

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III

C.P. No. (IB) 1067/MB/C-III/2022

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

In the matter of

LPHP Real Estate Private Limited

Having office at:

Flat No. 201, 2nd Floor, Ocean 360, 84-85
Banganga Cross Road, Walkeswar, Malabar Hill,
Mumbai - 400006

...Financial Creditor/Petitioner

Versus

Faime Makers Pvt Ltd

Having office at:

201/202, Vastu Prestige, Near Fame Adlabs,
Andheri Link Road, Andheri (west), Mumbai -
400053

...Corporate Debtor/Respondent

Order pronounced on: 7th February 2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

Appearances:

For the Financial Creditor: Adv. Charles D'Souza (VC)

For the Corporate Debtor: Adv. Manoj Mishra

Per: Ms. Lakshmi Gurung, Member (Judicial)

1. This Petition has been filed by LPHP Real Estate Private Limited (“**Petitioner/ Financial Creditor**”) to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against Faime Makers Private Limited (“**Respondent/Corporate Debtor**”) under **Section 7** of the Insolvency and Bankruptcy Code, 2016 (“**the Code**”) for the alleged default on part of the Corporate Debtor in repayment of debt of **Rs. 14,84,81,708/-** (Principal Amount of Rs. 11,35,00,000/- plus interest of Rs. 3,49,81,708/-). The date of default is stated as **01.03.2020**.
2. The Corporate Debtor is a private limited company having its registered office at Mumbai, Maharashtra. Therefore, this Bench has jurisdiction to deal with the present petition.
3. The Corporate Debtor is in the business of building and construction and is the owner of a piece and parcel of land admeasuring 2786 sq. mts. comprising CTA Nos. 75B, 75/33 and 75/34 situated in Village Bandivali, Mumbai (**Plot**). Out of the total area of 2786 sq. mts., an area admeasuring 1277 sq. mts. was declared as slum area under the provisions of the Maharashtra Slum Areas (Improvement, Clearance & Rehabilitation) Act, 1971. The remainder of the Plot admeasuring 1509 sq. mts. is owned by the Corporate Debtor on which there was a pre-existing building.
4. On 10.10.2012, a Development Agreement was executed between the Corporate Debtor and Navnirman Welfare Society whereby the Corporate Debtor agreed to redevelop the Plot under a housing project named ‘Euphoria’. The Corporate Debtor was in the process of demolishing the pre-existing building to carry out developmental activities in accordance with the terms and conditions of the said Development Agreement and

as per the plan and specifications duly approved and sanctioned by the various concerned authorities.

5. For the said purpose, the Corporate Debtor approached the Financial Creditor and requested to provide financial assistance for the completion of the developmental activities on the Plot. Consequently, the Financial Creditor and the Corporate Debtor executed a Finance Agreement dated 08.01.2019 whereby the Financial Creditor agreed to advance financial assistance up to Rs. 38,00,00,000 to the Corporate Debtor for the redevelopment of the said Plot.
6. The relevant terms and conditions of the Financial Agreement:
 - i) The disbursement of amounts was conditional upon the Corporate Debtor achieving progress in construction of the Project to the satisfaction of the Financial Creditor.
 - ii) The Loan was to be repaid by the Corporate Debtor within a period of 24 months from 08.01.2019 with a grace period of 6 months at the discretion of the Financial Creditor.
 - iii) If the Corporate Debtor failed to repay the loan within the agreed period, the Financial Creditor was entitled to charge interest at 12% per annum on the outstanding amounts.
7. The above-said Finance Agreement was executed for the purpose of completion of construction and development of a new building in the said Plot in Village Bandivali.
8. As per the Finance Agreement, an amount of Rs. 12,00,00,000 was disbursed to the Corporate Debtor in two tranches. The Corporate Debtor also executed a registered Indenture of Mortgage (**Mortgage**) dated 08.01.2019 under which the plot of land on which the redevelopment was to be carried out was mortgaged in favour of the Financial Creditor. The Corporate Debtor was also barred from selling any constructed units that

were part of the mortgaged property without obtaining a written no-objection from the Financial Creditor.

