

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I-II

CP(IB) 276 MB 2023

Under section 7 of the Insolvency and
Bankruptcy Code, 2016

IN THE MATTER OF

ICICI Prudential Real Estate AIF I

Acting through its Investment Manager

**ICICI Prudential Asset Management
Company Limited**

2nd Floor, Block B-2, Nirlon Knowledge
Park, Western Express Highway, Goregaon
(East), Mumbai - 400063.

... Financial Creditor

V/s.

Nandi Vardhan Infrastructure Limited

2403, A-Wing, Marathon Futurex, Mafatlal
Mills Compound, N M Joshi Marg, Lower
Parel, Mumbai – 400013.

... Corporate Debtor

Order delivered on :- 19.12.2023

Coram:

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

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Financial Creditor : Adv. Rohan Rajadhyakhsha a/w
Pushkar Deo

For the Corporate Debtor : Adv. Rohit Gupta a/w Prashansa
Agarwal

ORDER

Per: - Kuldip Kumar Kareer, Member Judicial

1. This Company petition is filed by ICICI Prudential Real Estate AIF I Acting through its Investment Manager ICICI Prudential Asset Management Company Limited (hereinafter called “**the Petitioner**”) seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Nandi Vardhan Infrastructure 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 of the 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. 5,00,00,000/-.

The submissions by the Financial Creditor:-

2. ICICI Prudential Real Estate AIF I (AIF 1) disbursed INR.40,00,00,000/- (Indian Rupees Forty Crores Only) to Sunshine Housing and Infrastructure Private Limited (SHIPL) by subscribing to 4,000 unlisted, unrated, secured, redeemable non-convertible debentures of a face value of INR 1,00,000/- each (Indian Rupees One Lakh Only) (Debentures) issued by SHIPL pursuant to a Debenture Subscription Agreement dated 6 September 2016 (DSA).
3. SHIPL defaulted in meeting its payment obligations as it failed to make payment of the Interest which was due and payable to AIF I on 31 December 2017. Such default continued and was not cured by SHIPL.

4. On 21 December 2018, AIF I filed an insolvency application against SHIPL. By way of its order dated 8 May 2019, this Hon'ble Tribunal admitted the insolvency application.
5. On 26 September 2020, the Corporate Debtor submitted its resolution plan for SHIPL (Resolution Plan). The Resolution Plan was approved by the Committee of Creditors of SHIPL on 3 October 2020 and the RP filed the application for approval of Resolution Plan before this Hon'ble Tribunal on 23 October 2020. The Resolution Plan was approved by this Hon'ble Tribunal by way of order dated 11 February 2022 (Plan Approval Date). A copy of the Resolution Plan was received by the Corporate Debtor on 29 March 2022.
6. In terms of Clause 3.6.1 of the Resolution Plan, the Corporate Debtor was required to pay AIF I, a sum of INR 5 Crores in partial discharge of the financial debt owed to the AIF I within six months from the Plan Approval Date. The Corporate Debtor failed to abide by the payment obligation under the Resolution Plan.
7. The Applicant issued a notice dated 17 October 2022, calling upon the Corporate Debtor to pay the sum of INR 5 Crores in terms of the Resolution Plan, immediately. However, no payment has been received from the Corporate Debtor till date. Hence, the present Company Petition.

The submissions by the Corporate Debtor:-

8. It is submitted that the Petitioner had filed a Company Petition No. 4733/MB/2018 under section 7 of the Code to initiate CIRP against SHIPL, which was admitted by this Hon'ble Tribunal vide order dated 08.05.2019.

