

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V

CP(IB) 163 (IB)2023

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

Phoenix ARC Private Limited

Trustee of Phoenix Trust FY23-7
5th Floor, Dani Corporate Park, 158,
CST Road, Kalina, Santacruz (East)
Mumbai, Mumbai City, MH- 400098.

... Financial Creditor

V/s.

**Precision Realty Developers Private
Limited**

Knowledge House, Shyam Nagar, Off.
Jogeshwari - Vikhroli Link Road
Jogeshwari - East Mumbai MH
400060.

... Corporate Debtor

Order delivered on: 20.10.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Bhatia, Member (Technical)

Appearances:

For the Financial Creditor : Adv. Nishit Dhruva a/w
Adv. Yash Dhruva and
Adv. Meghna Arvind

For the Corporate Debtor : Adv. Harsh Noorjani a/w
Adv. Ankita Yadav

ORDER***Per: - Kuldip Kumar Kareer, Member (Judicial)***

1. This Company petition is filed by Phoenix ARC Private Limited (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Precision Realty Developers Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 1,18,95,06,176/-.

The submissions by the Financial Creditor: -

2. The Financial Creditor is a public limited company incorporated under the provisions of the Companies Act, 1956 and is having its registered address at 5th Floor, Dani Corporate Park, 158, CST Road, Kalina, Santacruz (East) Mumbai, Mumbai City, MH- 400098.
3. The Financial Creditor has submitted that vide sanction letter dated 13th February, 2017, "Kaa Vee Retail Infra Private Limited" (hereinafter referred to as the "Original

Borrower") was sanctioned a Rupee Term Loan facility of INR 200 Crores by L & T Finance Limited (hereinafter referred to as the "Original Lender") for purchase of Fixed assets for leasing out to Future Retail Limited.

4. The Financial Creditor has further submitted that vide Addendum to Sanction Letter dated 24th February, 2017, the Original Borrower & the Original Lender entered into further terms for the sanctioned credit facility. Vide letter dated 14th March, 2017, Future Retail Limited engaged the Original Borrower for Supply of moveable fixed assets for setting up of various retail outlets/formats. Pursuant to the Sanction Letter, Financing Documents were executed in connection with the sanctioned credit facility.
5. The Financial Creditor has further submitted that the Facility Agreement dated 14th March, 2017 between the Original Borrower & the Original Lender was executed wherein the terms of the credit facility are enumerated along with the tenure and repayment schedule as referred to in the Schedule II of the Facility Agreement. The Facility Agreement further provides for interest to be paid at 11.80% p.a. payable monthly.
6. To secure the said credit facility, the Original Lender secured the facility together with all interests, liquidated damages, fees, costs, charges, expenses, and other monies and all other amounts payable, by way of:
 - a. Pledging of 100% shares of the Borrower by Mr. Arun Agarwal & Aksi Wholesalers Private Limited.

- b. Personal Guarantees of the Promoters of the Lessee (i.e. Mr. Kishore Biyani, Mr. Rakesh Biyani & Mr. Vijay Biyani).
7. The Financial Creditor has further submitted that the exclusive charge was created through a deed of hypothecation on –
 - a. The assets procured out of the facility.
 - b. Escrow of Lease rental & all other dues from the Lessee under the Tripartite Agreement dated 14th March, 2017 executed amongst the Original Borrower, Future Retail Limited & the Original Lender.
 - c. Lease Rental and all other dues from the Lessee under the Master Lease Agreement dated 14th March, 2017 executed by and between the Original Borrower & Future Retail Limited.
 - d. The said Deed of Hypothecation dated 14th March, 2017 executed between the Original Borrower & the Original Lender provides for details of exclusive charge on the assets as detailed in the Schedule II of the Deed of Hypothecation.
 - e. 18 Post Dated Cheques drawn on the Escrow Account on rolling basis and 2 undated cheques drawn on the Escrow Account in favour of the lender covering the entire facility along with the accrued interest from the Lender.
8. Escrow Agreement dated 14th March, 2017 was also

executed between the Original Borrower & the Original Lender & Axis Bank Limited created for the purpose of the depositing the lease rentals.

