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IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, DELHI
BENCH III

IB-1348/ND/2019 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 **Earthcon Universal Infratech Private Limited**

Nisus Finance & Investment Managers LLP & Anr.

....Financial Creditor (s)

Versus

Earthcon Universal Infratech Private Limited

....Corporate Debtor

Order delivered on 9th January, 2020

CORAM:

CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)
K.K. VOHRA, MEMBER (TECHNICAL)

For Financial Creditor: Mr. Shiv Kumar Suri/Mr. Shikhil Suri, Advocates

For Corporate Debtor: Mr. Farrukh Khan, Mr. Shantala-Sankrit
Mr. Attendra Saumya Singh,
Mr. Wasiq Khan, Advocates

ORDER

Per: CH. MOHD SHARIEF TARIQ, MEMBER (JUDICIAL)

1. Under adjudication is an Application bearing No., IB-1348/ND/2019 filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC, 2016) by the Financial Creditors jointly through their Representatives. The Financial Creditors are seeking an order to initiate Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor viz. 'Earthcon Universal Infratech Private Limited', which was originally incorporated on 19.10.2009 in the name and style of 'M/s Zayat Infratech Private Limited', declare moratorium and appoint Interim Resolution Professional (IRP).

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2. Heard the Ld. Counsels for the Financial Creditors ('FCs'), the Corporate Debtor ('CD') and perused the pleadings alongwith the documents placed on the case file.

3. The perusal of the record reveals that a Debenture Trust Deed dated, 13.06.2017, amended on 20.12.2017 and 24.12.2018, was entered among i.e., Earthcon Infracon Private Limited (the issuer/mortgager), Beacon Trusteeship Limited (Trustee), Earthcon Constructions Private Limited (Obligor -1), Mr.Shadab Khan (Obligor-2/ Personal Guarantor -1), Earthcon Universal Infratech Private Limited (Obligor-3/ **Corporate Debtor**), Mr.Susheel Kumar Sharma (Obligor-4 /Personal Guarantor-2), Mr. Pramod Choudhary (Obligor-5/Personal Guarantor-3), and Nisus Finance and Investment Managers LLP (Facility Agent).

4. Before touching upon the recitals of the Debenture Trust deed, it is necessary to mention the details of the documents executed by the CD in favour of the Debenture Trustee. The CD individually or alongwith the issuer company and other Obligors has executed agreements/documents in favour of the Debenture Trustee *inter alia as follows*;

- a) Deed of Corporate Guarantee executed on 13.06.2017 (further amended).
- b) A deed of Hypothecation executed on 13.06.2017(further amended).
- d) Mortgage Deeds executed (without possession) on 16.06.2017 and 05.12.2017.
- f) A demand promissory note issued on 13.06.2017 for an amount of Rs. 30,00,00,000 (thirty crores).
- g) Letter cum Undertaking executed on 13.06.2017.
- h) An undertaking executed on 09.02.2018.



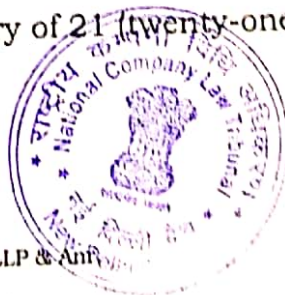
5. The Debentures Trust deed (Trust Deed) indicates that the issuer Company is engaged in the business of Real Estate, and CD i.e. Obligor-3, is engaged in the similar business and developing projects. The issuer Company was desirous of buying and Obligor -3 selling the units. The Obligor-3 has agreed to allot and perform an outright sale in favour of the issuer Company. Therefore, the issuer Company required funds for acquisition of units from Obligor-3, as well as for other general corporate purposes and raised funds upto Rs 30 crores through the issue and allotment of upto 3000 Senior, Secured Transferable, unlisted, unrated, redeemable, non-convertible debentures carrying a face value of Rs.1 lac each (Debenture), in one or more tranches as determined by the debenture trustee (as instructed by the facility Agent). Accordingly, the issuer Company vide Board Resolution passed on 18.04.2017 authorised the issuance of the debentures with the approval of shareholders in terms of the special resolution passed under Companies (Prospectus and allotment of Securities) Rules, 2014 at the Extraordinary General Meeting held on 18.04.2017. The issuer Company proposed to constitute, issue, and secure the said debentures together with all the outstanding amounts payable in respect thereof by way of a *registered legal mortgage created* by the issuer Company and Obligor-3 on the assets detailed in the debenture trust deed. Obligor-3 undertook that if the issuer company failed to pay all the secured obligations on the redemption dates, it would pay the secured obligations to the debenture holders.

