BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
COURT – 5, MUMBAI BENCH

CP No. 952/IBC/NCLT/MB/MAH/2020
Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of
Edelweiss Asset Reconstruction Company Limited
Edelweiss House, Off. CST Road, Kalina, Mumbai – 400 098

….. Petitioner

Vs.

D. M. Corporation Private Limited
Mohite House, 240/B, Genthorat Marg, Tarabai Park, Kolhapur, Maharashtra – 416 003

….. Corporate Debtor

Order reserved on: **06.09.2021**.
Order pronounced on: **07.10.2021**.

Coram :
Hon'ble Suchitra Kanuparthi, Member (J)
Hon'ble Chandra Bhan Singh, Member (T)

For the Petitioner : Mr. Somit Kumar Singh, Advocate.
For the Respondent : Mr. Ajinkya Kurdukar, Advocate.

Per: Suchitra Kanuparthi, Member (J)

ORDER

1. The Petitioner/Applicant viz. 'Edelweiss Asset Reconstruction Company Limited' (hereinafter as **Petitioner**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Petitioner" on 15.03.2021 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'D. M. Corporation Private Limited' (hereinafter as '**Corporate Debtor'**).

2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of loan sanctioned by the Assignor Bank is stated to be Rs. 45,00,00,000/-, and the amount claimed to be in default is Rs. 27,20,97,836/- as on 29.02.2020. the due to defaults in repayment of dues, the account of Borrower was classified as a NPA on 31.05.2013.

BRIEF HISTORY OF THE CASE

3. An aggregate amount of credit facilities sanctioned to Telsar Construction Pvt. Ltd. ("Borrower") by Abhyudaya Co-operative Bank Limited ("Assignor Bank") as per the Sanction Letter dated 28.10.2011 was Rs. 45,00,00,000/- towards a term loan as per the terms and conditions recorded in the Agreement for Working Capital Term loan ("Agreement") dated 09.11.2011.

4. Vide the said Agreement, a term loan of Rs. 25,00,00,000/- had been sanctioned in favour of the Borrower. As per the terms and conditions of the Agreement, the Borrower was required to repay the Term Loan in 60 monthly instalments of Rs. 58,82,070/- starting from 15.06.2012.

5. One Mr. Dilip Ramchandra Mohite and one Mr. Anand Shaktikumar Sancheti ("Personal Guarantors") gave personal guarantees to the Assignor Bank, to secure repayment of the debt.

6. The Corporate Debtor herein, also gave a corporate guarantee to secure payment obligations of the Borrower.

7. Following are the security agreements executed in favour of the Assignor Bank:
    a. Deed of simple mortgage executed between Mr. Dilip Ramchandra Mohite, Telsar Construction Pvt. Ltd. and the Assignor Bank on 09.11.2011;
    b. Declaration cum Undertaking cum Indemnity dated 09.11.2011 executed by Mr. Dilip Ramchandra Mohite;
    c. Memorandum of Entry of Deposit of Title Deeds/ Original Documents dated 18.11.2011;
    d. Declaration cum Undertaking dated 18.11.2011 executed by the Corporate Debtor for creation of equitable mortgage;
    e. Declaration dated 30.05.2012 executed by Mr. Dilip Ramchandra Mohite and the Corporate Debtor in respect of continuation of mortgage.

8. Due to default in repayment of dues, the account of the Borrower was classified as a NPA on 31.05.2013.

9. The Assignor Bank then initiated action for enforcement of securities under the provisions of the SARFAESI Act, 2002 and issued a statutory notice dated 29.10.2013 under Section 13(2) of the SARFAESI Act.

10. Thereafter, the Assignor Bank filed a recovery suit being Original Application No. 516/2013 in the Hon'ble DRT, Mumbai.

11. The Assignor Bank and the Borrower entered into a settlement as per the Consent Terms dated 14.02.2014. Under the Consent Terms, the Borrower had agreed to pay to the Assignor Bank, an amount of Rs. 800 lakhs on or before 24.02.2014, a further sum of Rs. 400 lakhs on or

before 15.04.2014 and thereafter, monthly instalments of Rs. 60 lakhs per month from May, 2014.