9. It is further submitted that the Resolution Plan submitted by the Respondent herein in the matter of Sunshine Housing & Infrastructure Pvt Ltd. in CP. (IB) no. 4733/MB/2018 was approved by majority of the members of the Committee of Creditors pursuant to which the Hon'ble NCLT, Mumbai Bench, Court-I approved the Resolution Plan submitted by the Respondent herein.
10. In the instant case, the Petitioner has filed the captioned Petition as it is their case that the Respondent has failed to pay the sum of Rs. 5,00,00,000/- (Rupees Five Crores only) as envisaged under the Resolution Plan. In this regard, it is submitted that the Petitioner never disbursed any money to the Respondent on the basis of which the Petitioner is claiming a purported debt of Rs. 5 Crores. Thus, the Corporate Debtor cannot be termed as the 'Financial Creditor' of the Petitioner. Moreover, it is well settled that the purported debt of Rs. 5 Crores does not qualify as a Financial Debt' for the reason that the same was not disbursed against the consideration of the Time Value of Money. Moreover, there is no privity of contract between the Petitioner and the Respondent and thus there does not exist any legal relationship between the Petitioner and the Respondent. Thus, in the absence of the Petitioner being categorised as a Financial Creditor, the Petitioner is not entitled to initiate CIRP against the Respondent as Section 7 mandates that the Petition can be filed only by a Financial Creditor. Therefore, the captioned petition is not maintainable and is liable to be dismissed on this ground alone.
11. It is further submitted that for an amount to qualify as a debt under the provisions of IBC 2016, there should have been a default occurred on the part of the Respondent. In the instant case, since there was no disbursement of monies to the Respondent, there cannot be a

situation that a default has occurred by the Respondent and hence, the captioned petition is liable to be dismissed.

12. It is submitted that on one hand, the Monitoring Committee of SHIPL had filed an application bearing Interlocutory Application No. 53 of 2023 against the Respondent under Section 74(3) of the IBC 2016 on account of the purported contravention of the Resolution Plan submitted by the Respondent (hereinafter referred to as the said application') and on the other hand, the Petitioner has filed the captioned petition on account of purported failure of the Respondent to satisfy the debt obligation of the Petitioner arising out of the Resolution Plan submitted by the Respondent in the matter of SHIPL. It is a settled law that two parallel remedies cannot be pursued at the same time in respect of the same matter.
13. It is submitted that the Respondent had made an application before the Slum Rehabilitation Authority (SRA) on 03.06.2022, 27.06.2022 and 10.10.2022 for issuance of revised LOI with respect to the development of the Galaxy Project. However, the same is not yet issued to the Respondent.
14. It is of pertinence to note that despite the failure of the SRA to issue revised LOI in the name of the Corporate Debtor by deleting the name of SHIPL, the Respondent have continued to comply with the obligation on their part and accordingly have made the payment of Rs. 4,00,00,000/- (Rupees Four Crores Only) towards outstanding rent of the Slum Dwellers, payment to operational Creditors being liabilities pertaining to Workmen and Employees and payment of CIRP Cost (in part) and the payment of professionals involved in CIRP process in the month of June 2022 and July 2022 against the invoices raised by them in January 2022, February 2022, March 2022 and April, 2022.

15. It is submitted that the Hon'ble Tribunal vide order dated 19.05.2021 has disposed of MA No. 3193 of 2019 and has held SRA's Order dated 17.07.2019 to be inoperative and invalid under the law. However, the SRA has not complied with the order of the Hon'ble Tribunal. In fact, instead of adhering to their obligation to issue revised LOI in favour of the Respondent pertaining to the development of the Galaxy property, the SRA has turned blind eye to the Respondent's various legitimate plea and has passed an Order dated 26th June 2023 for removal of Respondent as Developer u/s 13(2) of Slum Rehabilitation Act. In view of the above, the trigger date for implementation of the Resolution Plan has not arrived.
16. The Respondent submits that copy of order dated 11.02.2022 passed by the Hon'ble Tribunal was received by Mr. Rajendra Ganatra, the Resolution Professional of SHIPL on 29.03.2022. However, the copy of the same as well the certified copy of the aforesaid order dated 11.02.2022 was not received by the Respondent. Moreover, the RP of SHIPL handed over the incomplete charge/ management pertaining to the redevelopment of the SRA property to the Respondent only on 02.04.2022 vide handover letter/ report dated 02.04.2022 and thus there was delay in the implementation of the Resolution Plan. It is submitted that the certified copy of order dated 11.02.2022 was received by the RP of SHIPL only on 23.05.2022 and it is only thereafter that all the pending documents were handed over to the Respondent which were required to implement the Resolution Plan. In the end, the Respondent has prayed for the dismissal of the application.

