

**In the National Company Law Tribunal
Mumbai Bench**

MA 2984/2019 AND MA 3061/2019 IN C.P. 1951(IB)(MB)/2019

Application Under **Section 7 of the Insolvency and Bankruptcy Code, 2016** read with Rule 4 of the Insolvency and Bankruptcy Code.

In the matter of
Vejas Power projects Limited

....Financial Creditor
(Petitioner)

V/s

Vaayu Infrastructure LLP.

.... Corporate Debtor
(Respondent)

Registered Office No- 11th Floor, Fortune Terrace,
New Link Road, Andheri (W)
Mumbai.

Date of Order : 16.09.2019

Coram: Hon'ble Shri M.K. Shrawat, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Petitioner : Ranjit Shetty along with Priyanka Shetty i/by
Argus Partners for.

For the Respondent/Applicant : Senior Counsel Mr. Mustafa Doctor ,Pradeep Sancheti,
Rohit Gupta, Ashish Pyasi, Playgya Khaitan, Owish Jadhvani

Per M.K. Shrawat, Member (Judicial).

ORDER

1. A Petition under **Section 7** was filed on **27.05.2019** by the Financial Creditor M/s. Vejas Power Project Limited against the Corporate Debtor Vaayu Infrastructure LLP. for a total debt of rupees **268, 88,44,690**, which was admitted vide an order dated **30.08.2019**. On "Admission" Insolvency proceedings commenced.
2. A praecipe was mentioned on 5.09.2019 wherein referred a **Miscellaneous Application 2984 /2019 dated 03.09.2019**.An urgency was expressed that the order of the Tribunal be reserved . This application was put up for hearing on 12.09.2019. On this date the following order was passed:-
 1. *"The learned Representatives for Applicant and Corporate Debtor are present.*
 2. *MA-2984/2019 in C.P No. 1951/2019 has been filed by the Applicant. The Registry was directed to put up this Application on 24.09.2019, however, the Learned Counsel expressed an emergency for early hearing. Directed to communicate to the Learned Counsel of the Petitioner to be present on Monday 16.09.2019 so that according to the convenience of both the sides the date can be fixed to hear MA-2984/2019 on priority basis.*
 3. *The Learned Counsel for the Applicant has informed that one Stay Application Diary No. 6559 has also been filed on 11.09.2019. To be tagged along with MA-2984/2019.*
 4. *Matter is adjourned to **16.09.2019**."*

3. While the said application was pending again a miscellaneous application MA 3061/2019 was filed on 11.09.2019. In this application the prayer was that the operation of 30.08.2019 order be stayed till the decision on MA 2984. The Learned Representative appeared in the morning session as well as in the afternoon session and kept on pressing the demand of stay of 30.08.2019 order. On 13.09.2019 an order was passed as under:-

"1. A Miscellaneous Application bearing No. 6569 dated 11.09.2019 by the Corporate Debtor M/s. Vaayu Infrastructure LLP seeking stay of the Order dated 30.08.2019 admitting the Petition filed by a Financial Creditor M/s. Vejas Power projects Limited under section 7 of I&B Code in C.P. (IB)-1951- 9(MB)/2019 by pronouncing commencement of Insolvency Proceedings by appointing one IRP.

2. It is prayed that the implementation of the said Order dated 30.08.2019 to be stayed till Miscellaneous Application No. 2984/2019 be heard.

3. It is worth to mention that MA-2984/2019 in C.P. No. 1951/2019 was filed by this very Applicant (Corporate Debtor) which was put for immediate hearing on 16.09.2019. While granting urgent hearing vide Order dated 12.09.2019 the directions issued were as under:-

"1. The Learned Representatives for Applicant and Corporate Debtor are present.

2. MA-2984/2019 in CP No. 1951/2019 has been filed by the Applicant. The Registry was directed to put up this Application on 24.09.2019, however, the Learned Counsel expressed an emergency for early hearing. Directed to communicate to the Learned Counsel of the Petitioner to be present on Monday 16.09.2019 so that according to the convenience of both the sides the date can be fixed to hear MA-2984/2019 on priority basis.

3. The Learned Counsel for the Applicant has informed that one Stay Application Diary No. 6559 has also been filed on 11.09.2019. To be tagged along with MA-2984/2019.

4. Matter is adjourned to 16.09.2019."

5. Once an early hearing has already been granted, it is expected from the Learned Representatives and the Applicant to adhere to the directions. Today in the morning it is vehemently pressed to grant stay, that too, ex-parte in the absence of the opposite side. Again in the afternoon when the Court reassembled after Lunch hour the Learned Counsel has mentioned the impugned MA-2984/2019 by holding the proceedings of rest of the Board. Today this Bench had a very heavy Cause List of about 91 matter, but the Learned Counsel wanted the ex-parte stay by not allowing to call the hearing of the cases as enlisted in the Cause List. Under compelled circumstances, this Bench has pronounced the rejection by the following noting:-

“ ORDER

- 1. Rejected with imposition of cost of Rupees Two Lakhs to be paid to Registrar/Assistant Registrar, NCLT Mumbai on 16.09.2019 and produce the Challan, then only MA-2984/2019 shall be considered on 16.09.2019 at 3.00 PM.*

*Registry is directed to immediately upload this Order and on demand can give **DASTI** certified copy of this Order as per NCLT Rules."*

4. Today 16.09.2019 both applications 3061 and 2984 were clubbed together and argued by the Learned Counsel. The main argument of the Learned Senior Advocate appearing on behalf of the Respondent Debtor/Applicant is that the respondent debtor was not the 'principal borrower' but only a 'Guarantor'. On this issue he has submitted voluminous compilation containing Memorandum of Understanding and certain loan agreements to establish that the Corporate Debtor was not the 'principal borrower'. Hence, the proceedings under section 7 of the Code have wrongly been initiated against the Vaayu Infrastructure LLP.

