarthana Samaj, Girgaon, Mumbai- 400 004

.....Corporate Debtor

Order reserved on: 16.12.2022

Order Pronounced on: 03.02.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via videoconference)

For the Petitioner: Mr. Rahul Dev a/w Mr. Ranjit Shetty i/b Argus Partners

Per: Shri Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by ICICI Home Finance Company Limited, hereinafter called as "**Petitioner**" seeking to initiate of Corporate Insolvency Resolution Process ("**CIRP**") against Roxina Real Estate Private Limited hereinafter called as "**Corporate Debtor**" by invoking the provisions of Section 7 Insolvency and Bankruptcy code (hereinafter called "**Code**" read with rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of an unresolved Financial Debt of Rs. 09,10,99,702/-

Facts of the case

2. The Petitioner submits that sometime in year 2015, the Respondent had approached the Petitioner for the purpose of availing credit facility for the purpose of (i) reimbursement of cost (excluding land cost) incurred by the Respondent (ii) part financing of one of its projects. Based on the representations made by the Respondent, the Petitioner had sanctioned a credit facility. The Respondent had availed the credit facilities by way of Rupee Term Loan as construction finance facility under the Master Terms and Conditions and General Conditions forming part of the indenture of Mortgage dated 23.09.2015, executed between the Petitioner and the Respondent.
3. The Petitioner submits that under the financing documents, the Respondent had *inter alia* agreed to abide by the terms and conditions governing the grant/sanction of the credit facilities and agreed to repay the credit facilities by paying necessary installments/servicing the interest on its due dates.
4. The Petitioner submits that around the period of November-December 2020, the Respondent defaulted in payment of installments of the credit facilities.

Thereafter the Petitioner issued a notice dated 19.02.2021 wherein the Petitioner had referred to the series of defaults committed by the Respondent, and consequent failure to pay the interests and other charges on the respective due days.

5. In view of the fact that no amounts were forthcoming from the Respondent towards the overall outstanding dues, the Petitioner vide Loan Recall notice dated 15.04.2021 recalled the rupee term loan facility and called upon the Respondent (Along with its guarantors) to repay a sum of Rs. 8,70,63,508/- payable as on 31.03.2021, along with applicable interest within 7 days from the receipt of the letter. The Respondent has failed to repay the outstanding amounts.

Reply by the Respondent

6. The Respondent in its reply has denied every averment, allegation and contentions and made the following submissions. The Respondent submits that the Petitioner has failed to demonstrate as to what was the date of default. The alleged date of default is intended to bypass the Section 10A of the Insolvency and Bankruptcy Code, 2016. The Petitioner mentions the date of default as 01.05.2021. The Petitioner is obligated to follow the Reserve Bank India guidelines for determining the date of default. The Petitioner according to Reserve Bank of India guidelines is bound to classify such asset as Special Mention Accounts (SMA) and thereafter classify such account of the borrower as Non-Performing Asset (NPA)
7. The Respondent submits that the Notice dated 21.12.2020, addressed by the Petitioner to the Respondent itself records that, as on that date an alleged amount of Rs. 4,53,96,975/- was already overdue. In furtherance the Petitioner in its notice dated 19.02.2021, stated that there is an 'outstanding balance'. Therefore, the Respondent submits that the Petitioner cannot change the date of default to be as 01.05.2021.

8. In the case of the present transaction, the EMI was for Rs. 1,39,91,851/- which was due on 15.10.2020. As per the Financial Creditor, the non-payment of the alleged amount in default was from November 2020. Thereafter there was a part payment of Rs. 30,39,231/- on 08.01.2021. However, the aforesaid payment amount of Rs. 30,39,231/- was not repayment of the full EMI. Thus, the default has to be calculated from the first default and not when part payment was made, according to the RBI Circular. The account was supposed to be declared Non-Performing Asset on non-payment of principal or interest. The part payment of Rs, 30,39,231/- was not sufficient enough for payment of principal or interest. Thus, the date of default continues from the first date of default irrespective of subsequent part payment made.
9. The Respondent submits that the Petitioner has annexed a CIBIL report dated 21.05.2021 (Exhibit CC). Upon perusal of the said report, it is clear that the default took place somewhere between December 2020 and January 2021 and not as on 1st May 2021, as wrongly alleged by the Financial Creditor. Thus, it clearly shows that the Financial Creditor is trying to misguide this Hon'ble Tribunal on the date of default. Clearly, the date of default is prior to January 2021 and falls within the 'protected period' as per Section 10A of the Code.
10. The Corporate Debtor vide its letter dated 10.05.2021 addressed to the Financial Creditor had called upon the Financial Creditor to provide the inspection of original documents and provide copies of the documents, more particularly mentioned therein. The Corporate Debtor had specifically called upon the Financial Creditor to communicate the exact date of declaration of the Corporate Debtor's loan account as an NPA and furnish NPA Report.
11. The present petition has been filed by the Financial Creditor with a fraudulent intention in order to recover its alleged dues from the Corporate Debtor by of filing a Petition under the Code for initiating a Corporate Insolvency Resolution

