

410

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – I, CHENNAI**

**IBA/1286/2019**

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w  
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating  
Authority) Rules, 2016)*

*In the matter of M/s. Green Peace Construction Pvt. Ltd.*

**Mr. S. Lakshmanan,**

Power Agent of Mr L. Sriram Lakshmanan,  
S/o. L. Seetharaman,  
No. 26, Rivera Apartment,  
No.8, Crescent Avenue Road,  
Gandhi Nagar, Adyar,  
Chennai – 600 020.

... .. *Financial Creditor*

-Vs-

**M/s. Green Peace Construction Pvt Ltd.,**

Grand CITADEL,  
No.10, Natesan Salai,  
Ashok Nagar,  
Chennai – 600 083.

... .. *Corporate Debtor*

*Order Pronounced on 28<sup>th</sup> September 2021*

CORAM :

**SUCHARITHA R, MEMBER (JUDICIAL)**

**ANIL KUMAR B, MEMBER (TECHNICAL)**

*For Financial Creditor : Mr. Thilak Narayanan, Advocate*

*For Corporate Debtor : Mr. J. Antony Jesuraja*

**ORDER**

**Per: ANIL KUMAR B, MEMBER (TECHNICAL)**

Under adjudication, is an Application filed by one Mr. S.  
Lakshmanan, represented by its Power Agent Mr. L. Sriram

Lakshmanan, (hereinafter referred as "**Financial Creditor**") under Section 7 of Insolvency and Bankruptcy Code, 2016 by seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, namely, **M/s. Green Peace Construction Pvt Ltd.**, (hereinafter referred as "**Corporate Debtor**").

2. From Part-I of the Application, it is seen that the Applicant is an individual. Part-II of the Application, discloses the details in relation to the Corporate Debtor, from which, it is seen that the Corporate Debtor is a company incorporated on 20.03.1995 with CIN: U45201TN1995PTC030581 and the Registered Office address of the Corporate Debtor as per the Application is stated to be situated at Grand CITADEL, No.10, Natesan Salai, Ashok Nagar, Chennai - 600 083. From Part-III of the Application, it is seen that the Financial Creditor has proposed the name of one Mr. V. Duraisamy, as the Interim Resolution Professional (IRP).

3. Part-IV of the Application, sets out the details of the financial debt, from which, it is seen that the Corporate Debtor has claimed a sum of Rs.95,66,154/- including interest @ 10% per annum.

4. Part-V of the Application, lists out the details of the documents filed by the Financial Creditor in support of the claim, which are as follows:



- a. General Power Attorney dated 18.08.2011
- b. Cheque Receipt No.098 dated 26.06.2013 issued by Corporate Debtor to Applicant
- c. Cheque Receipt No.099 dated 03.07.2013 issued by Corporate Debtor to Applicant
- d. Cheque Receipt No.100 dated 29.07.2013 issued by Corporate Debtor to Applicant
- e. Cheque Receipt No.101 dated 19.08.2013 issued by Corporate Debtor to Applicant
- f. Master Data of Corporate Debtor
- g. Hon'ble NCLT Chennai Bench Order dated 27.08.2018 in C.P. No.344/2018 to initiating CIRP against Corporate Debtor.
- h. Form-A Public Announcement dated 07.09.2018
- i. Form-C submitted by Applicant to IRP
- j. List of Creditors prepared by IRP dated 06.10.2018
- k. Mail dated 07.08.2015 sent by Corporate Debtor to Applicant
- l. Mail dated 20.02.2016 sent by Corporate Debtor to Applicant
- m. Hon'ble NCLAT Order dated in C.A (AT) (Insolvency No.572 of 2018)
- n. Hon'ble NCLT, Chennai Bench Order dated 29.05.2019 in C.P. No.344/2018 in M.A. No.229 of 2019
- o. Mail dated 29.05.2019 sent by Applicant to Corporate Debtor

5. Learned Counsel for the Financial Creditor submits that the Applicant paid a sum of Rs.60,00,000/- in the year of 2013 at various dates/months to the Corporate Debtor towards booking of a flat in the construction project called "*Emerald Enclave*". It was

submitted that, since there was no progress in the construction of the project, the Financial Creditor wanted to cancel the booking of the flat and accordingly has sent an e-mail to the Corporate Debtor.

