

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1397(PB)/2019

IN THE MATTER OF:

Diamond Traexim Private LimitedFinancial Creditor/Petitioner
v.

Indirapuram Habitat Centre Private Limited
....Corporate Debtor/Respondent

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

JUDGMENT DELIVERED ON 22.08.2019

CORAM:

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

DR. V.K SUBBURAJ,
HON'BLE MEMBER (TECHNICAL)

PRESENT:


For the Petitioner: Mr. Abhishek Anand and Mr. Anant A.
Pavgi, Advocates

For the Respondent: Mr. Saurabh Kalia, Mr. Ashotosh
Gupta, Mr. Gaurav Rana, Mr. Abhishek
Aggarwal, Advocates

M.M.KUMAR, PRESIDENT

JUDGMENT

This petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') prays for initiation of Corporate Insolvency Resolution Process in respect of 'Corporate Debtor' namely Indirapuram Habitat Centre Private Limited. The petition has been filed on the prescribed Form-1 under Rule 4 of


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the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'Adjudicating Authority Rules'). The details of financial debt advanced by the petitioner-Financial Creditor have been set out in Part-IV of the proforma. The total amount disbursed on different dates from 2011 to 2019 is claimed to be INR 15,50,00,000/- (Rs. Fifteen Crore Fifty Lacs) (Annexure A-7). The amount claimed to be in default and the details of default have been given in sub para 2 of Part-IV and the same reads as under:

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH DEFAULT OCCURED	Amount Claimed to be in Default (In Rs.)	
		Principal Amount	15,50,00,000/-
		Interest up to 04.02.2019	17,11,86,762/-
		Total	32,61,86,762/- along with future Interest @ 9% per annum from 05.02.2019 till the date of payment of the said Financial Debt
		(ii) Date on which Default Occurred - 12.03.2019/30/03/2019	

		(iii) No. of days in Default – 34 days (Calculated up to 15.04.2019). (iv) Working sheet regarding computation of Rs. 32,61,86,762/- comprising of Principal Amount i.e. Rs. 15,50,00,000/- along with Interest up to 04.02.2019 i.e. Rs. 17,11,86,762/- is annexed herewith and marked as <u>Annexure A-8.</u>
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Thus, the case of the petitioner is that on 04.02.2019 a sum of INR 32,61,86,762/- is outstanding and the petition has been filed on 16.04.2019 stating the days of default of 34 days.

2. The petitioner has placed reliance on the details of amount given as loan (Annexure A-7) and the bank statement from 29.07.2011 to 04.11.2016 (Annexure A-9). A Special Resolution in the extraordinary General Meeting of the petitioner was passed on 09.07.2014, as required by Section 186 of the Companies Act, 2013, authorizing the petitioner to provide Inter Corporate Loan and Investment or Guarantee or Security exceeding the limit as mentioned under Section 186 of the Companies Act, 2013. A copy of the Resolution was also filed with the Registrar of Companies in Form No. MGT-14 (Annexure A-10). Further reliance has been placed on a Loan Confirmation Agreement dated 10.11.2017

entered between the petitioner and the Corporate Debtor as well as Victory Infraprojects Private Limited (Annexure A-12). The Corporate Debtor in the aforesaid Loan Confirmation Agreement had acted as a Confirming Party for the Loan given by the petitioner to the borrower and further both the Corporate Debtor and the Borrower had acknowledged the receipt of the said Net Loan of INR 15,50,00,000/- from the petitioner and the same has not been disputed. As a matter of fact, both of them had confirmed the same in their books of accounts and it is shown under the head loan and advances which is guaranteed by the Corporate Debtor and the Borrower as well as their Directors. The breakup from the financial year 2011-12 to 2018-19 have also been detailed (Annexure A-13 to A-25). The cheques for a total sum of INR 15,50,00,000/- drawn on ICICI Bank have also been mentioned in detailed [Annexure A-26 (Colly)].

3. Before coming to this Tribunal, the petitioner served notices on 05.02.2019 (Annexure A-27) and on 15.02.2019 (Annexure A-28). It was made clear that the petitioner would present the cheques to its bankers by putting the date as 11.03.2019 and accordingly the cheques were presented which were dishonoured.