9. The Corporate Debtor did not make any progress in the Project, consequently leading the Financial Creditor to withhold further disbursements. Thereafter, the Financial Creditor and Corporate Debtor executed a Memorandum of Understanding (**MoU**) dated 21.10.2019 under which the Corporate Debtor acknowledged the outstanding dues and agreed to repay the amount of Rs. 12,00,00,000 along with Rs. 15,00,000 towards registration and stamping expenses on or before 28.02.2020. However, only Rs. 2,50,00,000 was paid back.
10. In March 2020, the Corporate Debtor issued 26 post-dated cheques aggregating to Rs 14,35,00,000 comprising of outstanding amount of Rs. 9,50,00,000 and a further amount of Rs. 4,85,00,000. However, all the cheques were dishonored. Consequently, the Financial Creditor instituted proceedings under the Negotiable Instruments Act, 1881.
11. A criminal complaint was also filed with the Economic Offences Wing. The Corporate Debtor filed an Anticipatory Bail Application before the Sessions Court at Bombay. In the proceedings before the Sessions Court, the Financial Creditor and Corporate Debtor entered into Consent Terms dated 26.08.2021 whereby the Corporate Debtor agreed to pay the outstanding amount of Rs. 14,35,00,000 in installments. Accordingly, an amount of Rs. 3,00,00,000 was paid to the Financial Creditor.
12. The remaining amount of Rs. 11,35,00,000 is still to be paid and the Financial Creditor addressed a Demand Notice dated 23.05.2022 to the Corporate Debtor, and the Corporate Debtor, through its Advocates, addressed a letter dated 06.06.2022 *inter alia* admitting its liability and promised to pay the outstanding amount. However, the Corporate Debtor failed to repay.

13. In this background, the Financial Creditor filed the present Petition for default in payment of principal amount of Rs. 11,35,00,000 along with interest @ 12% per annum (from 01.04.2020 to 30.06.2022) amounting to Rs. 3,49,81,708.

Submissions of the Corporate Debtor

14. The Corporate Debtor raised the following objections on the maintainability of the present Company Petition:

- i) The financial assistance that was provided by the Financial Creditor to the Corporate Debtor was beyond the object clause of the Memorandum of Association (MoA) of the Financial Creditor. Thus, as per the 'doctrine of ultra vires', the Finance Agreement and all consequent acts executed by the Financial Creditor is *ultra vires* the MoA and thus *void ab initio*. Reliance is placed on **Om Prakash Mohta vs. Steel Equipment and Construction Co. (P) Ltd. [1966 SCC Online Cal 44]**, **Jaiveer Singh Virk vs. Sir Sobha Singh & Sons Pvt. Ltd. [2020 SCC Online Del 498]** and **Madras Native Permanent Fund Ltd. vs. B. G. Kolandavelu Mudaliar & Ors [1930 SCC Online Mas 272]**.
- ii) The loan advanced by the Financial Creditor is in contravention to Section 186(2) of the Companies Act, 2013 (**Act**) which mandates that when a company proposes to directly or indirectly give any person or body corporate a loan exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, then the company is required to obtain prior approval via Special Resolution passed in the Extra-ordinary General Meeting (EGM) of Shareholders. In the present case, the Financial Creditor had extended a loan of Rs. 12,00,00,000 to the Corporate Debtor which amount exceeds the limit stated in Section 186(2) of the Act as is evident from the perusal of its Form AOC-4 downloaded from MCA website. However,

the Financial Creditor failed to furnish any special resolution and thus violated the provisions of Section 186 of the Act. Reference is made to NCLT Delhi Order in **M/s UKG Steel Pvt. Ltd. vs. M/s. Erotic Buildcon Pvt. Ltd. [CP(IB)/1050(PB)/2020]**.