6. Obligor-3, who is Corporate Debtor in the matter on hand has availed of a facility of Rs.100 crores from CF Lender and has opened the Escrow Account in terms of availing such facility. In addition, the parties agreed to create a first charge on Obligor-3's current accounts, such that 10% (Ten Percent) on the amount transferred to the Obligor-3's current account from the Obligor-3's Escrow Account shall be swept in daily / weekly into the Escrow Account subject to a maximum of upto the amount of next payment milestone including any past dues, default amounts, Debt Service Reserve Account (DSRA), Statutory dues and other costs and charges due and payable by the issuer Company, under the terms of the Debenture Trust Deed.

7. Clause 9.13 (a) of the Trust Deed indicates that the issuer company agreed that if upon the occurrence of any event of default, it fails to pay to the Debenture Trustee, the secured obligations, or any part thereof in the manner provided therein or in the transaction documents, then the debenture trustee shall have the right to take all such necessary actions as authorized under the debenture trust deed and under other transaction documents.

8. Clause 13 of the trust deed provides for creation of security that states that the Obligors shall deposit in the Escrow Account all the receivables arising out of and from the units and the mortgaged premises and all monies so deposited in the Escrow Account shall be distributed, paid and utilized in accordance with the instructions of the Debenture Trustee (acting on the instructions of the facility agent) in the manner and order of priority set out in Clause - 8 of the trust deed. The Obligors also agreed that in no event should the receivables be deposited in any other account other than the Escrow Account.

9. Clause 7 Part-II of the Debenture Trust Deed provides that there shall be moratorium in respect of repayment of the principal amount until 20 (Twenty) months from the closing date. However, the moratorium period was not be given effect upon the occurrence of an event of default. The clause further provides that the principle amount will be repaid by the company in four equal quarterly instalments (principle payment dates), the first instalment being payable upon the expiry of 21 (twenty-one) months from the closing date. The repayment schedule in respect of the principle amount is set out in part-III of second schedule to the Debenture Trust Deed. However, Clauses 7.1 and 7.2 contained in part-II of the Debenture Trust deed were amended, which provide that the principle amount will be repaid by the issuer company in four quarterly instalments i.e., 31st March, 2019, 30th of June, 2019, 30th of September, 2019 and 31st of December, 2019. Effectively, the first instalment was payable upon the expiry of 21 (twenty-one) months from *Series-I Deemed date of allotment*.



10. It is further noted that as per the Term Sheet dated 28.10.2017 the 1st tranche of payment of **Rs.13.15 Crore** was disbursed by the FCs, commencing from 30.06.2017 to 06.09.2017, and vide letter, dated 19.07.2017 the Issuer Company had allotted debentures to the FCs.

11. The 1st FC has sent a letter dated 02.04.2019 to the issuer company intimating about the First Financial Event of Default, wherein it is stated that the Company failed to complete Principal Repayment instalment amounting to Rs. 13,12,50,000 for the Non-Convertible Debentures (NCDs) issued, which was due and payable on 31.03.2019. The FCs also mentioned that the issuer company failed to reply to the previous letter dated 14.03.2019 and no sufficient balance is maintained in the issuer Company's Escrow Account. It is also mentioned that the issuer company failed to maintain the Debt Service Reserve Account (DSRA), therefore the FC ~~shall~~ declared it as Event of Default. Thereafter, several letters were exchanged between the FCs and the issuer company. The 1st FC in its letter dated 24.04.2019 informed the issuer company about the consequences of non-payment and the actions that would be taken by the FC. The 2nd FC on 06.05.2019 sent a formal notice calling upon the issuer company to pay the outstanding within three days from the receipt of the notice and mentioned the actions that would follow. The issuer company replied on 14.05.2019, stating that the non-payment is not deliberate but due to economic conditions only and sought extension of time.

12. The record reveals that the FCs while sending the letters/demand notices to the issuer company has^{ve} marked the copies to the CD and other Obligors. It is noted that the CD and other Obligors issued cheques in favour of the Debenture Trustee, on presentation to the bank they were returned with a remark 'Funds insufficient'.

