

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

CHENNAI BENCH, CHENNAI

APPELLATE JURISDICTION

COMPANY APPEAL (AT)(CH)(INS) NO.217 OF 2021

(Arising out of Order dated 12th August, 2021 passed by the 'Adjudicating Authority, (National Company Law Tribunal, Division Bench II, Chennai) in IBA/149/2020)

In the matter of:

Mr. T. Prabhakar
Flat A4, Green Centaur,
7A/4, Cenotaph 1st Street,
Alwarpet, Teyarmpet,
Chennai 600018
Vs

Appellant

Mr. S Krishnan
Door No.3, G2, Sumangal Flats,
Parangusapuram Street,
Kodambakkam, Chennai 600024

1st Respondent

Nippon Life India AIF Management Ltd
Peninsula Business Park,
4th Floor, Tower A
Ganpatrao Kadam Marg, Lower Parel (W)
Mumbai 400013

2nd Respondent

Nippon Life India Asset Management Lt
Peninsula Business Park,
4th Floor, Tower A, Lower Parel (W)
Mumbai 400013

3rd Respondent

Present:

Mr. AS Sathish Kumar, Advocate for Mr. S. Sathiyarayanan,
Advocate (PCS) Advocates for Appellant.

Mr. Satish Parasaran, Sr. Advocate for Mr. Raj Jhabakh, Advocate,
Mr. Raj Kumar, Advocate for 2nd and 3rd Respondent.

JUDGEMENT
VIRTUAL MODE

M. VENUGOPAL, J

BACKGROUND:

The Appellant/Shareholder (Member of the Suspended Board of Director of M/s Green Valley Sheltors Pvt Ltd (Corporate Debtor) has filed the instant Comp App (AT)(CH)(Ins) No.217/2021 being dissatisfied with the Order dated 12.08.2021 in IB/149/2020 (Filed by the Financial Creditors under Section 7 of the I&B Code, 2016 r/w Rule 4 of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016), passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench II, Chennai).

APPELLANT'S SUBMISSIONS

2. According to the Learned Practising Company Secretary for the Appellant, the impugned order dated 12.08.2021 in IB/149/2020 was passed by the 'Adjudicating Authority' without providing an opportunity to the Appellant to file the 'Additional Written Submissions' and by countermanding its own order dated 29.07.2021 whereby the Authority had granted time to the Corporate Debtor at the request of the Counsel to file the 'Additional Written Submissions' before the Registry by both the

parties after serving a copy on the other side on or before 13.08.2021 and reserved the **‘Order’**.

3. The Learned Practising Company Secretary for the Appellant submits that the Appellant is a ‘Real Estate Company’ engaged in property development and is in existence from the year 2004 and as so far developed close to 50,00,000 sq. ft of space in multiple locations across South India and Sri Lanka.

4. The Learned Practising Company Secretary for the Appellant points out that the ‘Corporate Debtor’ is now developing the undermentioned projects:-

Name of the Project	Location	Remarks
GVSPL Raajguru	Vengaivasal, Chennai	Financed by Indian Overseas Bank
Green County	Coimbatore	Financed by Indian Bank
GVSPL Mahameru	Thiruvanmiyur, Chennai	Joint ventures with Land Owners
GVSPL Green Crest	Anna Nagar, Chennai	Joint Venture with Land Owners
GVSPL Raksha	Valasaravakkam, Chennai	Funded by 2 nd and 3 rd Respondent
GVSPL, Green Park	Nungambakkam, Chennai	Funded by 2 nd and 3 rd Respondent

and contends that only GVSPL Raksha and GVSPL Green Park were funded by the 2nd and 3rd Respondent and since their exposure is restricted only to these two projects, the remaining projects or other Assets of the 'Corporate Debtor' should be kept outside the purview of 'CIRP', because of the fact each project is an independent provide centre, is funded by a different financial creditor and there are different land owners for each project.

