

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-486(PB)/2018

IN THE MATTER OF:

Usha Devi**Financial Creditor/Petitioner**

v.

Praveer Constructions Private Limited

.....**Corporate Debtor/Respondent**

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

Judgment delivered on 15.10.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR

Hon'ble President

S.K. MOHAPATRA

Hon'ble Member (T)

PRESENTS:

For the Petitioner: Mr. Deepak Dahiya & Mr. Sachin Malik,
Advocates

For the Respondent: Ex-parte

M.M. KUMAR, PRESIDENT

JUDGMENT

Smt. Usha Devi claiming as the 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

company, M/s Praveer Constructions Private Limited, claimed to be the corporate debtor.

2. Mr. Mohit Mathur, son of the petitioner has been authorized to sign and submit the petition by the Special Power of Attorney dated 23.04.2018 (at pgs. 25-26) executed by the petitioner in his favour.

3. The Respondent company M/s Praveer Constructions Private Limited (CIN U45201DL1999PTC101672) the Corporate Debtor-Respondent was incorporated on 23.09.1999 under the provisions of the Companies Act, 1956. Mr. Sudhir Khurana is a Director of respondent company. The registered office of the respondent corporate debtor is at 413, 4th Floor Naurang House Building, Kasturba Gandhi Marg, New Delhi-110001. 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.

4. The 'Financial Creditor'-Petitioner has proposed the name of Resolution Professional, Shri Alok Kaushik, Flat No. G-105, Sai Baba Apartments, Rohini, Sector-9, Delhi-110085, email id -

alok_kaush@yahoo.com. He has registration No. IBBI/IPA-002/IP-N00253/2017-18/10767. A written communication dated 07.04.2018 sent by him in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record (Exhibit-13). There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or Insolvency Professional Agency of Institute of Company Secretaries of India. In addition, further necessary disclosures have been made by Mr. Kaushik, as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

5. It is the case of the petitioner that the respondent company is engaged in developing and constructing a multi-storied commercial complex & multiplex screens in the land measuring 5402 sq. Meters situated at Jagatpura, Jaipur (Rajasthan) under the project name of "CREATIVE CORPORATE PARK".

6. Petitioner had booked a unit bearing private no. A-34, on Ground Floor, having an area measuring 1200 sq.ft. (Approx. Area) for the total consideration of Rs. 60,00,000/- (Rupees Sixty Lakhs Only) in the said project of the respondent company by initial Unit

Buyer Agreement (Exhibit-3) as well as Addendum to Unit Buyer Agreement (Exhibit-4) both executed in September, 2006. The said unit was purchased by the Petitioner under the 'Assured Return Plan'. According to the terms as mentioned in the Addendum to Unit Buyer Agreement, the Respondent Company undertook to pay a particular amount to the Petitioner each month, as Assured Returns from the date of execution of the Addendum till the expiry of the 30 month's completion period as per the terms recorded in the Unit Buyer Agreement. In the said project the Petitioner also had an option to sell the entire Super Area of 1200 Sq.ft. @ 15,833/- per Sq.ft. on the expiry of 30th months from the date of executing the agreement and buyer agreement.

7. The agreement with regard to 'Assured Return' of the aforesaid Addendum to Unit Buyer Agreement (Exhibit-4) executed between the Petitioner and the Respondent-Corporate Debtor would thus read as under:-

“That for consideration recorded in the preamble the company shall from the date of signing and execution of this Addendum pay the Allottee (s) a monthly sum of Rs. 4,33,333/- (Rupees Four Lacs Thirty-three thousand Three Hundred Thirty-three per month) (hereinafter

referred to as 'Assured Return') deemed to be expected on completion of 30 monthly revenue generation envisaged, and so hereby being underwritten by the company, from the said premises and the monetary outlay involved in the purchase thereof by the Allottee (s).”

8. Subsequently memorandum of settlement/understanding dated 28.03.2012 (Exhibit-6) was executed between the Respondent Company and the Petitioner with respect to return of amount as per settlement as a final settlement of all investments made by the Petitioner in the aforesaid project of the Respondent Company in light of the initial Unit Buyer Agreement and Addendum to Unit Buyer Agreement executed in September, 2006. The modified terms mentioned in the memorandum of settlement/understanding dated 28.03.2012 (Exhibit-6), reads as under:-

- (i) That, M/s. Praveer Constructions Pvt. Ltd. shall pay Rs. 60,00,000/- (Rs. Sixty Lacs only) to Mrs. Usha Devi & Shri Anar Singh as full and final settlement as per schedule.



