



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 1251/MB-IV/2020

Under **Section 7** of the I&B Code, 2016

In the matter of:

Mr. Kashyap Deorah

...Financial Creditor/Applicant

V/s

AYG Realty Private Limited,

[CIN: U70102MH1988PTC048870]

...Corporate Debtor/Respondent

Order Dated: 09.06.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Yashodhan Divekar, Advocate.

For the Respondent(s) : Mr. Rohit Gupta i/b Aniruth Purusothaman,
Advocate.

Per: Prabhat Kumar, Member Technical

1. This is an Application being C.P. (IB) No. 1251/MB/C-IV/2020 originally filed on 25.09.2020 (and restored on 01.08.2022) by Mr. Ashok Deorah, Father and Constituted attorney of Mr. Kashyap Deorah, the Financial Creditor/Applicant, authorized vide a Special Power of Attorney dated 05.01.2018, under section 7 of Insolvency & Bankruptcy



Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Essar Services India Private Limited, Corporate Debtor.

2. After the present petition was filed, the Corporate Debtor approached the Applicant and gave the proposal for settlement and offered to pay the dues in instalments. Thereafter both the parties recorded the Consent Terms dated 18.11.2021. Pursuant the Consent Terms dated 18.11.2021, a Joint Application dated 29.11.2021 was filed on behalf of both the Parties. Clause 4 of the Consent Terms dated 18.11.2021 provided that in case the Respondent makes the payment of the entire amount, the said Company Petition will stand withdrawn. Clause 3, of the aforesaid Consent Terms provided that if the Respondent commits default in payment, the Petition shall stand admitted.

- 2.1 The said Company Petition was dismissed by this Hon'ble Tribunal by an order dated 24.03.2022 and aggrieved by the said order dated 24.03.2022.

- 2.2 The Applicant challenged the order dated 24.03.2022 before the National Company Law Appellate Tribunal (NCLAT) vide Company Appeal (AT) (Insolvency) No. 611 of 2022, on the ground that on the date of delivery of order dated 24.03.2022, the Corporate Debtor had already committed default in payment of the instalment due under Clause 2(c)(1) of the Consent Terms dated 18.11.2021; further failed to pay an amount of Rs. 20,87,500/- subsequent instalment due on 28.02.2022 as well as balance of Rs. 1,00,87,500/- due on 28.05.2022. As on date, outstanding of Rs. 3,23,50,000/- still remains to be paid by the Respondent, which is the debt due from the Corporate Debtor prior to settlement.



-
- 2.3 The Hon'ble National Company Law Appellate Tribunal at New Delhi vide an order dated 07.07.2022, granted liberty to the Applicant to file an Application before this Hon'ble Tribunal for revival of the Section 7 Application on the satisfaction of the adjudicating authority that there is a breach of the Consent Terms.
- 2.4 This Bench, vide an order dated 09.11.2022, allowed the restoration of main Company Petition i.e. CP(IB)/1251(MB)/2020 and disposed of RST.A/(IBC)/12(MB)/2022 filed for the same by the Applicant.
- 3 This Bench, vide an order dated 12.04.2023, allowed the Petitioner to amend the Petition within one week with respect to the date of default not having been stated in the Part-IV of the Petition and the same is filed by the Financial Creditor. The first date of default is thereafter stated to be 27.02.2019, being date of default in payment of part of instalment due to the Financial Creditor and there have been various subsequent defaults. The Financial Creditor has filed an Affidavit dated 28.03.2023 bringing on record the current stage of the present case and stated that as on date an amount of Rs. 3,23,50,000/- is payable by the Corporate Debtor.
- 4 The case of the Financial Creditor as per the pleadings in the main CP is as under-
- 4.1 The Applicant/Financial Creditor by a registered Agreement dated 27.07.2012, had agreed to purchase a flat at The Police Officer Progressive Co.op Hsg Soc Ltd, Fisheries University Road, Village Versova, Tal Andheri, Mumbai -400061 for Rs. 4,00,00,000/-. The Applicant/Financial Creditor is the only flat purchaser, therefore the only Allottee as contemplated in the proviso to the amended section 7(1) of the Insolvency and Bankruptcy Code, 2016. The



- Corporate Debtor failed to hand over the aforesaid flat to the Applicant/Financial Creditor.
- 4.2 Thereafter Memorandum of Understanding dated 12.03.2019 was entered into between the Applicant/Financial Creditor and Respondent/ Corporate Debtor whereby the Respondent/ Corporate Debtor agreed to pay a total sum of Rs.7,11,00,000/- which included a refund of Rs.4,00,00,000/- and the rest of the amount by way of damages and indexation.
- 4.3 The Corporate Debtor till the date of filing the Petition had only paid an amount of Rs. 1,15,00,000/-. The Applicant, through their Advocates, hand delivered a Demand Notice dated 03.09.2020 to the Respondent on 05.09.2020. The Applicant, through their Advocates has sent a further letter, in reply to the letter dated 12.09.2020.
- 4.4 The Respondent/ Corporate Debtor, through their Advocates, replied to the Demand Notice dated 03.09.2020 vide their letter dated 12.09.2020.
- 4.5 The last payment received by the Financial Creditor was of Rs.20,00,000 on 29.07.2022 subsequent to the substantial developments that took place in the present case as explained hereinabove.
3. The Corporate Debtor filed a Reply dated 03.07.2021 to the main Company petition wherein it has opposed the claims of the Financial Creditor on the grounds of – i) No authority of Mr. Ashok Deorah to file the present petition, ii) No date of default mentioned in Part 4 of the petition iii) Statement of account and certificates not annexed to the petition as required under the Act, iv) MOU not properly stamped, v)



