

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, NEW DELHI

C.P. NO.IB-1039(PB)/2018

IN THE MATTER OF:

ECL Finance Limited

.....Petitioner

Vs.

Digamber Buildcon Pvt Ltd

.....Respondent

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

Order delivered on: 27.11.2018

Coram:

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

Ms. INA MALHOTRA
Hon'ble Member (Judicial)

PRESENTS:

For Petitioner

: Mr. Atul Sharma, Mr.Kamal Gupta, Mr. Vikram Babbar, Ms. Yamini Khurana, Adv.

For Respondent

:Ms. Manisha Chaudhary, Mr. Mansumer Singh, Adv.

ORDER
M.M.KUMAR, PRESIDENT

The Petitioner claiming to be a financial creditor has filed the instant Petition 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 to trigger Corporate Insolvency Resolution Process in respect of respondent Digamber Buildcon Pvt Limited (for brevity the 'corporate debtor'). It is appropriate to mention that the 'financial creditor' is a company incorporated under the provisions of the Companies Act, 1956. It has its registered office at Edelweiss House, Off CST Road, Kalina, Mumbai - 400098 and has filed this petition acting through its branch at 603-Unit No. 10 & 12, Upper Ground Floor, Mercantile House, 15 Kasturba Gandhi Marg, New Delhi - 110001.

2. The Corporate Debtor - Digamber Buildcon Pvt Ltd was incorporated on 12.10.2006. The identification number of the Corporate Debtor given is CIN U70109DL2006PTC154732 and its registered office is situated at B-292, Chandra Kanta Complex, Shop No. 8, Near Metro Pillar No. 161, New Ashok Nagar, New Delhi - 110096. The authorised share capital of the company is Rs. 20,00,000/- (Rupees Twenty Lakhs only) and the Paid-up share capital is Rs. 1,00,000/- (Rupees One Lakh only) respectively.



3. It is submitted by the Petitioner that ECL Finance Limited had sanctioned a credit facility of Rs. 8,50,00,000/- (Rupees Eight Crores and Fifty Lakhs Only) vide its sanction letter dated 20.07.2017 **(Annexure-5)**. A Loan Agreement **(Annexure-6)** was executed amongst the Financial Creditor, Corporate Debtor and Rational Buildcon Pvt. Ltd. (Obligor-2) on 25.07.2017 for the said sum towards obtaining licenses with respect to construction and development of the residential project 'Era Sky Ville' @ 14% per annum payable quarterly.
4. The Respondent – Corporate Debtor pursuant to the sanction of the credit facility and the Loan Agreement executed various security/transaction documents **(Annexure 8 (Colly)) & (Annexure 11(Colly))** to secure the credit facility sanctioned for a sum of Rs. 8,50,00,00/- (Rupees Eight Crore Fifty Lakhs Only). A bird eye view of those executed documents is sketched as under:



- a. Promissory Note executed by Corporate Debtor unconditionally and irrevocably promising to pay Rs. 8,50,00,000/-
- b. Guarantee Agreement executed by Mr. Hem Singh Bharana (as Guarantor)
- c. Declaration and undertaking executed by Corporate Debtor through Mr. Sumit Bharana in respect of mortgaged immovable property
- d. Declaration and undertaking executed by Rational Buildcon Pvt. Ltd. (Obligor-2) through Mr. Sumit Bharana in respect of mortgaged immovable property
- e. Undertaking cum Indemnity executed by Corporate Debtor
- f. Undertaking cum Indemnity executed by Obligor-2
- g. Undertaking cum Indemnity executed by Mr. Hem Singh Bharana
- h. Undertaking-cum-indemnity dated July 25,2017 executed by Corporate Debtor to pay Differential Stamp Duty.



5. As per the averments of the 'Financial Creditor', the account of the Corporate Debtor was declared as Non-Performing Asset (NPA) on 31.03.2018 in the books of ECL Finance Limited.