In the memo the reason for dishonouring of cheques given is 'funds insufficient'. Copies of the cheques and memo have been placed on record (Annexure A-29 & A-30).

4. The security documents have also been relied upon including the copy of bank statement with a certificate issued under the Bankers Books Evidence Act, 1891.

5. Notice of the petition was issued on 07.06.2019 and as per the service affidavit a copy of the notice along with a copy of the order dated 07.06.2019 was served upon the Corporate Debtor by hand on 11.06.2019 and the same has been placed on record which is duly stamped and signed on behalf of the Corporate Debtor. Therefore, according to the affidavit of service the service has been completed and vide order dated 03.07.2019 we proceeded ex-parte against the Corporate Debtor. However, when the matter came up for hearing on 26.07.2019, Mr. Saurabh Kalia appeared for the Corporate Debtor and addressed arguments.

6. After hearing arguments, we reserved the order on 26.07.2019 and did not pronounce the order as a bunch of petitions under Section 7 of the Code involving homebuyers were also pending. The issue concerning Constitutional validity of

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explanation to sub section 8 (f) of Section 5 of the Code, 2016 was pending consideration before Hon'ble the Supreme Court. Had we proceeded to pronounce the order on the basis of 'Loan-Advanced Petition' like the one in hand then the nominated Interim Resolution Professional would have started the Corporate Insolvency Resolution Process and the homebuyers could have joined the process after the pronouncement if the order was to be favourable to them or could have been non suited. Therefore, we preferred to wait for the pronouncement of the order by Hon'ble the Supreme Court and eventually on 09.08.2019 the order has been pronounced and in the lead case titled as Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) the Constitutional validity of the aforesaid provision of the Code has now been upheld and the right of homebuyers to file a petition under Section 7 of the Code being Financial Creditor has been granted to them. Accordingly, now we proceed to pronounce the order.

7. Having heard the learned counsel for the parties we find that there is disbursement of the loan and the Corporate Debtor being the guarantor as well as Third Confirming Party has not only been

disbursed the loan amount but has also committed default. In that regard the Loan Confirmation Agreement dated 10.11.2017 (Annexure A-12) duly confirmed the loan advanced and the Corporate Debtor is described as Third and Confirming Party which is evident from the following recitals:

“Whereas believing and relying upon the said representations, assurances, promises and agreements of the Second Party and Third and Confirming Party, the First Party granted/provided to the Second Party and Third and Confirming Party from time to time Loan as per the details mentioned hereinafter at the simple rate of interest of 9 % per annum which shall be paid at the time of full and final repayment of the said Loan by the Second Party to the First Party.

Whereas the Second Party and Third and Confirming Party had further agreed with the First Party that in acknowledgement and Security for return of the said Loan in parts/whole, the Second Party and Third and Confirming Party shall issue and handover to the First Party duly signed undated cheques of various amounts with the further agreement that the First Party shall be entitled to fill up the date on any / all of the said cheques and give 15 days notice to the Second Party and Third and Confirming Party before the presentation of the said Cheques so that the Second Party is in a position to arrange the required funds in the Bank Account of the Second Party.



Whereas believing and relying upon the aforesaid representations, assurances, promises and agreements, the First Party had in the past from 29.07.2011 till 04.11.2016 granted/provided to the Second Party a Net Loan of Rs. 15,50,00,000/- as per the details mentioned in **Annexure “A”** attached with this Loan Confirmation Agreement against the guarantee of the Second Party and Third and Confirming Party as well as the personal guarantees of the Directors of the Second Party and Third and Confirming Party.”

8. A perusal of the aforesaid paras would show that the petitioner has advanced loan on the assurances and promises of *inter alia* the Corporate Debtor which is Third and Confirming Party.

