



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**IA.580/2023**

**IN**

**CP. No. 1123/MB-IV/2020**

Under Section 60(5) of the Companies Act, 2013

In the matter of:

**Vistra ITCL (India) Limited**

...Applicant

V/s

**Bhrugesh Amin**

(Resolution Professional)

Respondent

In the matter of:

**Yes Bank Limited**

...Financial Creditor

V/s

**Radius Infra holdings Private Limited**

...Corporate Debtor

**Order Dated: 17.03.2023**

*Coram:*

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

*Appearances (via videoconferencing):1*

For the Applicant(s) :

Mr. Aditya Shiralkar, Adv.

For the Resolution Professional(s):

Ms. Mitali Bhatt, Adv.



**ORDER**

*Per: Kishore Vemulapalli, Member (Judicial)*

1. This is an Application No. 580/2022 filed by M/s Vistara ITCL (India) Limited for following reliefs:
  - a. Quash and set aside the Decision of Respondent Nos.2 and 3 as contained in Respondent No.1's email dated 20<sup>th</sup> January 2023;
  - b. Declare and admit the Applicant as a "Financial Creditor" of the Corporate Debtor and issue necessary direction for the re-constitution of the Committee of Creditors with the Applicant as a member thereof;
  - c. Declare and admit the Applicant as a "secured financial creditor" of the Corporate Debtor and issue necessary direction for the re-constitution of the Committee of Creditors with the Applicant as a member thereof;
  - d. That pending the hearing and final disposal of the present Application, the Corporate Insolvency Resolution process (CIRP) of the Corporate Debtor be stayed.
  
2. The Applicant is Debenture Trustee for the Debenture holders holding Secured Optionally Convertible Debentures having face value of Rs.100/- each ("Debentures") and aggregating of Rs.340,00,00,000/- issued by M/s. Aaditri Constructions Private Limited ("Company") under Debenture Trust



Deed dated 03.08.2019 (“DTD”). Further, by an under clause 4 of the agreement dated 29.03.2019 (“Agreement”), M/s Radius Infra Holdings Private Limited (“Corporate Debtor” or RIHPL”) had undertaken to repay the secured obligations as defined under DTD and the failure of the Corporate Debtor to repay the same to amount an event of default. Clause 8 of the agreement further stipulated that the Debenture Trustee on the instructions of Debenture Holders shall be entitled to enforce security given by RIHPL. This Guarantee was provided by the Corporate Debtor in terms of clause 7.1 (iii) which stipulated corporate guarantee of the developer (Radius and Deserve Builders LLP, a group company of the Corporate Debtor) and such other entities as may be specified by the Debenture Holders. In terms of annexure-D to the DTD (specifying terms and conditions of the Debentures).

3. The Debentures were to be mandatorily and compulsorily redeemed on expiry of five years from the first tranche closing date. It is submitted that the applicant issued a notice dated 21.01.2022 address to the Corporate Debtor, the Applicant called upon it to forthwith pay the secured obligations in full to the Debenture Holders upon occurrence of various events of default and companies’ failure to redeem debentures in compliance of notice dated 28.07.2021. The Applicant also informed the Corporate Debtor that Applicant shall constraint to exercise all rights and remedies available to it



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under the said agreement. Clause 13 of the DTD provides consequences of an event of default wherein the debenture trustees are entitled to enforce the charge and the mortgage properties are any part thereof, cause the sale, assignment and transfer thereof and also to enforce the Corporate Guarantee.

