

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
SPECIAL BENCH
KOLKATA**

C.P. (IB) No. 270/KB/2021

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

In the matter of:

Shriram City Union Finance Limited, having **Corporate Identity No. L65191TN1986PLC012840**, a company registered under the Companies Act, 1956 and having its registered office at 123, Angappa Naicken Street, Madras 600001, Tamil Nadu aforesaid and regional office at 9th Floor, Mira Tower, DN 27, Near R S Software crossing, Salt Lake, Sector V, Kolkata – 700091.

... Applicant

-Versus-

Mountain Edge Tours and Holidays Private Limited, having **Corporate Identity No. U74900AN2009PTC000116**, a company registered under the Companies Act, 1956 and having registered office at opposite Rajasthan Manch, Shadipur, Port Blair, Andaman Islands, 744106 and also having an office at Unit No. B-125, Eastern Business District, Neptune Living Point, LBS Road, Bhandup (West), Mumbai – 400078.

... Corporate Debtor

Date of hearing: 31/08/2023

Date of pronouncing the order: 10/11/2023

Coram:

| | | |
|------------------------------|----------|---------------------------|
| Smt. Bidisha Banerjee | : | Member (Judicial) |
| Shri Balraj Joshi | : | Member (Technical) |

Appearances (via video conferencing/physically): -

| | | |
|-----------------------------------|----------|------------------------------|
| For the Financial Creditor | : | Mr. Arnab Basu Mullick, Adv. |
| For the Corporate Debtor | : | Mr. Sandip Kumar De, Adv. |
| | : | Mr. Abhijit Sarkar, Adv. |

: Mr. Abhik Chitta Kundu, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Heard Ld. Counsels for parties.
2. This application has been preferred by **Shriram City Union Finance Limited** to initiate the Corporate Insolvency Resolution process against the Corporate Debtor, namely, **Mountain Edge Tours and Holidays Private Limited**.

3. Briefs facts leading to the application as stated by the applicant: -

- (i) Mountain Edge Tours and Holidays Private Limited the respondent/Corporate Debtor (hereinafter referred to as CD) had approached Shriram City Union Finance Limited the Applicant/Financial Creditor (hereinafter referred to as FC) on or about May/June, 2018 for Loans to purchase office spaces.
- (ii) After due negotiations and discussions, the FC agreed to principally grant the CD the said loans on terms and conditions mentioned in the three Sanction Letters dated 30th May, 2018 and one Sanction Letter Dated 30th June, 2018.
- (iii) The CD having understood and agreed to the terms of the disbursement, signed the same as token of acceptance and returned the same back to the applicant.
- (iv) On such basis 4 formal loan agreements were executed by and between the parties herein. The details of the said loan agreements being depicted as follows: -

| Loan Agreement No. | Agreement Date | Loan Amount | Tenure | EMI Amount (Rs.) | Details of the property mortgaged as security |
|-----------------------|-------------------------------|-------------|--------|------------------|---|
| CDBDRTF 1805310027 | 30 th May, 2018 | 1,06,50,000 | 144 | 1,39,880 | Office No. 5, 1 st Floor, Wing "A", 119, Business Point, Sahar Road, (next to Sahar Cargo Complex) |

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|-----------------------|--------------------------------|-------------|-----|----------|---|
| | | | | | Andheri (East), Mumbai-400 099. |
| CDBDRTF 1805310028 | 31 st May, 2018 | 1,06,50,000 | 144 | 1,39,880 | Office No. 3, 1 st Floor, Wing “A”, 119, Business Point, Sahar Road, (next to Sahar Cargo Complex) Andheri (East), Mumbai-400 099. |
| CDBDRTF 1805310031 | 30 th May, 2018 | 1,27,00,000 | 144 | 1,66,805 | Office No. 17, 1 st Floor, Wing “A”, 119, Business Point, Sahar Road, (next to Sahar Cargo Complex) Andheri (East), Mumbai-400 099. |
| CDBDRTF 1807050012 | 30 th June, 2018 | 1,50,00,000 | 144 | 1,97,013 | Office No. 15, 1 st Floor, Wing “A”, 119, Business Point, Sahar Road, (next to Sahar Cargo Complex) Andheri (East), Mumbai-400 099. |