5. On behalf of the Appellant, a 'plea' is taken before this Tribunal that the 'Adjudicating Authority' had passed the impugned order which is quite inconsistent with the order of the 'Appellate Tribunal' dated 04.02.2020 wherein at paragraph 21 it is observed as under:-

"21. In Corporate Insolvency Resolution Process against a real estate, if allottees (Financial Creditors) or Financial Institutions/Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where separate plan(s) are approved by different authorities, land and its owner may be

different and mainly the allottees (financial creditors), financial institutions (financial creditors, operational creditors are different for such separate project. Therefore, all the asset of the company (Corporate Debtor) are not to be maximized. The asset of the company (Corporate Debtor – real estate) of that particular project is to be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority. Any other allottees (financial creditors) or financial institutions/ banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained. So, we hold that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not other projects which are separate at other places for which separate plans approved. For example – in this case the Winter Hill – 77 Gurgaon Project of the ‘Corporate Debtor’ has been place of Corporate Insolvency Resolution Process. If the same real

estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised.”

6. Advancing his argument, the Learned Practising Company Secretary comes out with a stand that only ‘GVSPL-Raksha’ and GVSPL Green Park’ were funded by the 2nd and 3rd Respondent and that there is no dispute that the ‘Corporate Debtor’ had defaulted in meeting its obligations to the 2nd and 3rd Respondent following which, they had initiated the ‘Corporate Insolvency Resolution Process’ against the ‘Corporate Debtor’ which was ordered by the ‘Adjudicating Authority’ in its impugned order dated 12.08.2021 despite the fact that the Appellate Tribunal had passed an order on 04.02.2020 in Flat Buyers Association Winter Hills-77 Gurugram case vide Company Appeal (AT)(Ins) No.926/2019.

7. In substratum, the clear cut stand of the Appellant is that only the assets of ‘GVSPL Raksha’ and ‘GVSPL Green Park’ are to be maximised by the 2nd and 3rd Respondents and no other assets of the ‘Corporate Debtor’ can be maximised. As such, the claims preferred by the ‘Finance Creditors’ or the ‘Operational Creditors’ of other projects are not to be entertained.

8. The other contention projected on the side of the Appellant is that the 'Corporate Debtor' filed its Counter and pointed out the defects in the Section 7 application filed by the 2nd and 3rd Respondent/Financial Creditors before the 'Adjudicating Authority' and the 'Adjudicating Authority' permitted the Applicants to file an amended Application, which was filed on 10.06.2021. No reason was assigned by the 'Adjudicating Authority' for permitting the applicants to amend the Section 7 application of the I&B Code, 2016 after 485 days' time, which is in breach of the provision of Section 7 of the I&B Code.

8. The Learned Practising Company Secretary for the Appellant points out that the amended application is surrounded with serious defects which cannot be ignored and the same was brought to the Notice of the 'Adjudicating Authority'. Apart from this the change in the name of both the 'Financial Creditors, change of ownership and the composition of the Board of Directors in respect of 'Financial Creditor' No.1 which requires a proper authorisation of the newly constituted Board of Directors, there being no such authorisation to file the amended application were suppressed by the Applicant before the 'Adjudicating Authority'.

9. It is represented on behalf of the Appellant that during the hearing on 29.07.2021, the Learned Counsel for the 'Corporate Debtor' before the 'Adjudicating Authority' had highlighted the defects in the application and explained the serious nature of the defects and made a request to permit him to file 'Additional Written Submissions' and that the 'Adjudicating Authority' had agreed to the said request and allowed the 'Corporate Debtor' to furnish the 'Additional Written Submissions' on or before 13.08.2021 and reserved the 'Order'.

10. The grievance of the 'Appellant' is that on 12.08.2021 the 'Corporate Debtor' had uploaded the electronic copy of the written submission in the e-filing portal of the 'Adjudicating Authority' (Tribunal) after which the 'Corporate Debtor' was shocked to receive the copy of the order admitting the application from the 'Adjudicating Authority' through email thereby an opportunity to submit the 'Additional Written Submissions' for which time was given till 13.08.2021 was denied to the 'Corporate Debtor', thereby the principles of natural justice were violated, to the detriment of the various stakeholders of the 'Corporate Debtor' and the 'Appellant'.

