

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

(IB)-477(PB)/2017

IN THE MATTER OF:

AU Small Finance Bank LimitedFinancial Creditor/
Petitioner
v.
Prabhu Shanti Real Estate Private LimitedCorporate Debtor/
Respondent

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

Judgment delivered on 13.06.2018

Coram:

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

S.K. MOHAPATRA
Hon'ble Member (T)

PRESENTS:

For the Financial Creditor:

Mr. H.L. Tiku, Senior Advocate with Mr.
Mrityunjay Kumar, Advocate

For the Respondent:

Mr. Anand A. Pavgi and Mr. Anurag Bhatt,
Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditor'-AU Small Finance Bank 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 Prabhu Shanti Real Estate Private Limited (for brevity 'the Corporate Debtor'). It is appropriate to mention that the 'financial creditor' is a company initially incorporated on 10.01.1996 with the name L.N. Finco Gems Private Limited, which, on May, 24, 2005 was changed to AU Financiers (India) Private Limited. On January 10, 2013, the company became a public company hence name was further changed to AU Financiers (India) Limited. Subsequently, the company was granted license to operate as a bank and hence on April 13, 2017, the name was further changed to AU Small Finance Bank Limited. Its assigned identification number L36911RJ1996PLC011381. It has its registered office at 19-A, Dhuleshwar Garden, Ajmer Road, Jaipur, Rajasthan-302001.

2. Mr. Puneet Gogia, Assistant Vice President-Legal of the Financial Creditor has been authorized by the Letter of Authority dated 30.05.2017 (at page No. 26) to sign and submit the petition.

3. The Corporate Debtor-Prabhu Shanti Real Estate Private Limited was incorporated on 07.05.2004. The identification number of the Corporate Debtor is U45201DL2004PTC126261 and its

registered office is situated at Ground Floor, Flat No. 2, Block-D, Pocket-5, Sector 15, Rohini, North Delhi-110089. Its authorised share capital is Rs. 2,50,00,000.00/- and the paid up share capital is Rs. 1,45,61,000.00/- as per the master data available on the website of Ministry of Corporate Affairs.

4. The Financial Creditor has proposed the name of Shri Abhishek Anand, E-103, Greater Kailash Enclave-I, New Delhi, email id – irpepoch@gmail.com to act as Interim Resolution Professional. He has registration No. IBBI/IPA-002/IP-N00038/2016-17/10077. He has also made declaration and sent a written communication. According to the declaration, Mr. Anand has no disciplinary proceedings pending against him with the Insolvency and Bankruptcy Board of India or ICAI. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

5. Brief facts of the case necessary for disposal of the controversy raised in this application as per the averments of the Financial Creditor are that the PD Memorial Religious and Educational Association (for brevity ‘the Association’) and the Corporate Debtor are part of the same group entities and they intended to set up an

educational institute in Chandigarh, Haryana and accordingly, they approached the Financial Creditor in the year 2014 for financial assistance in form of loan amount of Rs. 5,00,00,000 (five crores only). On the request of Association and the Corporate Debtor, the term loan of Rs. 5,00,00,000 (five crores only) was sanctioned and disbursed on 08.09.2014 for the total term of 84 months. In this regard an agreement was executed between the Financial Creditor, the Association, the Corporate Debtor and certain individual co-borrowers. A copy of the agreement has been placed on record [(Annexure-I(1)(Colly)].

6. In column 2 of part IV the amount claimed to be in default and the date on which the default occurred is stated to be 02.06.2016 as per the repayment schedule of the revised sanction letter. According to the averments made by the Financial Creditor the loan facility which is availed by the Corporate Debtor is overdue and total amount in default (together with the principal amounts, penalty arrears/charges, prepayment charges and other pending charges/interest, as applicable) as on 27.10.2017 as per statement of account issued to Association by the Financial Creditor is Rs. 6,82,31,415.00/- (Rupees Six Crores, Eighty-Two Lakhs, Thirty-

One Thousand, Four Hundred and Fifteen Only). A breakup of the outstanding amount as on 27.10.2017 has also been clearly mentioned in column 2 of part IV of the present application.