- (v) The respondent mortgaged the said properties with the applicant (FC) by Equitable Mortgage which stood as a security in favour of the applicant till the loan amount was repaid to the fullest. The copies of the 4 loan agreements are collectively attached to the Company Petition as A-5 [Page 34 to 57].
- (vi) The Corporate Debtor filed the requisite e-Form with the RoC for registering the said charge over the properties of the Company. A copy of the Index of Charges as downloaded from the website of Registrar of Companies is attached to the Company Petition forms Annexure A-6 [Page 58].
- (vii) In pursuance to the execution of the said 4 loan agreements, the respondent-CD forwarded several Post-Dated Cheques from their

accounts maintained with HDFC and Axis Bank in support of the said loan accounts which constitute further acknowledgment of an existing debt between the parties.

- (viii) Under the terms and conditions governing the said 4 Loan Agreements, the respondent-CD was bound to repay the loan amount in monthly installments as agreed upon vide Loan Agreements.
- (ix) However, contrary to the terms and conditions governing the said 4 Loan Agreements, the CD paid only a few installments and thereafter defaulted in repayments of the subsequent Monthly installments.
- (x) In spite of repeated requests, reminders and demands and apart of several opportunities by the applicant FC to the CD it failed, neglected and/or refused to make payment of the outstanding amounts/contractual dues.
- (xi) Left with no other alternative, the applicant FC recalled the said 4 loan agreements and called upon the CD to repay the foreclosed amount vide their Letter bearing no. LRN-01/Sept-19/2018-19 dated 13th September, 2019.
- (xii) The CD duly received the said notice, but, despite receipt of the such notice, the CD neither raised any objections nor honoured any payment. It failed and/or neglected to clear the foreclosed sum or regularize the said loan account.
- (xiii) Further cheques as forwarded by the respondent CD towards discharge of its contractual obligations under the 4 loan facilities were time and again dishonoured. Proceedings under Section 138 of the Negotiable Instruments Act, 1881 before the Learned Court of the Special Metropolitan Magistrate Court, Jaipur has been filed. These further establishes the existence of an undisputed debt of the Corporate Debtor towards the Applicant.
- (xiv) The Applicant herein has also filed a complaint with the BKC Police Station, Bandra Mumbai under Sections 406, 420, 465, 458, 471 read with Section 34 of the Indian Penal Code on 4th November, 2019. The copy of the said complaint dated 4th November, 2019 forms Annexure A-8 [Pages 74 to 80] to the CP.

- (xv) The applicant has also initiated arbitration as per the arbitration clause in the said agreement as against the Corporate Debtor herein. The same is sub-judice before the Ld. Arbitrator and the Corporate Debtor is contesting the same.
- (xvi) Such act or action of the respondent-CD of deliberately avoiding payment of the sum due paying sporadically and whimsically, instead and in place of making payment of the foreclosed amount tantamounted to acknowledgment of debt and inability to pay the outstanding.
- (xvii) The applicant having no other alternative, through their advocate called upon the CD for the last time to repay the sum as mentioned in their statutory notice vide their Letter bearing no. ABMAssoc/Feb/01 dated 19th February, 2020. The said notice was effectively served upon the CD. However, despite receipt of notice, the CD failed to make payment of the amount claimed.
- (xviii) The applicant had no other option but to take steps as under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. As per the directives of this Tribunal, the applicant caused service of the application upon the respondent CD prior to filing of the same under cover of their advocate's letter dated 16th March, 2020. Due to nationwide lockdown the track report was not available. The complaint status on 10th July, 2020 read as "A & N Islands Dn has reported that article has been returned to the sender on 26-05-2020 with remark addressee moved. The applicant was caused by publishing the same in the 2 newspapers on 22nd July, 2020 having circulation in Andaman & Nicobar Islands being "The Phoenix Post" (English Daily) and "इंफो इंडिया" (Info India being the Vernacular Daily).
- (xix) However due to the prolonged national lockdown, the Government of India was pleased to suspend matters under the Insolvency and Bankruptcy Code till March, 2021.

