

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

COMPANY PETITION NO. (IB) 446 OF 2023

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 R/W Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.]

IN THE MATTER OF C.P. NO. (IB) 446 OF 2023:

IDBI TRUSTEESHIP SERVICES LIMITED
(In the capacity as the Debenture Trustee for
Kautilya Finance BV)

...APPLICANT/FINANCIAL CREDITOR

VERSUS

DSS INFRASTRUCTURES PRIVATE LIMITED

...RESPONDENT/CORPORATE DEBTOR

CORAM:

**SHRI MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant : Sr. Adv. Krishnendu Datta, Adv. Pranjit
Bhattacharya, Adv. Tarini Khurana

For the Respondent : Adv. Pooja Mehra Saigal, Adv. Rajat
Joneja, Adv., Sakshi Kapoor.

Order Delivered on:07.05.2024

ORDER

PER: MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (J)

1. The instant Company Application (C.P.(IB) No. 446/2023) is filed by M/s. IDBI Trusteeship Services Limited ('Applicant') bearing CIN: U65991MH2001GOI131154 in its capacity of a Debenture Trustee of M/s. Kautilya Finance BV under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. DSS Infrastructure Private Limited (Respondent Company), referred to as the Corporate Debtor.

2. The Respondent Company M/s. DSS Infrastructure Private Limited (CIN No. U70109DL2008PTC184878) is a private limited company having its registered office situated at 309, Third Floor, Indraprakash Building, 21, Barakhamba Road, New Delhi - 110001. Since the registered office of the respondent Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of Respondent/Corporate Debtor under sub-section (1) of Section 60 of the Code.

AVERMENTS OF THE APPLICANT IN C.P.(IB)/446/2023

3. Succinctly stated, the facts of the present case as averred by the applicant in the present application are that M/s. Shree Vardhman Buildprop Private Limited ('Principal Borrower') has been developing a low cost/ affordable Housing Project called "Shree Vardhman Mantra" ('project') on the land admeasuring 11.262 acres situated at Village Badshahpur, Sector-67, Gurgaon Manesar. The Corporate Debtor i.e., M/s. DSS Infrastructure Private Limited is the wholly owned subsidiary of M/s. Shree Vardhman Buildrop Private Limited.

4. The Principal Borrower for the purpose of inter-alia facilitating the development and construction of the Project by raising finance, had proposed to issue and allot Debentures by private placement to Kautilya Finance BV. Further, the Principal Borrower had issued an Information Memorandum-cum- Private Placement Offer Letter dated 14.06.2016 for the aforesaid purpose, based on the which, Kautilya Finance BV agreed to invest in the Principal Borrower by subscribing to the debentures in question and following agreements were executed:
 - a. Under the Debenture Subscription Agreement dated 14.06.2016, M/s. Kautilya Finance BV had agreed to subscribe to listed, redeemable, transferable, interest bearing, non- convertible debentures (NCDs) for an amount of INR 35,00,00,000/- each having a face value of INR 1,00,00,000/- each at an interest rate of 16% per annum issued by the Principal Borrower.

- b. Debenture Trust Deed dated 14.06.2016 inter alia entered into between the Principal Borrower, the Promoters and the Financial Creditor (First DTD) which governs all the inter se rights and obligations between the parties. Pursuant to which M/s. Kautilya Finance BV had subscribed to the NCDs issued by the Corporate Debtor on 22.07.2016.
 - c. Guarantee Agreement dated 22.07.2016 was executed by M/s. DSS Infrastructure Private Limited ('Corporate Debtor') in favour of the Applicant.
 - d. Deed of Hypothecation dated 18.7.2016 was executed by the Corporate Debtor, Shree Vardhman Buildprop Pvt. Ltd., Mr. Sachin Jain, Mr. Ashok Kumar Gupta, Mr, Rishi Gupta and Mr. Sandeep Jain in favour the Applicant.
 - e. Declaration Cum Undertaking for Creation of Equitable Mortgage dated 22.7.2016 executed by the Corporate Debtor and Shree Vardhman Buildprop Pvt. Ltd.
5. The Applicant submitted that during the period June, 2016 to January 2021, certain amounts became due and payable towards the principal and interest in respect of the NCDs in terms of the Repayment Schedule. However, the Principal Borrower had failed to make payments as per the Repayment Schedule and kept delaying repayment on one pretext or the other including request for accrual of interest amounts for the quarter ending 30.06.2018, 30.09.2018, 31.12.2018 and 31.03.2019 for subsequent quarter which were duly granted by the Financial Creditor. The Applicant had issued a Default Notice dated 05.08.2019 and 18.11.2020 to the Principal Borrower.

