IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 146/KB/2023

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

IN THE MATTER OF:
Subham Capital Private Limited
[CIN: U51909WB199PTC066014]
... Financial Creditor/ Applicant.
Verses
Vedic Realty Private Limited
[CIN: U45201WB1996PTC079333]
... Corporate Debtor/ Respondent.

Date of Pronouncement: January 25, 2024.

Coram:
SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)
SHRI. D.ARVIND, MEMBER (TECHNICAL)

Appearance:
For the Financial Creditor: **Mr. Shaunak Mitra, Adv.**
Ms. Vaibhani Pandey, Adv.

For Corporate Debtor: **Mr. Yubaraj Bhattacharya, Adv.**

ORDER

PER Bidisha Banerjee, Member (Judicial):

1. This Court is congregated through hybrid mode.

2. Heard the Learned Counsels.

Factual matrix:

3. This instant application is filed under Section 7 of the Insolvency and Bankruptcy Code, for brevity I&B Code, read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, by **"Subham Capital Private Limited"**, hereinafter referred to as **"Financial Creditor" ("Applicant"/ "FC")** against **"Vedic Realty Private Limited",** hereinafter referred to as "**Corporate Debtor" ("Respondent"/ "CD")** seeking direction to initiate Corporate Insolvency Resolution Process (for brevity "CIRP") in respect of the Corporate Debtor.

4. ***Submissions of the Ld. Counsel for the Applicant:***

4.1. The Corporate Debtor in the year 2011 had approached the Financial Creditor to obtain loans as financial assistance for its operations. The Financial Creditor is and was at all material times a Non- Banking Financial Company ("NBFC") duly registered with the Reserve Bank of India under the provisions of the Reserve Bank of India Act, 1934**.**

4.2. Pursuant to the approach made by the Corporate Debtor, the Financial Creditor had initially disbursed a sum of Rs.2,00,00,000/- (Rupees Two Crores Only) by way of RTGS on 1 September 2011 and a sum of Rs.2,25,00,000/- (Rupees Two Crores and Twenty-Five Lacs only) by way of RTGS on 6 January 2012.)

4.3. Thereafter, on several dates and by several further tranches from the year 2012 up to the year 2016, the Financial Creditor had disbursed a further aggregate sum of Rs. 18,50,00,000/- (Rupees Eighteen Crore Fifty Lacs) to the Corporate Debtor.

4.4. All these disbursements were as loan carrying interest at agreed rates and having specified tenure. Copies of some of the written acknowledgments issued by the Corporate Debtor and Financial Creditor capturing the "Financial Contract" between the parties qua the loan transaction are collectively annexed hereto and marked as Annexure **"H".**

4.5. Further the Corporate Debtor requested for renewal and/or roll-over of the different loan tranches and in this respect the Financial Creditor had approved such renewal and/or roll-over of the loan as will appear from documents collectively annexed hereto and marked as Annexure "I".

4.6. Further the Corporate Debtor had also from time to time made payment in tranches on account of principal, particulars whereof are indicated in a schedule annexed hereto and marked as Annexure "K". The last such payment made by the Corporate Debtor on account of principal outstanding was on 7 April 2021.

4.7. It is submitted that after adjusting all payments made by the Corporate Debtor to the Financial Creditor on account of principal outstanding dues, a sum of Rs.2,25,00,000/- remained due and outstanding as principal with an interest calculated at the rate of 13% per annum the sum totals to Rs. 2,42,65,775/-.

4.8. It is contended that in the Financial Creditor was constrained to cause to be issued by its advocates a loan recall notice on 1 March 2022, placing on record the facts stated above and the continuing liability of the Corporate Debtor. By the said notice, the advocates for the Financial Creditor had called upon the Corporate Debtor to forthwith pay an aggregate amount of Rs. 2,45,44,157/- comprising principal amount of Rs. 2,25,00,000/- and the balance on account of interest (which was the amount outstanding on the date of such notice). A copy of the loan recall notice dated 1 March 2022 is annexed hereto and marked as Annexure "o".

4.9. The Learned Counsel of the Applicant contends that the Financial Creditor had filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 before this Adjudicating Authority against the Corporate Debtor based on the defaulted amount as on 31.03.2022 being a sum of Rs. 2,42,65,775/-. The said Company Petition was numbered as C.P. (IB) No.215/KB/2022. The Financial Creditor had craved leave to refer and rely on the records of the original Company Petition at the time of hearing, if necessary. No Reply Affidavit was filed to the Company Petition by the Corporate Debtor.

4.10. That during pendency of the original Company Petition, the Corporate Debtor had approached the Financial Creditor for settlement of the dues and had sought additional time for repaying the loan amount. In the interest of avoiding litigation and in the bona fide belief that the Corporate Debtor was actually interested to settle the matter, the Financial Creditor had entered into and executed an agreement styled as a Deed of Settlement dated 18 November 2022 (for short "said agreement") with the Corporate Debtor. In the said agreement, the Corporate Debtor had unequivocally acknowledged and admitted its indebtedness to the Financial Creditor and had also admitted default which had constrained the Financial Creditor to file the original Company Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016.