- (xx) Suddenly on or about 17th June, 2021, the applicant received a copy of a suit proceeding filed by the Corporate Debtor before the Hon’ble High Court at Bombay claiming compensation from the developer and the applicant herein on false and frivolous grounds mentioned therein. The applicant is taking necessary steps before the Hon’ble Court in the said suit proceedings.
- (xxi) The respondent CD had unambiguously admitted stopping payments of EMIs which is not only illegal and de-hors the terms of the contract but also an admission of debt.
- (xxii) The total dues of the respondent to the applicant as on 26th July, 2021 is Rs. 6,38,19,753/- details whereof are given as under:

| Loan Agreement No. | Loan Agreement Date | Foreclosure Amount (Rs.) |
|---------------------------|-----------------------------|---------------------------------|
| CDBDRTF1805310027 | 30 th May, 2018 | 1,40,57,309/- |
| CDBDRTF1805310028 | 31 st May, 2018 | 1,40,57,309/- |
| CDBDRTF1805310031 | 30 th May, 2018 | 1,70,54,305/- |
| CDBDRTF1807050012 | 30 th June, 2018 | 1,86,50,830/- |

The copy of the Foreclosure Statements pertaining to the captioned 4 loan agreements are collectively attached to the Company Petition as Annexure A-14 [Pages 131 to 134]. The copy of the Statement of Accounts pertaining to the captioned 4 loan agreements is collectively attached to the Company Petition as Annexure A-15 [Pages 135 to 162].

- (xxiii) The applicant claims that the petition has been filed within the period of limitation, the amount of default is more than the threshold limit under section 4 of the Code. Hence, it deserves to be admitted.
- (xxiv) The FC has proposed the name of IRP in Part – III of the petition.
4. Per contra, refuting the allegations as above the respondent CD by way of its **Reply Affidavit dated 10th January, 2022 would urge as follows: -**

- (i) The CD was induced to procure the loan from the FC and that the amount was disbursed in the name of the Developer in disregard to the banking process and without information of the CD.
 - (ii) It was represented by the FC that the legal due diligence would be done by the FC.
 - (iii) The FC has stated that it was a working capital loan and then as per norms, the amount should have been given to the CD.
 - (iv) The CD, as they did not get the possession of the said flats, stopped payments of the EMIs of the said loan accounts.
5. By way of written notes of arguments, the Corporate Debtor has submitted the following: -
- (i) The **Hon'ble Supreme Court in (Vidarbha Industries Power Limited vs. Axis Bank Limited) [(2022)8 SCC 352]** at Paragraphs 86 to 90 has held admission of application under Section 7 of the IBC, 2016 is not a mandatory but discretionary power of the Hon'ble NCLT considering the facts and circumstances of the case.
 - (ii) In the present case, the discretion requires consideration, as collusion amongst the financial creditor and the developer exists and cross-criminal complaints, pending arbitration proceedings, pending proceedings under Section 138 of the NI Act and above all, a suit for recovery of money from the Financial Creditor and the developer are pending before the Hon'ble High Court at Bombay filed by the corporate debtor, prior to the filing of this present proceeding.
 - (iii) That this Adjudicating Authority in exercise of powers under Rule 11 of the NCLT Rule, 2016 can rope in the developer in this proceeding and further enquire in the real state of affairs.
 - (iv) The Financial Creditor has surrendered its licence as NBFC (Non-Banking Financial Corporation) and the RBI has accordingly, cancelled their Certificate of Registration (CoR) as NBFC.

