

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 21 of 2020

IN THE MATTER OF:

Vipul Ltd. ...Appellant

Vs.

M/s. Vipul Greens Residents Welfare Association ...Respondent

Present: For Appellant: - Mr. Sudhanshu Batra, Senior Advocate with Mr. Saroj Jha, Mr. Aditya Mishra, Mr. Tushav Kumar and Mr. Jaibir Singh Sethi, Advocates.

For Respondent: - Mr. Rajiv Virmani, Advocate.

O R D E R

08.01.2020— The Appellant- 'Vipul Limited', an Infrastructure Company, has challenged the order dated 15th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, whereby it has been asked to give certain details, as follows:

“The Corporate Debtor shall give details of the maintenance amount outstanding in respect of any of the 384 allottees who are members of the RWA/ petitioner. They shall also give separate details of this allottees who are not in default. The outstanding liability should be as per actuals and not with any interest or penalty. It is observed

that while the Corporate Debtor may or may not be entitled to retain the one-time maintenance taken by them, the liability towards electricity etc. is an individual liability against the resident. The liability of one resident cannot be off set against the deposits of other residents. Therefore, the corpus of the maintenance deposit of those residents members of the RWA who are not in default should be handed over to the RWA in terms of the agreement. To come up on 25th November, 2019. The Corporate Debtor shall also indicate what are the common facilities which are being provided to the residents from the one-time maintenance deposit towards Common Area Maintenance.”

2. The Record shows that the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 has been filed by ‘M/s. Vipul Greens Residents Welfare Associates’ alleging non transfer of ‘Interest Bearing Maintenance Security Deposit’ (IBMS).

3. In the said application, before admitting, the Adjudicating Authority directed to give details of the maintenance amount outstanding in respect of 384 allottees (i) who are members of the RWA/Applicant; (ii)

separate details of allottees who are not in default; (iii) outstanding liability as per actuals and not with any interest or penalty.

4. Certain observation has been made with regard to the 'Corporate Debtor' entitlement to retain the one-time maintenance and liability towards electricity etc. and individual liability against the resident. Observation has also been made that the liability of one resident cannot be off set against the deposits of other residents.

5. An observation has been recorded that the corpus of the maintenance deposit of those residents members of the RWA who are not in default should be handed over to the RWA in terms of the Agreement and ordered to list the case for orders on 25th November, 2019.

6. Mr. Rajiv Virmani, learned counsel appears on behalf of the Respondent- 'M/s. Vipul Greens Residents Welfare Association' (Applicant under Section 7) submits that it is a dilatory tactic of the 'Corporate Debtor' and contradictory Affidavits have been filed. In their reply, the 'Corporate Debtor' has made a counter claim and escalated the amount by giving further wrong Affidavit.

7. In ***"Innoventive Industries Ltd. v. ICICI Bank– 2017 SCC OnLine SC 1025"***, the Hon'ble Supreme Court has already held as to how an application under Section 7 can be decided and the fact is to be noticed. The Hon'ble Supreme Court also observed that what objection can be raised by the 'Corporate Debtor'. Relevant of which reads as follows:

“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.”

8. The Hon’ble President of India has recently promulgated an Ordinance furthering amendment in the ‘Insolvency and Bankruptcy Code, 2016’ published in the Gazette of India extraordinary Part II-Section 1 dated 28th December, 2019 wherein in Section 7 of the principal Act, in sub-section (1), before the *Explanation*, the following provisos have been inserted:—

“Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate

insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be

within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.”

9. In view of the aforesaid insertion of provisions under *explanation* below Section 7, the Adjudicating Authority is only required to see whether the application under Section 7 has been filed by 100 allottees, who are members of RWA or a 10% of the allottees who are members of the allottees to maintain it. The Adjudicating Authority is required to take into consideration only the Form-1 and the enclosure therein but find out the default, if any and to proceed in accordance with law. Before the admission of the application under Section 7, the Adjudicating Authority has no jurisdiction to direct the ‘Corporate Debtor’ to deposit any amount to certain corpus or with regard to maintenance which may not be a subject matter of application under Section 7.

10. For the said reason, we set aside the impugned order dated 15th November, 2019 and remit the case to the Adjudicating Authority to decide the matter in accordance with law taking into consideration the fact whether the claim, as made, comes within the meaning of ‘financial debt’ as defined under Section 5(8) and on the basis of Form-1 as filed by the Applicant and not on the basis of any pleading by one or other parties. The Adjudicating Authority is also required to notice the maintainability on the basis of insertion as made by Ordinance dated 28th December,

2019 as noticed above and then to find out whether any debt is payable in the eye of law or in fact and there is a default.

11. Except the aforesaid facts and the observations as given by the Hon'ble Supreme Court in ***"Innoventive Industries Ltd. v. ICICI Bank—2017 SCC OnLine SC 1025"*** as quoted above, the Adjudicating Authority will not go into the other facts which are required to be determined by Court of Competent Jurisdiction.

The appeal is allowed with aforesaid observations and direction. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

Ar/g