11. The Learned PCS for the Appellant submits that the ‘Corporate Debtor’ had entered into a ‘Trustee Agreement’ on 10.8.2016 with ‘IDBI Trusteeship Services Ltd’ whereby the ‘Corporate Debtor’ had appointed ‘IDBI Trusteeship Service Ltd’ as the ‘Debenture Trustee’. A ‘Mortgage cum Trust Deed’ was executed on 01.08.2020 by the Obligors (consisting of the Corporate Debtor and Guarantors) and the ‘Debenture Trustee’ wherein at para 8 it is mentioned as under:-

“The Debenture Trustee and the Company have entered into a Trustee Agreement on 1st August, 2016 (Trustee Agreement) whereby the Company has appointed the Debenture Trustee and the Debenture Trustee has agreed to be appointed as Debenture Trustee acting for and on behalf of and for the benefit of the Debenture Holders and the purposes related thereto, including for holding, maintaining and enforcing the security to be created by the obligors in favour of the Debenture Trustee to secure the payment and other obligations of the Company in respect of the issuance of NCD’s acting for and on behalf of and for the benefit of the Debenture Holders.”

12. The Learned PCS for the Appellant contends that as per Clause 19 of the Mortgage cum Trust Deed dated 1.8.2020, the

Debenture Trustee is vested with enormous power in the event of default and this includes initiating proceedings in any Court or Tribunal of competent jurisdiction. Furthermore, the two cheques issued by the Corporate Debtor were dishonoured and demand notices dated 26.2.2019 were issued by the Advocates under Section 138 of the Negotiable Instruments Act, 1881 based on the instructions of 'Debenture Trustee'. Also that, on 03.03.2020 the Debenture Trustee had invoked the personal guarantees of all the guarantors by serving demand notices dated 03.03.2020 addressed to all the Guarantors.

13. In fact, the Debenture Trustee has preferred an application on 12.11.2020 for initiating 'CIRP' against the Guarantors under Rule 7(2) of the Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for personal Guarantors) 2019, before the Adjudicating Authority.

14. The Learned PCS points out that the 'Debenture Trustee' is alone empowered to initiate the Section 7 application of the I&B Code, 2016 and that the applicants before the 'Adjudicating Authority' has no locus standi to file the said application and as such, the said application is not maintainable and cannot be proceeded with.

1ST RESPONDENT'S SUBMISSIONS

15. According to the 1st Respondent/Resolution Professional the claims were received from the 'Financial Creditors' and were collated, pursuant to Section 18(1)(b) of the I&B Code, 2016 and the same is as follows:-

	Name of Financial Creditor	Amount claimed	Amount admitted	Voting share
1	Nippon Life India Asset Management Ltd	6,84,88,567.00	6,84,88,567.00	4.29%
2	Nippon Life India Alf Management Ltd	60,65,36,617.00	60,65,36,617.00	38.01%
3	Indian Bank	56,25,97,071.94	56,25,97,071.94	35.26%
4	Indian Overseas Bank	17,21,42,538.00	17,21,42,538.00.	1079%
5	Easy access financial services ltd	18,58,71,221.00	18,58,71,221.00	11.65%
	Total	1,59,56,36,014.94	1,59,56,36,014.94	100%

16. In so far as the claims submitted by the 'Operational Creditors' the same is as follows:

S.No.	Name of Financial Creditor	Amount claimed	Amount admitted
1	Johnson Life Pvt Ltd	769,785/-	769,785/-
	Total	769,785/-	769785/-

17. It is the stand of the 1st Respondent/Resolution Professional that the impugned order of the ‘Adjudicating Authority’ is for the Company as a ‘whole’ and not for ‘individual projects’.

