

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

(IB)-489(PB)/2017

IN THE MATTER OF:

IFCI LimitedFinancial Creditor
v.
Era Housing & Developers (India) LimitedCorporate Debtor

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

Judgment delivered on 08.02.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

S. K. MOHAPATRA
HON'BLE MEMBER (TECHNICAL)

For the Financial Creditor:

Mr. Kush Chaturvedi & Mr. Path Singh
Chaudhari, Advocates

For the Respondent:

Mr. Vijay K. Singh, Mr. Vineet Arora and Ms.
Ruchika Darira, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditor'-IFCI Limited has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of Era Housing & Developers (India) Limited (for brevity 'the Corporate

Debtor'). It is appropriate to mention that the 'financial creditor' is a company incorporated under the Companies Act, 1956. The 'financial creditor' was incorporated on 21.05.1993 and was assigned identification number L74899DL1993GOI053677. It has its registered office at IFCI Tower, 61, Nehru Place, New Delhi-110019.

2. Mr. Ehteshamuddin, Manager-Law has been authorized by the Authority letter dated 21.09.2017 (Annexure A) to sign and submit the petition.

3. The Corporate Debtor-Era Housing and Developers (India) Limited was incorporated on 15.09.1995. The identification number of the Corporate Debtor is U74899DL1995PLC072507 and its registered office is situated at 1107, Indraprasth Building, 21, Barakhamba Road, New Delhi-110001. Its authorised share capital is Rs. 6,25,00,000/- (Rupees Six Crores Twenty Five Lakh Only) and the paid up share capital is Rs. 2,89,70,700/- (Rupees Two Crores Eighty Nine Lakh Seventy Thousands Seven Hundred Only).

4. The Financial Creditor has proposed the name of Shri Vikram Kumar, Sector B-1/1748, Vasant Kunj, New Delhi - 110070, email id vikramau@gmail.com. His registration number is IBBI/IPA-001/IPP00082/2017-18/10178. A written communication dated 23.09.2017 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record (from pg. 409-410). There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Vikram Kumar as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

5. Facts which are material to the controversy raised may first be noticed. According to the particulars of the debt disclosed in part IV of Form-1 prescribed under sub rule 1 of Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 the total amount of debt granted to the Corporate Debtor is Rs. 180,00,00,000/- (Rupees One Hundred Eighty Crores) by executing a term loan agreement dated

22.10.2009 for a sum of Rs. 80,00,00,000/- (Rupees Eighty Crores) and a corporate loan agreement dated 15.10.2010 for a sum of Rs. 100,00,00,000/- (Rupees One Hundred Crores). Copies of the aforesaid both term loan and corporate loan agreements have been annexed (Annexure-G & H) respectively.

6. The 'financial creditor' has placed on record an overwhelming evidence to prove the default. The details of the security held by, or created for the benefit of 'financial creditor'- IFCI Limited have been given in Part V which are set out below:-

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- (i) Mortgage of Property at Palwal, Haryana admeasuring 81.77 acres (Adel Green World Project).
 - (ii) Mortgage of Property at Bahadurgarh, Distt: Jhajjar, Haryana admeasuring 13.30 acres.
 - (iii) Escrow of receivables from sale of Property at Palwal, with 60% of the cash flow to be utilized for repayment of IFCI's loans.



Copy of the Certificates of Registration of Charge issued by the Registrar of Companies have been placed on record (Annexure-D).

7. The appraised value of the aforementioned property situated at Palwal, Haryana admeasuring 81.77 acres (Adel Green World Project) as per the valuation report of Goel & Associates dated 01.05.2017 is Rs. 205,47,50,000/- and distress sale value is Rs. 154,10,62,500/-. The appraised value of the other property situated at Bahadurgarh, District Jhajjar, Haryana admeasuring 13.30 acres as per the valuation report of Goel & Associates dated 01.05.2017 is Rs. 29,93,06,250/- and distress sale value is Rs. 22,44,79,500/-. Copy of the valuation reports have been placed on record (Annexure-C).

8. A record of default is also available with the Credit Information Companies like the status classification report of the 'Corporate Debtor' issued by the TransUnion CIBIL dated 10.10.2017 (Annexure I).