6. It is also submitted by the Petitioner – Financial Creditor that a Loan Recall Notice (**Annexure 11(Colly) 8.**) dated 16.07.2018 was issued whereby the credit facility sanctioned to Digamber Buildcon Private Limited was recalled. The Corporate Debtor was then asked to pay a sum of Rs. 9,14,34,687/- (Rupees Nine Crore Fourteen Lakhs Thirty Four Thousand Six Hundred and Eighty Seven Only) which stood due and payable as on 31.03.2018 in connection with the Loan together with interest.

7. Further it is submitted by the Petitioner that the Financial Creditor issued a notice dated 27.07.2018 (**Annexure 11(Colly) 9.**) for invocation of Personal Guarantee to the Corporate Debtor-Respondent demanding to pay a sum of Rs. 9,14,34,687/- (Rupees Nine Crore Fourteen Lakhs Thirty



Four Thousand Six Hundred and Eighty Seven Only) together with interest and other charges thereon with effect from 01.04.2018 at the given contractual rates upon the footing of compound interest until payment.

8. The precise case of the Petitioners is that the financial debt to the tune of Rs. 9,14,34,687/- (Rupees Nine Crore Fourteen Lakhs Thirty Four Thousand Six Hundred and Eighty Seven Only) has accrued in favour of the Financial Creditors as per the Loan Agreement dated 25.07.2017 **(Annexure 6)**.

9. The Financial Creditor has proposed the name of Mr. Udayraj Patwardhan as the Insolvency Professional with the address 2 Patwardhan Apartments, Patil Colony #3, College Road, Nashik-422005,

E-mail-id

udayraj_patwardhan@sumedhamanagement.com.

His

registration number is IBBI/IPA-001/IP-N00024/2016-17/10057. He has filed his written communication as per the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration **(Annexure -4(Colly))**. He



has declared that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosure has been made as per the requirement of the IBBI Regulations.

10. In Part-IV of the Petition, the Financial Creditor has given the details of the total amount of the financial debt.

PARTICULARS OF FINANCIAL DEBT													
1.	Total amount of debt granted	ECL Finance Limited had sanctioned Rupee Term Loan Facility aggregating to INR 8.50 Crores (Rupees Eight Crores Fifty Lakhs Only).											
	Date(s) of disbursement	The following are the details of the disbursement of the amounts to Digamber Buildcon Pvt. Ltd. as per the Loan Agreement dated 25.07.2017:											
		<table><tr><td>LOAN</td><td>ACCOUNT</td><td>NO:</td></tr><tr><td colspan="3">PR00000213</td></tr><tr><td>Date of Disbursement</td><td>Amounts Disbursed</td><td></td></tr><tr><td></td><td>(In Rs.)</td><td></td></tr></table>	LOAN	ACCOUNT	NO:	PR00000213			Date of Disbursement	Amounts Disbursed			(In Rs.)
LOAN	ACCOUNT	NO:											
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Date of Disbursement	Amounts Disbursed												
	(In Rs.)												

CP

		04.08.2017	8,50,00,000/-	
2.	Amount claimed to be in default and the date on which the default occurred	<p>The first default occurred on 31.08.2017. The default continued to occur and on 31.03.2018 the account of the Corporate Debtor was classified as NPA by ECL Finance Ltd. The facility availed from the Financial creditor by the Corporate Debtor is outstanding and the total amount in default is Rs. 9,14,34,687/- (Rupees Nine Crore Fourteen Lakhs Thirty Four Thousand Six Hundred and Eighty Seven Only) as on July 31, 2018.</p> <p>A tabular chart depicting working of the amount in default under the debt is enclosed (Annexure-7).</p>		


11. In column 2 of part IV the total amount of debt sanctioned and the date on which the amount was disbursed, have been stated. The total overdue amount in default as on 31.07.2018



is INR. 9,14,34,687/- (Rupees Nine Crore Fourteen Lakhs Thirty Four Thousand Six Hundred and Eighty Seven Only) **(Annexure 7).**

12. In Part V of the Petition the Financial Creditor has mentioned the particulars of the documents, records and evidence of default. The details of the documents and securities as mentioned in Para 4 have been stated.