4.11. As per the said agreement, the Corporate Debtor had agreed to make payment of the dues in the following manner: -

i) Principal amount of Rs.2,25,00,000/- in 9 (Nine) monthly instalments till August 2023 (details given in clause 3 of the said agreement).

ii) Accrued interest up to 30 September 2022 of Rs.50,47,709/-, out of which (Rupees Rs.25,00,000/- was already paid and the balance amount after deducting TDS was to be paid by 30 December 2022.

iii) Interest for the period from 1 October 2022 till August 30, 2023, of Rs.15,23,404/- by August 30, 2023. which (Rupees Rs.25,00,000/- Twenty-Five Lakhs) was already paid and the balance amount after deducting TDS was to be paid by 30 December 2022.

iv) Interest for the period from 1 October 2022 till August 30, 2023, of Rs.15,23,404/- by August 30, 2023.

4.12. The Learned Counsel for the applicant has supplied the bank statements of the financial creditor maintained with the ICICI Bank and PNB to substantiate the claim of the disbursement of amount.

5. We would note that on December 01, 2023, the Ld. Counsel for the respondent sought for further time to file reply affidavit, which was allowed for one week subject to payment of cost of Rs.25,000/-, payable to Prime Minister's National Relief Fund.

6. We would also note that the Respondent herein neither filed Reply Affidavit, nor paid the cost in terms of order dated December 01, 2023, and therefore, on January 08, 2024, the right to file Reply Affidavit has been closed. The Corporate Debtor has been set *ex parte* and this matter has been reserved for order.

7. ***Analysis and Findings***

7.1. As no Reply Affidavit was filed and we decided to proceed against the Corporate Debtor *ex-parte*, it would be appropriate, at this juncture, to quote the Rule 49 and Rule 110 of the National Company Law Tribunal Rules, 2016, which are reproduced in verbatim as below: -

> **Rule 49**: ***Ex-parte* Hearing and disposal. – (1)** Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application *ex-parte*.
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> **xxx xxx xxx**
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> **Rule 110: Default of appearance of respondent and consequences. —** Where the respondent, despite effective service of summons or notice on him does not appear before the date fixed for hearing, the Tribunal may proceed to hear the appeal or application or petition *ex-parte* and pass final order on merits:
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> Provided that it is open to the Tribunal to seek the assistance of any counsel as it deems fit in case the matter involves intricate and substantial questions of law having wide ramifications.

7.2. It is an admitted fact that the Financial Creditor previously filed an application being C.P. (IB) No. 215/KB/2022 under Section 7 of the I&B Code, against the Corporate Debtor on the basis of the defaulted amount as on June 30, 2022 being a sum of Rs. 2,54,00,822/-. During the pendency of that company petition, the Corporate Debtor approached the Financial Creditor for settlement of the dues and had sought time for repayment of the loan amount. Accordingly, both the parties entered into a Settlement Agreement on November 18, 2022, (annexed at Page 273 to the application as annexure "P") wherein at Page 2 of the Deed of Settlement, the Corporate Debtor agreed upon and undertook to make payment of full Principal amount, interest accrued and due till September 30, 2022 and further interest on principal from October 01, 2022, till the date of repayment of the full principal amount which constitutes an unequivocal admission on the part of the Corporate Debtor of its debt and default in repayment.

7.3. Further, it is evident that the Corporate Debtor undertook that the interest for the period accruing from October 01, 2022, till the date of full and final payment of Loan shall be paid within August 31, 2023 (Para 3 of the Deed of Settlement Agreement).

7.4. As Page 4 (Para 7) of the said deed of settlement explicit that, the Corporate Debtor has agreed that any deviation from the repayment will tantamount to breach of the Deed of Settlement<u>, the Financial Creditor shall be at liberty to initiate necessary legal proceedings at the cost and consequence of the Corporate Debtor, including execution proceedings</u>.

7.5. We would note that the Company Petition being C.P. (IB) 215/KB/2022 was dismissed as withdrawn since the parties settled their disputes and the Learned Counsel for the Applicant had sought to withdraw the application.

7.6. The Learned Counsel for the Applicant, Shri Shaunak Mitra at hearing would assert that the after the said settlement agreement was signed, the Corporate Debtor till date has made payment of an amount of only Rs. 20 Lakh to the Financial Creditor. It is further contended that five of the post-dated cheques given by the Corporate Debtor on the respective dates such as on 30 December 2022 (Cheque Nos. 172637 & 172638), on 30 January 2023 (Cheque No.172639), on 27 February 2023 (Cheque No.172640), on 29 March 2023 (Cheque No. 172641) which fell due by 31 March 2023 have been **dishonoured upon** presentation for payment. The copies of the dishonoured cheques together with the relevant memoranda of dishonour are of collectively annexed as Annexure "R" to the application.

