

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 202
(IB)-308/ND/2024

IN THE MATTER OF:

Ashutosh Garg

Regd. Office at:
LTH3 PH1,
The Laburnum, Sushant Lok-1,
Gurugram-122002 (Haryana)

**... Applicant/
Financial Creditor**

Versus

M/s Guardian Lifecare Pvt. Ltd.

Regd. Office at:
WZ-56, Second Floor, Ram Nagar,
Tilak Nagar, New Delhi-110018

... Respondent

Under Section: 7 of IBC, 2016

Order delivered on 05.09.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Sr. Adv. Manish Vashisht, Adv. Vedansh
Vashisht
For the Respondent : Adv. Rikky Gupta and Ms. Ananya Singh,
Advocates

Hearing Through: VC and Physical (Hybrid) Mode

ORDER

As can be seen from the Part-IV (1) of the application, the Corporate Debtor has defaulted to pay an amount of Rs. 1,09,25,296.50/-. The date of default as mentioned in the application is 31.12.2023. Ld. Sr. Counsel for the Petitioner could draw our attention to the NeSL report placed on record as Annexure-14 to the application. Part (d) of the NeSL report as available in the petition reads thus:

Default Details			
Date Of Default	23/02/2024	Days Past Due	80
Default Amount	10216340.50	Total Outstanding Amount	10216340.50
Date of Last AOD	31/03/2024		

2. The liability is not disputed and has been duly authenticated. After hearing the parties, we had passed an order dated 12.06.2024 calling upon them to file an affidavit specifically stating therein that the petition is not a collusive one. The order reads thus: -

“Ld. Counsel for the Applicant could draw our attention to NeSL report to espouse that the default has been committed by the Corporate Debtor in repaying the amount of debt. Issue notice. Mr. Gupta, Ld. Counsel for the Corporate Debtor accepts notice and seeks an opportunity to file reply within one week. Both the Petitioner and Respondent are directed to file a specific affidavit that the present petition is not the collusive one and has not been filed for reasons and with ulterior motive. Let the affidavit be filed within one week.

List on 02.07.2024.”

3. In compliance of the aforementioned order, the Petitioner namely Ashutosh Garg filed an affidavit dated 19.06.2024. Relevant excerpt of the affidavit reads thus: -

“That the Deponent submits that the present Petition is neither collusive nor a malafide one nor has been filed for ulterior purposes. The same is absolutely bonafide and filed as per the provisions of Insolvency & Bankruptcy Code, 2016.”

4. The Corporate Debtor has also filed a separate affidavit dated 18.06.2024. In para 4 of the affidavit, it accepted its liability to pay the amount of debt to the Petitioner and submitted that a default had occurred regarding the same. Para 4 of the affidavit reads thus: -

“That I state that the liability of the Corporate Debtor to our other Director Mr Ashutosh Garg is not disputed. I say that Mr Ashutosh Garg has paid the liabilities of M/s. Guardian Lifecare Pvt Ltd at the time of the need by the Company and in the process has paid a sum of Rs. 1,09,25,296.50 for meeting the liabilities of the Company, as is verifiable from the records of the Corporate Debtor, as maintained by it in the normal course of business. I state further that the Corporate Debtor is not doing any business activity today and has not engaged in any business activity for the past 8 years. There are no assets or revenues in the Corporate Debtor to be able to repay to Mr Ashutosh Garg the above amount, which forms part of the liability of the Company i.e. M/s. Guardian Lifecare Pvt. Ltd. I state that this stand of the Company is a correct statement based on the records maintained by the Company.”

5. From the report of NeSL, it writ large that there is a liability on the Corporate Debtor to repay the amount of debt to the Petitioner and the Corporate Debtor has committed default qua the same. In terms of the provision of Section 7(5) of IBC, 2016, while considering the application for admission, this Tribunal would satisfy itself as to whether the default has occurred, the application is complete and no legal proceedings are pending against the proposed Resolution Professional. Section 7(5) of the Code reads thus: -

“7. Initiation of corporate insolvency resolution process by financial creditor.

[...]

(5) Where the Adjudicating Authority is satisfied that – (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the

proposed resolution professional, it may, by order, admit such application;

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.”