- (ii) That M/s. Praveer Constructions Pvt. Ltd. shall allot & handover Physical Possession at first and second Floor admeasuring area 10,000 sq.ft at sub judice plot no. C-1, Jagat Pura, Jaipur, Rajasthan when ever the clear title will be handed our to us by Jaipur Development Authority.
- (iii) That Mrs. Usha Devi & Shri Anar Singh hereby agrees that all issues/agreements between him and M/s Praveer Constructions P. Ltd. have been settled as full and final and nothing remains to be resolved.
- (iv) That Mrs. Usha Devi & Shri Anar Singh agrees and undertakes that he has no claims against M/s Praveer Constructions Pvt. Ltd., its Directors or employees whatsoever as far as payments made to M/s Praveer Constructions Pvt. Ltd., or rights and interests accrued under any agreement signed between him and M/s Praveer Constructions Pvt. Ltd.
- (v) That Mrs Usha Devi & Shri Anar Singh further undertakes to return all cheques received from the company & its directors at the time of the signing of this Memorandum and agreements, if any cheque remains

treated as cancelled and void. That all issues between him and the company have been settled as full and final settlement and there are no issue which remains to be settled.”

9. It is alleged that the Respondent issued various payment cheques (Exhibit-5) to the Petitioner to inspire confidence as to said Assured Return against the investment made by the petitioner. Subsequently once again to restore the confidence in the Petitioner, Shri Sudhir Khurana, Director of the Respondent Company handed over two cheques (Exhibit-7) as security to the Petitioner for a total amount of Rs. 75,00,000/- from his proprietorship firm namely Creative Services with a request not to present the cheques for clearance as the Respondent would be making payment shortly, which in fact was never made.

10. It is alleged that the Respondent has failed to refund the assured amounts in accordance with Unit Buyer Agreement (Exhibit-4) till date despite various requests and efforts made by the Petitioner. A demand notice dated 19.12.2017 (Exhibit-9) to that effect was sent by the Petitioner to the Respondent which as per the tracking report was returned with the endorsement “item delivery attempted ‘Door locked’”. The petitioner has written various

e-mails (Exhibit-8, 10 & 11) to the Respondent. E-mail dated 29.12.2017 (at page 85) highlights the assurance given by the Respondent to the Petitioner for resolving the issue amicably within 30 days. The aforesaid assurance reads as under:-

“Dear Ma’am,

We hereby request too resolve the issue amicably within 30 days.

Looking forward for kind cooperation.”

11. It is claimed that the Respondent is liable to pay an amount of Rs. 1,04,26,000/- (Rupees One Crore Four Lac Twenty Six Thousand) till April 18, 2018 to the petitioner and further interest thereon @ 12% per annum from April 18, 2018 till the date of realization of the amount.

12. The petitioner made various attempts to serve the Respondent firstly by dasti mode and secondly by e-mail address reflected in the master data available at the website of MCA. An affidavit of service to aforesaid effect was also filed by the petitioner which was considered vide order dated 14.06.2018 but inspite of service Respondent have not chosen to appear. Therefore, vide



order dated 14.06.2018 we proceeded ex-parte. The aforesaid order is set out below in ex-tenso:-

“An affidavit of service filed by the petitioner show that the email has been duly received by the corporate debtor and a copy of the email sent has been placed on record as Annexure-A. The email address is the same which is given in the master data. Despite service no one put in appearance on behalf of the corporate debtor-respondent. Hence, respondents are proceeded exparte.

List for arguments on 23rd July, 2018.”

13. Vide diary No. 6594 dated 12.09.2018 the Petitioner has filed an additional affidavit enclosing various documents (Exhibit A to D) highlighting the acknowledgement of debt of the petitioner by the respondent on a continuous basis and further explained the issue concerning the period of limitation. In para 3 of the said affidavit a table demonstrating continuous acknowledgment of debt has been given in details. The same reads as under:-

Sr. No.	Date	Document
---------	------	----------



1.	March 28, 2012	MOU between the Corporate Debtor and Petitioner along with husband (late Mr. Anar Singh)
2.	September 01, 2014	Annual Report for the year 2013-14 duly acknowledging the payment due to various invoices
3.	November 16, 2014	Death of the husband of the Petitioner, who was party to the MOU with the Corporate Debtor
4.	January 22, 2015	Part Payment of Rs. 25,000 made by the Corporate Debtor in the account of son/authorized representative of petitioner.
5.	September 04, 2015	Annual Report for the year 2014-2015 appreciating the patient investors and reassuring the investors of the continuing persistent efforts towards revival despite constant hurdles and impediments. It is an admitted fact that the petitioner is also one of the investors of the Corporate Debtor.
6.	August 12, 2016	Application was filed by the Managing Director of the Corporate Debtor in the Hon'ble High Court of Delhi duly

		acknowledging the payment due to various investors.
7.	September 26, 2016	Email seeking documents was issued on behalf of the Petitioner to the Corporate Debtor.
8.	October 19, 2016	Reminder was sent to the Corporate Debtor.
9.	October 27, 2016	Some of the documents sought on behalf of the petitioner were shared by the Managing Director of the Petitioner.
10.	December 24, 2017	Final Demand Notice was issued on behalf of the Petitioner.
11.	December 29, 2017	Request from the Managing Director of the Corporate Debtor to the Petitioner to amicably resolve the issue within 30 days.
12.	April 27, 2018	Present petition was filed before Hon'ble Adjudicating Authority.