- iii) It is also submitted that the Financial Creditor is neither a Bank/NBFC nor a body corporate recognized by RBI for carrying out financial business as no such certification / authorization has been enclosed in the said Petition and therefore, the Financial Creditor is not authorized to advance any such loans to other companies. However, the Corporate Debtor was led to believe that the Financial Creditor was competent to enter into the Finance Agreement as per the objects in its MoA. Thus, in furtherance to the 'doctrine of indoor management', there was no disclosure to the Corporate Debtor of the objects of the Financial Creditor under its MoU and thus, the Corporate Debtor was unaware of the gross illegalities perpetuated by the Financial Creditor.

Submissions of Financial Creditor

15. In response to the contentions of the Corporate Debtor, the Financial Creditor submitted the following:
- i) The MoA of the Financial Creditor states that the objects to be pursued by the Company includes *inter alia* purchase, renting and leasing immovable property and the matters which are necessary for furtherance of the above objects include acquiring and mortgaging property, acquisition, lease and development of immovable property. In view of the same, it is submitted that the subject loan, which was secured by a registered mortgage of immovable property falls within the object clause as stated in the MoA.
 - ii) The provisions of Section 186(2) and 186(3) of the Act are not applicable to the Financial Creditor. Section 186(11) of the Act

provides that nothing contained in Section 186 (except sub-section 1) shall apply to a loan advanced by a company engaged in the business of providing infrastructural facilities. The Financial Creditor is involved in the business of housing and the Project for which loan was advanced was in the line of its business. Thus, the question of non-compliance with the same does not arise.

iii) However, without prejudice to the above, the Financial Creditor had passed the Special Resolution dated 08.10.2018, though, the same was filed with the Registrar of Companies on 08.01.2024. It is submitted that the delay in filing the Special Resolution does not invalidate the Resolution as the delay was merely a procedural defect which was curable in terms of Section 117 of the Act.

FINDINGS

16. Heard the Counsels and perused the documents placed on record.
17. It is an admitted fact that the Financial Creditor agreed to grant financial assistance not exceeding Rs. 38,00,00,000 to the Corporate Debtor for a housing project at Village Bandivali and a Finance Agreement dated 08.01.2019 was executed pursuant to which Rs. 12,00,00,000 (with interest @ 12%) was given to the Corporate Debtor. Since, no development work was carried out by the Corporate Debtor, the Financial Creditor did not make further disbursements.
18. A Memorandum of Understanding (MoU) dated 21.10.2019 was signed between the parties whereby the Corporate Debtor undertook to pay the amount of Rs. 12,00,00,000 (plus charges) on or before 28.02.2020. The Corporate Debtor initially paid Rs. 2,50,00,000 but failed to make payments thereafter. Thus, amount of Rs. 9,50,00,000 was yet to be paid.

19. After some negotiations between the two parties, a Consent Terms dated 26.08.2021 was signed and the Corporate Debtor admitted the debt and agreed to pay a sum of Rs. 14,35,00,000 (principal amount of 9,50,00,000 + additional amount) in installments. In pursuance thereto, the Corporate Debtor paid Rs. 3,00,00,000 but defaulted thereafter.
20. A demand notice was sent by the Financial Creditor on 23.05.2022. In response thereto, the Corporate Debtor sent a letter dated 06.06.2022 acknowledging the debt of Rs. 11,35,00,000 and undertook to repay the same. However, the Corporate Debtor defaulted in paying the outstanding due.
21. The Financial Creditor has placed on record the proof of amount disbursed as loan to the Corporate Debtor. The material on record that includes the Finance Agreement, the registered Indenture of Mortgage, MoU dated 21.10.2019, Consent Terms dated 26.08.2021, and Bank Statement of the Financial Creditor, clearly depict that the loan was sanctioned and disbursed to the Corporate Debtor.
22. The Corporate Debtor did not deny the averments made in the Petition or the documents annexed thereto. however, in its Reply, the Corporate Debtor raised two grounds on maintainability of the present Petition:
 - i) That the execution of finance agreement is *ultra vires* the Memorandum of Association of the Financial Creditor and thus, the Finance Agreement and all consequent acts executed by the Financial Creditor are *void ab initio*; and
 - ii) That the Financial Creditor, while sanctioning the loan, did not comply with the provisions of Section 186(2) & 186(3) of the Companies Act, 2013.
23. We have carefully examined the Memorandum of Association of the Financial Creditor, it is observed that the main object of the Financial Creditor is stated in Clause 3(a) which is reproduced below:

“To purchase any moveable or immovable property including industrial, commercial, residential, or farm lands, plots, buildings, houses, apartments, flats or areas within or outside the limits of Municipal Corporation or other local bodies, anywhere within the Domain of India, to divide the same into suitable plots, and to rent or sell the plots for building/construction residential houses, bungalows, business premises, and colonies and rent or sell the same and realize cost in lump sum or easy installments or by hire purchase system and otherwise.

To carry on the business to provide owned property on lease or to sublet leased property on lease or to provide on hire purchase basis all types or description of property whether commercial, residential or industrial and non-industrial building and real estate required for manufacturing, processing, transportation and trading business and other commercial, non-commercial services and business purposes.”

24. Clause 3(b) of the Memorandum of Association of the Financial Creditor enlists the incidental and ancillary objects to carry on activities which are necessary for furtherance of the objects specified in clause 3(a). Under clause 3(b), sub-clause 23 and 28 reads as follows:

“***

23. *To purchase, take on lease or exchange, hire or otherwise, acquire and dispose off any immovable or moveable properties, real or personal of all kinds and of any rights or privileges which the Company may think necessary or convenient for the purpose of its business and either to retain the properties so acquired for the purpose of the Company’s business or to turn the same to account as may seem expedient.*

28. *To undertake, carry out, promote, **sponsor, contribute** or **assist** in any activity, project for rural development including any programme for promoting the social and economic welfare of or the upliftment of the people in rural area irrespective whether the Company has any business dealings in such areas or not to incur any expenditure or use any of the assets and facilities of the Company on any programme or project or activity on rural development and to assist execution and promotion thereof either directly or in association with other*

company or person or organization or through independent agency or in any manner as the Company may deem fit in order to implement any of the projects or programmes or activities of rural development, to transfer without consideration or at such fair or concessions value and divert the ownership of the properties of the Company to or in favour of any public or local body, authority, Central or State Government or any public institution or trust or fund.”

(Emphasis Provided)

25. It is pertinent to note that a Development Agreement dated 10.10.2012 was signed between the Corporate Debtor and Navnirman Welfare Society for redevelopment of the plot in Village Bandivali for which purpose the Corporate Debtor approached the Financial Creditor seeking financial assistance pursuant to which the Finance Agreement dated 08.01.2019 was executed. Part 15(xii) states that *the said loan amount will be used by the Company only for the purposes of the development of the Plot of Land and for no other purposes.* The disbursement of amount agreed under the Finance Agreement is also agreed to be paid in instalments with the initial amount of Rs. 11,00,00,000 being paid towards costs of vacating the Plot, payment of rent of the tenants on the Plot and for commencing the development work till the plinth level. Further amount of Rs. 1,00,00,000 was agreed to be disbursed upon the Corporate Debtor completing the construction and development of the building. Thereafter, the disbursement of further amount was at the complete discretion of the Financial Creditor based on the developments in the plot.
26. We note that the financial assistance has been provided to the Corporate Debtor for completion of development activities of Housing Project entered into between the Corporate Debtor and Navnirman Welfare Society to redevelop the Plot under a housing project named ‘Europhia’ at Village Bandivali. No dispute was raised on the fact that the Plot at Village Bandivali is a rural area.