Process against the Corporate Debtor under the Code. Admittedly, the Corporate Debtor has already repaid around 90% of loan amount to the Financial Creditor. The alleged amount of Rs. 9,10,99,702/- is claimed by the Financial Creditor as due and in default. In any event and without prejudice to the contentions stated herein, the Financial Creditor has adequate security available with itself and could have preferred alternative remedies as available under law for the recovering its alleged dues from the Corporate Debtor. The Financial Creditor has filed the present Petition with the sole intention to recover money from the Corporate Debtor by approaching this Hon'ble Tribunal. It is a settled position under the law that this Tribunal is not a '*recovery forum*' and a Petition under Section 7 of the Code is only to be filed for the purpose of reorganization and insolvency resolution of Corporate Debtors. Under no circumstances, can it be said that a Petition filed under Section 7 of the Code can be maintained for recovery of sums as is the case of the Financial Creditor.

12. As per Section 3(12) of the Code, "default" has been defined as follows:-

"means nonpayment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the Corporate Debtor, as the case may be;"

Upon plain reading of the aforesaid definition, the term '*any part*' used after the term '*non-payment of debt*' makes it clear that even a part-payment made against an outstanding amount would continue to be a 'default' within the meaning of the aforesaid section under the Code. In the present case, the Corporate Debtor has made part-payment as stated above. In view thereof, the same does not allow the Financial Creditor to shift the date of default as in the case of the Financial Creditor in the present case and in view thereof, the present petition squarely falls within the time period as stated under Section 10A of the Code and hence, the present petition is not maintainable and is liable to be dismissed.

13. Since the date of default as demonstrated by the Corporate Debtor from the Credit Rating Report obtained as on 21st May 2021 by the Financial Creditor is

posterior to the date from which Ordinance was made retrospectively applicable on and from 25th March 2020, as stated above, the Ordinance which was promulgated taking into consideration the extraordinary situation prevalent all over the world, including India, impacting business, financial markets and economy which had created uncertainty and stress for business for reasons beyond the control of the Corporate persons. Therefore, the Hon'ble Tribunal is hence required to dismiss the present proceedings forthwith by virtue of Section 10A of the Code as amended irrespective of any default has been allegedly committed or not and whether being admitted or not. It is further stated that the Financial Creditor has neither availed nor exhausted the remedies as per the Indenture of Mortgage dated 23rd September 2015 containing the Master Terms and Conditions and the General Conditions under which the credit facilities were sanctioned/granted to the Corporate Debtor and even though there were alternate remedies available, yet the Financial Creditor opted to maliciously initiate proceedings before this Tribunal only for the purpose of recovery.

Findings

14. We have heard, the Counsel for the Parties.

15. During the course of arguments. The Counsel for the Petitioner has contended that as per the terms and conditions of the credit arrangement letter dated 16.09.2015, the Petitioner had sanctioned the term loan of Rs. 80,00,00,000/- to the Corporate Debtor out of which a sum of Rs. 40,00,00,000/- was disbursed, so as per the terms and conditions of the loan agreement, the credit facility was to be repaid in 24 months in accordance with the repayment schedule. The Corporate Debtor did not pay the balance principal instalments from 15.09.2020 onwards. Prior to that as per the RBI guidelines the Petitioner had granted a moratorium periods of 5 months to the Corporate Debtor in respect of instalments failing due between 15.04.2020 and 15.08.2020, and the balance tenure under the repayment schedule was shifted by 5 months and the Corporate Debtor was obliged to pay the remaining instalments from 20.09.2020