6. It was submitted that the Corporate Debtor vide their email dated 07.08.2015 has agreed to refund the amount to the Financial Creditor within a period of three months. However, it was submitted that the Corporate Debtor has defaulted in repayment of the said sum to the Financial Creditor. In the meantime, this Tribunal vide its Order dated 27.08.2018 passed in CP/344/(IB)/CB/2018 had initiated the Corporate Insolvency Resolution Process in relation to the Corporate Debtor viz. Green Peace Constructions Private Limited.

7. Subsequent thereto, the Interim Resolution Professional caused a public announcement on 07.09.2018 and the Applicant herein has submitted his claim before the IRP on 15.09.2018 for a sum of Rs.90,00,000/- which came to be admitted by the IRP on 28.09.2018.

8. In the interregnum, the Corporate Debtor challenged the Order passed by this Tribunal before the Hon'ble NCLAT in CA(AT)(Insolvency No.572 of 2018). Pending the said Appeal, it is



seen that the settlement has been arrived at between the parties and hence the Hon'ble NCLAT vide its Order dated 07.05.2019 has set aside the Order passed by this Tribunal.

9. Thereafter, on 29.05.2019, the Financial Creditor has sent an email to the Corporate Debtor demanding the payment of the dues to be paid to the Financial Creditor. However, there was no response from the Corporate Debtor and hence it was submitted that the Financial Creditor was constrained to file this present Application before this Tribunal seeking initiation of the CIRP in relation to the Corporate Debtor.

10. It was further submitted that during the pendency of the present Application, the Corporate Debtor has agreed to settle the amount of Rs.90,00,000/- to the Applicant, based on the agreement, the Corporate Debtor has paid a sum of Rs.4,50,000/- to the Applicant. Hence, it was submitted by the Learned Counsel for the Financial Creditor that the debt and default on the part of the Corporate Debtor are proved and hence prayed for initiation of the CIRP as against the Corporate Debtor.

11. In relation to the Corporate Debtor, in spite of numerous opportunities having been granted, the Corporate Debtor was not in a position to file its reply before this Tribunal. However, during



the fag end of the proceedings, there was a change of Counsel for the Corporate Debtor, who was filed his written arguments before this Tribunal.

12. It is the contention of the Learned Counsel for the Corporate Debtor that the present Application is not maintainable on the count that the said Application has been filed by a Power Agent and hence as per the decision of the Hon'ble NCLAT in the matter of **Palogix Infrastructure Private Limited -Vs- ICICI Bank Limited** in *Company Appeal (AT)(Ins) No. 30 of 2017*, a Power of Attorney holder is not competent to file an Application on behalf of the Financial Creditor. Further, it was argued by the Learned Counsel for the Respondent that, the claim of the Applicant is time barred, in view of the fact that, the booking has been cancelled in the year 2015 and the same was accepted by the Corporate Debtor vide its email dated 07.08.2015 and also on 20.02.2016 the Corporate Debtor has sent another email to the Applicant for repaying the sum and the present Application has been filed before this Tribunal only on 26.07.2019. Hence, it was submitted that the present Application is barred by limitation.

13. Heard the submissions made by the Learned Counsel for both the parties. The first and foremost issue which arises for consideration before this Tribunal is whether the present



Application has been filed by the Financial Creditor in the capacity as a 'home buyer' (Financial Creditor) or in the category of other Financial Creditor. If the present Application has been filed by the Financial Creditor in the capacity as 'home buyer' then the present Application is liable to be dismissed *in limine*, in view of the fact that the Applicant has failed to comply with the 1<sup>st</sup> and 2<sup>nd</sup> Proviso to Section 7(1) of IBC, 2016 which states that the Application for initiation of CIRP against the Corporate Debtor shall be filed jointly by not less than 100 (one hundred) of such creditors in the same class or not less than 10% (ten percent) of the total number of such creditors in the same class. However, the Applicant nowhere stated that the present Application has been filed in the capacity of a 'home buyer'.