7.7. It is clearly evident from the bare perusal of fact of the case that this application has been filed under Section 7 of the I&B Code, 2016, for the breach of terms of the Settlement Agreement dated November 18, 2022.

7.8. The key issue that cropped up before us for determination is whether the amount claimed to be in default derived from the breach of terms of the Settlement Agreement will constitute an "financial debt" under the provisions of the Code. At this juncture, it would be useful to quote ***Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd. and Anr.*** reported in **(2023) ibclaw.in 86 NCLAT:**

> *"12. The judgement which has been relied by Learned Counsel for the Appellant "Amrit Kumar Agrawal" (supra) was a case where section 7 application was filed on the ground of default in payment of settlement agreement where the court held that default in payment of settlement agreement does not constitute a financial debt. The facts of the present case are clearly distinguishable. Present is not a case where Section 7 Application has been filed only on the ground of default in the settlement agreement rather section 7 application has been filed on the basis of original financial debt which was extended by the Financial Creditor to the Corporate*

> *Debtor. The mere fact that in earlier company petition, consent terms was arrived, which consent terms was breached by the corporate debtor, the financial debt which was claimed by the financial creditor would not be wiped out nor the nature and character of financial debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving premium to the corporate debtor who breach the consent terms. Another judgement which has been relied on by Learned Counsel for the Appellant is "Dr. Gopal Krishnan MS", (supra) which is also judgement relying on "Amrit Kumar Agrawal". The court in the facts of the said case came to the conclusion that debt is not a financial debt. The above judgement is also clearly distinguishable.'*
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> *"13. It is relevant to notice that in clause 9 of the consent terms there was clear stipulation that financial creditor shall be entitled to revive the company petition, the mere fact that instead of reviving company petition, a fresh company petition has been filed under section 7 shall not be reason to reject the company petition and not to entertain the said company petition."*
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> **(Emphasis Added)**

7.9. In the instant case, the earlier company petition filed by the applicant was withdrawn as the both parties would settle the matter. However, the Corporate Debtor has breached the clauses of settlement agreement by not paying the full and final payment of Loan within August 31, 2023. It is evident that this application has been filed on 12.06.2023 and thus, we are of the view that the instant application is not barred by limitation and the default amount is more than the threshold financial limit as prescribed under Section 4 of the Code. In any event, even if we go by the date of settlement as acknowledgment of debt and default thereof. The applicant still has ample time to file this application and consequently, the question of time bar does not arise at all.

7.10. In terms of the foregoing discussions, the application bearing **Company Petition (IB) No. 146/KB/2023,** and the evidence placed on record and the discussion hereinabove, we **allow** this application filed under **Section 7 of I&B Code**, and accordingly, we order the initiation of **Corporate Insolvency Resolution Process (CIRP)** in respect of the Corporate Debtor by the following **Orders**:

i. The Application filed by the **Subham Capital Private Limited (Financial Creditor),** under **Section 7** of the Insolvency & Bankruptcy Code, 2016, is hereby, **admitted** for initiating the **Corporate Insolvency Resolution Process** in respect of **Vedic Realty Private Limited (Corporate Debtor).**

ii. As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.

iii. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

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 asset 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 (54 of 2002);*

d) *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.*

[Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

iv. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

v. 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.

vi. The Applicant has proposed the name of **"Mr. Kannan Tiruvengadam", [Registration no.: IBBI/IPA-001/IP-P00253/2017-2018/10482, Address: Netaji Subhas Villa Flat No. 3C, 3rd Floor, 18 Karunamoyee Ghat Road Near Dharapara Tollygunge, Kolkata, West**

Bengal ,700082], Email ID: calkannan@gmail.com, as the "IRP". We have perused that there is a written communication, annexed as **Annexure "D" ,** to this Application as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with ICAI Institute of Insolvency Professionals. In addition, further necessary disclosures have been made by **"Mr. Kannan Tiruvengadam"** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of the Section 7(3)(b) of the code. Hence, we appoint **"Mr. Kannan Tiruvengadam"** as the **Interim Resolution Professional (IRP)** of the Corporate Debtor to carry out the functions as per the I&B Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the I&B Code.

vii. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016, shall be made immediately. The expression immediately means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

viii. During the CIRP period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.

ix. The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned Police Authorities and/or the Officer-in-Charge of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.

x. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

xi. The Financial Creditors shall be liable to pay to IRP a sum of **<u>Rs. 3,00,000/-</u>** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

xii. In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.

xiii. Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

xiv. The Resolution Professional shall conduct CIRP in time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xv. The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIRP in respect of the

Corporate Debtor to this Adjudicating Authority time to time.

xvi. The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.

8. This order is issued under Section 7 of I&B Code 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016.

9. The certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

10. Post the matter on **04/ 03/ 2024** for filing the Periodical Progress Report by the IRP/RP.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on 25th Day of January, 2024.

Bose, R. K. [LRA]/Tiwari, V. [LRA]