onwards. According to the Counsel for the Petitioner, the Corporate Debtor admittedly failed to pay the instalments. The Petitioner has further contended that petition cannot be said to have hit by the provision of Section 10 (A) of the Code. According to the Counsel for the Petitioner, in this case the default has occurred after the suspension period of envisaged under Section 10(A). In this regard, the Counsel for the Petitioner has referred to the loan agreement/indenture agreement executed between the Parties and in the said document under Section 8.1 of the said document defines the events of the default as under:-

*".....a) DEFAULT IN PAYMENT OF PRINCIPAL SUMS OF THE FACILITY
Default has occurred in the payment of principal sums of the Facility on the Due Dates (whether at stated maturity, by acceleration or otherwise) for payment thereof.
b) DEFAULT IN PAYMENT OF INTEREST AND OTHER MONIES
Default has occurred in payment of interest on the Facility or any other monies payable under these Terms and Conditions....."*

The Counsel for the Petitioner has further pointed out that in pursuance of the Clause 8.3 of the agreement, the Petitioner issued a recall notice dated 15.04.2021 after the suspension period under Section 10(A) of the Code had expired. Therefore, according to the Counsel for the Petitioner, the date of default for all intent and purpose is 15.04.2021 and not any time before. Therefore, the Petition cannot be said to be hit by Section 10(A) of the Code.

16. On the contrary the Counsel for the Corporate Debtor has argued that the Petition is barred under Section 10(A) of the Code as the first date of default occurred sometime in October, 2020 i.e., during the suspension period of 25.03.2020 to 25.03.2021. The Counsel for the Corporate Debtor has further pointed out that first notice regarding default was issued by the Petitioner on 21.12.2020, claiming an outstanding sum of Rs. 4,53,96,975/- as on December

2020. Therefore, as per the said notice given by the Petitioner the default took place in December, 2020. Apart from that, admittedly, the Petitioner, disbursed only Rs. 40,00,00,000/- out of sanction amount of 80,00,00,000/- and the disbursal of remaining 40,00,00,000/- was cancelled on 07.01.2021 unilaterally. This further strengthens the view that the default took place sometime before 07.01.2021 which led to the cancellation of disbursement of remaining part of the loan. The Counsel for the Corporate Debtor has further contended that the Petitioner has deliberately suppressed and omitted to mention NPA date in the Notices dated 15.04.2021 and 21.04.2021 and it has been done just to avoid falling under the bar of section 10(A). The Counsel for the Petitioner has further referred to the Statement of Account relied upon by the Petitioner itself which was shown that the account became irregular in October, 2020. Thus, it is abundantly clear that the date of default is from October, 2020 which clearly falls within the four corners of Section 10(A) of the Code. The Counsel for the Corporate Debtor has further contended that as per the provision of the Code, there cannot be more than one date of default and the first date of default is to be taken into consideration for the purposes of Section 7 of the Code, which in this case clearly falls in the exempted period given in Section 10(A) of the Code. Therefore, the present petition cannot be maintained, being clearly barred Under Section 10(A).

17. In support of his contentions, Counsel for the Corporate Debtor has relied upon Next Education India Private Limited v. K12 Techno Services Private Limited 2021 SCC Online NCLAT 105 whereby the Hon'ble NCLAT has held that it is not discretion of the Tribunal to accept one date or the other if there are several dates of default and further that the date of default is fixed and hence a crucial date and cannot be shifted and the cause of action is to be determined from the first date of default. He has further relied upon Laxmi Pat Surana Vs. Union of India (2021) 8 Supreme Court Cases 481 whereby it has been held that the date on which the loan in question was declared NPA is ordinarily the date of default to be considered as the reckoning the period of limitation for initiation proceedings Under section 7.