12. It is pertinent to mention that the Borrower made payment of Rs. 800 lakhs to the Assignor bank, however failed to make further payments as per the Consent Terms.

13. Accordingly, a fresh statutory notice dated 03.03.2015 was issued under section 13(2) of the SARFAESI Act. Vide this statutory notice, the Borrower, Personal guarantors and the Corporate Debtor, were jointly and severally, called upon to make a payment of Rs. 21,93,67,443/-, together with further interest and charges payable from 01.03.2015 under the loan account no. CFSCLN/501434 in order to discharge the liability within 60 days of receipt of the statutory notice.

14. Due to the failure of the Borrower to comply with the Consent terms, the Assignor Bank filed an MA No. 70 of 2015 for issuance of a certificate of recovery. The said MA was disposed of on 02.12.2015 and the Recovery Officer issued Recovery Certificate dated 25.04.2015 for a sum of Rs. 23,69,54,603/- along with cost and future interest @17% p.a. with monthly rests from 04.11.2015 on the balance Principal amount of Rs. 15,22,60,738/- till realization in full, from the Borrower, Corporate Debtor and the Personal Guarantors.

15. Further, vide a letter dated 12.03.2018 addressed to the Assignor Bank, the Borrower referred to a meeting that was held on 06.03.2018 between the Assignor Bank and the Borrower and informed the Assignor Bank that the Borrower had proposed to settle the dues owed to the Assignor Bank under a one-time settlement offer. Vide the said letter, the Borrower offered a sum of Rs. 16 crores as lump sum settlement, which was to be utilized towards closure of the Borrower's Loan Account with the Assignor Bank. According to the schedule for payment proposed, Rs. 8 crores would be payed up-to 31.03.2018 and the remaining amount of

Rs. 8 crores were to be paid by 30.06.2018. it is evident from the letter that the Corporate Debtor has admitted his liability.

16. Vide the Assignor Bank's letter dated 28.03.2018, receipt of Rs. 8 crores were acknowledged by the Assignor Bank towards part payment of dues of the Borrower's Loan Account.

17. Thereafter, the debt payable under the credit facility was assigned by the Assignor Bank in favour of the Financial Creditor vide an Assignment Agreement dated 18.03.2019 on such terms and conditions as mentioned therein.

18. Pursuant to the issuance of recovery certificate, the Hon'ble DRT, Mumbai by its order dated 20.06.2019, issued a warrant of attachment against the secured assets of the Borrower, Corporate Debtor and the Personal Guarantors.

19. As per the Assignment Agreement, as on 11.03.2019 an amount of Rs. 23,08,94,076/- along with future contractual interests, charges and costs thereon was payable as outstanding to the Assignor Bank by the Borrower, Corporate Debtor and the Personal Guarantors.

20. As on 29.02.2020 an amount of Rs. 27,20,97,836/- along with future contractual interests, charges and costs thereon is payable as outstanding to the Financial Creditor, jointly and severally, by the Borrower, Corporate Debtor and the Personal Guarantors.

21. The dates of disbursement of the amounts disbursed by the Assignor Bank under the credit facility are given in Part V of the present Application.

<u>Reply of Corporate Debtor</u>:

22. The Corporate Debtor contended that the Petitioner has made false allegations to illegally extorted money from the Corporate Debtor. The Corporate Debtor is engaged in the business of development primarily for State Government project and power generation project. It is a matter of record that Telstar Construction Pvt. Ltd.namely Principal Borrower secured some financial. The Corporate Debtor had given a corporate guarantee in respect of amount lent by the Principal Borrower. A sum of Rs. 35 crores along with a working capital term loan agreement dated 09.11.2011 around Rs. 22 crores, the Principal Borrower was declared and as NPA by the Abhudaya Coop Bank. The Bank also initiated proceedings vide OA 1646/2013 before DRT, Mumbai against Principal borrower and the Corporate Debtor. In this proceeding, the parties agreed to amicably settle their disputes and consent terms were drawn between the parties on 14.02.2014. The first instalment was paid to the assignor bank on the basis of consent terms, however, it appears that the Principal Borrower thereafter failed to pay the balance amount as agreed in the consent terms. Further, an application MA 17/2015 was filed before DRT, Mumbai seeking issuance of recovery certificate.

