

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

C.P. No. 821/IBC/MB/2019

Under Section 7 of the Insolvency and Bankruptcy Code,
2016 read with Rule 4 of the Insolvency and Bankruptcy
(Application to Adjudication Authority Rules, 2016)

In the matter of

S. Ramasubramonian

501, Cedar, Tower 4, Runwal Greens, Bhandup West,
Mumbai- 400078

...Financial Creditor

Vs

Shree Sukhakarta Developers Private Limited.

10, 1st floor, Ruparel Iris, nair Mahal, Senapati Bapat
Marg, Mahim (W), Mumbai- 400016

...Corporate Debtor

Order Reserved on : 12.04.2023

Order Pronounced on : 17.05.2023

Coram:

Hon'ble Member (Judicial) : Mr. H.V. Subba Rao

Hon'ble Member (Technical) : MS. Anu Jagmohan Singh

Appearances (through video-conferencing):

For the Petitioner : Mr. Madhur Rai a/w Ms. Isha Punalekar,
Advocates

For the Respondent : Mr. Nausher Kohli, Advocate

ORDER

Per: H.V. Subba Rao, Member (Judicial)

1. This Company petition is filed by *S. Ramasubramonian* (hereinafter called “Financial Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Shree Sukhanarta Developers Private Limited* (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of an unresolved financial debt Rs. 1,56,42,406/-
2. The brief submissions of the Financial Creditor are as follows:
 - a. The financial creditor submits that the letter of Allotment issued by Shree Sukhakarta Developers Private Limited (Corporate Debtor) on March 30, 2014
 - b. Financial Creditor made payment of various instalments as and when demanded by Corporate Debtor as per the terms and conditions laid down under Letter of Allotment.
 - c. The Corporate Debtor issued the letter of termination dated November 07, 2017 to the Financial Creditor. The Corporate Debtor has issued 6 post-dated cheques along with letter of termination.
 - d. Out of 6 post-dated cheques issued by Corporate Debtor to Financial Creditor only 2 cheques of Rs. 1,00,000/- and Rs. 25,00,000/- were honoured by the drawee bank. The rest of the 4 cheques were dishonoured by the drawee bank for the want of insufficient funds.
 - e. Subsequently, Corporate Debtor issued 4 fresh post-dated Cheques aggregating to Rs. 1,34,73,228/- The fresh post-dated

cheques when presented to drawee bank were dishonoured for the want of insufficient funds.

- f. The Financial Creditor has not deposited the cheque of Rs. Rs. 59,73,228/- as all the earlier cheques of Rs. 25,00,000/- each deposited by Financial Creditor have been dishonoured by the Drawee bank.
- g. Hence, this company petition.

3. The Corporate Debtor filed affidavit in reply of Mr. Amit Mahendra Ruparel, the authorized representative of the Corporate Debtor opposing the admission of the above Company Petition. The brief submissions of the Corporate Debtor are as follows:

- a. The Corporate Debtor upon perusing the Miscellaneous Application, the Respondent has been advised that the reliefs as sought for by the Petitioner in the Miscellaneous Application are not maintainable and in fact, the Miscellaneous Application is misconceived and ill-advised. The Corporate Debtor therefore filing this preliminary and limited Affidavit in Reply raising an objection as to the very maintainability of the Miscellaneous Application. the Corporate Debtor respectfully pray that in view of the objection so raised, this Hon'ble Tribunal ought to first determine whether such a frivolous, baseless, misconceived and ill-advised Miscellaneous Application is maintainable at the threshold and as a preliminary issue.
- b. The Respondent submits that the Miscellaneous Application is not maintainable for the following reasons, amongst others, each of which are in the alternative and without prejudice to one another:

- c. The Petition has been filed on the basis that Cheque No. 000000010515 for an amount of Rs. 75,00,000/- (Rupees Seventy-Five Lakhs only) referred to by the Petitioner (Cheque”) was returned dishonoured, and therefore; the Respondent has purportedly defaulted on the Consent Terms between the Petitioner and the Respondent, taken on record by this Hon’ble Tribunal on September 11, 2019 (“Consent Terms”).
- d. Owing to the global pandemic COVID-19 (“Pandemic”), the legislature, by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 No. 17 of 2020. Inserted the following Section 10A after Section 10 of the Code:

“10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020,”

- e. The Cheque on the basis of which the Miscellaneous Application has been filed is admittedly dated April 30, 2020 and the purported default has admittedly taken place on July 30, 2020 (the date on which the Cheque was allegedly returned by the drawee bank) i.e. after March 25, 2020 as stipulated by Section 10A of the Code reproduced hereinabove. This being so, it patently clear that the Miscellaneous Application is non-maintainable as Section 10A of the Code mandates that OF

INDIA notwithstanding anything contained in Sections 7, 9 and 10 of the Code, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any alleged default arising on or after March 25, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf. On this count alone, the Miscellaneous Application ought to be dismissed as not maintainable.

- f. The Petitioner is seeking to do exactly what the legislature has prohibited it from doing. Being cautious of the perils of the Pandemic, the legislature, in its wisdom. Enacted Section 10A of the Code to protect Corporate Debtors from the Code in relation to defaults occurring after March 25, 2020. Notwithstanding such enactment of the law, it is astonishing as to the extent to which the Petitioner is ready and willing to initiate frivolous proceedings against the Respondent in a desperate attempt to coerce and arm twist the Respondent into making payments to the Petitioner.
- g. Furthermore, the amount claimed to be in default including the interest at the time of filing of the aforesaid Petition was Rs. 1,56,42,406/- (Rupees One Crore Fifty- Six Lakhs Forty-Two Thousand Four Hundred and Six only). As has been admitted by the Petitioner in paragraph no. 5 of the Miscellaneous Application, the Respondent has paid a sum of Rs. 80,00,000/- (Rupees Eighty Lakhs) to the Petitioner, out of a sum of Rs. 1,55,00,000/- (Rupees One Crore Fifty-Five Lakhs only) as agreed upon under the Consent Terms. Therefore, this clearly reflects the Bona fides of the Respondent and it clear that the Respondent has and always has had every intention to honour

the terms of the Consent Terms. The Respondent respectfully submits that the Pandemic which has been duly classified as a Force Majeure event and its consequent economic ramifications have had an adverse impact on the business of the Respondent. The Respondent is engaged in the Reg. No. 15545 GOVT. Business of real estate and development, which has suffered gravely on account of the Pandemic. There has been a significant slump in sales in the real estate sector and there are currently adverse market conditions in the said sector. The cash flows of the Respondent have been significantly affected. Despite the unfortunate circumstances in the real estate sector, the Respondent has constantly been making sincere efforts to come out of the vicious cycle of the market turmoil and stabilise its situation. The Respondent is currently dealing with over 3 nos. Of Projects in And around India. The Respondent employees over 56 nos, of employees. The lives of these employees as also the faith of these Projects are vest in the Respondent. This being so, it is wholly unjust and inequitable for the Petitioner to file such frivolous proceedings against the Respondent during the Pandemic.

- h. In addition to the aforesaid, it is pertinent to note that the order dated September 11, 2019 passed by this Hon'ble Tribunal taking on record the Consent Terms provided the Petitioner with "liberty to file a fresh petition in case of the breach of the consent terms.". This being so, assuming without admitting that there was any default by the Respondent on the terms of the Consent Terms, the Petitioner only had liberty to file a fresh Petition and not a Miscellaneous Application for revival.

- i. In view of the aforesaid, corporate debtor repeat and reiterate that the Miscellaneous Application is not maintainable and the reliefs as sought for by the Petitioner cannot be granted by this Hon'ble Tribunal. Therefore, corporate debtor respectfully prays that this Hon'ble Tribunal be pleased to reject the Miscellaneous Application at the very threshold with costs.