6. Further, the applicant submitted that the Financial Creditor in the capacity of Debenture Trustee of KFBV and Kautilya Real Estate Fund (KREF) had agreed to revise the repayment schedule for the repayment of principal and interest of the NCDs issued by the Principal Borrower as per Second Debenture Trust Deed dated 02.02.2021. However, the Principal Borrower continues making default, resultant to which the Applicant had issued Legal Notice dated 20.01.2023 demanding repayment of outstanding amounts within 15 days. Also, the Applicant had issued Demand Notice dated 16.06.2023 calling upon the Principal Borrower to make repayment of INR 57,87,76,971 as on 31.03.2023.
7. The Applicant submitted that the Applicant vide Notice dated 6.7.2023 invoked the Corporate Guarantee dated 22.7.2016 provided by the Corporate Debtor in favour of the Applicant under the Debenture Trust Deed dated 14.6.2016 and called upon the Corporate Debtor herein to pay an amount of Rs 60,07,19,783/- (Indian Rupees Sixty Crores Seven Lakhs Nineteen Thousand Seven Hundred Eight Three only) along with the further future interest till payment within 7 days from the receipt of the Notice. However, the Corporate Debtor had failed to pay the above said amount within 7 days. Accordingly, prays for the initiation of the Corporate Insolvency Resolution Process against M/s. DSS Infrastructure Private Limited ('Corporate Debtor').

REPLY OF THE CORPORATE DEBTOR IN C.P.(IB)/446/2023

8. The Corporate Debtor had filed its reply and submitted that the Corporate Debtor is a financially sound company and if it is subjected to admission for CIRP under the provisions of the Code, the same would be detrimental to the interest of the stakeholders and the homebuyers. The Corporate Debtor further submitted that the Principal Borrower can repay the alleged default amount from the amounts receivable from the Project, therefore, there is no reason to push the Corporate Debtor into the rigors of Corporate Insolvency Resolution Process only for the benefit of the Applicant. To support the contention, the Corporate Debtor had placed reliance on the Hon'ble Supreme Court judgement in the matter of **Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 ("Vidarbha Industries")**, Judgment dated 12.07.2022
9. Moreover, the Corporate Debtor submitted that the delay in repayment of the loans of the Applicant is on account of force majeure events for which the Corporate Debtor cannot be held responsible. The Corporate Debtor submitted that the Project Land of the Principal Borrower was finally released from acquisition proceedings under Land Release Policy dated 26.10.2007. However, the Director General, Town and Country Planning, Haryana had withheld the approvals for an indefinite period of time merely on the basis of a CBI Inquiry under an FIR relating to the acquisition/release of land by the State of Haryana in Sectors 58 to 63 and 65 to 67 of Gurugram Manesar urban Complex. Therefore, it is the case where on account of land acquisition proceedings and thereafter, CBI enquiry on the land forming part of the Project

Land, the Principal Borrower could not fully utilize the land and repay the Applicant.

10. The Corporate Debtor submitted that the Insolvency and Bankruptcy Board of India ("IBBI") vide Notification No. IBBI/2022-23/GN/REG085, dated 14th June, 2022 had introduced Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2022 which makes it mandatory for the creditors to file the information of default, with the information utility. Therefore, the record of information utility is a necessity for applications under Section 7 and Section 9 of the Code to be effectively heard. However, no such record has been filed and the present application is therefore liable to be dismissed
11. The Corporate Debtor further submitted that the present petition is not maintainable as no demand certificate was ever issued to the Corporate Debtor in terms of the corporate guarantee. Additionally, it was submitted that clause 6.6 of the Corporate Guarantee dated 22.07.2016 provides that the Applicant has to issue a "Demand Certificate" to the Respondent being the Corporate Guarantor for repayment of the amount. However, no such notice was issued to the Corporate Debtor.

ANALYSIS & FINDINGS IN C.P.(IB)/446/2023

12. We have heard the Learned Counsel for the parties and perused the averments made in the Application, Reply and Written submission filed by the parties. Adverting to the facts of the present case, there is no dispute that M/s. Shree Vardhman Buildrp Private Limited is

the Principal Borrower in terms of Debenture Trustee Deed dated 14.06.2016, pursuant to which M/s. Kautilya Finance BV had disbursed an amount of Rs.35,00,00,000/- to the Principal Borrower on 22.07.2016 by subscribing to non-convertible debentures (NCDs) for an amount of INR 35,00,00,000/- each having a face value of INR 1,00,00,000/- as per the covenants of Debenture Trustee Deed dated 14.06.2016. The Corporate Debtor had entered into a Corporate Guarantee Agreement dated 22.07.2016 with the Applicant, pursuant to which as per Clause 3.2, the Corporate Debtor agrees that the Guarantor's liability hereunder is co-extensive with that of the Principal Borrower.