18. The 1st Respondent/Resolution Professional refers to the directions issued in the order dated 04.02.2020 of this Tribunal in the matter of Flat Buyers Association Winter Hills -77 Gurgaon V. Umang Realtech Pvt Ltd through IRP and others wherein at paragraph 267 to 31 it is observed as under:-

“26. The ‘Uppal Housing Pvt. Ltd.’ – Intervenor (One of the Promoter) is directed to cooperate with the Interim Resolution Professional and disburse amount (apart from the amount already disbursed) from outside as Lender (financial creditor) not as Promoter to ensure that the project is completed with the time frame given by it. The disbursement of amount which has been made by ‘Uppal Housing Pvt. Ltd.’ and the amount as will be generated from dues of the Allottees (Financial Creditors)

during the Corporate Insolvency Resolution should be -32- Company Appeal (AT) (Insolvency) No. 926 of 2019 deposited in the account of the Company (Corporate Debtor) to keep the Company a going concern. The amount can be utilized only by issuance of cheque signed by the authorised person of the Company (Corporate Debtor) with counter signature by the Interim Resolution Professional. The Bank in which the Corporate Debtor (Company) has account the amount should be deposited only for the purpose of completion of the Winter Hill – 77 Gurgaon Project. Banks will allow the cheques for encashment only with the counter signature of the Interim Resolution Professional.

27. The flats/apartments should be completed in all aspect by 30th June, 2020. All internal fit outs for electricity, water connection should be completed by 30th July, 2020. The Financial Institutions/ Banks should be paid simultaneously. The allottees are directed to deposit their balance amount and pay 90% without penal interest, if not deposited, by 15th March, 2020. The Allottees in whose favour possession has been offered and clearance has been given by the competent authority are bound to pay the cost for registration and

directed to deposit registration cost to get the flats/ apartments registered after paying all the balance amount in terms of the agreement.

28. Common area such as Swimming Pool, Club House etc. as per the agreement, be also completed by 30th August, 2020. The allottees are allowed to form 'Residents Welfare Association' and get it registered to empower them to claim the common areas.

29. All these processes should be completed by 30th August, 2020. If it completed, the Corporate Insolvency Resolution Process be closed after intimating it to the Adjudicating Authority (National Company Law Tribunal). The resolution cost including fee of the Interim Resolution Professional will be borne by the Promoter. Only after getting the certificate of completion from the Interim Resolution Professional/ Resolution Professional and approval of the Adjudicating Authority (National Company Law Tribunal) unsold flats/ apartments etc. be handed over to the Promoter/ Uppal Housing Pvt. Ltd.

30. It is made clear that even during the Corporate Insolvency Resolution Process, the Interim Resolution Professional can

also sell the unsold flats/apartments, by way of a Tripartite Agreement between the Purchaser, Interim Resolution Professional/ Resolution Professional and Promoter (Uppal Housing Pvt. Ltd.). The proceeds as may be generated from such sale should be utilized for completion of the project and payment to Financial Institutions/Banks and Operational Creditors. Once the project is completed, the Interim Resolution Professional will mover application before the Adjudicating Authority (National Company Law Tribunal) with the report of completion and ask for disposal of application under Section 7, ‘Rachna Singh’ and ‘Ajay Singh’ (Allotees – Financial Creditors) having already occupied their flats.

31. However, if the ‘Promoter’ fail to comply with the undertaking and fails to invest as financial creditor or do not cooperate with the Interim Resolution Professional/ Resolution Professional, the Adjudicating Authority (National Company Law Tribunal) will complete the Insolvency Resolution Process. The appeal stands disposed of with aforesaid observations and directions.”

2nd and 3rd RESPONDENT’S SUBMISSIONS

19. The Learned Counsel for the 2nd and 3rd Respondent contends that the 'Corporate Debtor'/Green Valley Sheltors Pvt Ltd (engaged in the Real Estate Business and development of properties) had approached the 2nd and 3rd Respondents for financial assistance to repay the existing indebtedness and to fund the construction and development of its housing projects.

20. According to the Learned Counsel for the 2nd and 3rd Respondents, based on the execution of Mortgage cum Trust Deed dated 1.8.2016 with the 'Corporate Debtor', the 2nd and 3rd Respondents had invested a sum of Rs.31,75,00,000/- by subscribing through private placement to senior, secured, unrated, unlisted, fully redeemable, non-convertible debentures in multiple tranches.