9. As per the averments of the 'Financial Creditor', the account of the Corporate Debtor was declared as Non-Performing Asset (NPA) on 30.09.2013 in its books and is still continuing as such. In view of the repeated defaults on the part of the Corporate Debtor to comply with the repayment of the principal and interest dues, the Financial Creditor was constrained to issue the recall notice dated 17.01.2014 but inspite of the notice they failed to clear the unpaid debt/liability. Thereafter the Financial Creditor initiated recovery proceedings against the Corporate Debtor under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before the Learned Debt Recovery Tribunal-I, Delhi by filing Original Application No. 321/2014. The learned DRT-I, Delhi vide its order dated 26.10.2016 allowed the application filed by the Financial Creditor with direction to issue the recovery certificate and sent the same to the Recovery Officer, DRT-I, Delhi. The operative portion of the said order dated 26.10.2016, which reads as under:-

“(i) I allow this OA and direct the defendants No. 1 and 2 pay jointly and severally to the applicant FI, within a period of 30 days, a sum of Rs. 92,04,38,768.00 (Rupees Ninety Two Crore, Four Lacs Thirty Eight



Thousand Seven Hundred Sixty Eight Only) together pendent lite and future interest @ 16% simple p.a. from the date of filing of this OA till its realization, failing which the aforesaid amount shall be recovered from the sale of mortgaged properties i.e. (i) Property situated at Sector-8, Palwal, Tehsil & District Palwar, Haryana and (ii) Property situated at Village Khedka Musalman at Tehsil Bahadurgarh, District Jhajjar, Haryana as detailed in para 5.25 of OA, pledged shares and other movable and immovable assets of these defendants.

Cost of the litigation be also borne by the defendants. The applicant FI is also directed to file the revised statement of account before the Ld. Recovery Officer of this Tribunal.

(ii) The recovery certificate be issued forthwith and be sent to the Recovery Officer, DRT-I, Delhi.”

A copy of the order dated 26.10.2016 passed by the Learned DRT-I, Delhi in O.A. No. 321/2014 has been placed on record (Annexure E).



10. The Financial Creditor also issued notice dated 17.09.2014 under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity 'the Act, 2002) qua the Corporate Debtor. Thereafter on 28.11.2014 possession notice under Section 13 (4) of the Act, 2002 was also issued. A copy of the notice under Section 13 (2) and 13 (4) of the Act, 2002 have been placed on record (Annexure -L & M).

11. The Financial Creditor also approached the Hon'ble High Court of Delhi by filing winding up petition under the provisions of Companies Act, 1956 and the same was registered as Company Petition No. 573/2015. The Hon'ble High Court vide its interim order dated 14.08.2015 restrained the Corporate Debtor from disposing off or alienating or encumbering either directly or indirectly, or otherwise part with possession of any assets of the Company to the tune of Rs. 95,00,00,000/- except in the ordinary course of business and for the payment of salaries and statutory dues. A copy of the interim order dated 14.08.2015 has been placed on record as (Annexure-F).



12. As per the averments of the 'Financial Creditor', the amount in default as on 10.10.2017 is claimed to be Rs. 151,08,11,345/- (Rupees One Hundred Fifty One Crore Eight Lakh Eleven Thousand Three Hundred Forty Five Only). A copy of computation of amount of default and days of default has been placed on record (Annexure B).

13. Learned counsel for the Corporate Debtor opposed the admission and has argued that prior to approaching this Tribunal the Financial Creditor has filed a winding up petition bearing C.P. No. 573/2015, which is pending adjudication before the Hon'ble High Court of Delhi. He further argued that the Financial Creditor is involved in forum shopping as Original application bearing No. 321/2014 was also filed at their behest before the Debt Recovery Tribunal-I, Delhi in which a final order dated 26.10.2016 was passed of Rs. 92,04,38,768/- together with pendent lite and future interest from the date of filing of the OA i.e. 31.10.2014 till its realization and cost of Rs. 1,50,000/-. In addition, Learned Debt Recovery Tribunal-I, Delhi also issued the Recovery Certificate and in pursuance thereof, execution of the same is pending adjudication. He further argued that the Financial



Creditor has also invoked the jurisdiction under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by issuing notice under Section 13 (2) dated 17.09.2014 and further possession notice dated 28.11.2014.