14. From the facts culled out above, it is seen that the present Application has been filed by the Financial Creditor on the ground that the Corporate Debtor has failed to repay the booking amount, which was given by the Financial Creditor. Hence under such a circumstances, a question which arises for consideration is that, whether non- refund of a booking amount by the Corporate Debtor would partake the character of a 'financial debt' as defined under Section 5(8) of IBC, 2016 which is extracted hereunder;

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

*Explanation.* -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;





15. Thus from the above definition , it is seen that for a Financial Creditor to qualify to file an Application under Section 7 of IBC, 2016, they have to satisfy that there is a 'financial debt' as extracted above.

16. The instant petition has been filed under Section 7 of IBC, 2016 read with Rule 4 of the IBBI (Application to Adjudicating Authority) Rules, 2016. The Rule 4 of the said rule is extracted hereunder;

**4. Application by financial creditor.—** (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

17. In this context, it is relevant to refer to attendant Regulation 8 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

**8. Claims by financial creditors.** (1) A person claiming to be a financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in Form C of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of –

(a) the records available with an information utility, if any;  
or

(b) other relevant documents, including –

(i) **a financial contract supported by financial statements as evidence of the debt;**

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been paid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

18. The term '*Financial contract*' is defined in clause (d) sub-section 1 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

(d) "**financial contract**" means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;

19. Referring to the aforementioned Rule, it becomes clear that it is incumbent upon the Financial Creditor while filing this petition to place on record before this Authority, the '*Financial Contract*' and demonstrate without any ambiguity from the financial contract, the amount disbursed as per the loan/debt, the tenure of the loan/debt, the interest payable and the conditions of repayment. In the present case, we have set out the list of documents in para 4 *supra*, the details as stated in Part – V of the Application along with

the Annexures filed by the Financial Creditor. A perusal of the same, would show that the Applicant herein has not placed on record any financial contract / documents to show the nature of transaction, or any document which sets out the exact amount which is required to be paid by the Financial Creditor along with the details including interest, if any, which is required to be paid. Also, the Application is bereft of the tenure of the loan / debt, the interest payable and the conditions of repayment.

20. In the absence of any documents being filed along with the Application by the Financial Creditor, the claim of the Applicant does not fall within the definition of a 'financial debt' as defined under Section 5(8) of IBC, 2016 and hence the Applicant does not qualify to be a 'Financial Creditor' in relation to the Corporate Debtor either in the category of home buyer or in the category of a Financial Creditor.

21. Also, we find force in the contention raised by the Learned counsel for the Corporate Debtor that a Power of Attorney holder cannot file an Application under Section 7, 9 or 10 of IBC, 2016 since the Hon'ble NCLAT in the matter of **Palogix Infrastructure Private Limited** (*supra*) in para 31, 32 and 33 has held as follows;



31. As per Section 7 of the 'I&B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by 'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-I' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I&B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

32. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.

22. Thus, it has been categorically held by the Hon'ble NCLAT that a 'Power of Attorney Holder' is not competent to file an Application on behalf of the 'Financial Creditor' or 'Operational Creditor' of 'Corporate Applicant' either under Section 7, 9 or 10 of IBC 2016 respectively. Admittedly, the present Application under Section 7 of IBC, 2016 has been filed by a 'Power of Attorney Holder' and hence on the said count itself, the present Application is required to be dismissed.



23. For the foregoing reasons and in view of the discussions made *supra*, the Application filed by the Financial Creditor stands dismissed. No costs.

-sd-  
(ANIL KUMAR B)  
MEMBER (TECHNICAL)

-sd-  
(R. SUCHARITHA)  
MEMBER (JUDICIAL)

*Raymond*