

FIT FOR INDEXING

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-67(PB)/2019

IN THE MATTER OF:

Mr. Mohit Kumar AroraFinancial Creditor/Petitioner
v.

M/s. MVL LimitedCorporate Debtor/Respondent

SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 13.06.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA
HON'BLE MEMBER (T)

PRESENTS:

For the Petitioner:

Mr. Nakul Mohta, Ms. Misha Rohatgi
and Mr. Johnson Subba, Advocates

For the Respondent:

Ms. Suhani Dhingra, Advocate for Ex-
Management

M.M. KUMAR, PRESIDENT

JUDGMENT

Mr. Mohit Kumar Arora claiming himself to be a 'financial creditor' has filed this petition 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 company, M/s. MVL Limited, who is stated to be the corporate debtor.

2. The Respondent company-the Corporate Debtor, M/s. MVL Limited (CIN L45200DL2006PLC154848) was incorporated on 18.10.2006 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at 1201 B, 12th Floor, Hemkunt Chamber, 89, Nehru Place, New Delhi-110019.

3. The Financial Creditor has proposed the name of Resolution Professional, Mr. Arun Jain with the address Vila No. 34, Block 4, 2nd Floor, Eros Garden, Charmwood Village, Faridabad-121009 and email id – arjain1966@gmail.com. His registration number is IBBI/IPA-01/IP-P00590/2017-18/11029. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

4. The precise case of the Petitioner is that he has entered into an Assured Return Agreement dated 03.11.2010 with the Respondent for purchase of IT Space admeasuring 1000 sq. ft. super area on the 4th floor in the complex under the project namely

“India Business Centre” which was proposed to be constructed by the Respondent. The petitioner has paid a total amount of Rs. 40,00,000/- in two tranches (Rs. 16,00,000/- on 27.10.2010 & Rs. 24,00,000/- on 29.10.2010). The relevant term dealing with the payment of ‘Assured Return’ from the aforesaid agreement executed between the Petitioner and the Respondent-Corporate Debtor reads as under:-

“3.1 Assured Return: Till tenant is inducted, possession is delivered to it and the lease commences and rental is received by the allottee(s) from the tenant, the Developer, shall pay to the Allottee(s) an Assured Return at the rate of Rs.40/- per sq. ft. per month of super area of premises subject to the receipt of full/total consideration/total payment.”

5. It is submitted by the petitioner that the Respondent honoured its commitment towards assured return from 2010 till November 2015 which is explicit from a perusal of TDS deducted by the Respondent from the assured return payments made to him. However, thereafter no payments have been made to him. Neither possession has been given nor any lease has commenced. The petitioner has also filed a complaint against the Respondent



Company before the Haryana Real Estate Regulatory Authority but all in vain.

6. It is claimed that the Respondent is liable to pay an amount of Rs. 17,85,600/-, Rs. 89,280/- & Rs. 40,00,000/- respectively to the petitioner (in the different heads namely assured return, TDS deducted but not deposited & principal amount).

7. On 09.01.2019, during the course of hearing it was brought our notice that in the earlier order dated 26.09.2018 against the Corporate Debtor passed in (IB)-890(PB)/2018, we have noticed that Hon'ble Delhi High Court had already appointed Official Liquidator as Provisional Liquidator on 05.07.2018 and the application for recalling that order before the Delhi High Court was pending. Accordingly, we had granted time to the learned counsel for the petitioner to study the provision as well as that order to make submission thereafter.