13. However, even after the revision of repayment schedule, the Principal Borrower had failed to repay in terms of the second Debenture Trust Deed dated 02.02.2021 from the first due date i.e. 31.03.2021. The Applicant vide Notice dated 06.07.2023 had invoked the Guarantee and called upon the Corporate Debtor to discharge the above-mentioned outstanding liabilities of Rs. 60,07,19,783/- as on 30.06.2023.
14. The date of default is clearly stated in part IV as 14.07.2023. There is no dispute that the Principal borrower as well as the Corporate Debtor being Corporate Guarantor have committed default in repayment of debt. On perusal of document annexed to the Application, it is seen that the Applicant had invoked the Corporate Guarantee in consonance with the Corporate Guarantee dated 22.06.2016 and issued Notice dated 06.07.2023 for invocation of the Corporate Guarantee as provided by the Corporate Debtor in

favour of the Applicant as provided under the Corporate Guarantee Agreement dated 22.07.2016 and Debenture Trust Deed dated 14.06.2016. Accordingly, the Corporate Debtors contention that Demand Notice is not issued as per the required law cannot be sustained.

15. As regard to the Corporate Debtor's contention that record of Default is not annexed with the present application, which is a mandatory requirement. This Adjudicating Authority is of the considered view that Section 7 of the Code, 2016 read with the CIRP Regulations, 2016 empowers the Financial Creditor to file record of the default recorded in the information utility or "such other record and default as may be specified". This Adjudicating Authority is further persuaded by the decision of Hon'ble NCLAT in the matter of **Vijay Kumar Singhania Vs. Bank of Baroda and Anr.** Company Appeal (AT) (Insolvency) No.1058 of 2023; Order dated 13.12.2023, had adjudicated on the question, "Whether filing of Record of Default (RoD) of Information Utility is mandatory? and without obtaining an Authentication of Default(AoD) as per IU Regulation 21, no application under Sec. 7 can be filed by Financial Creditor?" and held as follows:-

"30. Before the Adjudicating Authority, submission on the basis of the argument which has been advanced by the Appellant before us that no information of default from the information utility have been filed, application deserves to be rejected was raised and dealt with by the Adjudicating Authority. It is useful to extract the following observations in paragraph 11 of the judgment of the Adjudicating Authority:-

“.....As far as the plea of default being not recorded with the information utility is concerned, as can be seen from Section 7 (3)(a) of the IBC, 2016, along with the application, the Financial Creditor may furnish the record of default recorded with the information utility or such other or record or evidence of default as may be specified. Besides, as can be seen from Regulation 2A of IBBI (Insolvency Resolution Process for Corporate Persons Regulations), 2016, for the purpose of Clause (a) of sub-section 3 of Section 7 of the Code (ibid), the Financial Creditor may furnish a certified copy of entries in the relevant account in Banker's Book as evidence of default. In the present case, the Petitioner has enclosed the copies of the statement of account in respect of Account Nos. 05860600004851 and 05860500000127 along with the interest calculation sheet and Certificate under Section 2(A) of Banker's Book Evidence Act, 1891, as Annexure-7 to the Petition, which is valid evidence in terms of the provisions of Regulation 2A(a) of IBBI (CIRP) Regulations, 2016. As far as the plea of Regulation 20(1A) of IBBI (Information Utilities) Regulations, 2017 is concerned, in terms of the said provision, before filing an application to initiate CIRP the creditor should file the information of default with the Information Utility and the IU shall process the information for the purpose of issuing record of default in accordance with Regulation 21 of the Regulations. The Regulation nowhere provides that the information of default recorded by IU can be the only evidence to be relied on while taking a decision regarding the admission of a Petition under Section 7 of IBC, 2016. Even otherwise also, neither the IBBI (IU) Regulations, 2017 nor the order issued by the Registrar, NCLT can have overriding effect qua the provisions of Regulation 7(3)(a) of the IBC, 2016. In the wake, we are unable to countenance the plea raised by the Respondent i.e., in the absence of a record of default recorded by IU, an application filed under Section 7 of IBC, 2016 may not be admitted.”