9. Vide Letter of Undertaking dated 14th March, 2017, the Directors/Promoters/Shareholders of the Original Borrower namely Mr. Arun Agarwal, Mr. Jayesh Merchant, Aksi Wholesalers Private Limited undertook to retain 100% stake in the Original Borrower till the facility is repaid with shareholding as mentioned in Schedule I of Letter of Undertaking.
10. It is further stated by the financial creditor that vide order dated 8th May, 2019 in CP(CAA) 2930/230-232nvB/2018, the NCLT, Mumbai approved the Scheme of Merger by absorption between the Transferor Company i.e. Kaa Vee Retail Infra Private Limited and the Transferee Company i.e. Precision Realty Developers Private Limited ("hereinafter referred to as the "Corporate Debtor") whereby all debts, liabilities, contingent liabilities, duties and obligations of the Transferor Company stood transferred to and vested in the Transferee Company on the same terms and conditions as were applicable to the Transferor Company.
11. Pursuant thereto, in view of the said Scheme of Merger, the First Amendment to the Facility Agreement dated 28th January, 2020, was executed by and between the Original Lender and the Corporate Debtor. Vide the said amendment agreement, the Corporate Debtor sought for a modification in the terms of facility agreement with respect to the Call/Put Option as detailed in the Clause 2 of the First

Amendment Agreement.

12. Thereafter, placing reliance on the RBI Circulars dated 27th March, 2020 and 23rd May, 2020 (COVID-19 Regulatory Package), the Corporate Debtor vide email dated 31st March, 2020 and letter dated 27th May, 2020 requested for grant of moratorium in servicing of the Borrower's debt obligations for the period from 1st April, 2020 till 31st August, 2020.
13. Vide letter dated 25th August, 2020, the Original Lender accepted the requests of the Corporate Debtor and granted moratorium on interest and repayments related to the credit facility, and extended the repayment schedule by 6 months more particularly mentioned in Annexure-I of the said letter. Further, the letter stated that interest shall continue to accrue monthly and interest will be charged on such accrued interest.
14. Vide letter dated 27th September, 2020, the Corporate Debtor requested the Original Lender to restructure:
 - a. The Existing Facility of INR 200 Crores along with all interests, costs, charges;
 - b. COVID 19 Moratorium Facility of INR 6,09,70,186/- along with Interests, costs, charges
 - c. New funded interest Term Loan ("hereinafter referred to as FITL") for an amount of up to INR 4.22 Crores along with interests, costs, charges payable

Total of the above aggregating to a sum of INR 210.31

Crores and duly securing the same by the existing security credit enhancements, guarantees.

15. In consideration of the requests of the Corporate Debtor, the Original Lender agreed to restructure the Existing Facility, Covid 19 Moratorium Facility and granting of FITL, vide its letter dated 22nd October, 2020 as amended from time to time (hereinafter referred to as the "Restructuring Package").
16. In anticipation that the Original Borrower's request for Approval of the Restructuring Package will be considered by the Original Lender favorably, the Original Borrower being one of the companies of the Future Group Companies, approached Future Capital Investment Private Limited & Future Corporate Resources Private Limited for creating additional security for securing the repayment of the Restructuring Package, who vide respective Board Resolution dated 27th April, 2021 agreed to create such security vide pledging of such number of shares of Future Retail Limited and Future Consumer Limited as stipulated in the unattested share pledge agreement dated 28th December, 2017 and LAS Agreement dated 28th December, 2017 on pari passu basis with LAS Loan of INR 215 Crores and Corporate Loan of INR 160 Crores availed by Future Entertainment Pvt Ltd from the Original Lender which was further extended to secure the Existing Precision Facility vide pledge extension documents dated 29th August, 2020.
17. Vide Letter dated 30th April, 2021, the Original Lender entered into a Restructuring Agreement with the Original

Borrower whereby the Restructuring Package was approved and revised terms of the facility agreement as detailed in the Key terms and conditions of the Restructuring Agreement was agreed upon. As per the Restructuring agreement, the Restructured Facility consisted of:

- a. Term Loan Facility 1 -INR 103.17 Crores
- b. FITL 1 - Covid 19 Package - INR 6.09 Crores
- c. FITL 2 - New Facility - INR 4.22 Crores

The tenure of the Restructuring Facility was till 1st August, 2025. Further, the Principal Payments was to be made as under:

Term Loan Facility - Principal was to be repaid as per revised repayment schedule starting from February 1st 2023, with original payment shifted by two years including moratorium of two years, ending on 1st August, 2025.