14. A perusal of the aforesaid table shows that the Respondent on various occasions has acknowledged the debt in a continuous basis. On 22.01.2015 part payment of Rs. 25,000/- was transferred by the Respondent through NEFT in the bank account (Exhibit-A at pg. 11) of the son/authorized representative of the

petitioner. Further by an e-mail dated 29.12.2017 assurance was given by the Respondent to the Petitioner for resolving the issue amicably within 30 days.

It would first be necessary to deal with the issue as to whether the claim of the Petitioner is within the limitation or not. In that regard we may read the provisions of Section 18 of the Limitation Act, 1963 which reads as under:-

“Section 18. Effect of acknowledgment in writing.—

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2)

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

A glance on the aforesaid provision makes it patent that once there is acknowledgement of liability before the expiration of the period of limitation prescribed for filing suit then fresh lease of limitation would start running. In the present case a settlement was reached on 28.03.2012. Thereafter part payment of Rs. 25,000/- was made on 22.01.2015 in the bank account of the son/authorized representative of the Petitioner as per bank statement (Exhibit-A at pg. 11) and further by way of an e-mail dated 29.12.2017 whereby assurance was given by the Respondent to the Petitioner for resolving the issue amicably within 30 days. All these documents show that a fresh period of limitation became available to the Petitioner for filing the present application. In the present case the acknowledgement of liability/debt dated 22.01.2015 in the form of transfer of part payment and further email dated 29.12.2017 are sufficient to fulfil the requirement of Section 18 of Limitation Act. The amount of Rs. 25,000/- was paid on 22.01.2015 which is within three years of the date of settlement agreement executed on 28.03.2012. The email dated 29.12.2017 is again within three years of 22.01.2015. The present application was filed on 27.04.2018 which is much prior to the expiry of three years.



15. Now we deal with the submissions made on behalf of the Petitioner.

16. Mr. Deepak Dahiya, learned Counsel for the petitioner has argued that all requirements of Section 7 of the Code for 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 of Section 7 (2) of the Code and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. He has further submitted that the details of 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.

17. After hearing learned counsel 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)"

18. 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 the Code. We are satisfied that

a default amounting to lacs of rupees has occurred within the meaning of Section 4 of the Code and the application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

19. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (amendment) Ordinance, 2018 with effect from 6th June, 2018. In view of the revised definition, 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 and thus will come within the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has been amended to specifically include dues of home buyers. Amendment Act 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.

20. It is also pertinent to mention that apart from the agreement executed in the year 2006 even the settlement reached on 28.03.2012 would patently show that the Corporate Debtor was to

allot physical possession of first and second floor of plot No. C-1, Jagatpura, Jaipur (Rajasthan) whenever clear title was to be handed over to the Corporate Debtor by the Jaipur Development Authority along with a sum of Rs. 60,00,000/- (Rs. Sixty Lacs only) was to be paid to the Financial Creditor. 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. 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 the Hon'ble NCLAT has held that:

*"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 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 fulfils the aforesaid condition.

21. In the present case Petitioner had booked a unit on payment of Rs. 60,00,000/- to the respondent corporate debtor. The date of disbursement of the said principal amount including the detail of a unit have been furnished in the application. Respective Unit Buyer Agreement, Addendum to Unit Buyer Agreement and Memorandum of Understanding/settlement executed in respect of a unit have been placed on record, which reveals that the principal amount has been paid by the petitioner and has been received by the respondent corporate debtor.

22. Since the amount has been raised from the petitioner/allottee under a real estate project, not only the debt has a commercial effect of borrowings and come within the scope of 'financial debt' but also the petitioner comes within the definition of 'financial creditor'.

23. Therefore, petitioner being a 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.

24. Dealing with the ambit and scope of Section 7 of the Code in “Innovative Industries Ltd. Vs. ICICI Bank and Ors.” reported in (2018)1 SCC 407, the Hon’ble Supreme Court has observed as under:

“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution



professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of



receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

25. As a sequel to the aforesaid discussion it is seen that the applicant being a 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 a unit. Though considerable long period has since lapsed 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 the statutory limit of rupees one Lakh. Thus, the application warrant admission as it is complete in all respects.

26. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

27. Mr. Alok Kaushik, having registration number IBBI/IPA-002/IP-N00253/2017-18/10767 resident of Flat No. G-105, Sai



Baba Apartments, Rohini, Sector-9, Delhi-110085 with e-mail id – alok_kaush@yahoo.com is appointed as an Interim Resolution Professional.

28. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately 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.

29. 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.”

30. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. 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



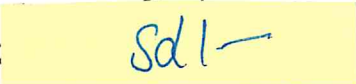
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

31. 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/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/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.


32. 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.


(M.M. KUMAR)
PRESIDENT


(S. K. MOHAPATRA)
MEMBER (T)
12.10.2018

15.10.2018
Vineet

Pronounced today under Rule 151 of the NCLT Rules 2016 as Shri S.K. Mohapatra, Hon'ble Member (T) is not holding Court today.


(M.M. KUMAR)
PRESIDENT
15.10.2018