

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.677/MB-IV/2023

Under Section 7 of the IBC, 2016

In the matter of

Mr. Lucindo Domingos De Foria.

...Financial Creditor

v/s.

Malwan Hotels Private Limited.

[CIN: U55101GA2006PTC004901]

...Corporate Debtor

Order Delivered on: 06.12.2023.

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Financial Creditor:

Ms. Vinita Melvin, Ld. Counsel.

For the Corporate Debtor:

Ms. Surekha Yadav, Ld. Counsel.

ORDER

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Mr. Lucindo Domingos De Foria ("Financial Creditor"), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Malwan Hotels Private Limited., the Corporate Debtor.

1.1 The petition is filed on 21.02.2023 and the total outstanding amount of debt granted is Rs. 4,65,57,589/- in default inclusive of interest of Rs. 2,80,52,589 @10% p.a. as on 15.12.2022. The date of default as Specified in Part IV of the petition is 31.03.2022.

Submissions of the Financial Creditor:

2. The Financial Creditor is the Shareholder and Erstwhile Director of the Corporate Debtor. The Financial Creditor resigned from the Directorship with effect from 26.03.2011. In or around May 2007, the Corporate Debtor's then management requested for a loan from the Financial Creditor for running the operations of the Company. The Corporate Debtor undertook to repay the said loan on demand and to reflect the said Loan in the Company's financial Statements at all times until repayment. Thereof alongwith interest.

2.1. Based on the said representation, on or about 21st May, 2007 an amount of Rs 1,75,00,000/- was transferred by the Financial Creditor to the company by cheque no. 354131 drawn on Indian Overseas Bank and on 15th September 2010 a further amount of Rs 10,00,000/- was transferred vide cheque no. 56093 drawn on State Bank of India. As the loan was repayable on demand, the Financial Creditor demanded repayment of loan within 14 days from the date of receipt of the said notice vide its Loan Recall notice dated 29.09.2022.

Submissions of the Corporate Debtor:

3. The Corporate Debtor vide its Affidavit in reply dated 20.11.2023 states that: The Corporate Debtor has accepted an amount of Rs. 1,75,00,000/- (in form of deposit) from the Financial Creditor through a Board Resolution passed in

a meeting dated 20.04.2007. It may be seen that the deposit which is taken by the Corporate Debtor is an *interest free deposit*, therefore, the petitioner does not qualify to be a Financial Creditor under the provisions of the Insolvency and Bankruptcy Code,2016('Code'). The alleged debt is not qualified under the provisions of s. 5(8)(a) of the Code. There is no agreement for the payment of interest. Further the Corporate Debtor states that Financial Creditor/Petitioner fails on the ground of proving of default, as per the repayment terms mentioned in Resolution No. 7(c) passed in Board Meeting dated 20.04.2007, it is clear that the deposit taken by the respondent from the petitioner is repayable on the mutual consent between the parties. Lastly, the Corporate Debtor submits that, there is counter claim by the Corporate Debtor over Financial Creditor with reference to the land transaction.

Findings:

4. We have heard the arguments of Learned Counsel for Financial Creditor and the Corporate Debtor.

4.1. For the purpose of Section 7 of Insolvency and Bankruptcy Code,2016, twin conditions of debt and default are mandatory to pass the test of admission. In the present case, the Financial Creditor has failed to establish the mandatory condition of proving default.

4.2. The Corporate Debtor has produced the minutes of Board Resolution dated 20.04.2007 which is the only document to prove the nature of transaction. The resolution reads as follows:

“the repayment of the deposit shall be subject to mutual consent i.e. the Company and Mr. Lucindo De Faria. The Company is

authorised to make any deduction against the amount receivable from Mr. Lucindo De Faria or his Family”.

Therefore, this bench is of the view that Financial Creditor submissions that debt was payable on demand holds no ground as its repayment was an mutual consent . As the Financial Creditor has not produced any document which shows otherwise or which shows that the two parties mutually agreed to repay the loan, this bench is not inclined to observe that there was a default. In the absence of mandatory condition of default being established this bench observes that it is a fit case for dismissal under Section 7 of the Insolvency and Bankruptcy Code,2016.

5. Considering the facts placed before us, this bench is of the considered view that in such circumstances, that the present case deserves to be dismissed under Section 7 of the Insolvency and Bankruptcy Code, 2016.

ORDER

6. The petition bearing CP(IB) 677/MB-IV/2023 filed by Mr. Lucindo Domingos De Foria (“Financial Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Malwan Hotels Private Limited., the Corporate Debtor is **Rejected**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
06.12.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)