4. In view of this facts the Applicant has pleaded that the Corporate Debtor owes amount receivable by the Applicant on the redemption of the debentures from the Corporate Debtor in default of the company to pay the same. Since this debt is a nature of financial debt, the applicant is a financial creditor of the Corporate Debtor, accordingly, deserved to be considered so by the Resolution Professional.
5. The Resolution Professional/Respondent No.1 has submitted that present application is devoid of any merit and the applicant has approach this Hon'ble Adjudicating Authority with unclean hands which makes the applicant guilty of *suppressio veri*. It has drawn our attention to e-mail communication dated 10.06.2022 from the Applicant stating that “2. *While there was an agreement to create a mortgage, no mortgage has been created by the Corporate Debtor on the property of the Corporate Debtor at J.P. Road, Versova, Andheri West Mumbai, to secure the debentures, Security was however created in terms of Clause 2(a) and 2(b) of the agreement dated 29<sup>th</sup> March 2019*”. It has further been submitted that the applicant is merely relying on Section 126 of



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Contract Act, 1872 without appreciating the fact that the obligation of surety cannot be created after the event of default has occurred. He has submitted various dates in this relation as (a) DTD is dated 03 August 2018; (b) Event of default is dated 04 November 2018; and (c) the guarantee agreement with the Corporate Debtor is dated 29<sup>th</sup> March 2019. Also, DTD nowhere states that the Corporate Debtor has any obligation or guarantee to secure the debt. The Respondent Resolution Professional has also submitted that non-compliance to order dated 16.11.2022 passed by this Bench. He had placed the claim of the applicant before COC in the 6<sup>th</sup> meeting held on 28.11.2022 and thereafter, in 7<sup>th</sup> meeting held on 27.12.2022 where at the claim of Applicant in the capacity of Financial Creditor was rejected due to negative vote casted by Respondent No. 2 and R-3. He has also drawn our attention to clause 4 of the agreement which only states that “failure to repay the same shall result in event of default” cannot be construed to mean that the Corporate Debtor stood as Guarantor to the amounts due on debentures issued by the company and the applicant can only be entitled to enforce RIHPL security {provided in clause 2 (a) & (b) of the agreement} in terms of clause 6 of the agreement on the occurrence of default is stated in clause 4 thereof.

6. We have heard both the Counsel and perused the material on record. We find from the recitals contained in the agreement, the Corporate Debtor was



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developing a slum rehabilitation scheme in phased manner and had appointed the company as a Development Manager whereby the company was required to provide non-interest-bearing deposit of Rs.50 Crores and interest-bearing loan of Rs. 345 Crores to the developer. Further, we find from clause 2 of the agreement that the applicant had bound the Corporate Debtor to deposit all amounts to be paid to the promoters from time to time by whatever name called in whatever form in a company escrow account and such money is referred as RIHPL security in the agreement. Besides it, this clause also stipulated obligation on the part of RIHPL to create mortgage over RIHPL project and obligation on the part of the promoters not to create any encumbrance on the shares. Clause 4 is obliged to Corporate Debtor to pay the secured obligations under DTD. However, its further states that the failure to repay the same shall result in an Event of default, the consequences to follow on such occurrence are provided in clause 6 which empowers the applicants to enforce RIHPL security only. In other words, on combined reading of clause 2(a), 2(b) 4 & 6, it follows that the obligations of the Corporate Debtor was limited to the extent of RIHPL security, Mortgage on RIHPL project if any created and shares of the promoters. It is undisputed fact that no mortgage was created on the RIHPL project. Accordingly, RIHPL's obligation under the agreement is only to the extent of amounts stated under clause 2 (a) and 2(b) thereof.



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7. In view of the above we do not find any infirmity in the decision of the Respondent No.1 and upheld by CoC to reject the claim of the applicant. Since the records placed before us do not refer to any amount falling under clause 2 (a) and 2(b) of the agreement lying with the Corporate Debtor, it is made clear that our decision in this order shall not have any impact on the claim of the applicant in relation to those amounts falling under clause 2(a) and 2(b) of the agreement, if any.
8. In view of the above, IA.580/2023 is **dismissed**.

**Sd/-**

**Prabhat Kumar**  
**Member (Technical)**  
SVR.17.03.2023

**Sd/-**

**Kishore Vemulapalli**  
**Member (Judicial)**