7. It is the pleaded case of the Financial Creditor that due to financial constraints faced by the borrower/the Corporate Debtor, they failed to pay the principal amount of the aforesaid facility. The financial creditor received request letter from the Association requesting restructuring of the aforesaid term loan. The said request for restructuring of the aforesaid term loan facility was approved by the Financial Creditor.

8. As per the averments of the 'Financial Creditor', the account of the Corporate Debtor was declared as Non-Performing Asset (NPA) on 31.07.2016 in its books. 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 30.08.2016 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Corporate Debtor, the Association and other individual co-

borrowers but inspite of the notice they failed to clear the unpaid debt/liability. A copy of the recall notice has been placed on record (Annexure-I(8)).

9. The details of the security held by, or created for the benefit of 'financial creditor'- AU Small Finance Bank Limited along with the certificate of registration of charge issued by the Registrar of Companies have been placed on record [Annexure-I(3)(colly)].

10. A record of default is also available with the Credit Information Bureau (India) Limited (CIBIL) as per its commercial credit information report of the Corporate Debtor based on report dated 19.09.2017 [Annexure-I(14)].

11. An additional affidavit vide diary No. 669 dated 07.02.2018 has been filed by Mr. Puneet Gogia on behalf of the Financial Creditor highlighting the fact that the Financial Creditor was an NBFC company at the time of execution of the Original Loan Agreement in September, 2014, namely, AU Financiers (India) Limited which, subsequently, in April, 2017 was granted license to operate as a Bank and its name was consequently changed to AU

Small Finance Bank Limited. A copy of statements of accounts by AU Financiers (India) Limited for the duration of January 1, 2013 to January 4, 2016 and from January 1, 2016 to March 31, 2017 as well as a copy of statement of account by AU Small Finance Bank Limited for the duration of April 1, 2017 to February 1, 2018 with a certificate in accordance with the Banker's Books Evidence Act, 1891 have been placed on record [Annexure-B (Colly)]. In the said affidavit it has also been highlighted that the original loan agreement was executed by one Mr. Rajeev Kumar on behalf of the Financial Creditor, who at that relevant time held the post of Manager with the Financial Creditor. Affidavit of Mr. Rajeev Kumar verifying the contents has also been placed on record (pgs. 5-6).

12. Subsequently another additional affidavit vide diary No. 1272 dated 08.03.2018 was filed by Mr. Puneet Gogia on behalf of the Financial Creditor whereby a consent letter (Annexure-A) executed by the borrowers including the Corporate Debtor as part of the original loan agreement at the time of loan disbursement has been placed on record which demonstrates that the Corporate Debtor gave the consent for making payment in favour of the Association.



13. Learned Counsel for the Corporate Debtor has opposed admission of the petition by raising the following arguments:-

- A. The alleged amount has been disbursed by the petitioner to an Education Society, viz., 'PD Memorial Religious and Educational Association' and not to the respondent. In the absence of any disbursement of the amount in favour of Respondent, there cannot be any Debtor-Creditor relationship between the Respondent and the Petitioner.
- B. The authorization provided by the petitioner to its Authorized Representative vide letter of attorney dated 30th May, 2017 is not valid and does not give any specific legal authority to the said authorized representative, to file the petition under Insolvency and Bankruptcy Code, 2016.
- C. The petitioner has failed to adhere to the provisions of the Bankers Book Evidence Act, 1891 while submitting the Statement of Accounts, which is a mandatory provision as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
- D. Petitioner has not produced any document to substantiate the fact, that the legal status of the Petitioner has been 'changed



from a NBFC Company to a Bank' i.e., from AU Financiers Private Limited to AU Small Finance Bank Limited.