23. The assignor bank and Principal Borrower further instituted settlement deed on 25.03.2018 for an amount of Rs. 16 crores as OTS. It was agreed between the parties upon payment of 50% of amount that is Rs. 8 crores that is attachment/encumbrance created on certain properties being as follows:
    a. Flat No. C1, Sea Face Park, Cumballa Hill, Mumbai.
    b. Flat No. 517, A/1 Shivaji Park, Kolhapur,
    c. Plot No. 240-B2, Mohite House, Gen Thorat Marg, Kolhapur.

24. In pursuance of the 2nd settlement, the Principal Borrower paid an amount of Rs. 8 crores and the assignor bank filed an application before DRT seeking withdrawal of attachment of two property namely Flat No. C1, Sea Face Park, Cumballa Hill, Mumbai and Plot No. 240-B2, Mohite House, Gen Thorat Marg, Kolhapur. The assignor bank vide

letter dated 28.03.2018 handed over the original papers pertaining to the said property and executed reconveyance deed subsequently.

25. Further, the Corporate Debtor pointed out that the said properties were attached by the order of DRT dated 27.11.2013 and despite the undertaking to file an application for withdrawal of attachment, the assignor bank failed to file the application before DRT.

26. The Corporate Debtor contended that the Petition is liable to be dismissed on following grounds:
    a. The application tantamount to the applicant taking advantage to its own ground;
    b. In any event, the Corporate Debtor is a surety who should discharge virtue of second settlement deed which significantly amended the terms of original borrowing.
    c. The assignor bank having failed to act to security of Principal Borrower the surety being the Corporate Debtor now stands discharge.

27. In view the above, the Corporate Debtor claim that the petitioner had breached the terms of 2nd settlement deed and the petition deserved to be dismissed with cost.

<u>Findings:</u>

28. The original lender Abhyudaya Cooperative Bank (Assignor Bank) has lend an amount of Rs. 45 crores vide sanction letter dated 28.10.2011 to Telstar Construction Pvt. Ltd. (Principal Borrower). Further a term loan of Rs. 25 crores was sanctioned to the Borrower which was repayable in 6 monthly instalments of Rs. 58, 82, 070/- staring from June 15, 2012.

29. One Mr. Dilip Ramchandra Mohite and Mr. Anand Shaktikumar Sancheti have executed personal guarantee in favour of Assignor Bank.

The Corporate Debtor executed a corporate guarantee. The Petitioner also executed several security agreements in favour of Assignor Bank.

30. Due to default in repayment of dues, the borrower's Account was classified as NPA on 31.05.2017. The Assignor Bank then initiated action for enforcement of security in SARFAESI Act and filed recovery suit being OA No. 516/2013 before Hon'ble DRT, Mumbai. The Assignor Bank and Borrower executed consent terms dated 14.02.2014. Under the Consent terms, the Borrower agreed to pay Assignor Bank an amount of Rs. 800 lakhs on or before 24.02.2014, further sum of Rs. 400 lakhs on or before 15th April, 2014 and thereafter agreed to pay Rs. 15 Lakh per month. The borrower made payment of Rs. 800 lakhs and failed to pay further payment as per consent terms.

31. The Assignor Bank issued fresh notice under SARFAESI Act on 03.03.2015 and called upon borrower to repay the Amount of Rs. 21 crores. The Original Lender also filed MA bearing No. 70 of 2015 for issuance of recovery certificate issued on 20.04.2015. Further, 2nd settlement deed was agreed between the Principal Borrower and Original Lender (Assignor Bank). According to schedule of payment of Rs. 8 lakhs were to be payment by 30.06.2018. The Borrower paid the said amount.

