

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI**

Company Petition No. (IB)-375(PB)/2018

**Under Section 7 of the Insolvency and Bankruptcy
Code, 2016**

In the matter of:

M/s Bipin Industries Private Limited

.... Applicants/ Financial Creditor

Vs.

M/s ABW Infrastructure Limited

.....Respondents/ Corporate Debtor

Judgment delivered on: 12.09.2019

CORAM:

**MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT
MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)**

For Applicants:	Mr. Vipul Sharma, Ms. Hardika Kalia, Mr. Saurabh Upadhyay, Advocates
For Respondents:	Mr. Harsh Sethi & Mr. Sarvapriya Makkar, Advocates
For Dove Infrastructure: Pvt. Ltd.	Mr. Saurabh Kalia, Ms. Madhvi Khare, Advocates

ORDER

S. K. Mohapatra, Member

1. M/s Bipin Industries Pvt. Ltd., applicant financial creditor has filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent, M/s ABW Infrastructure Limited, claimed to be the corporate debtor.
2. The Respondent company M/s ABW Infrastructure Limited (CIN U45201 DL2003 PLC120136) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 01.05.2003 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at Office No. 208-210, Rectangle – 1, D-4, Saket, New Delhi – 110017.. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal having territorial jurisdiction over the place is the Adjudicating Authority in relation to the



prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It has been submitted in the application that the applicant financial creditor had invested in the project "ABW Gateway Tower". The return on investments were to occur by way of monthly assured returns and thereafter, lease rent arising out of the proposed office space to be allotted and delivered and transferred in the name of the investor by the corporate debtor.
4. Both the parties signed Memorandum of Understanding dated July 12, 2011 for an investment in the project "ABW Gateway Tower" and against the investment respondent agreed to provide an assured monthly return @ Rs. 50/- per sq. ft. per month for the Super area purchased by the applicant till the allotments are not leased out.
5. It is the case of the Petitioner that the petitioner financial creditor had invested in the project an amount of Rs. 91,54,819/- through four RTGS transactions as follows:

05.07.2011- Rs. 30,00,000/-

07.07.2011- Rs.30,00,000/-

08.07.2011-Rs. 29,25,000/-

12.07.2011- Rs. 2,29,819/-

Total.....Rs. 91,54,819/-

6. In furtherance of the same, the respondent corporate debtor issued provisional receipt dated July 12, 2011 for the investment of Rs. 91,54,819/- made by the petitioner M/s Bipin Industries Private Limited.
7. It is the further case of the applicant that respondent issued provisional allotment letter to the applicant on 14.07.2011 after acknowledgment of investment consideration of Rs. 91,54,819/-.
8. Subsequently, a Buyer's Agreement dated 18.07.2011 was entered into between the corporate debtor, M/s ABW Infrastructure Ltd. and the financial creditor, M/s Bipin Industries Private Limited regarding allotment of Unit No. 306 & 307 with super area of 3500 sq. ft. at Gateway Tower.
9. It is claimed that as per the agreement, M/s ABW Infrastructure Limited was under an obligation to pay an assured return calculated @ Rs. 50/- per sq. ft. per month qua the above mentioned units to M/s Bipin Industries Private Limited. The assured returns were to commence from

11.07.2011 till the due date of the project. The assured returns were received by applicant M/s Bipin Industries Private Limited till December 2014. It is alleged that since December 2014, no assured returns have been paid in favour of the applicant.

- 10.** Due to non-adherence of the terms of the MOU and the Buyers agreement and the consequential non-payment of the assured returns and non-completion of the project, the corporate debtor was served with a notice dated 08.01.2018 demanding payment of the entire amount owed by the corporate debtor to the applicant financial creditor.
- 11.** Applicant has also claimed that on 23.01.2018 a reply from the advocate of the corporate debtor was received signifying that the applicant shall be allotted additional space in lieu of outstanding dues, which shows that the corporate debtor admitted its liability.
- 12.** Reply on behalf of respondent corporate debtor was filed on 04.06.2018 mainly denying the liability and disputing the agreements relied upon by the applicant as manipulated documents.