31. Thus, we are of the view that the Adjudicating Authority has correctly repelled the contention of the Appellant that in absence of a record of default recorded

by information utility, the application filed under Section 7 may not be admitted.”

16. Therefore, considering the judicial precedent and provisions of Code, 2016 and the regulations made thereunder, it is settled proposition that the record of default recorded with the Information Utility cannot be the only document to be furnished in a Section 7 Application and the financial creditor is at liberty to submit such other record of default as may be specified which proves the existence of debt and default. Therefore, the contention of the Corporate Debtor regarding the non-maintainability of the present application in absence of record of default cannot be sustained.

17. As regard to the Corporate Debtor’s Contention that the Principal Borrower is making efforts to make payment to the Applicant. It is pertinent to note that under section 128 of the Indian Contract Act, 1872 the liability of the surety is coextensive with that of the principal debtor, unless otherwise provided under the contract. Further, in relation to the aspect of Corporate Guarantee it is apt to refer to the decision of the Hon'ble Supreme Court in the matter of **Laxmi Pat Surana --Vs- Union Bank of India & Anr. in Civil Appeal No. 2734 of 2020** wherein it was held that the liability of the `Corporate Guarantor' is `coextensive' with that of the `Principal Borrower' and that acknowledgment given by the `Principal Borrower' also binds the `Corporate Guarantor'. Accordingly, the Corporate Debtor’s contention cannot be sustained.

18. The Corporate Debtor had further contended that because of the Force Majeure, the Corporate Debtor was unable to complete the project, which resulted in default of the obligations to the Applicant, however, the Corporate Debtor is a solvent company and will repay the outstanding Financial Debt from the proceeds of the project.
19. As regard to the Corporate Debtor's reliance on Hon'ble Supreme Court judgement in the matter of Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 ("Vidarbha Industries"). It is observed that the facts of the case relied upon in the facts of the present case are different. Accordingly, the judgement relied upon by the Corporate Debtor is not helpful.
20. It is a trite law that while considering the application for initiation of CIRP of the Corporate Debtor under section 7 of the IBC, 2016, the Adjudicating Authority has to merely satisfy the requirements as provided under Section 7(5) of the Code, 2016. Further, the Hon'ble Supreme Court in the case of **Innoventive Industries Limited vs ICICI Bank Ltd (2018) 1 SCC 407**, had observed the scope and extent of the powers conferred with the Adjudicating Authority under Section 7.

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before

such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. 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.”

“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.”

21. Thus, from the material placed on record as stated above further confirms that the debt is due and the Corporate Debtor has committed default in repayment of the outstanding financial debt. Therefore, on the basis of discussion in the aforesaid paragraphs, we are satisfied that the present application is complete in all respects. The Applicant is entitled to move the application against the Corporate Debtor in view of outstanding Financial Debt in default which is above the pecuniary threshold limit as provided under Section 4 of the Code, 2016. As a sequel to the above

discussion and in terms of Section 7 (5) (a) of the Code, the instant **Petition I.B./446/ND/2023 stands admitted and CIRP of M/s. DSS Infrastructure Private Limited shall commence.**

22. The petitioner in revised Part-III has proposed the name of M/s. Ducturus Resolution Professional Private Limited, through its Director Mr. Jalesh Kumar Grover having Registration Number IBBI/IPA-001/IP-P00200/2017-2018/10390 as proposed Interim Resolution Professional of the Corporate Debtor. M/s. Ducturus Resolution Professional Private Limited, through its Director Mr. Jalesh Kumar Grover having Registration Number IBBI/IPA-001/IP-P00200/2017-2018/10390 and email – id j.kgrover27@gmail.com is appointed as an Interim Resolution Professional (IRP) for Corporate Debtor. The consent of the proposed interim resolution profession in Form-2 along with valid AFA is taken on record.

23. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

- (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 Securitization 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.

(e)The IB Code 2016 also prohibits *Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*

24. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

25. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (within 3 days) as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

26. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs (Two Lakh Rupees) with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount, however, is subject to adjustment towards Resolution Process cost as per applicable rules.
27. The Interim Resolution Professional shall perform all his functions as contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.
28. It is further made clear that all the personnel connected with the Corporate Debtor, its 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 day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders.

29. 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 his obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.
30. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.
31. Accordingly, the instant application filed under Section 7 of the Code, 2016 bearing **I.B./446(ND)/2023 stands admitted.**

Sd/-

**(DR. SANJEEV RANJAN)
MEMBER (T)**

Sd/-

**(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)**