- E. All the documents, with respect to the alleged loan disbursement and sanction, are between the Petitioner and the Association. The Memorandum of Deposit of the Title Deeds is in the name of Mr. Joginder Singh Lather, who is the authorized signatory of the Association. The aforesaid Memorandum of Deposit of Title Deed does not specify that the same has been signed by him in the capacity of the director of the Respondent.
- F. The loan agreement dated 9th September, 2014, is illegal and thus cannot be relied upon. It is a settled position of law that for an agreement to be valid and binding, it has to be signed by both the parties and from the bare perusal of the aforesaid loan agreement, it is clearly evident that it has not been signed by the Petitioner. Further it does not contain the date on which the same has been entered upon between the parties neither there is any attestation of any witness nor it contain the seal of the Petitioner.



14. The applicant has filed rejoinder reiterating the averments made in the application and denying the objection raised by the Corporate Debtor.

15. Mr. H.L. Tiku, learned Senior 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 application is complete as per the requirements prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 (2) of IBC. He has further submitted that the details of the default along with its dates have been clearly stated in part IV along with all the minute details. There is overwhelming evidence to prove default and name of the resolution professional has also been clearly specified.

16. Having heard learned counsels for the parties and having perused the paper book with their able assistance we may first examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-



“Initiation of corporate insolvency resolution process by financial creditor.

7 (1)

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

7 (3)

7 (4)

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b)

17. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed.

It is evident from the record that the application has been filed on

the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of IBC. We are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional. Thus, the application warrant admission.

18. As a sequel to the above discussion, this petition is admitted and Mr. Abhishek Anand, E-103, Greater Kailash Enclave-I, New Delhi, email id – irpepoch@gmail.com, Registration No. IBBI/IPA-002/IP-N00038/2016-17/10077 is appointed as an Interim Resolution Professional.

19. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately make public announcement with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.



20. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

- “(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. 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. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, 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 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 a 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.

23. A perusal of the letter of authority (at page No. 26) issued by the Financial Creditor in favour of Mr. Puneet Gogia clearly states that Mr. Gogia has been conferred the powers to institute, prosecute, defend, oppose, continue to appear, represent, appeal in, issue legal notice, refer to arbitration, abandon, submit to judgment, proceed to judgment and execution or become non suited in, all or any suits, legal proceedings and demands (including but not limited to, matters before Courts, Consumer Forum, Commissions, Tribunals, and any other Statutory Authority(ies), Regulators etc.) proceedings, relating to matters under the

provisions of Indian Penal Code and Negotiable Instrument Act. Aforesaid powers give a light to the fact that Mr. Gogia is authorized to institute and prosecute all and any legal proceedings in any tribunal which will include even the institution of the proceedings before this Tribunal as well. In pursuance thereof, Mr. Gogia has signed the petition, pleadings, subsequent affidavits/pleadings and other relevant papers. Therefore, it is established that the petition has been filed by a person authorized in accordance with law. The affidavit and the vakalatnama have also been signed by the aforesaid officer. In view thereof, we do not find any substance in such kind of objection raised on behalf of respondent.

24. The argument of the Corporate Debtor that the agreement has not been signed by the Financial Creditor would not cut any ice because one copy is signed by one party and deposited with the other and vice versa. Moreover, the agreement is supported by CIBIL account and the statement of account is duly supported by a certificate issued under the Banker's Book Evidence Act. There is no denial concerning disbursement of the loan or default in its repayment. Thus, on merit occurrence of default has not been



disputed. Accordingly, we reject the objections raised by the Corporate Debtor.

25. One of the principal objection raised by the Corporate Debtor is that the amount has been disbursed by the petitioner to an Education society namely P.D. Memorial Religious and Educational Association and not to the respondent-Corporate Debtor, a rejoinder to the aforesaid objection has been filed and various documents have been placed on record. An application for loan was sent on the letter pad of the A.U. Financiers (India) Limited which is duly signed by Shri Joginder Singh Lather who is Director and Joint Secretary in the respondent company and the Association respectively. Even a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was issued on 30.08.2016 to the Corporate Debtor amongst others and the same has been placed on record [Annexure-I(8)].