13. The CD filed its **reply** on 06.08.2019 and submitted that over the years it has successfully developed various real estate projects around the country and has established an unimpeachable reputation in the real estate business. Further, it is stated that the CD availed financial facility pursuant to certain



understanding between the FCs and the Company i.e., Earthcon Infracon Private Limited and three Term Sheets were executed prior to respective tranches of payments. The CD in the capacity as Co-Mortgager had executed Mortgage Deeds along with other Documents wherein certain covenants were mutually agreed between the Company and the CD as Co-Mortgager and the covenants were technically and substantially ex-post facto, since the covenants thereof were duly complied with before execution of the Term Sheets. The CD has pointed out that Clause 11 of the Term Sheet, executed on 28.10.2017 provides that the tenure of investment/ date of maturity of the Debentures was 30 months from the date of 1st Disbursement of the Tranche i.e., on 30.06.2017, which was purposely delayed. Further, as per the terms agreed between the Company and the FCs, the first Tranche of Rs. 13.15 Crore was disbursed, which commenced from 30.06.2017 and concluded on 06.09.2017. As per the contention of the CD, this delay in disbursement of funds caused irreparable loss to the Company as the entire fund viability and cash flow management of the Company was sabotaged and in turn caused irreparable loss to the CD being the Co- Mortgagor. The CD also submits that the FCs acted in contravention to the terms agreed in the Term Sheets by demanding the repayment of Rs. 13.15 Crore on 31.03.2019 i.e. in 19 months only instead of 30 months as agreed i.e., from the date of receipt of the amount. It is stated that the Applicant No.1 and the Company had orally agreed that Mr. Amit Goenka would be inducted as Nominee Director of the CD and the Applicant No.1 would infuse funds in the Company's project, which would enable early completion of the project. Therefore, in good faith and believing in the assurance, the Company accepted the demand and a mandate was signed and Mr. Amit Goenka furnished a purported sanction letter/ Term Sheet to win the confidence of the Company and the CD, however the Applicant No.1 failed to perform its part. The CD in its reply states that its liability is only limited to the collateral in the form of 200 units/ flats owned by the issuer Company albeit developed by the CD. It is also stated that the CD invoked the arbitration clause in pursuance to the clause 51 of the Debenture Trust Deed and a notice was sent on 24.06.2019 to the FCs.

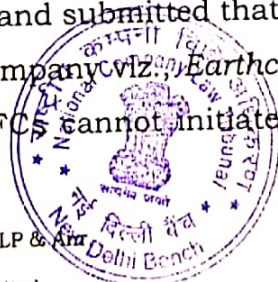


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14. The CD in its reply further raised objections that the FCs do not come under the definition as provided under section 5 (7) of the IBC, 2016 and the FC has failed to establish the existence of debt as provided under section 3(11) of the IBC, 2016. The CD also submits that there are alternative remedies available to the FCs under 'The Arbitration and Conciliation Act, 1996,' 'The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002' (SARFAESI Act).

15. The issue raised by the CD with regard to the timeline for redemption of the debentures is taken at the first time in the reply, which is contrary to the communications made by the CD to the FCs, wherein the time has been sought for repayment. Further, as has been noted herein above, Clauses 7.1 & 7.2 in part-II of the Debenture Trust deed were amended, which provide that the principle amount was to be repaid by the issuer company in four quarterly instalments i.e., 31st March, 2019, 30th of June, 2019, 30th of September, 2019 and 31st of December, 2019. In view of it, the issuer company and the CD were under legal obligation to repay the 1st instalment by 31st March, 2019. It appears that the CD is deliberately avoiding the reference to the amended clauses of the Debenture Trust Deed. Further, the plea of the CD that its liability is only limited to the collateral in the form of 200 units/ flats owned by the issuer Company albeit developed by the CD is not enough to reject the application of the FCs, as the CD never offered the possession of the 200 units to the FCs. The Debenture Trust Deed clearly demonstrates that in the event of failure of the issuer company to fulfil the conditions of the Debenture Trust Deed and the Term Sheet(s), the CD is under legal obligation to make the payment to the FCs.