21. It is represented on behalf of the 2nd and 3rd Respondents that to secure the repayment of the aforesaid amount, the 'Corporate Debtor' created various 'securities' in favour of the 2nd and 3rd Respondent, including promissory notes, purchase option agreement, mortgage of freehold lands, mortgage of residential flats on an exclusive charge basis etc. which was also contractually financed by the 'Corporate Guarantee' and Personal Guarantees from its promoters.

22. The Learned Counsel for 2nd and 3rd Respondents points out that because of the breach of several terms and conditions of the transaction documents and violation of obligations made by the 'Corporate Debtor', the 2nd and 3rd Respondents projected an application under Section 7 of I&B Code on 18.12.2019 seeking to initiate 'CIRP' of the 'Corporate Debtor'.

23. The Learned Counsel for the 2nd and 3rd Respondent contends that the 'Corporate Debtor' before the 'Adjudicating Authority' had not filed any Reply Affidavit and finally it filed the 'Notes of Submissions' even as mentioned in the email dated 07.12.2020 (vide Annexure A-5 Page 64 of the Appellant type set) thereby evidencing the fact that the debt payable by the Appellant was never disputed.

24. It is the version of the 2nd and 3rd Respondent that they underwent a name change and this was brought to the notice of the 'Adjudicating Authority' and that the application IA No.72/2021 was allowed on 15.04.2021 by the 'Adjudicating Authority'. When the matter came up on 29.07.2021, the 2nd and 3rd Respondent during the hearing of the petition made a submission and further that the 'Corporate Debtor' also made the submissions. It was recorded clearly in the order passed by the

‘Adjudicating Authority’ on 29.7.2021 that *‘however, at the request of the counsel for the Respondent seeking two weeks’ to file additional written submissions. The written submissions shall be filed in the registry by both the parties after serving a copy on the other side on or before 13.08.2021. Heard the parties, Order Reserved.’*

25. The Learned Counsel for 2nd and 3rd Respondent adverts to the fact that the 1st written submissions filed by the ‘Corporate Debtor’ contained no substantial ground and only frivolous grounds were raised. Further, the Additional Written Submissions allegedly filed by the Appellant does not contain any substantial ground and contains the same grounds raised in the 1st written submissions. In short, there is no material variance or addition in the Additional Written Submissions as compared to the 1st written submissions.

26. The Learned Counsel for 2nd and 3rd Respondent refers to the decision of the Hon’ble Supreme Court in *Innoventive Industries Ltd Vs ICICI Bank Ltd (2018) 1 SCC 407* wherein it is held that *:the scheme of IBC 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 beings.’* Therefore, on this score alone, the

present Appeal before this 'Tribunal' filed by the Appellant is to be dismissed.

27. The Learned Counsel for the 2nd and 3rd Respondent places reliance upon the decision of the Hon'ble Supreme Court in State of Uttar Pradesh V. Sudhir Kumar Singh & Ors reported in 2020 SCC OnLine SC 847 wherein it is held that "*in cases where infraction of justice has been contended, the question any purpose would be served in giving opportunity to the said party have to be addressed.*"

28. The Learned Counsel for the 2nd and 3rd Respondent comes out with a plea that the negation 'audi alteram partem' cannot by itself, without more, lead to the conclusion that the prejudice is caused and in view of the Hon'ble Supreme Court decision in State of Uttar Pradesh V. Sudhir Kumar Singh and Ors 20020 SCC OnLine SC 847 the present 'Appeal' has no legs to stand.

29. The Learned Counsel for 2nd and 3rd Respondent contends that the 'Debenture Trustee' is alone entitled to file an application under Section 7 of the I&B Code against the Corporate Debtor and that the 2nd and 3rd Respondent being the debenture holder are clearly the Financial Creditors. Moreover, the right to invoke the 'CIRP' under I&B Code is vested with the 'Financial Creditor'.

30. The Learned Counsel for 2nd and 3rd Respondent brings to the notice of this Tribunal that an insolvency petition/CIRP application can be filed by the 'Debenture Holders' without impleading the 'Debenture Trustee'. That apart, the 'Trust Deed' does not in any way fetter the rights of 2nd and 3rd Respondents/Debenture Holders from acting without the 'Debenture Trustee'. Per contra, the right of the Respondent No.2 and 3 to act is expressly saved in the 'Debenture Trust Deed'.