26. The credit facilities, interest thereon, costs, charges, expenses and all other expenditures was secured by First and Exclusive charge (equitable mortgage) on the property described in part V of



Form-1 of the application. The charge was created on 09.09.2014 and the Form No. CHG-1 filed by the respondent company was executed by the Director Shri Joginder Singh Lather and Mr. Manmohan Parnani on behalf of the charge holder i.e. the Financial Creditor. The Form No. CHG-1 also contains copies of relevant pages of the original loan agreement executed by the borrower and the co-borrower. A copy of the Form No. CHG-1 as available on the website of the MCA along with the extracts of the original loan agreement has been placed on record [Annexure R(4)]. A perusal of Form No. CHG-1 would show that Prabhu Shanti Real Estate Private Limited-the Corporate Debtor is creating a charge on the property in pursuance of Section 77, 78, 79 read with Section 384 of the Companies Act, 2013 and the Financial Creditor is the charge holder. A copy of the original loan agreement dated 09.09.2014 (Annexure R/6) has also been placed on record which show that loan agreement has been entered into between the Financial Creditor and the borrowers as depicted in Schedule-A. The loan agreement has been duly signed by Mr. Joginder Singh Lather on behalf of Corporate Debtor i.e. Prabhu Shanti Real Estate Private Limited with seal along with other. It is also pertinent to mention that Mr. Joginder Singh Lather has also signed the document for



one Shanti Devi and PDMERA. In Schedule-A the details of the borrowers have been given and the names of the borrower/co-borrowers are PD Memorial Religious and Education Association, Mr. Joginder Singh Lather, Mr. Bijendra Singh Lather, Smt. Shanti Devi and inter alia Prabhu Shanti Real Estate Private Limited-the Corporate Debtor. The loan agreement has been duly signed on behalf of the co-borrower by Mr. Joginder Singh Lather. Therefore, there is thus no escape that the Corporate Debtor is a co-borrower and has also created charge on the property as per the Form No. CHG-1. Therefore, Mr. Tiku, learned Senior Counsel has argued that the Corporate Debtor is part and parcel of the loan agreement as very much party to the same. In view of the aforesaid detail rejoinder filed by the petitioner we have no option but to accept the submission that the loan has been taken by the Corporate Debtor along with others.

27. It is also evident from the perusal of documents [Annexure R(1)(Colly)] & Annexure R(2) filed by the Financial Creditor along with the rejoinder that the shareholders of the Respondent Company are also the members of the Association, and thus fall under the same management. It is further obvious that the affairs

of the Association being managed by the persons who are holding key managerial position and 99.83% of the shareholding in the Respondent Company. It can be further seen that Mr. Joginder Singh is the Director and Joint Secretary in the Respondent Company and Association respectively, who has executed and signed each of the documents including loan agreement as well which were required for the purpose of granting loan. Moreover, it does not lie in the mouth of the respondent to raise such an argument once respondent itself is in default. Therefore, admission of the petition cannot be successfully resisted on such a flimsy ground. Thus, we have no hesitation to reject the argument raised on behalf of the Corporate Debtor.

28. Another argument that the petitioner has failed to adhere to the provisions of the Bankers Book Evidence Act, 1891 while submitting the Statement of Accounts, which is a mandatory provision as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also lost its sheen because vide diary No. 669 dated 07.02.2018 an additional affidavit has been filed by Mr. Puneet Gogia alongwith a certificate in accordance with the Banker's Books Evidence Act, 1891 [Annexure-B (Colly)].

The filing of the aforesaid certificate completely answers the said objection raised by the Corporate Debtor. Accordingly, we find that the aforesaid objection is frivolous and is devoid of merit. Accordingly, the same is rejected.

29. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than three days from today.



Sdl

**(M.M. KUMAR)
PRESIDENT**



Sdl

**(S.K. MOHAPATRA)
MEMBER(TECHNICAL)**

**13.06.2018
Vineet**