Claim under the MOU dated 12.03.2019 not a “financial debt” and therefore the Applicant herein not a Financial Creditor within the definition under the Code and vi) existence of dispute between the parties in terms of the MOU.

4. The Financial Creditor herein has filed a Rejoinder dated 17.07.2021 countering all the allegations made by the Corporate Debtor in its reply.
5. We have carefully gone through the pleadings available on records and considered the arguments of both the sides.

5.1. This Bench finds that the debt claimed to be in default arose from a MOU dated 12.03.2019, whereby the Corporate Debtor agreed to refund the principal amount of Rs. 4,00,00,000/-, received from the Applicant towards purchase of flat in the under construction Co-operative housing society’s residential project, alongwith Rs.3,11,00,000/- towards damages and indexation, and the Applicant agreed to execute a cancellation /release deed in relation to the said flat in consideration of the said payment.

5.2. This Bench notices that the said MOU contemplated payment in instalments and last instalment was due on 15.09.2019. This MOU further stipulated payment of penalty of Rs. 15,00,000/-, in case the Corporate debtor fails to pay the total amount. Upon execution of said MOU, the present petition was withdrawn vide order dated 24.03.2022 without granting any liberty to revive. The applicant filed an Appeal before the Hon’ble NCLAT pointing out that breach of the said MOU has occurred. The Hon’ble NCLAT vide order dated 07.07.2022 allowed the applicant to file an Application for revival in case the adjudicating authority is satisfied that a breach has occurred. Consequently, this Bench revived the petition on the restoration



application vide order dated 09.11.2022 keeping the issue of admission to be decided later on.

5.3. It is found that a sum of Rs. 3,95,00,000/- has been paid till the date and the same is confirmed by the Applicant. However, the corporate debtor was under obligation to pay Rs. 7,11,00,000/- till 15.09.2019 and the cancellation of sale deed was to take place only upon full payment. It is noticed that the said payment of Rs.4,00,00,000/- was made towards flat under construction and only one unit was booked by the Applicant. The Corporate Debtor has pleaded that the said complex was being built and the remaining flats were to be for self-occupation, accordingly, the said project does not constitute a real estate project under RERA. This Bench finds that Section 2(zn) of Maharashtra Rera Act defines Real Estate Project to mean “*the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be,.....*” Accordingly, the definition covers real estate projects where even some of the flats are contemplated for sale. Hence, this Bench does not find any merit in the arguments of the Corporate Debtor.

5.4. On perusal of documents available on record, we find that the Corporate Debtor defaulted in honouring the Consent Terms dated 18.11.2021. Clause 3 of the aforesaid Consent Terms provided that if the Respondent commits default in payment, the Petition shall stand admitted.

5.5. We find that there exists a “financial debt” within the meaning of Sec. 5(8) of the Code, as the debt under the Consent term was a



financial debt in the nature of the amount paid towards purchase of flat by a home-buyer. The indexation contemplated in the said consent is in nature of time value of money. Hence, this Bench is of considered view that there exists a financial debt, in repayment of which the corporate debtor has defaulted.

5.6. On perusal of the documents submitted by the Applicant, it is clear that financial debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) is due and payable by the Corporate Debtor to the Applicant and there is default by the Corporate Debtor in payment of debt amount. We do not have any other objection on record against the application filed for initiation of CIRP against the Corporate Debtor.

5.7. In view of the above, we find that the present petition is fit for admission under Section 7 of the Code for initiation of CIRP against the Corporate Debtor.

6. The Applicant has proposed the name of Mr. Adesh Kumar Gupta, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00747/2017-18/11251], Email- adeshgupta@probizadvisor.com as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him.

ORDER

This Application being C.P. (IB) No. 1251/NCLT/MB/C-IV/2020 filed under Section 7 of I&B Code, 2016, filed by Mr. Kashyap Deorah, Financial Creditor/ Applicant against AYG Realty Private Limited,



Corporate Debtor for initiating Corporate Insolvency Resolution Process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

- 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 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 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 possession of the corporate debtor.

II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to

- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;



- b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under subsection (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench appoints Mr. Adesh Kumar Gupta, a registered insolvency resolution professional having Registration Number - [IBBI/IPA-001/IP-P00747/2017-18/11251] and Email-adeshgupta@probizadvisor.com as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- e) The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- f) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.



- g) The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

Prabhat Kumar
Member (Technical)
/LRA-Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)