9. It is further clear from clause 5 of the terms and conditions that the petitioner (First Party) had extended the facility of loan from 29.07.2011 till 04.11.2016 a total sum of INR 15,50,00,000/- against the guarantee of the Second and the Third which are Confirming Party and personal guarantee of the Directors. A reference has also been made to the advance cheques which are to be encashed by giving 15 days notices. Clauses 5 & 6 of the terms and conditions read as under:



“5. That believing and relying upon the aforesaid representations, assurances, promises and agreements, the First Party had in the

past from 29.07.2011 till 04.11.2016 granted/provided to the Second Party a Net Loan of Rs. 15,50,00,000/- as per the details mentioned in Annexure "A" attached with this Loan Confirmation Agreement against the guarantee of the Second Party and Third and Confirming Party as well as the personal guarantee of the Directors of the Second Party and Third and Confirming Party.

6. That in acknowledgement and Security for return of the said Net Loan of Rs. 15,50,00,000/-, the Second Party and Third and Confirming Party had also issued and handed over to the First Party duly signed undated cheques of various amounts as per details mentioned hereinafter with the further agreement that the First Party shall be entitled to fill up the date of on all or any of the said cheques and give 15 days notice to the Second Party before the presentation of any/all of the said cheques so that the Second Party and Third and Confirming Party is in a position to arrange the funds in the Bank Account of the Second Party."

10. Moreover, the Borrower i.e. Victory Infraprojects Private Limited had issued undated cheques which were encashable by giving 15 days' notice. Copies of the cheques have been placed on record (Annexure A-26) and 15 days' notice as per loan agreement was given on 05.02.2019 to *inter alia* Borrower, Corporate Debtor-Third Confirming Party and the Director asking them to ensure that on presentation the cheques were honoured. However, the cheques were presented and were dishonoured [Annexure A/30



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(colly)]. The return memo issued by the Punjab National Bank [Annexure A/30 (colly)] shows under the column Return Comments that funds were insufficient. All the memos have been placed on record [Annexure A/30 (colly)]. It was thereafter that recall notice was given and payment was demanded by the Financial Creditor on 30.03.2019 (Annexure A/31) and the amount remains unpaid. It is thus obvious that disbursement has been proved along with the act of commission of default.

11. Learned Counsel for the petitioner has then argued that all requirements of Section 7 of the Code for initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled and other conditions prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The name of the resolution professional has also been specified.

12. Mr. Kalia, learned counsel for the Corporate Debtor has however vehemently argued that sufficient time for repayment has not been given and the petition has been filed on the expiry of 34 days of default. According to the learned counsel it is a hurriedly



filed petition and it would completely derail the project of the Corporate Debtor and other associates.

13. The aforesaid submission made by Mr. Kalia, learned counsel for the Corporate Debtor does not warrant any detailed consideration because the petition has been filed on 16.04.2019. The Corporate Debtor has sufficient time till 26.07.2019 when the arguments were heard. As on date no document has been placed on record showing any intention on the part of the Corporate Debtor to repay the loan. On the contrary even written statement has not been filed and the Corporate Debtor was proceeded ex-parte on 03.07.2019. No use of the time has been made in between. Therefore, the defence is wholly without substance and the we have no hesitation to reject the same.

14. We may now 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)"

15. 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. As per requirement of Section 4 of the Code if default amount is one lac or more then the CIR Process would be issued. The application under sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional.

16. The Financial Creditor has proposed the name of Resolution Professional, Mr. Pawan Kumar Goyal with the address 304 D R Chamber, 12/56 D B Gupta Road, Karol Bagh, New Delhi -110005 and email id – ca.pawangoyal@gmail.in. His registration number is IBBI/IPA-001/IP-P00875/2011-18/11473. 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.

17. As a sequel to the above discussion, this petition is admitted and Shri Pawan Kumar Goyal is appointed as an Interim Resolution Professional.



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18. 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.

19. 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.”

20. 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 services or supplies as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.



21. 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



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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.

22. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

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. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

24. Before parting we must notice the complaint made against Financial Creditor in the form of discrepancies in the statement of

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account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditor as it is only fair to do so.

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 its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

Sd/-

22.08.2019

(M.M. KUMAR)
PRESIDENT

Sd/-

(DR. V.K SUBBURAJ)
MEMBER (TECHNICAL)

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VINEET

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