31. The Learned Counsel for the 2nd and 3rd Respondents points out that the order dated 04.02.2020 of this Tribunal and Company Appeal (AT)(Ins) No.926/2019 in Flat Buyers Association Winter Hills-77 Gurgaon relied on by the Appellant is inapplicable to the present case because of the fact it was a 'Case Specific' and was an outcome of a settlement and is in the nature of 'obiter dicta'.

32. The Learned Counsel for 2nd and 3rd Respondents points out that paragraph 13 of the order dated 04.02.2020 in Flat Buyers Association Winter Hills-77 Gurgaon case clearly observes as under:-

"13. One of the Promoter – 'Uppal Housing Pvt. Ltd.'/ Intervenor agreed to remain outside the Corporate Insolvency Resolution Process but intended to play role of a Lender

(Financial Creditor) to ensure that the Corporate Insolvency Resolution Process reaches success and the allottees take possession of their flats/apartments during the Corporate Insolvency Resolution Process without any third party intervention. The Flat Buyers Association of Winter Hill – 77 Gurgaon also accepted the aforesaid proposal. It is informed that ‘JM Financial Credit Solutions Ltd’ one of the financial institution has also agreed to cooperate in terms of agreement with the condition that they will get 30% of the amount paid by the allottees at the time of the registration of the flat/apartment.”

and submits that the mechanism was arrived at, pursuant to ‘inter parties’ settlement and in any event, the instant case on hand is not a fit case for initiation of Reverse ‘CIRP’ as projected on the side of the Appellant.

EVALUATION

33. At the outset, this ‘Tribunal’ points out that an application in IBA/149/2020 (under Section 7 of the I&B Code, 2016 r/w Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016) was filed by the Financial Creditors/Reliance AIF Management Company Ltd, Reliance

Nippon Life Asset Management Ltd, Mumbai seeking to initiate 'CIRP' against the M/s Green Valley Sheltors Pvt Ltd (Corporate Debtor).

34. In the Section 7 application the Financial Creditors/Applicants under Part IV 'particulars of financial debts at Sl. No.3, the details of the amount lent by the Applicants to 'Corporate Debtor/GVSPL is described as under:-

Date of disbursement	Amount disbursed	Disbursed by
31/08/2016	Rs.10,00,00,000/-	Financial Creditor No.1
31/08/2016	Rs.16,00,00,000/-	Financial Creditor No.1
31/08/2016	Rs,3,00,00,000/-	Financial Creditor No.2
20/10/2016	Rs.1,50,00,000/-	Financial Creditor No.1
03/11/2016	Rs.75,00,000/-	Financial Creditor No.1
30/12/2016	Rs.50,22,000/-	Financial Creditor No.1
Total	Rs.31,75,00,000/-	

35. According to the Financial Creditors, the amount due as on 31.10.2019, from the 'Corporate Debtor' runs as under;

Particular	Amount (Rs)
Principal	25,30,40,154
Interest	5,41,45,167
Redemption Premium	3,38,37,000

Default Interest	2,49,05,995
Grand Total	36,59,28,316

The aforesaid amount of Rs.36,59,28,316/- being the default sum payable by the Corporate Debtor is inclusive of Principal, interest, default interest and redemption premium (default amount).

36. In Part V of the application it is mentioned as under:-

PARTICULARS OF FINANCIAL DEBT (DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT)