14. Learned counsel then submitted that taking possession of the secured assets and proceeding further to sell the same would itself show that there is no debt, even otherwise the value of the assets secured by the Corporate Debtor is more than the amount claimed in the present application. He also placed reliance in Section 13 (10) of SARFAESI Act by arguing that it gives liberty to the Financial Creditor to file an application in the form and manner as may be prescribed to the Debt Recovery Tribunal for recovery of balance amount from the borrower, therefore, it cannot be inferred that a default has occurred for the purpose of invoking the jurisdiction of the Code unless sale value realized does not satisfy the claim.

15. Another argument raised by the learned counsel is that the statement of account has not been computed on the basis of the



aforesaid recovery certificate granted by the Learned DRT, Delhi and the Financial Creditor has charged additional amount, which does not correspond to the recovery certificate and therefore, for the purpose of ascertaining the existence of default within the meaning of Section 7 (4) of the Code, the statement of account relied upon by the Financial Creditor, cannot be considered keeping in view the fact that there exist recovery certificate granted by the Ld. DRT, Delhi. In essence the argument of learned counsel is that there is mismatch in the amount disclosed in the statement of account and recovery certificate.

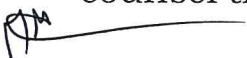
16. The aforesaid submission with respect to pendency of winding up petitions or initiation of proceedings under SARFAESI Act made by learned counsel is devoid of merit in view of the judgment rendered by the Hon'ble Appellate Tribunal in the case of M/s. Unigreen Global Private Limited v. Punjab National Bank & Ors., Company Appeal (AT) (Insolvency) No. 81 of 2017 decided on 01.12.2017 as well as in the case of Forech India Private Limited v. Edelweiss Assets Reconstruction Company Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 202 of 2017 decided on 23.11.2017; while taking a view that no application under Section

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7, 9 & 10 of IBC, 2016 would be maintainable in case a liquidation order has been passed in respect of the same Corporate Debtor in winding up proceedings either by the High Court or by the Tribunal. In that regard reliance has been placed on the ineligibility clause in Section 11 (d) of the IBC and the meaning of the word 'winding up' given in Section 2 (23) and 94A of the Companies Act, 2013. In the present case it is an admitted fact that till date liquidator in the winding up petition before the Hon'ble High Court of Delhi, has not been appointed. In para 25 of the judgment rendered in M/s. Unigreen Global Private Limited (supra), the Hon'ble Appellate Tribunal has held as under:-

“Similarly, if any action has been taken by a ‘Financial Creditor’ under Section 13 (4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against Corporate Debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal cannot be a ground to reject an application.....”

17. With regard to the other objection raised by the learned counsel that there is mismatch of the defaulted amount as shown



in the statement of account and recovery certificate. We are not impressed with such kind of objection raised by the learned counsel for the 'Corporate Debtor' for variety of reasons as we have already discussed and rejected such like objections in the case of Bank of India v. Tirupati Infraprojects Pvt. Ltd., IB-104(PB)/2017. Firstly, as an Adjudicating Authority we are not entrusted with any function to determine the amount of default. Once the default has occurred involving rupees one lac or more in terms of Section 4 of the Code one of the requirements is satisfied and secondly any objection with regard to amount would be maintainable before the Committee of Creditors. Once default in terms of Rule 3 (12) of the Code is established and all other requirements are fulfilled the Insolvency Resolution Process has to be triggered.

18. As a sequel to the above discussion, this petition is admitted and Mr. Vikram Kumar, Sector B-1/1748, Vasant Kunj, New Delhi -110070, email id vikramau@gmail.com is appointed as an Interim Resolution Professional.



19. 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 Regulations) with regard to admission of this application under Section 7 of the Code.

20. 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). 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



Securitisation 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.”

21. 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.

22. 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, 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.

23. The office is directed to communicate a copy of the order to the Financial Creditor and the Corporate Debtor at the earliest possible but not later than seven days from today.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (TECHNICAL)

08.02.2018
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