

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

(IB)-37(PB)/2018

IN THE MATTER OF:

Mr. Dinesh Chand Jain & Ors.Financial Creditors/
Petitioners

v.

M/s. Fantastic Buildcon Private Limited & Ors.
.....Corporate Debtors/
Respondents

**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. Krishna Kumar & Ms. Surjana
Suman Mund, Advocates

For the Respondent:

Mr. Ashish Aggarwal & Mr. Gurucharan
Singh, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The 'Financial Creditors'-Mr. Dinesh Chand Jain & Ors. have 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 M/s. Fantastic Buildcon Private Limited & Ors. (for brevity 'the Corporate Debtors'). It is appropriate to mention that the financial creditor Nos. 1 & 2 are the individuals and the financial creditor No. 3 is a company incorporated on 25.05.2004 under the Companies Act, 1956 and financial creditor No. 1 namely Mr. Dinesh Chand Jain is a Director of the Financial Creditor No. 3. Its assigned identification number U51909DL2004PTC126579. It has its registered office at 201, Surya Kiran Building 19, Kasturba Gandhi Marg, Connaught Place, New Delhi-110001.

2. The Corporate Debtor No. 1-M/s. Fantastic Buildcon Private Limited was incorporated on 29.12.2004. The identification number of the Corporate Debtor is U45201DL2004PTC131674 and its registered office is situated at C-43, LGF, Jangpura Extension, New Delhi-110014. Its authorised share capital is Rs. 1,00,000.00/- divided into 10,000 equity shares of Rs. 10/- each and the paid up share capital is Rs. 1,00,000.00/- consisting of 10,000 shares of Rs. 10/- each as per the master data available on the website of Ministry of Corporate Affairs which has been placed on record (Annexure-B). It is pertinent to mention here that the

Corporate Debtor Nos. 2 & 3 are the Directors in the Corporate Debtor No. 1-Company.

3. The Financial Creditor has proposed the name of Shri Om Prakash Vijay, 2250, Gali Raghu Nandan, Naya Bazar, Delhi-110006, email id - opvca21@gmail.com to act as Interim Resolution Professional. He has registration No. IBBI/IPA-001/IP-P00491/2017-18/10879. 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.

4. 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 Petitioner No. 1 & 2 are the erstwhile directors of the Corporate Debtor and had originally, held a total of 75% shareholding of the Company, acquired on various dates, through various share purchases, in accordance with the law. Since the Corporate Debtor was in need for funds for a Hotel Project undertaken by it the Petitioner No. 1 & 2 along with

Petitioner No. 3, of which both of them are Directors, had, on various dates, lent various amounts to the Corporate Debtor the principal amounting to the tune of Rs. 18,67,11,000/- (Rupees Eighteen Crores Sixty-Seven Lakhs and Eleven Thousand Only), after adjusting the amount returned to the Financial Creditors and at an interest @ 18% per annum. The details of the payments made and received between 2007-2014 and the amount due and payable together with details of the calculation are given in the Schedule-A, B, C & D (at pgs. 44 to 48).

5. In column 2 of part IV the principal amount claimed to be in default is stated to be Rs. 18,67,11,000/- (altogether in the case of all three financial creditors) and figure of interest calculated till 30th November, 2017 has also been clearly mentioned in the said column.

6. It is the pleaded case of the Petitioners that the petitioner No. 1 & 2 were once Directors of the Corporate Debtor and in order to finance a project of the Corporate Debtor, both of them having resigned on 02.02.2015, advanced loans to the Corporate Debtor namely M/s. Fantastic Buildcon Private Limited from time to time

and also through the Petitioner No. 3-Company in the abovementioned amounts as unsecured loan.

7. It is also pleaded case of the Petitioners that the amount of loans given subject to the payment of interest i.e. 18% per annum and the said amount was treated initially as Long-term borrowings. The said borrowings were duly recorded in the books of accounts of the Corporate Debtor, in the normal course of the business and also in the balance sheet of the Company, duly audited, for the year ending 31.03.2014. A copy of the audited balance sheet as on 31.03.2014 has been placed on record (Annexure-F). Subsequently, on or about 02.02.2015, the Petitioners, through Petitioner Nos. 1 & 2, entered into an agreement (for brevity 'Share Purchase Agreement') with the Corporate Debtor, *inter alia* providing that:

- A. that the entire shareholdings of the Petitioners would be transferred by way of sale at par value to Mr. Lalit Modi, Director and shareholder in the Corporate Debtor, i.e. 7,500 equity shares of Rs. 10/- each (being 75% of issued capital and paid up capital all the Corporate Debtor held by the Financial Creditor No. 1 & 2;



- B. that Mr. Lalit Modi and the Corporate Debtor would jointly undertake to refund the entire unsecured loan of Rs. 18,67,11,000/- to the Financial Creditors on or before 31.03.2015;
- C. that in view of the payment being made by 31.03.2015, the Financial Creditors did not specifically provide for payment of interest on the said borrowings specifically.

A copy of the Share Purchase Agreement dated 02.02.2015 has been placed on record (Annexure-A).

8. It is also the pleaded case of the Petitioners that the Corporate Debtor however failed to make payment to the Financial Creditors in terms of the said Share Purchase Agreement dated 02.02.2015, though the Financial Creditors had duly complied with the conditions of the said Agreement by effecting transfer of their shares.