16. Besides the above the Ld. Counsel for the CD has referred to the judgment given by the Hon'ble NCLAT in **Dr. Vishnu Kumar Agrawal Vs M/s Piramal Enterprises Ltd.** and submitted that the FCs have already initiated CIRP against the issuer Company viz., **Earthcon Infracon Private Limited**. As per his submissions, the FCs cannot initiate the CIRP for the same claim



against the CD. It is noted that the FCs have initiated the CIRP against the issuer Company which has already been stayed vide order dated 30.09.2019 passed by the Hon'ble **Supreme Court** in Civil Appeal No. 7641/2019. Therefore, there is no legal bar on the FCs to initiate CIRP against the CD, which is an Obligor in terms of the Debenture Trust Deed and other documents. Otherwise, also, the facts and circumstances involved in the case on hand are distinguishable as compared to the facts and circumstances involved in the case of *M/s. Piramal Enterprises Ltd. (supra)*. Moreover, the application on hand is not for recovery of money, but for initiation of CIR Process against the CD/Obligor-3 which failed to pay the outstanding to the FCs. In these circumstances, the CD/Obligor-3 needs to be put under CIR Process for seeking suitable and viable Resolution Plan, if any, in order to revive its business, which is the sole objective under the IBC.

17. On perusal of the documentary evidence placed on record and the record of default produced by the FCs obtained from the Information Utility, a clear default is ascertainable on the part of the CD viz., *Earthcon Universal Infratech Private Limited*. This Authority is satisfied that the CD failed to fulfil the obligation under the Debenture Trust Deed and other document executed to guarantee/ secure the repayment of the amount disbursed by the FCs towards the issuance of the NCDs. The defence raised by the CD is nothing but a moonshine.

18. The FC has fulfilled all the requirements for admission of the application and has proposed the name of the IRP viz., Mr. Jitender Arora, whose consent has been sought in Form-2, which is placed on record. There is no disciplinary proceeding pending against the IRP as is evidenced from Form-2. Therefore, the application is **admitted**. The commencement of CIR Process is initiated, which ordinarily shall be completed within 180 days, reckoning from the day this order is passed.



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19. The moratorium is declared which shall have effect from the date of this Order till the completion of CIRP, for the purposes referred to in Section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:-

- (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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.

20. The supply of essential goods or services of the CD shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

21. The Resolution Professional viz., Mr. Jitender Arora as proposed by the FC is hereby appointed as IRP and directed to take charge of the CD's management immediately including the Bank Accounts. The IRP is also directed to cause public announcement as prescribed under Section 15 of IBC, 2016 within 3 (three) days from the date the copy of this Order is received, and call for submissions of claim by the creditors in the manner as prescribed.



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22. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the Code. The Directors of the CD, its Promoters or any person (s) associated with the management shall extend all assistance and cooperation to the IRP as stipulated under Section 19, for the purpose of discharging his functions under Section 20 of the IBC, 2016.

23. The FC and the Registry are directed to send the copy of this Order to the IRP with immediate effect, so that he could take charge of the CD's assets etc., and make compliance with this Order as per the provisions of IBC, 2016.

The e-mail and other details of the IRP are as follows: -

Name: Mr. Jitender Arora

Registration No.: IBBI/IPA-002/IP-N00305/2017-18/10863

Address: 209 - 211A, 2nd Floor,

H-17/18, Laxmi Palace,

Laxmi Nagar, Vikas Marg,

Near Metro Pillar No. 35

Delhi -110092.

E-mail: csjitender@yahoo.com

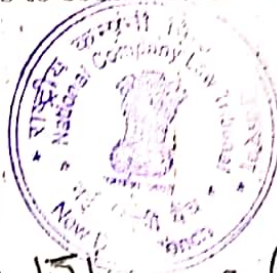
Mobile No.: 9999595107

24. The Registry is also directed to communicate this Order to the FC, the CD, and the concerned RoC.

25. There is no order as to cost. The Order is pronounced in the open court.

S d

(K.K. VOHRA)
MEMBER (TECHNICAL)



S d

(CH. MOHD SHARIEF TARIQ)
MEMBER (JUDICIAL)

U.D.Mehta/V

Rule 151
Date 09/11/2020
Deputy Registrar may

National Company Law Tribunal
J.P. & Anr.,
Earthcon Universal Infotech Private Limited

(1) Any member of the Bench may pronounce the order for & on behalf of the bench.

(2) when an order is pronounced under this rule, the court master shall make a note in the order sheet, that the order of Bench consisting of President & members was pronounced in open court and he/she shall remain.

(M) ARDHU NERULA
COURT CLERK
J.P. & Anr.

a note in the order sheet, that the order of Bench consisting of President & members was pronounced in open court and he/she shall remain.