27. Upon conjoint reading of the main object at Clause 3(a) and sub-clause 23 and 28 of the ancillary and incidental objects at Clause 3(b) of the MoA of the Financial creditor, it is clear that the Financial Creditor is entitled to carry on a project for rural development by purchase/lease/hire/or otherwise acquire any immovable property. The Financial Creditor had provided financial assistance for a housing project and had acquired an immovable property by way of mortgage deed and all these activities were permitted by its MoA. In view of the same, we hold that the said Finance Agreement dated 08.01.2019 signed between the Financial Creditor and Corporate Debtor is within the ambit of the Memorandum of Association of the Financial Creditor. Thus, we find no merit in the contention of the Corporate Debtor and the same is rejected.
28. Since we have held that the Finance Agreement executed between the Financial Creditor and the Corporate Debtor is not *ultra vires*, there is no need to deal with the judgments relied upon by the Corporate Debtor as they do not support the Corporate Debtor's case.
29. With respect to the second issue raised by the Corporate Debtor, we see that Section 186(11) of the Companies Act, 2013 exempts certain companies from the applicability of section 186 (except sub-section 1) of the Act, one of them being a company engaged in providing infrastructural facilities. Schedule VI of the Companies Act, 2013 that defines 'infrastructural facilities' which includes housing which is part of business of the Financial Creditor. The MoA of the Financial Creditor clearly mandates it to engage in housing projects. In furtherance to its objects, the Financial Creditor has advanced financial assistance to the Corporate Debtor for completion of housing project. In view of the above, we agree with the submission of the Financial Creditor that by virtue of Section 186(11) of the Act, sections 186(2) and 186(3) are not applicable to the Financial Creditor. Nonetheless, the Financial Creditor has also

placed on record the special resolution dated 08.10.2018 as required under section 186(3) of the Act by way of an additional affidavit. In view thereof, we see no merit in the averments of the Corporate Debtor and the judgments relied upon by the Corporate Debtor does not support the present case.

30. According to the terms of the Memorandum of Understanding (MoU) dated 21.10.2019, the debt was due and payable on 28.02.2020. Since there is failure on the part of the Corporate Debtor to pay the debt, there is default.
31. It is a well-settled position that the Adjudicating Authority has to determine whether there is debt and default and if it is satisfied that a default has occurred, then the application under section 7 of the Code must be admitted unless it lacks other necessities as mandated thereunder. We are supported by the decision of Hon'ble Supreme Court in **Innoventive Industries Limited vs. ICICI Bank and Anr [(2018) 1 SCC 407]** wherein it was held as follows:

“28. ... The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days receipt of a notice from the adjudicating authority.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

(Emphasis Provided)

32. Upon perusal, this Tribunal is of considered opinion that the application made by the Financial Creditor is complete in all respects as mandated under the Code and the default amount is also in excess of the minimum amount stipulated in section 4(1) of the Code. The Petition is filed within the limitation period, and therefore we are satisfied that the present petition is maintainable.
33. In view of the facts and circumstances of the case and discussions hereinabove, the Company Petition bearing no. 1067 of 2022 is **admitted** and ordered as follows:

ORDER

- i) The above Company Petition No. (IB) 1067 (MB)/2022 is hereby **allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Faime Makers Private Limited**.
- ii) The Petitioner has proposed the name of **Mr. Pramod Dattaram Rasam**, Registration No. IBBI/IPA-001/IP-P00722/2017-2018/11259, to be appointed as an Interim Resolution Professional (IRP) of the Corporate Debtor. The proposed IRP has filed his Written Communication dated 14.07.2022 in Form 2 as required under Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Written Communication is accompanied by AFA dated 05.01.2022. Accordingly, **we appoint Mr. Pramod Dattaram Rasam (pdrasam@gmail.com) as the Interim Resolution Professional (IRP)** to carry out the functions as per the Insolvency & Bankruptcy Code, 2016.
- iii) 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 (IRP) appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by the Committee of Creditors.

- iv) There shall be a moratorium under section 14 of the Code prohibiting the following:
- 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 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 Corporate Debtor.
- v) The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- vi) 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.
- vii) 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.

- viii) The public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- ix) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP in terms of section 17 of the Code. 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.
- x) The Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- xi) The Registry is further directed to communicate this order to the Financial Creditor, the Corporate Debtor and the IRP immediately.
- xii) The Registry is also directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (IBBI) for their record.
- xiii) A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
- xiv) The Company Petition No. 1067 of 2022 is accordingly **admitted**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

Sd/-

Lakshmi Gurung
Member (Judicial)

Uma, LRA