13. The entries and statement of account depicted in the Account of Digamber Buildcon Private Limited as maintained by the Financial Creditor pertaining to the Rupee Term Loan along with the calculation of the amount till 31.07.2018 has been annexed **(ANNEXURE 10(COLLY))**. A copy of the CRILC (Central Repository of Information on Large Credits) Report dated 20.04.2018 pertaining to the default of the Corporate debtor in respect of Debt qua the Financial Creditor has been attached. The same is reflected at serial No. 180 **(Annexure-9).**



14. A reply to the petition is filed by one Mr. Arun Singh, being the Authorized signatory of the Respondent- Corporate Debtor, who has been given authority vide Board Resolution dated 20.08.2018. Rejoinder to the Reply was filed by the Petitioner-Financial Creditor on 10.09.2018.

15. In the Reply filed on 12.09.2018 the Respondent-Corporate Debtor has raised certain objections to the petition filed by the Financial Creditor. One of the preliminary objection raised is that the Petitioner has filed the present petition without complying with the relevant provisions of the Notification dated 12.02.2018 issued by the RBI bearing No. DBR.No.BP.BC.101/21.04.048/2017-18 titled "Resolution of Stressed Assets-Revised Framework" (RBI Circular).

The Financial Creditor-Petitioner has denied the above submission made by the Respondent Corporate Debtor and has stated that the said RBI Circular is only applicable to the accounts of the borrower(s) which are maintained with Scheduled Commercial Banks (excluding Regional Rural Banks) or All India Financial Institution. The Petitioner is a Non-Banking Financial Company (NBFC) which does not fall

in any of the above mentioned category and hence, the RBI Circular is not applicable to the Petitioner.

16. Further it is stated by the Respondent-Corporate Debtor that the present Petition has been filed under improper authorization and the amount claimed is exaggerated.

However the assertions have been controverted. The Financial Creditor-Petitioner has attached a copy of the resolution dated 01.08.2017 passed by the Board of Directors (Annexure A) authorizing Mr. Dinesh G Kumar to file the present petition. It is also averred by the Petitioner that the amount claimed is based on the terms of the Loan Agreement and it is calculated in a transparent manner.

17. The Respondent-Corporate Debtor admits the disbursement of loan and further states that owing to the subdued market conditions in the infrastructure industry, there was an inordinate delay in realising the receivables, which further aggravated the issue concerning the shortage of cash flow, thereby, leading to financial distress. Due to this there was a default in paying the monthly instalments. It was candidly

admitted by Ms Manisha Chaudhary and there was no resistance to the admission of the petition.

18. In view of the aforesaid statement made by the learned counsel for the Respondent-Corporate Debtor, we find that advancement of loan and default stand admitted. Even Otherwise there is overwhelming documentary evidence on record as is evident from a perusal of para 3 and 4 of this order which support those findings.

19. 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.

20. Having heard the learned counsels for the Financial Creditor and Corporate Debtor 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)"

21. 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 Performa 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. The name of the IRP has been proposed and there are no disciplinary proceedings pending against the proposed Interim Resolution Professional.

22. As a sequel to the above discussion, this petition is admitted and Mr. Udayraj Patwardhan with the address 2



Patwardhan Apartments, Patil Colony #3, College Road,
Nashik-422005,

E-mail-id

udayraj_patwardhan@sumedhamanagement.com

and

registration number IBBI/IPA-001/IP-N00024/2016-
17/10057 is appointed as the Interim Resolution
Professional.

23. 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. 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.”

24. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and a surety in a contract of guarantee 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.

25. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *inter alia*, 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 by the ex-management or its ex-directors 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.

26. 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 seven days from today. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-

(M.M.KUMAR)
PRESIDENT

27.11.20

Sd/-

(INA MALTHOTRA)
MEMBER (JUDICIAL)

27.11.2018
(VIDYA)