6. The applicant would rejoin to state that: -
- (i) CD admitted to having executed the loan agreements for the said loan amount and had been paying the installments.
 - (ii) Nowhere in the reply has the CD clarified as how the FC had induced them to take the said loans.
 - (iii) The CD being a business entity desirous of purchasing the said units had taken a commercial call and understanding the terms of the loan agreements had signed the same signifying their consent.
 - (iv) The allegation of the CD that the loan was not disbursed to them but to the third party without their knowledge and against banking norms is claimed as a baseless allegation, for when a borrower takes a property loan it is a normal banking procedure that the borrower makes a down payment and the remaining amount being the loan amount is paid by the Financer to the third party for and on behalf of the borrower who pays the loan amount back in EMIs. Attention is drawn to clause 3 of the loan agreement which states – *“The Borrower has requested the Lender to disburse the Loan in the manner specified in Schedule 4 hereto”*. The Schedule of Disbursement contains the details of disbursement signed by the CD/Borrower. Similar clauses are found in the other 3 agreements. Therefore, the CD not only knew about the disbursement but had also instructed the same as would appear from the agreements.
 - (v) That it was never represented to the CD by FC that the due diligence of the property would be done by the FC. In fact the CD wanted to expedite the process and wished that the due diligence be conducted by the FC so that the loan procedure may also be expedited. It would be evident from the email dated 8th May, 2018 [Page No. 29 of the Reply of the CD] that the FC has requested to the CD to deposit the amount to the account of the advocate directly and the amount that was deposited by the CD in the account of the FC was refunded to the CD as would be evident

from the email dated 19th May, 2018 [Page No. 30 of the Reply of the CD].

- (vi) The grievance of the CD that the said units are not been handed over to the CD by the Developer in connivance with the FC are bald allegations. In fact, when the FC came to know of the alleged fraud played upon them, the FC lodged complaints with Police Station on 4th November, 2019 [Page No. 74 of the Company Petition].
- (vii) The loan being stated as a “Working Capital Loan” in the petition is an inadvertent typographical error of which the CD is trying to take advantage to evade their legal and contractual obligations.
- (viii) That the Sanction Letters [Pages No. 26 of the Company Petition] would show that at Clause 6 the type of the loan is stated to be “Secured Loan with Equitable Mortgage of the Commercial Property”. Schedule 1 of the loan agreements mention the purpose of the loan and schedule 5, the Schedule of the Property/Security, which happens in a secured property loan and not in business or working capital loans as attempted to be made out by the CD.
- (ix) The CD had approached the FC for financial assistance to purchase the said units is admitted in the suit proceeding pending before the Hon’ble High Court at Bombay at Paragraph No. 6. Further the CD also admitted that the FC had disbursed the loan amount to the Developer in paragraph 7 of the plaint and that the Developer on receiving the amount from the FC had issued NOCs for creation of mortgage of the said units as admitted in paragraph 8 of the plaint [Page No. 113 of the Company Petition]. Therefore, it is evident from the admissions of the CD in their own plaint that FC had performed their part of the obligation and it was now the obligation of the CD to repay back the said loan amount as mentioned in the loan accounts.

7. We have considered the rival contentions and perused the records.

8. Irrefutably and indubitably, the debt and default is admitted. The default meets the threshold and the date of default is within the professed period of limitation.
9. The celebrated decision ***Mobilox*** very succinctly points out that: -

75. Legislature has in its wisdom used the word 'may' in Section 7(5)(a) of the IBC in respect of an application for CIRP initiated by a financial creditor against a Corporate Debtor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the IBC relating to the initiation of CIRP by an Operational Creditor.

76. The fact that Legislature used 'may' in Section 7(5)(a) of the IBC but a different word, that is, 'shall' in the otherwise almost identical provision of Section 9(5)(a) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. An application of an Operational Creditor for initiation of CIRP Under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the Rules and Regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.

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87. Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application Under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition.

10. Such being the factual and legal position this Tribunal passes the following order: -

ORDERS

- (i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.
- (ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- (iii) Moratorium is declared for the purpose referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under sub-Section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following: -
 - a) The institution of suits of 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (52 of 2002);
- (v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- (vi) The provisions of sub-Section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (vii) The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution Process.
- (viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-Section (1) of Section 31 or passes an order for liquidation of the Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- (ix) **Mr. Kanchan Dutta** registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-001/IP-P00202/2017-18/10391** Email kanchan@kgrs.in is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee or Creditors for evolving a resolution plan subject to production or written consent within one week from the date of receipt of this order.
- (x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the Insolvency commencement date.
- (xi) The Financial Creditor/Applicant is directed to deposit Rs. 3,00,000/- (Three Lacs) to IRP appointed hereinabove within **three** days from this

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order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

- (xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- (xiii) List the matter on **22.12.2023** for the filing of the **Progress Report**.
- (xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 10th day of November, 2023.

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