18. Having thoughtfully considered the rival contention of Counsel for the Parties, we are of the considered view that as per the facts and circumstances of this case, the date of default cannot be said to be 15, October 2020 as shown in the statement of account (Exhibit DD). In this context, a reference has to be made to the terms and conditions, incorporated in the indenture of mortgage. Section 8.3 of the of the indenture of mortgage deals with 'Consequences' of default and remedies'. This clearly provides that on any of the events of the default, the Petitioner may issue a notice in writing to the borrower declare the Principal of and all accrued interest in respect of the Facility to be due payable forthwith and may exercise the rights including the right to enter upon and take possession of the assets of the borrower and/or to transfer the assets of the borrower comprise within the security of the ICICI HFC etc., In pursuance of Section 8.3 of the indenture of mortgage, the Petitioner issued a loan recall notice dated 15.04.2021 (Exhibit-V). It was clearly mentioned in the loan recall notice that the account of the Corporate Debtor has been classified as Non-Performing Asset as the borrowed committed series default in the terms and condition of the agreement and failed to pay the dues toward repayment loan on the due date and interest and other charges. Prior to this notice, the loan was not declared the NPA at any point of time. In the letter (Exhibit T) dated 21.12.2020, the loan was not declared the NPA and the Corporate Debtor was merely exhorted to pay the overdue amount so that its good credit score may not get affected. Similarly, in the notice dated 19.02.2021 (Exhibit U), another chance was given by the Petitioner to the Respondent to pay the outstanding amount. It was stated in the said letter that the borrower has fail to pay the dues toward repayment loan on the due date and interest and other charges till date which constitute breach of the terms and conditions of the loan agreement. it is further stated in the said letter that final chance was being afford to the borrower to pay the entire outstanding balance together with interest forthwith. In the context, it would not be out of place to mention here that during the Covid period the RBI has issue an instruction exempting payment of instalments by the loanees due to the prevalence extraordinary circumstances therefore if

certain instalment were not paid during moratorium period of the declared by the RBI whereby the loanees was exempted from payment of instalments, the account could not have been validly declared NPA during the said period Even otherwise as per the terms and conditions settled between the parties reflected in indenture of mortgage, a recall notice was to be issued to the Borrower, which was issued by the Petitioner on 15.04.2021 whereby the account was declared NPA in unequivocal terms and the Corporate Debtor was asked to make the entire payment forthwith in respect of principal amount as well as interest. Thus, for all intents and purposes, the account was declared NPA as on 15.04.2021 which is clearly beyond the exempted period provided under Section 10 (A) of the Code. Therefore, it cannot be said that the present petition is barred under Section 10 A of the Code.

19. It has also been argument on behalf of the Corporate Debtor that the present petition has been filed by the Financial Creditor in order to recover the outstanding dues with the mala-fide intension knowing fully well that the Corporate Debtor has already repaid almost 90% of the loan amount. Even this contention of the learned counsel for the Corporate Debtor does not appear to be tenable considering the fact that a sum Rs. 9,10,99,702/- is undisputedly outstanding against the Corporate Debtor... Thus, there is a Financial debt and default which fulfil the condition as per Section 7 of the Code entitling the Petitioner to invoke the provision of the said Section.

20. No other points have been raised on behalf of the Corporate Debtor. Even otherwise, on the basis of the foregoing discussion, a clear-cut case for initiation of CIRP in terms of Section 7 of the Code is made out in accordingly the petition is **admitted** in the following terms.

ORDER

- a. The above Company Petition No. **(IB) 848 (MB) of 2021** is hereby **allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Roxina Real Estate Private Limited.**
- b. The Petitioner has proposed the name of **Mr. Udayraj Parwardhan** Insolvency Professional, Registration No: IBBI/IPA-001/IPP00024/2016-2017/10057, e-mail id: ca.udayraj@viajure.in, residing at Naman Midtown, B Wing, 1106, 11th Floor, Behind Kamgar Kala Kendra, Senapati Bapat Marg, Elphinstone West, Mumbai City, Maharashtra ,400013; as the Interim Resolution Insolvency Professional. The IRP proposed by the Petitioner, is hereby appointed as Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of **Rs. 5 Lakhs** towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount only towards expenses and not towards fee till his fees is decided by CoC.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

- k. Accordingly, **C.P.(IB)/848/MB/2021** is **admitted**.
- l. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
ANURADHA SANJAY BHATIA
(TECHNICAL MEMBER)

Sd/-
KULDIP KUMAR KAREER
(JUDICIAL MEMBER)