1	Particulars of Security Held, if any, the Date of its Creations, its Estimated value as per the Creditor (Attach a copy of certificate of registration of charge issued by the Registrar of Companies (if the Corporate Debtor is a Company)	a) First and exclusive charge on the underlying freehold lands and developments rights on the “Project Properties” from the date of execution of Mortgage Cum Trust Deed dated 01/08/2016, and the Unsold Units thereon (without possession of land/superstructure, Undivided Share on the land with possession of original title agreements). b) First and exclusive charge on the Project Receivables from the “Project Properties” effective from the date of execution of Transaction Documents in favour of the Applicants. c) Corporate Guarantee issued by the Corporate Debtor and Article Atelier Design India Pvt Ltd
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		d) Personal guarantee issued by the promoters of the Corporate Debtor. e) Demand Promissory Note issued for the face value of the NCDs alongwith the coupon. f) Purchase Option Agreement with respect to the mortgaged properties. g) Any other security interest created in favour of the Debentures Holders under the Transaction Documents.
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37. Before the 'Adjudicating Authority', there is no proof that a reply was filed by the 'Corporate Debtor'. The 'Corporate Debtor' had filed its 1st 'Written submissions' on 08.12.2020 before the 'Adjudicating Authority'.

38. In the instant case, the 'Appellant' had confirmed the 'default' and the same is undisputed. Indisputably, to secure the repayment of Rs.31,75,00,000/- invested by the 2nd and 3rd Respondents, the 'Corporate Debtor' had created numerous securities to and in favour of 2nd and 3rd Respondents like that of promissory notes, purchase option agreement, mortgage of freehold lands, mortgage of residential flats on an exclusive charge basis, which was contractually financed by corporate guarantee and first personal guarantees from its promoters.

TIME FRAME FOR ADMISSION

39. It is relevantly pointed out that before an admission of an application filed under Section 7 of the I&B Code, by a 'financial creditor', an 'Adjudicating Authority' as per Section 7(4) of the Code is to find out the existence of the default within 14 days of receipt of the application, as mentioned in Section 7(4). On being satisfied that such a default took place, then, an 'Adjudicating Authority' may admit such application, subject to rectification of defect, which the proviso in Section 7(5) of the Code enjoins that it must be done within 7 days of receipt of such notice from the 'Adjudicating Authority' by the 'Applicant'.

40. At this juncture, this 'Tribunal' points out that the time limit within which the default is to be ascertained, as well as the time within which the defect is to be rectified are held to be 'Directory' as per decision of Hon'ble Supreme Court in the matter of Surendra Trading Co V. Juggilal Kamlapat Jute Mills Co Ltd reported in (2017) 16 SCC 143.

41. As per Section 7(6) of the Code, the CIRP starts from the date of admission of the application. The 'Adjudicating Authority' as per Section 7(7) is to communicate the order either or accepting or rejecting the application of the 'financial creditor' or the 'Corporate Debtor' within 7 days of such admission or rejection as per

decision of the Hon'ble Supreme Court in Arcelor Mittal V. Satish Kumar Gupta reported (2018) SCC OnLine 1733.

'DEBT' AND 'DEFAULT'

42. Ordinarily, an 'Adjudicating Authority' is not required to go into the claim or counter claim made by the parties except to ascertain whether or not the record is complete and whether or not there is a 'debt' and 'default' committed by the 'Corporate Debtor'. Always a 'Corporate Debtor' has the option to point out that a 'default' had not occurred in the sense that 'debt' including a disputed claim is not due. In short, it is open to the 'Corporate Debtor' or its Directors to mention that/point out that 'debt' is not payable by the 'Corporate Debtor' either in Law or on facts of a given case. A 'debt' may not be due if it is not payable either on facts of a given case or in Law.

EVIDENCE OF EXISTENCE OF 'DEBT'

43. To sustain an application under Section 7 of the Code, an applicant ought to establish an existence of 'debt' which is due from the 'Corporate Debtor'. It cannot be ignored that the issue of whether there is 'debt' and 'default' can be gone into, if only, the

‘Corporate Debtor’ questions/disputes the ‘debt’ or come out with a clear cut stand that there is no ‘default’, despite there is a ‘debt’.

44. In the instant case, the 2nd and 3rd Respondent/Debenture Holder are undoubtedly the ‘financial creditor’. There is no fetter in Law for the ‘Debenture Holder’ to file an application seeking to initiate CIRP against the concerned, without adding the ‘Debenture Trustee’. Even the ‘Trust Deed’ is not restricting the rights of 2nd and 3rd Respondents from acting, in the absence of ‘Debenture Trustee’. To put it precisely, the ‘Debenture Trust Deed’ gives right to the 2nd and 3rd Respondents to act.