5. Learned Senior advocate representing the corporate debtor has also pleaded that the ex-parte order 30.08.2019 was bad in law because the proper and reasonable opportunity of hearing was not granted. According to the argument the impugned petition was filed on 27.05.2019 which was never communicated or served upon the corporate debtor. In the absence of any intimation the Corporate Debtor was not able to appear before the NCLT Bench. It is wrong to allege that there was due service of notice intimating the date of hearing of 28.08.2019. It is pleaded that an order was reserved for 28.08.2019. The said Order was not available to the Corporate Debtor till 10.09.2019, Therefore, applications were moved for immediate injunction. The respondent debtor was deprived of natural justice. If the Corporate Insolvency Resolution Process proceedings are not stayed the respondent debtor shall suffer irreparable loss to be caused on advertisement by the Interim Resolution Professional. Hence, finally prayed to stop the advertisement by giving instructions of stay to the Interim Resolution Professional.
6. On the other hand from the side of the Petitioner (Financial Creditor) learned representative has pleaded that sufficient opportunity was given by due intimation through notice but the Respondent Debtor had failed to appear before the NCLT Mumbai Bench.

(A) List of Dates as per the Financial Creditor are as under:-

1. On 27.05.2019 the first letter sent by Financial Creditor to Corporate Debtor a/w Company Petition.
2. On 28.05.2019 the copy of the letter a/w Company Petition received by the Corporate Debtor.
3. On 3.06.2019 the affidavit proving service filed by Financial Creditor.
4. On 24.07.2019 an order was passed by Hon'ble Tribunal that petition was served to Corporate Debtor but there is no response also non-attendance.
5. On 31.07.2019 the second letter addressed by Financial Creditor along with Company Petition to the Partners of the Corporate Debtor as well as the Corporate Debtor.
6. On 02.08.2019 the copy of the second letter and the Company Petition was duly received by all the partners of the corporate debtor.
7. On 06.08.2019 the copy of the second letter the Company Petition was received by the Corporate Debtor.
8. On 27.08.2019 the affidavit proving service filed by the Financial Creditor.
9. On 28.08.2019 the matter listed for hearing when the Advocate for Corporate Debtor sought to file reply/vakalatnama (After 3 months)
10. On 30.08.2019 an order was passed by the Hon'ble Tribunal "Admitting" the Company Petition.

(B) List of Dates as per the Corporate Debtor as under:-

1. On 28.08.2019 the Company Petition was reserved for order ex-parte.
 2. On 30.08 2019 the admission order pronounced [order copy was not available till 10.09.2019 and online status was RFO]
 3. On 03.09.2019 MA - 2984/2019 filed by the Applicant for recall of the order.
 4. On 05.09.2019 the MA – 2984/2019 was mentioned and circulation of the same was granted on 24.09.2019 with direction to give notice to petitioner about the date of hearing.
7. Heard the parties, Perused the record. It is worth to place on record that the petition was submitted on 27.05.2019 by the Financial Creditor, listed for hearing in due course. On 24.07.2019 the Bench had made an observation as under:

"1. The Learned Representative for Petitioner is present. When called none present from the side of the Respondent.

2. This Petition is under Section 7 of the I & B Code. The copy of this Petition has been duly served upon the Respondent/Debtor. However, there is no response and also there is non-attendance.

3. This is a High Stake debt case, required to be taken on priority basis. Therefore, the Petitioner is hereby directed to serve another Notice upon the debtor Company as a last chance to represent the matter, as well as, any substituted mode of service through advertisement in the newspaper by putting the names of the debtor Company and all the directors as defaulters be published, asking them to be present in person on the next date of hearing, otherwise strict legal action will be taken against the defaulters.

4. Due compliance of serving to be reported to this Bench along with evidences on 28.08.2019. "

8. When the matter was called on 28.08.2019 neither the Respondent (Corporate Debtor) nor a duly authorized representative was present. Under the circumstances when the respondent debtor remained absent; although opportunities were granted, the Bench had no option but to proceed as per the provision of Insolvency Code. Section 7 (4) the Insolvency Code has prescribed a time limit of 14 days. The Adjudicating Authority on receipt of application shall ascertain the existence of 'default' within 14 days and under Section 7 (5) on satisfaction that the 'default' had occurred, admit the application by passing an order. This procedure was duly followed and the order was passed. There was no irregularity hence the prayer for recalling such an order, which is valid in the eyes of law, deserves rejection. Otherwise also this Bench has no jurisdiction to review its own order.
9. Further, the prayer for staying the operation of Insolvency is also not sustainable in the eyes of law. The applicant has not demonstrated any provision of the Insolvency Code under which the staying of Insolvency proceedings could be demanded. In the absence of any jurisdiction being not vested with NCLT Bench to stay the operation of Insolvency, this prayer as well, is hereby dismissed.
10. Applications MA 3061/2019 and MA 2984/2019 both are dismissed.

SD/-
CHANDRA BHAN SINGH
Member (Technical)

SD/-
M.K. SHRAWAT
Member (Judicial)

Date : 16.09.2019
Sushil