FINDINGS

17. We have heard the Counsel for the parties and have gone through the records.
18. During the course of arguments the Counsel for the Financial Creditor has argued that the Financial Debt in this case arises out of Resolution Plan which was submitted by the Corporate Debtor in the CIRP of Sunshine Housing and Infrastructure Private Limited (SHIPL) which was approved by the Adjudicating Authority on 11.02.2022. The Financial Creditor had subscribed to 4000 secured redeemable non-convertible debentures of the face value of Rs. 1 lakh each which were issued by SHIPL. The Corporate Debtor was the Successful Resolution Applicant in the CIRP of SHIPL. The Counsel for the Financial Creditor has further contended that the Corporate Debtor in the capacity of Successful Resolution Applicant agreed to pay an amount of Rs. 5 crores to the Financial Creditor within a period of 6 months from the NCLT approval date or the receipt of the commencement certificate of the first sale building whichever is earlier, as stated in clause 3.6.1 of the approved Resolution Plan. According to the Counsel for the Financial Creditor, the said amount of Rs. 5 crore was payable by the Corporate Debtor which was due on account of the non-convertible debentures referred to above. Therefore, according to the Counsel for the Financial Creditor, there cannot be an iota of doubt about the fact that the amount of Rs. 5 crores payable by the Corporate Debtor was a financial debt.
19. The Counsel for the Financial Creditor has further contended that by virtue of non-payment of the sum of Rs. 5 crores, as stipulated in the Resolution Plan, default has been committed by the Corporate Debtor and therefore, for non-payment of financial debt, the Petitioner is entitled to initiate proceedings u/s 7 of the Code, 2016.

The Counsel for the Financial Creditor has further contended that the definition of the financial debt, as given u/s 5(8) of the Code, 2016 is very wide and even if there is no time value of money involved even then the debt can be treated as the financial debt. In this regard the Counsel for the Petitioner has relied upon *Pioneer Urban Land and Infrastructure Limited and another vs. Union of India and others 2019 SCC Online SC 1005* whereby it has been held that the interpretation of financial debt cannot be confined only to a debt which is disbursed against the consideration of time value of money and which permeates clauses (a) to (i) of section 5(8) of the Code, 2016 as the expression “and includes” speaks of subject matters which may not necessarily be reflected in the main part of definition. The Counsel for the Petitioner has further relied upon *Orator Marketing Private Limited vs. Samtex Desinz Private Limited 2021 SCC Online SC 513* whereby it has been held that the definition of financial debt in Section 5(8) of the Code, 2016 does not expressly exclude an interest free loan and “financial debt” would have to be construed to include interest free loan advance to finance the business operations of a corporate body.

20. The Counsel for the Petitioner has further relied upon *Srinivasa Pillai and ors. Vs. Muthayya Pillain and ors. MANU/TN/0369/1955* whereby it was held that where with the consent of the Creditor another Debtor is substituted for the original debtor, there is infact an assignment of liability and the new debtor would be an assignee of the original one so long of course the identity of the debt is maintained. It was further held that the expression is wide enough to include a person executing a fresh document in pursuance of an undertaking to do so on behalf of the original debtor. In the light of the law laid down in this case, it has been argued by the Counsel for the Petitioner that when the Corporate Debtor became successful

resolution applicant in the CIRP of SHIPL, it took over the liabilities of the said company and by way of the Resolution Plan also undertook to pay the outstanding amounts payable by SHIPL including the maturity amount of the non-convertible debentures held by the Financial Creditor. Therefore, the Petition u/s 7 of the Code, 2016 must be admitted against the Corporate Debtor as it meets all the requirements and ingredients under the Code.

21. On the other hand, the Counsel for the Corporate Debtor has argued that the Petition is not maintainable at all nor the so-called debt, in respect of which the default is said to have been committed, can be called a financial debt in terms of section 5(8) of the Code, 2016. According to the Counsel for the Corporate Debtor, no doubt the Corporate Debtor submitted the Resolution Plan which it failed to implement due to certain circumstances beyond its control but non-payment of certain dues promised to be paid in the Resolution Plan cannot be equated with a default in respect of a financial debt nor the proposed undertakings made by the Corporate Debtor as a Successful Resolution Applicant in the CIRP of SHIPL to make certain payments to the CoC Members/Creditors can be said to be covered under the definition of financial debt. According to the Counsel for the Corporate Debtor, an essential ingredient of the definition of the financial debt in terms of section 5(8) and 3(3) of the Code, 2016 is flow of money from the Debtor to the Creditor and further that the disbursement is an indispensable requirement to constitute a financial debtor within the meaning of the financial debt u/s 5(8) of the Code, 2016. In this regard the Counsel for the Corporate Debtor has relied upon *New Okhla Industrial Development Authority vs. Anand Sonbhadra (2023) 1 SCC Online SC 724* whereby it has been held that disbursement within the meaning of section 5(8) of the Code, 2016 is the payment of money which flows to the Debtor from the Creditor

and if there has been no disbursement of any debt (loan) or any sums the Appellant cannot be treated as Financial Creditor.