8. The issue concerning maintainability of a petition under Section 7 of the Code during the pendency of a winding up petition before the High Court even after admission and appointment of Official Liquidator, is no longer *res integra*. Hon'ble the Supreme Court in the case of ***M/s. Forech India Limited v. Edelweiss***

Assets Reconstruction Company Limited (Civil Appeal No. 818 of 2018 decided on 22.02.2019) has clarified the aforesaid position by approving the views of Bombay High Court in **Ashok Commercial Enterprises v. Parekh Aluminex Limited**, (2017) 4 Bom. CR 653 in the following paras:

“19. Mr. Sen also referred us to a judgment of the learned Single Judge of the High Court of Bombay reported, in (2018) 2 AIR Bom R 350 in PSL Limited vs. Jotun India Private Limited. The Learned Single Judge, after referring to the self-same provisions of the Code and subordinate legislation made thereunder, held as follows:-

“93. The fact that post notice winding up petitions continue to be governed by the Companies Act, 1956, only means – that to those proceedings it will be the Companies Act, 1956 which will apply. It does not, however, mean that if, in a post-notice winding up petition a new proceeding is filed under IBC, and where orders are passed by NCLT, including under Section 14 of IBC, the consequences provided for under IBC will not apply to post notice proceeding, whatever their stage may be.

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98. Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC, vis-a-vis the company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation. This is contrary to the plain language of IBC. If the contentions of petitioner were to be accepted, it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator



C.P. No. (IB)-67(PB)/2019

Mr. Mohit Kumar Arora V. M/s. MVL Limited

appointed, provisions of IBC can never apply to such companies for all times to come.

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100. The mere fact that post notice winding up proceedings are to be "dealt with" in accordance with the provisions of the Companies Act, 1956, does not bar the applicability of the provisions of IBC in general to proceedings validly instituted under IBC, [nor] does it mean that such proceeding can be suspended."

20. This judgment was upheld by a Division Bench of the Bombay High Court. We may hasten to add that the law declared by this judgment has our approval."

It is patent from the aforesaid paras that the Code would prevail and the Official Liquidator would answer all the queries of the Resolution Professional who is to take over the process. He is subjected to all the directions of the NCLT and Resolution Professional. It is for that reason we had issued notice to the Official Liquidator as well who has preferred not to appear. Therefore, it cannot be said that a petition is not maintainable merely because Official Liquidator has been appointed.

9. After service of notice when the matter came up for consideration on 20.02.2019 learned counsel for the respondent sought time to file reply and vakalatnama. We granted three days' time for filing reply and vakalatnama and the matter was to be heard on 25.03.2019. Despite granting time the Respondent has not chosen to file reply.



C.P. No. (IB)-67(PB)/2019
Mr. Mohit Kumar Arora V. M/s. MVL Limited

10. It is pertinent to mention here that the notice of the petition was also issued to the Official Liquidator which was duly served upon him. However, no one put in appearance on behalf of Official Liquidator and the position obtaining has been recorded by us in the order dated 25.03.2019. On behalf of the ex-director an attempt was made to address arguments on the basis of some material which is not on record. Such a course is not available in law. Accordingly, we heard the arguments on behalf of the petitioner.

11. Now we deal with the submissions made on behalf of the applicant-Financial Creditor.

12. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended. In view of the revised definition, any amount raised from an allottee under a real estate project is deemed to be an amount having the commercial effect of a borrowing and thus is covered by the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has also been amended to specifically include dues of home buyers i.e. Real Estate (Residential). The amendment also recognizes home buyers as "Financial Creditor". Accordingly, the home buyers can initiate Corporate Insolvency Resolution Process against defaulting builder or developer, as "Financial Creditor" in terms of Explanation to

Section 5 (8) (f) of the Code with effect from 06.06.2018. Therefore, the submission made to the contrary by respondent would not require any serious consideration.

13. It is pertinent to mention that on 03.11.2010 an Assured Return Agreement was executed between the Petitioner & Corporate Debtor whereby the petitioner was allotted by earmarking IT Space admeasuring 1000 sq. ft. super area on the 4th floor in the complex under the aforesaid project of the Corporate Debtor. In the light of the said agreement, the petitioner has paid the total amount of Rs. 40,00,000/- to the Corporate Debtor in two tranches. According to the terms of the agreement, the Corporate Debtor undertook to pay assured return of Rs. 40/- per sq. ft. per month to the Petitioner till the Respondent delivered possession, inducted a tenant and lease commenced. The Respondent honoured its commitment towards assured return till November, 2015 and thereafter failed in paying the same or delivering the possession of the aforesaid commercial space. The petitioner is thus covered by the expression 'Financial Creditor' as has been used in the amended definition of Section 5 (8) (f) of the Code and the explanation appended thereto. In that regard we draw support from the observations made by Hon'ble the Appellate Tribunal in

the case of **Rajendra Kumar Saxena V. Earth Gracia Buildcon Pvt. Ltd.** passed in Appeal (AT) (Insolvency) No. 187/2018 wherein it has been held as under:

*“By the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 No. 6 of 2018 dated 6th June, 2018 followed by the Act, in clause (8), in Sub-clause (f), of Section 5 an explanation has been inserted as per which 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. **Thereby, after amendment of the Act, the allottees of real estate project have been treated as ‘Financial Creditors’.**” (Emphasis supplied).*

A bare perusal of the aforesaid paragraph of the judgment would show that even without any element of ‘assured return’ an allottee in the real estate project has to be regarded as a ‘Financial Creditor’. The petitioner eminently fulfills the aforesaid condition.

14. The amount has been raised from the petitioner/allottee under a real estate project. In such a situation not only the debt has a commercial effect of borrowings and come within the scope of ‘financial debt’ but also the petitioner is covered by the definition of expression ‘financial creditor’.

C.P. No. (IB)-67(PB)/2019

Mr. Mohit Kumar Arora V. M/s. MVL Limited



15. Therefore, petitioner being financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the respondent corporate debtor in case of default in repayment of financial debt.

16. Learned counsel for the petitioner has argued that all requirements of Section 7 for the initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the petition as prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 (2) of IBC is complete in all respects. He has further submitted that the details of the default along with the dates have been stated in part IV and the additional documents have been submitted subsequently along with all the minute details. There is overwhelming evidence available to prove default and name of the resolution professional has been specified who does not suffer from any disqualification.

17. Under sub-section 5(a) of section 7 of the code, the petition filed by the petitioner financial creditor has to be admitted on satisfaction that:

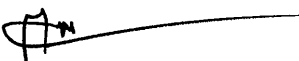
(i) Default has occurred;



- (ii) Application is complete, and
- (iii) No disciplinary proceeding against the proposed IRP is pending.

18. After a conjoint reading of the aforesaid provision along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the petition under sub section 2 of Section 7 is complete.

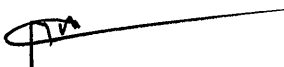
19. As a sequel to the aforesaid discussion and the material placed on record it is clear that applicant-financial creditor has disbursed the money to the respondent corporate debtor as consideration for purchase of a commercial space. Though a considerable long period has lapsed even the principal amount disbursed has not been repaid by the respondent corporate debtor as per the terms of the Assured Return Agreement. It is accordingly held that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one Lakh. Thus, the petition warrant admission as it is complete in all respects.



20. As a sequel to the above discussion, this petition is admitted and Mr. Arun Jain with the address Vila No. 34, Block 4, 2nd Floor, Eros Garden, Charmwood Village, Faridabad-121009, email id – arjain1966@gmail.com and Registration No. IBBI/IPA-01/IP-P00590/2017-18/11029 is appointed as the Interim Resolution Professional.

21. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

22. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately (3 days) make public announcement with regard to admission of this petition under Section 7 of the Code. The public announcement is



required to be made in all territories/areas where the business have been transacted by the Corporate Debtor so that all stakeholders may have noticed of the fact that Corporate Insolvency Resolution Process has been triggered in respect of the Corporate Debtor.

23. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional 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 amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

24. Before parting we must notice a general complaint being agitated against Financial Creditors, Banks, NBFC and Asset Reconstruction Companies for charging exorbitant rates of interest or compounding of interest on penal rates of interest or discrepancies in the statement of account. We cannot determine

the amount due. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly.

25. 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, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

Sd/-

(M.M.KUMAR)
PRESIDENT

13.06.2019

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

13.06.2019
(VINEET)