6. Our attention is drawn to the declaration given at page no. 35 of the petition to indicate that the proposed RP has declared that no legal proceedings are pending against him. The relevant part of the declaration submitted as Form 2 under Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads thus:

- iv. Certify that there are no disciplinary proceedings pending against me with the Board or Institute of Insolvency Professionals of ICSI;
- v. Affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;

7. Relying upon the judgment of Hon'ble Supreme Court in ***M/s Orator Marketing Pvt. Ltd. vs. M/s Samtex Desinz Pvt. Ltd.*** [(2023) 3 SCC 753], the Ld. Senior Counsel for the Petitioner espoused that the definition of “financial debt” under the Code would also include such debt in respect of which no interest was payable. Para 2, 15 to 22 of the aforementioned judgement reads thus: -

“2. The short question involved in this appeal is, whether a person who gives a term loan to a corporate person, free of interest, on account of its working capital requirements is not a financial creditor, and therefore, incompetent to initiate the corporate insolvency resolution process under Section 7 IBC.

[...]

15. *The definition of “financial debt” in Section 5(8) IBC cannot be read in isolation, without considering some other relevant definitions, particularly, the definition of “claim” in Section 3(6), “corporate debtor” in Section 3(8), “creditor” in Section 3(10), “debt” in Section 3(11), “default” in Section 3(12), “financial creditor” in Section 5(7) as also the provisions, inter alia, of Sections 6 and 7 IBC.*

16. *Under Section 6 IBC, a right accrues to a financial creditor, an operational creditor and the corporate debtor itself to initiate the corporate insolvency resolution process in respect of such corporate debtor, in the manner provided in Chapter II IBC.*

17. *Section 7 IBC enables a financial creditor to file an application for initiating corporate insolvency resolution process against a corporate debtor either by itself, or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government, when a default has occurred.*

18. *The eligibility of a person, to initiate the corporate insolvency resolution process, if questioned, has to be adjudicated upon consideration of the key words and expressions in the aforesaid Section and other related provisions.*

19. *Corporate insolvency resolution process gets triggered when a corporate debtor commits a default. A financial creditor may file an application for initiating a corporate insolvency resolution process against the corporate debtor, when a default has occurred.*

20. *A “corporate debtor” means a corporate person who owes a debt to any person, as per the definition of this expression in Section 3(8)*

IBC. Section 3(11) defines “debt” to mean “a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”. The word “claim” has been defined in Section 3(6) to mean, inter alia, “a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured”. “Default” is defined in Section 3(12) to mean “non-payment of a debt when the whole or any part or instalment 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”. Under Section 5(7) IBC “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has legally been assigned.

21. *The definition of “financial debt” in Section 5(8) IBC has been quoted above. Section 5(8) defines “financial debt” to mean “a debt along with interest **if any** which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8)(a) IBC. The definition of “financial debt” in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.*

22. *NCLT and NCLAT have overlooked the words “if any” which could not have been intended to be otiose. “Financial debt” means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5(8), in terms whereof “financial debt” includes any amount raised under any other transaction, having the commercial effect of borrowing.”*

8. Ms. Ananya Singh, Ld. Proxy Counsel for Mr. Vicky Gupta, the Ld. Counsel for the Corporate Debtor categorically admitted that the Corporate Debtor is liable to pay the amount of debt to the Petitioner.

9. In view of the aforementioned, we are left with no option but to admit the application.

10. In the backdrop, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

(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.

11. As proposed by the Petitioner, Mr. Bharat Bhushan Sethi, having Registration No. IBBI/IPA-002/IP-N00650/2018-2019/12034 and E-mail id: bbsethi.adv@gmail.com, is appointed as IRP.

12. It is further ordered that Mr. Bharat Bhushan Sethi, having Registration No. IBBI/IPA-002/IP-N00650/2018-2019/12034, shall take charge of the CIRP of the Corporate Debtor with immediate effect and would

take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 thereof read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.

13. The Petitioner is directed to deposit Rs. 2,00,000/- with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

14. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

15. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their record

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Upasana/ Atul Raj