22. We have weighed the contention raised by the Counsel for the parties and have carefully gone through the records as well as the case law cited by the Counsel for the parties.
23. The instant Petition u/s 7 of the Code, 2016 has been filed by the Petitioner in respect of a debt obligation arising out of non-implementation of the Resolution Plan in the CIRP of the SHIPL. The plan was approved by the Adjudicating Authority on 11.02.2022. It has been claimed that the Petitioner was holder of 4000 non-convertible debentures issued by SHIPL and as the consequence of default of those debentures, the Petitioner initiated proceedings u/s 7 of the Code, 2016 against SHIPL. The said Petition filed through ICICI Prudential Asset Management Company Limited was admitted on 08.05.2019 whereby an IRP was appointed. Eventually a Resolution Plan submitted by the Corporate Debtor and as per clause 3.6.1 of the Resolution Plan, the Corporate Debtor was required to pay a sum of Rs. 5 crores in partial discharge of the financial debt within a period of six months. Since the said payment was not made, it constitutes default in payment of financial debt by the Corporate Debtor.
24. The pivotal question involved in the present Petition whether any undertaking/promise/proposal made by a Successful Resolution Applicant in a Resolution Plan to pay certain money to the stakeholders/creditors of the Corporate Debtor in CIRP can be equated with a financial debt or not. Having thoughtfully brooded over the matter, we are of the considered view that such a promise or undertaking made by a Resolution Applicant, if not fulfilled, cannot be treated as a default of a financial debt nor the so called obligation

to pay such sums to the Financial Creditors of the Corporate Debtor in CIRP by such an Applicant can be treated as a financial debt covered under the four corners of the definition provided u/s 5(8) of the Code, 2016. In our considered view, in such an eventuality when the SRA is not able to implement the plan, some consequences are bound to follow. The performance guarantee furnished by such SRA can be forfeited and the SRA can also be prosecuted u/s 74 of the Code, 2016 but since the liability of the SRA either to pay the creditor or to infuse money in the Corporate Debtor in CIRP for its revival cannot be equated with a financial debt, proceedings u/s 7 of the Code, 2016 cannot be initiated.

25. For the sake of convenience, the provisions of Section 5(8) of the IB Code is being reproduced here under:-

5(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.- 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 the Real Estate (Regulation and to them in clauses (d) (d) and (zn) of section 2 of 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-clauses (a) to to (h) of this clause;

From the above definition it is clear that the obligation to pay undertaken by SRA under the Resolution Plan cannot be held to be a financial debt.

26. During the course of arguments the Counsel for the Petitioner has tried to draw a parallel that a guarantee furnished by a Corporate Guarantor in favour of a Corporate Debtor, being the principal borrower is also financial debt and in the similar fashion, the SRA has also sort of furnished a guarantee to implement the plan and pay

the creditors which is akin to Corporate Guarantee and, therefore, the Corporate Debtor is liable to be treated as a Financial Debtor.

27. We have thoughtfully considered the aforesaid contentions raised by the Counsel for the Petitioner but in our considered view, it would be quite far fetched to equate the obligation of the Successful Resolution Applicant to implement the plan with incurring a financial debt qua the Financial Creditors or Members of the Committee of Creditors of the Corporate Debtor in CIRP. We have also gone through the case law cited by the Counsel for the Petitioner but we are afraid to say that on the basis of the law laid down in the cited cases relied upon by the Counsel for the Petitioner it cannot be held that the debt invoked by the Petitioner in filing the instant Petition u/s 7 of the Code, 2016 is a financial debt in terms of section 5(8) of the Code, 2016. The obligations of a successful Resolution Applicant cannot be equated to a Corporate Guarantee.
28. As a result of above discussion, it is held that the Petitioner has failed to make out a case of existence of a financial debt and its default committed by the Corporate Debtor. Accordingly, the Petition i.e. **CP(IB) 276(MB)2023** fails and is hereby **dismissed** with no order as to cost.

Sd/-

ANIL RAJ CHELLAN
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)