- 13.** It is relevant to note here that respondent company, M/s ABW Infrastructure Limited was ordered to be wound up by the Hon'ble High Court of Delhi vide order dated 29.05.2018 passed in C.P. 449/2016 and the Official Liquidator was appointed as the provisional Liquidator of the respondent company (in liquidation). However the order appointing the Official Liquidator was suspended for a period of four weeks, making it clear that in the event the payments as directed in the order were not made within a period of four weeks, the order appointing the Official Liquidator, was to become operational. Thereafter respondent company failed to comply with the directions of the Hon'ble High Court and the order appointing the Official Liquidator as the provisional Liquidator became operational since 29.06.2018.
- 14.** The Official Liquidator of the respondent company (in liquidation) has filed the status report on 02.04.2019.
- 15.** It is thus seen that during pendency of the present Section 7 application filed under the Code, winding up order has been passed by the Hon'ble High Court and Official Liquidator has been appointed in respect of the respondent company (in liquidation).

16. It is pertinent to refer here the order passed by the Hon'ble Supreme Court in the matter of *Jaipur Metals and Electricals Employees Organization vs. Jaipur Metals and Electricals Ltd. and Ors.* reported in 2018 (15) SCALE 836 in which Hon'ble Supreme Court has observed that:

“17.....This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. **It was open for Respondent No. 3 at any time before a winding up order is passed to apply Under Section 7 of the Code.....**

18.....We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd.”
(emphasis given)

17. Similarly, in the case of *Forech India Ltd. v. Edelewiss Assets Reconstruction Co. Ltd.* in Civil Appeal No. 818 of 2018, despite pendency of winding up proceedings before High

Court, Hon'ble Supreme Court vide order dated 22.01.2019 has observed that:

“financial creditor’s application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code”.

18. Hon'ble Supreme Court has thus made it clear that Section 7 application filed under the Code is an independent proceeding and must run its entire course, which has nothing to do with the pendency of winding up proceedings before High Court. In view of the precedent laid down by the Hon'ble Supreme Court, pendency of winding up petition before High Court will not be a bar for initiation of proceedings under Section 7 of the Code.

19. The objection on the maintainability of Section 7 application cannot therefore sustain, as the order of admission or the order of appointment of liquidator will not create any bar on the applicability of the provisions of IBC to the proceedings instituted under the Code. Till the company is ordered to be wound up i.e. the final dissolution order is

passed; Adjudicating Authority can entertain a petition filed under the Code.

20. In the present case respondent company has acknowledged receipt of Rs. 91,54,819/- disbursed through four RTGS transactions during July 2011. Besides MoU and buyer's agreements were executed between the parties in the year 2011. The applicant was allotted Unit No. 306 & 307 with super area of 3500 sq. ft. at 'Gateway Tower'. The applicant therefore comes within the definition of home buyer. Besides as per the agreement the respondent was liable to pay assured return. The loan was disbursed against the consideration for time value of money with a clear commercial effect of borrowing. Moreover, the debt claimed in the present application includes both the component of outstanding principal and interest. In that view of the matter not only the present claim comes within the purview of '*Financial Debt*' but also the applicant bank can clearly be termed as '*Financial Creditor*' so as to prefer the present application under Section 7 of the Code. Respondent has defaulted in paying the assured returns nor has handed over the possession of the units to the applicant. Moreover, the

winding up order passed against the respondent company itself, is a record of default by the respondent corporate debtor. As per the Explanation to sub-section (1) of Section 7 the default can be to any financial creditor to the entity and not restricted to the creditor who triggers the insolvency resolution process.

21. It is thus seen that the applicant 'financial creditor' has placed on record sufficient evidence in support of the claim as well as to prove the default.

22. One of the important objectives of the insolvency resolution is to ensure that if a particular management is not in a position to run a company, then instead of the company closing down, a more liquid and a professional management must come to save the company.

23. The spirit of the Code encourages resolution as against liquidation. Resolution is the rule; whereas liquidation is to be an exception. The object of the Code is to promote resolution over liquidation. Until option of resolution is exhausted, liquidation ought not to follow and therefore every effort must be made to try and see that resolution is made

possible. Liquidation can only be allowed upon failure of resolution process.