9. The Financial Creditors then filed an application for permission to file additional documents vide diary No. 1739 dated 28.03.2018 whereby Form No. DIR 11 filed before the ROC dated 02.02.2015 recording that Mr. Dinesh Chand Jain and Mrs. Lata

Jain have ceased to be the Director of Corporate Debtor No. 1 namely M/s. Fantastic Buildcon Private Limited w.e.f. 02.02.2015. Along with said application a copy of the receipt of the fee paid in connection with the filing of said Form 11, a copy of letter dated 02.02.2015 acknowledging the receipt of resignation letter by the Respondent Company, a copy of the extract of the resolution passed in the meeting of the Board of Directors of Respondent Company held on 02.02.2015 accepting the resignation with immediate effect and a copy of letter dated 02.02.2015 sent by Respondent Company communicating the decision of the Board and the acceptance of the resignation of Mr. Dinesh Jain, have been placed on record.

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

- A. The applicants have wrongly claimed themselves to be a Financial Creditors and no financial debt as specified under Section 5 (8) of the Code is due against the Respondent No. 1 Company.
- B. Admittedly applicants acting as promoters in the Respondent Company were holding substantial shareholding



and had also signed the Balance Sheet for the years ending 31st March, 2011 to 31st March, 2014 of the Respondent Company and nowhere in the balance sheets was there any mention of payment of any interest on the alleged amounts payable by the Respondent Company.

- C. The alleged share purchase agreement being relied upon by the applicants is collusive and is a manipulated document and same has been fraudulently created, collusively between Petitioner No. 1 & 2 on one hand and Mr. Lalit Modi on the other hand.
- D. The alleged amount of Rs. 18,67,11,000/- mischievously mentioned in the alleged share purchase agreement was filled in later by the Petitioner Nos. 1 & 2 in connivance with Mr. Lalit Modi. The said amount is/was not counter signed by any of the alleged parties to the share purchase agreement. Under the alleged share purchase agreement, the undertaking to pay the alleged amount of Rs. 18,67,11,000/- as mentioned was taken over by Mr. Lalit Modi personally.
- E. Various legal proceedings have been initiated by the Respondent Company and its associate entities against Mr. Lalit Modi and his family members. It has also filed criminal



complaints as well against Mr. Lalit Modi and his family members in Economic Offence Wing of Delhi Police regarding cheating and criminal breach of trust.

F. The alleged share purchase agreement contains arbitration clause therefore the same cannot be adjudicated under the Code as the same is subject matter of arbitration.

11. The Petitioners have filed rejoinder reiterating the averments made in the application and denying the objection raised by the Corporate Debtor.

12. Mr. Krishna Kumar, learned Counsel for the petitioners 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.



13. 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)

14. 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.

15. As a sequel to the above discussion, this petition is admitted and Mr. Om Prakash Vijay, 2250, Gali Raghu Nandan, Naya Bazar, Delhi-110006, email id – opvca21@gmail.com, Registration No. IBBI/IPA-001/IP-P00491/2017-18/10879 is appointed as an Interim Resolution Professional.

16. 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.

17. 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.”

18. 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.

19. 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.

20. Before parting it would be appropriate to deal the objection raised by the Corporate Debtor. A bald allegation has been made in the reply filed by the Corporate Debtor alleging in para 4 that



the share purchase agreement is a manipulated document and that it has been created fraudulently, collusively between Petitioner No. 1 & 2 on the one hand and Mr. Lalit Modi on the other hand. Such like allegations are not easy to prove nor any factual basis has been disclosed to show the fraud or collusion. The allegation of fraud is levelled very often but are rarely proved. It is not the case of the respondent that the document is antedated or that it has never been executed. Moreover, in para 4 at page 7 of the reply it is conceded that the present management at the time of take over of the respondent company had knowledge of the debt payable to the petitioners. This completely belay the theory of fraud and collusion and in fact is a pure afterthought. A perusal of agreement specifically states that both the Company and Mr. Lalit Modi have jointly undertaken to repay the loan amount by 31.03.2015. Otherwise also the share purchase agreement did not in any way dilute the obligation of the Respondent Company to repay the loan together with interest. In view thereof, we do not find any substance in such kind of objection raised on behalf of respondent.



21. The other argument raised by the Corporate Debtor with regard to initiation of various legal proceedings against Mr. Lalit Modi at the instance of the Corporate Debtor are concerned, the same is nothing but an attempt to divert the attention to irrelevant matters and further an attempt has been made by the Respondent Company to wriggle out of its legal obligations. 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.

22. Another objection raised on behalf of the Corporate Debtor is that the share purchase agreement contains arbitration clause therefore, the agreement cannot be adjudicated under the Code. The presence of an arbitration clause in the share purchase agreement would not cause any impediment with regard to initiation of Corporate Insolvency Resolution Process because under Section 7 of the Code the mentioning of an arbitration clause in the disputed agreement is no bar to the admission of the petition and initiation of Corporate Insolvency Resolution Process unlike

Section 8 & 9 of the Code. In accordance with the provisions of Section 8 and 9 of the Code if a dispute in a civil suit or a dispute in arbitration proceeding is pending then a bar has been created by Section 8 (2) (a) of the Code and it is deemed to be an existence of dispute therefore, no Corporate Insolvency Resolution Process could be triggered. There is however no such provision in Section 7 of the Code. Accordingly, this argument is also rejected as unfounded.

23. 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
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