

**THE NATIONAL COMPANY LAW TRIBUNAL  
PRINCIPAL BENCH  
AT NEW DELHI**

**Company Petition No. (IB)-572 (PB)/2019**

**Under Section 7 of the Insolvency and Bankruptcy Code,  
2016**

In the matter of:

Dinesh Khetan

Applicant/Financial Creditor

Vs.

M/s Bigmoon Buildcon Private Limited

Respondent/Corporate Debtor

*Judgment delivered on: 03.09.2019*

**CORAM:**

**MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT**

**MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)**

For Petitioner: Mr. Dinesh Khetan,  
Mr. B. Patnaik, Advocates.  
For the Respondent: Mr. Rishi Kapoor,  
Mr. Abhay Kaushik, Advocates.



## **ORDER**

**S. K. Mohapatra, Member**

1. Mr. Dinesh Khetan, claiming as the financial creditor, has filed the instant 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') for initiation of Corporate Insolvency Resolution Process in respect of respondent Company M/s Bigmoon Buildcon Private Limited referred to as the corporate debtor.
2. The Respondent Company M/s Bigmoon Buildcon Private Limited (CIN No. U 70109 DL 2011 PTC 221077) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 17.06.2011 having its registered office at A-213, 2<sup>nd</sup> Floor, Shanti Gopal Chamber, Vikas Marg, Shakarpur, Delhi - 110092. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal having territorial jurisdiction



over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It is the case of the applicant that respondent Corporate Debtor through its director had approached him in March, 2018 for arranging financial assistance for the corporate debtor to a tune of Rs. 6,00,00,000/- (Rupees Six Crore) from private sources, with an understanding to pay Rs. 11,00,000/- to the applicant as service charge. Thereafter, due to further requirement the Corporate Debtor requested the applicant for a short-term investment. Accordingly, applicant transferred Rs. 20,00,000/- through RTGS to the corporate debtor as a short-term financial assistance on 21 August, 2018. In order to assure due repayment, the Corporate Debtor had issued a cheque dated 27.08.2018 for Rs. 31,00,000/- along with a forwarding letter dated 21 August, 2018 towards the previous service charge for 11 Lacs and short-term



loan for 20 Lacs. However, on presentation the said cheque got dishonored due to “insufficient funds”.

4. Subsequently both the parties executed an *‘investment agreement cum memorandum of understanding’* dated 30.10.2018 by treating the entire outstanding amount of Rs. 31 Lacs as investment. Accordingly, the corporate debtor issued two PDCs both dated 21.11.2018, one for Rs. 31 Lacs towards investment and Rs. 3 Lacs towards investment charge / interest. Once again both the postdated cheques given by the respondent corporate debtor got dishonored for want of funds.

5. At Part-IV of the application Rupees 35,87,000/- has been claimed as on 20.01.2019, which comprises of Rs. 31,00,000/- towards investment and Rs. 3,00,000/- towards interest charges till 26.11.2018 including Rs. 1,87,000/- towards further interest for the period from 27.11.2018 to 20.01.2019 calculated @ 3% per month.



6. It is the case of the applicant that despite several demands the Corporate Debtor has not paid the outstanding dues. It is accordingly prayed to initiate Corporate Insolvency Resolution Process against the respondent-corporate debtor by admitting the present application.
7. The respondent corporate debtor has filed its reply on 06.06.2019. We have heard the learned counsels for the parties and have perused the case records.
8. The main contention of the respondent is that the alleged claim is not in the nature of financial debt. It is stated that as per the application the applicant acted as a mediator in arranging a sum of Rupees 6 Crores from private financiers for the corporate debtor and pursuant to the said service, applicant has charged a sum of Rupees 11 Lacs. This being a service charge in arranging funds for the respondent, cannot be a financial debt within the definition of the Code.
9. In this regard it is relevant to refer to the *Investment Agreement Cum Memorandum of Understanding dated 30.10.2018* executed between



the applicant and the respondent-corporate debtor. In order to appreciate the matter in its proper prospective Clause I of the agreement is reproduced below:

*“NOW, THEREFORE, THE PARTIES HEREBY AGREE AS UNDER:*

*1. The Company had approached the investor for arranging investment upto Rs. 6 crores from private financier on the terms and condition mutually agreed with them and agreed to pay a fee of Rs. 11,00,000/- towards this service. After availing the investment from the private financiers, the Company also requested the Investor for an investment of Rs. 20,00,000/- in the Company for one week and issued a cheque for Rs. 31,00,000/- dated 27.08.2018 after receipt of the Investment of Rs. 20,00,000/- on 21.08.2018 which covers repayment of investment of Rs. 20,00,000/- and payment fee of Rs. 11,00,000/-. The said cheque of Rs.31,00,000/- got dishonoured by*



*the bank of the Company on presentation of the same by the Investor. Thereafter with the mutual discussion, investor and company have agreed to convert the entire amount of Rs.31,00,000/- into a new investment on the terms conditions as stated/contained in this Agreement.”*

**10.** In the present case the claim consists of two separate transactions, one for 11 lacs towards initial service charges for arranging investment and the other for an actual cash investment disbursed to corporate debtor for 20 lacs. Both parties agreed to term the entire outstanding amount as an investment to the corporate debtor and the applicant was styled as ‘*Investor*’ in the agreement.

**11.** The respondent company has executed the *Investment Agreement Cum Memorandum of Understanding dated 30.10.2018* duly affixing the seal of the company and signature of one of its directors authorised by Board Resolution dated 29.02.2016. Moreover, the respondent corporate debtor has not



disputed the execution of the *Investment Agreement Cum Memorandum of Understanding* dated 30.10.2018.

**12.** The parties themselves are the best judges to take commercial decision to suit their cause. But once they entered in to and executed an agreement, they are bound by the mutually agreed terms there being accord and satisfaction. In the present case respondent company instead of paying service charge of 11 lacs to the applicant, adjusted and acknowledged the receipt of the said amount as investment in terms of the agreement.

**13.** That apart even if the first part of 11 lacs is excluded as not financial debt being service charges for arranging investment, the subsequent actual investment disbursed to the corporate debtor for Rs. 20 lacs cannot be ignored. It is pertinent to note here that application under Section 7 is maintainable once the default is more than one lakh, in view of Section 4 of the Code.



**14.** Respondent corporate debtor has not denied the receipt of Rupees 20 lacs from the applicant. In order to assure due repayment, the Corporate Debtor had issued a cheque dated 27.08.2018 for Rs. 31,00,000/- along with a forwarding letter dated 21 August, 2018 towards the previous service charge for 11 Lacs and in respect of short-term investment for 20 Lacs. As the cheque got dishonored, again the corporate debtor issued two PDCs both dated 21.11.2018, one for Rs. 31 Lacs towards investment and Rs. 3 Lacs towards investment charge / interest.

**15.** The disbursement of Rupees 20 lacs and receipt thereof by respondent has not been denied. As per the agreement on the request of the respondent corporate debtor, applicant invested Rs. 20,00,000/- in the respondent company and respondent issued a cheque for Rs. 31,00,000/- dated 27.08.2018 after receipt of the Investment of Rs. 20,00,000/- on 21.08.2018 which covers repayment of investment of Rs. 20,00,000/- and fee of Rs. 11,00,000/-.



**16.** The agreement further shows that the investment was for 3 months from 21.08.2018 and the agreed rate of interest was 3% p.m. payable at the end of each month. There was thus clear mutual agreement to pay interest on the investment amount. The corporate debtor had availed the investment amount against payment of interest as agreed between the parties. The amount was disbursed against the consideration for time value of money with a clear commercial effect of borrowing. In that view of the matter not only the investment comes within the purview of '*Financial Debt*' but also the applicant can clearly be termed as '*Financial Creditor*' of the respondent corporate debtor so as to prefer the present application under Section 7 of the Code.

**17.** It is no longer *res integra* that if there is a debt and default of rupees one lakh or more and the application under Section 7 of the Code is complete, Adjudicating Authority is bound to admit the application.



**18.** In support of claim of default applicant has placed on record *Investment Agreement Cum Memorandum of Understanding dated 30.10.2018*, where in respondent has acknowledged that Rs. 31 lacs are due to the applicant, which is payable with interest as per agreed terms. Besides as per the agreement the investment was for 3 months from 21.08.2018 and the default occurred long before in the year 2018 itself.