32. The petitioner further claimed that the Original Lender executed Assignment deed dated March 18, 2019 in favour of Petitioner.

33. The Hon'ble DRT, Mumbai on 28.06.2019 issued a warrant of attachment against secured asset of the Borrower, Corporate Debtor and Personal guarantor. The outstanding due payable by the borrower/ Corporate Debtor as on February 29, 2018 is Rs. 27 crores, date of default being June 13, 2018.

34. The issue for consideration is whether there is outstanding liability in terms of recovery certificate dated 25.04.2016 The 2nd issue for

consideration is whether the Corporate Debtor is liable to pay the sums due and is bound under the terms of Corporate guarantee. Upon perusal of corporate guarantee, it can be seen at Clause 6 that the guarantee shall be enforceable against the guarantor notwithstanding that no action in any kind had been taken by Bank against the Borrower. Clause 9 guarantee deed further undertake that guarantee shall not be revoked by guarantor and shall remain in force till all the amount is due and payable by the Bank to the Borrower. Clause 9 further envisages that the guarantee shall continue to remain in force even though some of the credit fee is utilized or not utilized or repaid. clause 9 is as follows:

> "*This guarantee shall not be revoked by the Guarantors and shall remain in force till all the amounts due and payable to the Bank by Borrower in respect of the said credit facilities are paid in full inclusive of interest and other charges payable by the Borrower. The Guarantors further specifically agree that this guarantee shall continue to remain in force and Guarantors shall continue to be liable there under for all amount due and payable to the Bank by the Borrower even though some of the credit facilities may have been unutilised or utilised and then repaid in full so long as the credit facility is continued by the Bank to the Borrower. This guarantee shall be in full force even though the Borrower has not renewed the documents and even though the claim of the Bank for the amounts due from the Borrower gets time barred and the Bank cannot recover the same from the Borrower by filing a suit or any legal proceeding against the Borrower.*"

35. The SARFAESI Notice dated 03.06.2015 had also invoked the corporate guarantor against the Corporate Debtor herein. It is undisputed fact that the original lender and the borrower had executed two settlement deeds and under 2nd settlement deed the borrower had to pay an amount of Rs. 8 crores and the original lender was obligated to return

the original documents of mortgage property and seek release of attachment order from Hon'ble DRT, Mumbai, however, there was default in payment of dues and the petition u/s. 7 was filed.

36. The recovery certificate dated 25.04.2016 further gives the fresh period of limitation in view of the judgment of Hon'ble Supreme Court in Dena Bank on 04.08.2021. the Hon'ble Supreme Court at Para 139 held that the proceedings u/s. 9 of IBC on the date of issuance of recovery certificate. The ratio laid down by the Hon'ble Supreme Court at para 139, 140, 141 is reproduved below:

> *"139. The Appellant Bank was thus entitled to initiate proceedings under Section 7 of the IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24th May, 2020.*
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> *140. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.*
>
> *141. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the*

Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019."

37. The liability of the Corporate Debtor is coextensive with the liability of repayment of debt of the borrower and as such the petitioner has demonstrated that there is a debt due and payable under the various sanction letters and the same was crystallised by issuance of recovery Certificate by Hon'ble DRT on 25.04.2016. Hence the petition is liable to be admitted.

38. The Principal borrower executed the OTS settlement of NPA Account and requested the original lender on 12.03.2018. The settlement of dues under OTS from the lumpsum full and final payment of Rs. 16 crores. The lumpsum amount is to be utilised towards the closure of companies loan account with the bank. The letter of principal borrower is as follows;

"No. Abhyu./002/2017-18
Date-12/03/2018

To,
The Chairman,
Abhyudaya Co-op. Bank Ltd.,
K.K. Tower, Abhyudaya Bank Lane,
Parel Village, Off. G. D. Ambedkar Marg,
Mumbai-400012

Sub:- OTS of NPA Accounts of Telstar Constructions Pvt. Ltd.