FITL Facilities - of the FITL facilities were to be repaid on 31st March, 2022 and balance 50% was repayable in 12 equal instalments commencing from 30th April, 2022 and ending on 31st March, 2023.

Interest Rate - 11.80% p.a. payable monthly and was to accrue and be payable on 31st March, 2022 onwards at end of each month with the last payment being on 1st August, 2025.

Security — As detailed in Clause 15 of the Key terms & conditions.

18. The Financial Creditor has further submitted that the Restructuring Agreement, Deed of personal guarantees dated 30th April, 2021 were executed by Mr. Kishore Biyani, Mr. Rakesh Biyani & Mr. Vijay Biyani, as stipulated under the terms of the Restructuring Agreement. Hereto annexed and marked as Exhibit - Z & AA & BB are copies of the respective Deeds of Guarantee dated 30th April, 2021.
19. Pursuant to the Restructuring Agreement, an undertaking by the Corporate Debtor was also executed vide Letter of Undertaking dated 30th April, 2021. Hereto annexed and marked as Exhibit - CC is a copy of the letter of undertaking dated 30th April, 2021.
20. Apart from that, Deed of Hypothecation was executed between the Original Lender and the Original Borrower dated 30th April, 2021.
21. In addition to this, an undertaking by the Director, Promoter and Shareholders was also executed vide Letter of Undertaking dated 30th April, 2021. Hereto annexed and marked as Exhibit - EE is a copy of the letter of undertaking dated 30th April, 2021.
22. Pursuant to the Restructuring Agreement, Supplemental Escrow Agreement dated 1st June, 2021 was also executed.
23. As per the Restructuring Agreement dated 30th April, 2021, an amount of Rs 17,44,89,106/- (gross amount) was due and payable by the Corporate Debtor on 31st March, 2022. However, since the Corporate Debtor failed to pay the amount, the same along with amount due on 30th April,

2022 was recoverable by way of invocation of Debt Service Reserve Account. However, the Corporate Debtor has defaulted in payment of the instalments due since May 31st, 2022. In addition, the Corporate Debtor was required to adhere to certain terms & conditions of the Restructuring Agreement dated 30th April, 2021 by way of meeting certain ratio prescribed by Kamath Committee by 31st March, 2022. Since the Corporate Debtor failed to meet the prescribed ratios within the timelines, the account was classified as NPA w.e.f. 31st May, 2022.

24. The Original Lender assigned the dues pertaining to the Corporate Debtor to the Financial Creditor vide Assignment Agreement dated June 29, 2022. The Petitioner states that the above credit facilities were availed by the Corporate Debtor for the purpose of their business requirement and the same has been disbursed. The Petitioner submits that the Corporate Debtor along with the Guarantors have committed default in complying with various terms and conditions of the Restructuring Agreement and security documents executed by them in favour of the Petitioner. The Petitioner have time and again called upon the Corporate Debtor to make the payment of the amounts due and payable. The Corporate Debtor, however, have failed to honor their commitment in terms of the said Restructuring Agreement and security documents and despite several assurances the Corporate Debtor has failed to repay the amount outstanding.

25. The Corporate Debtor has acknowledged the existence of

Debt amounting to Rs.4,67,48,142/- on 11th April, 2022, Rs.1,14,35,18,299/- on 3rd April, 2022 & Rs. 6,75,73,341/- on 3rd April, 2022.

26. Balance Sheet of the Corporate Debtor for the years 2021-2022 shows an amount of Rs. 133,35,61,816/- to Original Lender under various credit facilities.

Reply filed by the Corporate Debtor: -

27. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
28. The Corporate Debtor has submitted that it has been in the business of reality and construction for the last 16 years but its business was severely impacted with the onset of Covid-19 pandemic. The Corporate Debtor has further submitted that it is already in the process of monetizing its assets including a warehouse situated on National Highway 19 behind Alisha Bus Stand, Bardhaman, West Bengal to repay the outstanding loan to the Financial Creditor. It has also been stated that since the Corporate Debtor is seriously trying to improve its business prospects, the discretion under Section 7 (5)(a) of the Code be exercised to keep the admission application in abeyance.