**19.** In addition, applicant has placed on record its bank account statements and post-dated cheques issued by respondent dated 27.08.2018 and 21.11.2018 to clear the debts in question. Besides return memos have been enclosed to show that the cheques were dishonored. That apart copy of demand notices dated 30.11.2018 and 07.12.2018 have been placed on record in support of the contention that despite demand the debt has not been cleared by the respondent corporate debtor.



- 20.** A person who signs cheques and make it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheques had been issued for payment of a debt or in discharge of a liability. Acknowledgement of debt made in the agreement followed by issuance of cheques by respondent are *prima facie* admission of debt.
- 21.** There is thus sufficient material on record to conclude that respondent corporate debtor has committed default in repayment of the financial debt.
- 22.** Respondent corporate debtor has disputed the quantum of claim mainly on the ground that the interest charged is highly excessive and cannot sustain in law.
- 23.** In this regard the settled position of law is that Section 7 application filed under the Code cannot be rejected on the ground that the claim has been disputed. Adjudicating Authority is only to ascertain the existence of a default and is not required to decide as to what is the actual amount of claim and other details including applicable rate of interest. Once the



default is more than 1 lakh, in view of Section 4 of the Code, the application is maintainable.

**24.** Similarly, the claim of respondent that it is a solvent company will not help as long as there is a debt and default. The Code gets triggered the moment default is of Rupees one Lakh or more. The material on record clearly goes to show that the respondent corporate debtor has committed default in payment of the outstanding debt.

**25.** It is appropriate to mention that the present application under Section 7 of the Code for initiation of Corporate Resolution Insolvency Process has been filed by petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with required information, documents and records as prescribed under the Rules.

**26.** The applicant *inert-alia* has annexed to the application detail particulars of 'financial debt' including documents, records and evidence of default as required under subsection 3 (a) of Section 7 of the



Code. It is reiterated that the Form-1 filed in the present case under Section 7 of the Code read with Rule 4 of the Rules, shows that the Form is complete in all respect and there is no infirmity in the same.

**27.** Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Ajay Goyal, , for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P00382/ 2017-18 / 10639 resident of 49, DDA Site No. 1, M Block, New Rajendra Nagar, Delhi - 110008 with email - id [ajaygoyalca75@gmail.com](mailto:ajaygoyalca75@gmail.com). Sh. Ajay Goyal has agreed to accept the appointment as the interim resolution professional and has signed a communication dated 19.11.2018 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or



elsewhere. In addition, further necessary disclosures have been made by Mr. Ajay Goyal as per the requirement of the IBBI Regulations. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has also been satisfied.

**28.** The application filed by the applicant financial creditor under sub-section 5 (a) of Section 7 of the code, has to be admitted on satisfaction that:

- I. *Default has occurred.*
- II. *Application is complete, and*
- III. *No disciplinary proceeding against the proposed IRP is pending*

**29.** Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited V. Kirusa Software Private Limited* reported in AIR 2017 SC 4532 at Para 19 has observed that:

*“Once the adjudicating authority / Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending*



*against the proposed resolution professional, it shall admit the application”.*

**30.** It is pertinent to mention here that the Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application.

**31.** As a sequel to the above discussion we are satisfied that the present application is complete in all respect and that no disciplinary proceeding against the proposed IRP is pending. We are also satisfied that the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

**32.** Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

**33.** Mr. Ajay Goyal having registration number IBBI / IPA-001 / IP-P00382/ 2017-18 / 10639 resident of 49, DDA Site No. 1, New Rajendra Nagar, Delhi -



110060 with email - id [ajaygoyalca75@gmail.com](mailto:ajaygoyalca75@gmail.com) is appointed as an Interim Resolution Professional.

**34.** In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

**35.** We direct the Financial Creditor to deposit a sum of Rs. 2 Lacs with the Interim Resolution Professional namely Mr. Ajay Goyal 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 Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per rules and shall be paid back to the Financial Creditor.



**36.** We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

*“(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.”*

**37.** It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

**38.** The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty



and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its 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 day to day 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 would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under 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, Rules and Regulations.



**39.** The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible 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 to the public at large.

Sd/-

03.09.2019

**(M.M. KUMAR)  
PRESIDENT**

Sd/-

**(S. K. MOHAPATRA)  
MEMBER (T)**

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