Ref:- i. Your letter No. DGM/LNR/EOS-539/4102/2017-18 dated 06/02/2018 received on 12/02/2018

ii. Our letter No. Abhyu./001/2017-18
iii. Our Meeting with Bank's Chairman & Managing Director dated 06/03/2018

Dear Sir,

With reference to our meeting with your Bank's Chairman, Managing Director dated 06/03/2018, we wish to state as under-

We have clarified all the facts regarding the outstanding loan in the meeting stated above and the bank has supported the company till date. We are aware that the action under SARFAESI were initiated by the Bank. As a borrower, we would like to co-operate and support the Bank for settling the dues.

As discussed in the meeting as referred above, we agree to settle the dues of the Abhyudaya Co-op bank Ltd. Under OTS for a lump sum full and final payment of Rs. 16 Crores. The Lump sum amount is to be utilised towards the closure of our Company's Loan Account with your bank.

The schedule for payment of these dues is proposed as 50% amount of the OTS i.e. Rs. 8 crores will be paid upto 31st March 2018 and the remaining amount of Rs. 8 Crores will be paid by the 30th June, 2018.

After payment of 50% OTS amount, we would like to request you to release the charge of our following properties-

1. *Flat No. C-1, Sea Face Park, cumballa Hills, Mumbai-400036.*
2. *Plot No. 517/A/1, Shivaji Park, Kolhapur-416001*
3. *Plot at 250-B/1A/5, Plot No. 2 Shantanu villa, Aamrai, Nagala Park, Kolhapur-416003*
4. *Plot No. 240/B-2, Mohite House, Gen, throat Marg, Tarabai Park, Kolhapur-416003*
5. *Any other plot or property attached by the Bank.*

The Bank may continue to hold the charge of the Plot located at Survey No. 21A, Hissa No. 3, CS No. 3062, At Uchgaon, Dist-Kolhapur until the payment of full OTS amount.

We Sincerely request the Bank to Confiem the above so we can proceed further with the OTS and for this act of kindness we shall remain forever grateful.

Thanking you in anticipation."

39. The letter requesting for OTS amounts to extension of date and extension of Limitation under section 18 of Limitation Act, 1963. In response to the letter of OTS, the Principal borrower on 28.03.2018 agreed to release the properties charged with the bank. Once the liability of the debt and defaulted is accepted by the Principal borrower and there has been a subsequent default in the loan amount therefore, the Corporate Guarantor is liable to repay the said loan amount and the liability under the Corporate Guarantee Deed is coextensive as of the Principal borrower.

40. Hence, the Petition is admitted.

41. On going through the submissions made by the Learned Counsel from the both sides and on perusing the documents produced on record, it is understood that the Corporate Debtor has defaulted in repayment of debt. The Corporate Debtor has acknowledged its debt from time to time in the audited statements of accounts and its liability to repay the same. However, the Corporate Debtor failed to pay. Hence, owing to the inability of the Corporate Debtor to pay its dues, this is a fit case to be moved under Section 7 of the I&B Code.

42. The above facts clearly reveal that the Corporate Debtor is liable to pay the Petitioner and defaulted in making the payment to the Petitioner. Hence, it is a fit case for admission.

43. Considering the above facts, the Bench concludes that the nature of Debt is a “Financial Debt” as defined under section 5 (8) of the Code. It has also been established that there is a “Default” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential requirements, i.e. existence of ‘debt’ and ‘default’, for admission of a petition under section 7 of the I&B Code, have been met in this case.

44. Further, the Bench also perused the Form – 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Petitioner and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, **Mr. Sachin Shrinivas Bhattad**, having office at Flat No.1A, 1st Floor, Vijay Towers, 139, Railway Lines, Solapur, Maharashtra-413001, having registration No. IBBI/IPA-001/IP-P00680/2017-18/11159, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

45. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

46. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.

47. That the Interim Resolution Professional shall perform the duties as assigned under **Section 18** and **Section 15** of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

48. The Petition is hereby **"Admitted"**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.

49. Ordered Accordingly.

Sd/-	sd/-
Chandra Bhan Singh	Suchitra Kanuparthi
Member (Technical)	Member (Judicial)