24. As a sequel to the aforesaid discussions the petitioner being a financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the Code against the respondent corporate debtor (in liquidation) as default in repayment of the financial debt is established.

25. Under sub-section 5 (a) of Section 7 of the code, the application filed by the applicant financial creditor has to be admitted on satisfaction that:

1. Default has occurred.

2. Application is complete, and

3. No disciplinary proceeding against the proposed IRP is pending.

26. The present application under Section 7 of the Code for initiative Corporate Resolution Insolvency Process has been filed by petitioner financial creditors in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with required information, documents and records as prescribed under the Rules.

27. The petitioners have proposed the name of Mr. Anand Chandra Swain, for appointment as Interim Resolution Professional having registration number IBBI /IPA-002 /IP-N00162 /2017-18/ 10431, resident of, H. N – 200, Ground Floor Tower – 7, Supreme Enclave, Mayur Vihar, Delhi - 110092 with email-id anandsawin2@gmail.com. Shri Anand Chandra Swain has agreed to accept the appointment as the interim resolution professional and has signed a communication dated 13.10.2018 in FORM 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceeding is pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Anand Chandra Swain as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

28. It is reiterated that the Form-1 filed in the present case under Section 7 of the Code read with Rule 4 of the Rules, shows that the Form is complete in all respect and there is no infirmity in the same.



29. In the present case financial debt is outstanding since December 2014. Neither the possession of the flats has been given to the petitioners nor has the Corporate Debtor returned even the amounts collected from the petitioners since the year 2011. There is sufficient material on record to conclude that respondent corporate debtor has committed default in repayment of the financial debt. The amount of default exceeds much more than Rupees 1 lakh. The threshold limit to trigger the Code is purposely kept low at only one lakh rupees, making it clear that even small individuals may also trigger the Code as financial creditors. In view of Section 4 of the Code, the moment default is Rupees one lakh or more, the application to trigger Corporate Insolvency Resolution Process under the Code is maintainable. Once there is a debt and default and the application is complete the Adjudicating Authority is bound to admit the application preferred under Section 7 of the Code.

30. As a sequel to the aforesaid discussion it is seen that the applicant being home buyer comes within the definition of Financial Creditor. The material placed on record further



confirms that applicant financial creditor had disbursed the money to the respondent corporate debtor as consideration for purchase of flats. Though considerable long period has since lapsed the possession of the flats has not been given to the petitioner . Even the principal amount disbursed has not been repaid by the respondent corporate debtor. It is accordingly reiterated that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds much above the statutory limit of rupees one Lakh. Besides it is also seen that the application filed in Form – I under Section 7 of the Code read with Rule 4 of the Rules is complete and there is no infirmity in the same. Moreover, the material on record reveals that there is no disciplinary proceeding pending against the proposed IRP. In the facts we are satisfied that the present application is complete and there has been a default in payment of the financial debt and that no disciplinary proceeding is pending against the proposed IRP and therefore, the applicant financial creditor ~~is~~ entitled to initiate Corporate Insolvency Resolution Process against the respondent corporate debtor under Section 7 of the Code

- 31.** As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.
- 32.** Mr. Anand Chandra Swain, having registration number IBBI / IPA-002 / IP-N00162 / 2017-18 / 10431, resident of, H. N – 200, Ground Floor Tower – 7, Supreme Enclave, Mayur Viharm, Delhi - 110092 with email-id anandsawin2@gmail.com. is appointed as an Interim Resolution Professional.
- 33.** We direct the applicant Financial Creditors to deposit a sum of Rs. 2 Lacs with the Interim Resolution Professional namely Mr. Anand Chandra Swain to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per rules and shall be paid back to the Financial Creditor.

34. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

35. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(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 the possession of the corporate debtor.”

- 36.** It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

37. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all

his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

- 38.** The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

-Sd-

(M.M. KUMAR)
PRESIDENT

12.09.2019

-Sd-

(S. K. MOHAPATRA)
MEMBER (T)