Findings:

4. Heard, Mr. Madhur Rai, counsel appearing for the Financial Creditor and Mr. Nausher Kohli, counsel appearing for the Corporate Debtor.
5. Before entering into the merits of the above Company Petition, it is appropriate to mention here that the above Company Petition was filed by the Applicant who is a single home buyer claiming a financial debt of Rs. 1,56,42,406/- including interest in February 2019. Subsequently, both the parties have entered into a consent terms dated 11.09.2019 whereunder the Corporate Debtor agreed and accepted the outstanding liability at Rs. 1,55,00,000/- and agreed to pay the said amount in instalments mentioned in the consent terms dated 11.09.2019. Accordingly, the above company petition was disposed of vide order dated 11.09.2019 on receiving the consent terms.
6. The corporate debtor having paid the maximum instalments under the consent terms, committed default in respect of payment of Rs. 75,00,000/- which is due and payable on or before 30.04.2020. Therefore, the financial creditor filed interlocutory application bearing I.A. No. 1731/2021 for restoration of the above Company Petition and accordingly, the above Company Petition was restored on 21.02.2023. In fact, while disposing of the main company petition on 11.09.2019, this tribunal merely granted liberty to the Financial Creditor to file fresh company petition in case of breach and did not grant any liberty for restoration of the present company petition. Since the Corporate Debtor

did not challenge the above order, the above restoration order attained finality.

7. Be that as it may, the Corporate Debtor is now objecting the final admission of the present Company Petition despite admitted debt and default on the following two grounds:
- i) the default of remaining amount of Rs. 75,00,000/- is due and payable on or before 30.04.2020 which is hit by section 10A of the Code.
 - ii) The applicant being a single homebuyer did not bring the required number of homebuyers to continue the above Company Petition within 30 days from the date of the amendment came into force and therefore the above company petition shall be deemed to be withdrawn before admission as per the amended provisions.
8. Let us deal with the first contention of default during the 10A period. It is true that the last instalments of Rs. 75,00,000/- is due and payable on or before 30.04.2020 as per the consent terms. Section 10A of the Code get attracts for the defaults occurred from 25.03.2020 till 24.03.2021. This bench is conscious that any default fell during the period of Section 10A cannot be considered as a default and no petition can never ever be filed on such default. However, in the present case the above Rs. 75 Lacs is the only amount due and payable to the Financial Creditor under the consent terms and the said default is continuing even subsequent to 24.03.2021 till date. Admittedly, Section 10A does not bar for filing of an application for the subsequent default after 10A period. As stated above, Rs. 75,00,000/- is the only amount due and payable and the default continues even till date and therefore Section 10A is not applicable to the facts of the present case on hand and the

argument of the Corporate Debtor on the point of 10A is liable to be rejected.

9. The next issue is with regard to the ineligibility of the Financial Creditor to continue the above Company Petition being a single homebuyer. In order to decide the above issue, it is once again important to mention here that the above CP was disposed of by recording the consent terms on 11.09.2019 and whereas the amendment came into force with effect from 28.12.2019. Therefore, the question is:

Whether the amendment is applicable to the present company petition which was already disposed of prior to the amendment?

It is appropriate to mention here that this tribunal vide its order dated 21.02.2023 merely restored the present company petition which was disposed of in view of settlement entered into between the parties and the same is pending till today for final admission on merits. It is a well settled position of law that an amendment to any statute applies prospectively unless retrospective effect is either expressly or impliedly provided in the amendment or the statute. From the careful reading of the amendment, this tribunal has no doubt to hold that the amendment prescribing minimum number of homebuyers for initiating section 7 of the code is applicable to all the pending Company Petitions that are pending for final admission. Therefore, under these circumstances as rightly contented by Mr. Kohli, the petitioner cannot escape the clutches of the amendment and the above company petition is deemed to be withdrawn as per the amendment. Accordingly, the second issue is answered in favour of the Corporate Debtor and against the Financial Creditor.

10. This tribunal is sympathetic towards the financial creditor who is a single homebuyer who became a victim in the legal process and change

of law. Since, this tribunal is bound to decide the matter as per the law and not on sympathetic or moral ground, it has no option except to dismiss the same.

11. Accordingly, the above Company Petition is dismissed without costs.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)

17.05.2023