

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT)(Insolvency) No.184 of 2019

IN THE MATTER OF:

M/s. Phoenix ARC Pvt. Ltd.

.....Appellant

Vs.

Shri Vishal M.Poonater & Anr.

.....Respondents

Present :

**For Appellant: Mr. Om Prakash, Senior Advocate with Ms.
Sonakshi Dhiman, Advocates**

For Respondents: Mr. Gaurav Gupta, A.R. for Respondent

O R D E R

22.04.2019 - The Appellant has filed an application u/s 7 of the Insolvency & Bankruptcy Code ('I&B Code'), 2016 against M/s. Sovereign Developers and Infrastructure Limited ('Corporate Debtor') which is yet to be admitted. In the said application, the Respondent Shri Vishal M.Poonater who claims to be the allottee of Infrastructure Project filed an 'Impleadment Application' which has been allowed by impugned order dated 17.12.2018 by the Adjudicating Authority(National Company Law Tribunal), Bengaluru Bench. Thus, the present appeal has been filed.

Learned counsel for the Appellant submits that no third party can intervene in the application if the Respondent Shri Vishal M.Poonater can claim himself to be the 'Financial Creditor', he may join along with the Appellant for initiation of 'Corporate Insolvency Resolution Process' against M/s. Sovereign

Developers and Infrastructure Limited ('Corporate Debtor') or he may file his claim before the 'Resolution Professional' if Section 7 application is admitted.

Mr. Gaurav Gupta, who claims to be the 'Authorised Representative' (in short A/R) of Shri Vishal M.Poonater submits that Poonater being one of the allottee has right to oppose the prayer, however, such submission cannot be accepted as person other than the 'Corporate Debtor' has no role to play at the stage of application u/s 7.

The Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407*" has observed as under:-

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to

Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

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 subsection (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 sub-section (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.

30. *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of*

the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

In view of such observations and findings of the Hon’ble Supreme Court, we are of the view that Adjudicating Authority is to notice whether there is financial debt and default and if the matter is complete or not.

Learned Counsel for the Respondent Shri Vishal M.Poonater submits that in terms of the decision of the Hon’ble Supreme Court, no debt is payable. If no debt is payable as per the law, the application may get rejected. Such claim cannot be made by another ‘Financial Creditor’ though it is open to the ‘Corporate Debtor’ to resolve the dispute.

For the reason aforesaid, we set aside the impugned order passed by the Adjudicating Authority and remit the case to the Adjudicating with direction to decide the application after hearing the Appellant and 'Corporate Debtor' in accordance with law. No other person should be given liberty at this stage. However, we make it clear that if the application u/s 7 is admitted, it will be open to the aggrieved person to move before this Appellate Tribunal.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

ss/gc