45. Continuing further, in the present case, 100% of the ‘Debenture Holders’ had preferred the application under Section 7 of the Code and they are the ‘Financial Creditors’ and they do have a right to file an application seeking to invoke the provisions of the I&B Code. As such, the contra stand taken on behalf of the Appellant is not acceded to by this ‘Tribunal’.

46. In the present case, after the filing of the Application under Section 7 of the Code by the ‘Financial Creditor’/‘Applicant’ the ‘name change’ took place and in reality IA No.72/2021 was filed by the 2nd and 3rd Respondents in regard to the amendment in ‘Cause

Title' and the same was allowed by the 'Adjudicating Authority' on 15.04.2021.

47. Be it noted, that when there is any change in the Directors or ownership', the 'Power of Attorney', Authorisation letter need not be executed once again and that the subsisting authorisation is good enough in Law, all the more when the said authorisation was not revoked. Also that, in any event, no prejudice is caused to the 'Corporate Debtor' in regard to the aspect of 'name change' of the 2nd and 3rd Respondents. Further that, the aspect of name change will not affect the 'default' committed by the 'Corporate Debtor' especially when the 'Corporate Debtor' admittedly had defaulted in meeting its obligations to the 2nd and 3rd Respondents as a result of which the 'CIRP' was initiated by the 2nd and 3rd Respondents against the 'Corporate Debtor' by filing the Section 7 application under I&B Code before the 'Adjudicating Authority'.

48. It cannot be gainsaid that the 'Debenture Holders' even in the absence of 'Debenture Trustees' is entitled to file an 'Application' under the I&B Code seeking necessary relief. In short, the right of the 2nd and 3rd Respondent is very much saved in the 'Debenture Trust Deed'. It is to be remembered that in the present case the Section 7 Application under the Code was filed by the 100%

‘Debenture Holders’ and they are the ‘Financial Creditors’ under the I&B Code. As such, this ‘Tribunal’ holds that they do have a valid and legal right to file the Section 7 Application under the I&B Code, 2016.

49. As regards the order dated 04.02.2020 of this ‘Tribunal’ relied on by the Appellant in Company Appeal (AT)(Ins) No.926/2019 in the matter of Flat Buyers Association Winter Hills-77 Gurgaon V. Umang Realtech Pvt Ltd, this Tribunal points out that the same cannot be pressed into service by the ‘Appellant’ because of the fact that the said order was passed based on the settlement arrived at between the parties wherein, one of the ‘promoters’, had agreed to remain outside the ‘CIRP’ and intended to perform the ‘lender role’ to perform with a view to ensuring the success of ‘CIRP’ etc. But the said order in Flat Buyers Association Winter Hills-77 Gurgaon case is inapplicable because of the fact the facts of the present case are different and that the ‘Corporate Debtor’ had admitted the default in meeting its obligations to the 2nd and 3rd Respondents who had funded for GVSPL Raksha and GVSPL Green Park Projects.

50. In the light of detailed upshot, this ‘Tribunal’ considering the facts and circumstances of the case comes to a consequent

conclusion that the existence of 'financial debt' and the 'default' of 'financial debt' were established on the part of the 'Financial Creditors'/Applicant' and 'debt' in question is payable not only in Law and also in fact. Viewed in that perspective, this 'Tribunal' unhesitatingly holds that the 'impugned order' passed by the 'Adjudicating Authority' dated 12.8.2021 (National Company Law Tribunal, Division Bench II, Chennai) in IBA/149/2020 in admitting the Application (Filed under Section 7 of the I&B Code) by the 'Financial Creditors'/Applicants is free from any legal infirmities. Resultantly, the Appeal is devoid of merits.

DISPOSITION

51. In fine, the Company Appeal (AT)(CH)(Ins) No.217/2021 is dismissed. No costs. I.A. No. 437 of 2021 is closed.

(Justice M. Venugopal)
Member (Judicial)

((Mr. Kanthi Narahari)
Member (Technical)

Dated: 03-12-2021

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