Findings:

29. We have heard the counsel for the parties and gone through the records.
30. It is not disputed that an entity called Kaa Vee Retail Infra

Private Limited, the Original borrower got sanctioned a Rupee term loan facility of Rs. 200 Crores from L & T Finance Limited, the original lender vide sanctioned letter dated 13.02.2017. At the time of availing the said loan Facility Agreement dated 14.03.2017 was executed. In addition to this, several other documents including pledge agreement dated 14.03.2017 was also executed to secure the repayment of the loan facility. Subsequently, the entity called Kaa Vee Retail Infra Private Limited merged with the Corporate Debtor vide order of merger dated 08.05.2019 passed by the National Company Law Tribunal, Mumbai and the Corporate Debtor took over all the liabilities of the said transferor Company.

31. It is also not disputed that subsequently the Corporate Debtor sought extension of moratorium and on the request of the Corporate Debtor, restructuring agreement dated 30.04.2021 was executed between the original lender and the Corporate Debtor. Article VII of the said Restructuring Agreement defines the events of the defaults. Schedule 1 attached with the Restructuring Agreement shows that a total restructured facility of Rs.113,49,25,765/- was granted to the Corporate Debtor. As per the terms and conditions of the said agreement, interest at the rate of 11.85% per annum was payable from 31.03.2022. It is further on record that the financial debt in question was assigned by the original lender to the financial creditor vide assignment letter dated 29.06.2022.

32. In the reply filed by the Respondent, the factum of

availability of loan facility has not been denied by the Corporate Debtor. In addition to this, in balance confirmation letter dated 11.04.2022 the Corporate Debtor has acknowledged its liability. The Financial Creditor has further placed on record NeSL report which shows that the total outstanding against the Corporate Debtor as on 31.01.2023 was Rs. 1,15,15,08,225/- and the date of default is also mentioned as 31.05.2022. Therefore, from the aforesaid record it is evident that the Corporate Debtor availed of the Financial debt of more than of Rs. 1 Crore and has committed the default in repayment of the said loan facility.

33. The only defence raised by the Corporate Debtor in the reply is that the business of the Corporate Debtor was affected by Covid-19 Pandemic and it is in the process of reviving itself and therefore, it should not be pushed into insolvency. The counsel for the Corporate Debtor further relied upon the law laid down in Vidarbha Industries Vs Axis Bank Limited whereby it has been held that Section 7 (5) (a) confers a discretionary power on the NCLT so that solvent companies temporarily defaulting in repayment of financial debts are not penalized by an Insolvency Resolution Process.

34. Having thoughtfully considered the contentions raised on behalf of the Corporate Debtor, we are of the considered view that the law laid down in Vidarbha Industries (Supra) cannot be applied to the facts and circumstances of the present case considering the fact that the Corporate Debtor

has not brought on record any substantial evidence to prove that its financial health is sound enough to sustain itself or that the default occurred only temporarily. The Corporate Debtor has further not provided any record that after the pandemic, its financial condition has improved.

35. As a result of above discussion, we are of the considered view that the Petitioner in this case has been able to establish the factum of existence of financial debt and its default committed by the Corporate Debtor and further that the petition has been filed well within the period of limitation. Therefore, we find the present petition to be a fit one for admission under Section 7 of the Code. Accordingly, the Petition is admitted in the following terms.

ORDER

- a. The above **Company Petition No. (IB) 163(MB)/2023** is hereby admitted and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Precision Realty Developers Private Limited, the Corporate Debtor.**
- b. This Bench hereby appoints **Mr. Pradeep Kumar Kabra**, Registration No: IBBI/IPA-001/IP-P01104/2017-18/11790 as the Interim Resolution Professional having address at 103, Dhanraj Shopping Centre, Near UCO Bank, Carter Road No. 7, Borivali-East, Mumbai - 400066 email :- pradeepkabraca@gmail.com,

ipradeepkabra@gmail.com to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

- c. The Financial Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be

terminated or suspended or interrupted during moratorium period.

- f. That 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.
- g. That 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.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. 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.
- j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

ANURADHA BHATIA
Member (Technical)

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)