



**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

CP (IB) NO.29/ALD/2023

In the matter of

An application 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:

**ASSETS CARE AND RECONSTRUCTION ENTERPRISE LIMITED
(Trustee of India Real Estate 2021 Trust)**

Having its Registered Office at:
2nd Floor, Mohandev Building 13,
Tolstoy Marg, New Delhi 110001

..... Applicant/Financial Creditor

Versus

SUPERTECH ORB PROJECT PRIVATE LIMITED

Having its Registered Address at:
C-45, Sector 62,
Noida, Gautam Buddha Nagar,
Uttar Pradesh 201307

.....Respondent/Corporate Debtor

Order pronounced on 13th October, 2023

Coram:

Mr. Praveen Gupta. : Member (Judicial)
Mr. Ashish Verma : Member (Technical)

Appearance:

Sh. Darpan Wadhwa, Sr. : For the Financial Creditor
Adv. assisted by Sh. Angad
Varma & Sh. Toyesh Tewari,
Advs.

Sh. Aman Kumar Dwivedi : For the Corporate Debtor
Adv.

-Sd/-

-Sd/-



ORDER

Per : Praveen Gupta, Judicial Member

1. The Present Application has been filed on 10.04.2023 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “**I&B Code, 2016**”) by the Applicant/Financial Creditor namely, **Assets Care and Reconstruction Enterprises Limited** seeking initiation of the Corporate Insolvency Process (hereinafter referred as ‘**CIRP**’) against the Respondent/Corporate Debtor i.e. **M/s Supertech ORB Private Limited** read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 in Form 1 containing all the information as required in Part I, II, III, IV and V of the Form.
2. The Applicant vide Board Resolution dated 25.02.2023 passed by its Board of Directors, has authorized its Associate Vice President to sign and verify on behalf of the Applicant any complaints, applications, petitions, written statements, affidavits, vakalatnamas and all other documents connected with the legal proceedings that are



required to be signed on behalf of the Applicant. Copy of Board Resolution dated 25.02.2023 has been annexed as **Annexure-A/2** with the Application. In view of the above resolution, Mr. Mr. Manish Kumar Manav being Associate Vice President of the Applicant Company filed application u/s 7 of the I&B Code, 2016 as an authorized representative in the present case.

3. The Corporate Debtor i.e. Supertech ORB Project Private Limited is a company incorporated under the provisions of Companies Act, 1956 and is carrying on the business of real estate development.
4. It is stated that a Facility Agreement dated 20.12.2017 was executed between M/s Altico Capital Limited and Corporate Debtor for providing Financial Assistance wherein M/s Altico Capital Limited sanctioned an amount of Rs. 430,00,00,000/- (Rupees Four Hundred and Thirty Crores Only). Out of the said sanctioned amount, a sum of Rs. 349,36,07,801/- was drawn and disbursed with interest rate of 17% p.a. as per the terms and conditions mentioned in the Facility Agreement. This amount was drawn down and disbursed in the following tranches.



Date	Amount Disbursed (in INR)
22-Dec-17	1,830,000,000
22-Feb-18	100,000,000
12-Mar-18	120,000,000
17-Apr-18	80,000,000
7-Jun-18	100,000,000
4-Jul-18	60,000,000
20-Aug-18	80,000,000
1-Sep-18	40,000,000
26-Sep-18	60,000,000
28-Sep-18	110,000,000
29-Sep-18	150,000,000
30-Oct-18	50,000,000
26-Nov-18	80,000,000
6-Dec-18	80,000,000
26-Dec-18	15,000,000
25-Mar-19	80,000,000
18-Apr-19	100,000,000
23-May-18	50,000,000
21-Jun-19	70,000,000
26-Jul-19	50,000,000
30-Sep-19	92,262,044
31-Dec-19	96,345,757
Total	3,493,607,801/-

5. In terms of the Facility Agreement, the principal loan amount was to be repaid in 12 equated monthly installments as stated in the Loan agreement and the same is mentioned in the table below:-

S.NO.	DATE	PERCENTAGE OF PRINCIPAL OUTSTANDING
1.	31.03.2020	8.33%
2.	30.06.2020	8.33%
3.	30.09.2020	8.33%



4.	31.12.2020	8.33%
5.	31.03.2021	8.33%
6.	30.06.2021	8.33%
7.	30.09.2021	8.33%
8.	31.12.2021	8.33%
9.	31.03.2022	8.33%
10.	30.06.2022	8.33%
11.	01.09.2022	8.33%
12.	31.12.2022	8.33%

6. In terms of the Facility Agreement, the amount disbursed carried an interest rate of 17 % per annum. Any outstanding amounts or part thereof which were not paid on their respective due dates, were to carry a default interest rate of 4% per annum over and above the applicable interest rate, from the date of such default to the date of actual payment. The Facility was secured by certain assets, a details of which are given in **Annexure-6** of the application.
7. It is stated in the application that as per Clause 18 of the Facility Agreement, the whole of the loan shall become forthwith due and payable by the Corporate Debtor and the Lender can enforce the security created in its favour upon happening of any one or more of the events specified in the Events of Default clause.



8. When the debt became due under the Facility Agreement dated December 20, 2017, the Corporate Debtor has committed default in repayment of the loan amount as per the agreement and committed default in terms of clause 18.

9. Due to the Corporate Debtor's failure to adhere to various terms and conditions outlined in the Facility Agreement, resulting in default of subsequent payments, M/s Altico Capital Limited took action in accordance with the provisions stipulated in the Facility Agreement. Initially, M/s Altico Capital Limited issued a Covenant Default Notice on 21.11.2019, highlighting the numerous breaches committed by the Corporate Debtor. Thereafter, owing to failure of the Corporate Debtor in complying with its payment obligations, M/s Altico Capital Limited issued the First Payment Default Notice dated 19.10.2020, pertaining to payments due on 30.09.2020, which fell outside the scope of the COVID-19 relief as provided under RBI guidelines. Additionally, M/s Altico Capital Limited issued the Second Payment Default Notice dated 11.12.2020. Despite receiving these notices, the Corporate Debtor failed to make any repayments of the loan amount. Subsequently,



M/s Altico Capital Limited executed an Assignment Agreement on 04.03.2021, effective from 10.03.2021. **This agreement transferred all rights of M/s Altico Capital Limited under the Facility Agreement, including all associated security interests and rights established by the Corporate Debtor and other obligors, along with Altico Capital Limited's entitlements, to the Applicant i.e. Assets Care and Reconstruction Enterprise Limited.**

10. In light of the aforesaid Corporate Debtor's defaults, the Applicant issued Acceleration and Enforcement Notice dated 06.09.2021. This notice called for the repayment of the entire outstanding amount under the Facility Agreement as on August 31, 2021, totaling to Rs. 357,46,85,097/- (*Rupees Three Hundred Fifty Seven Crore Forty Six Lakhs Eighty Five Thousand and Ninety Seven Only*). Despite serving the said notice, the Corporate Debtor failed to make any repayment of the loan amount.
11. Thereafter, a Settlement Agreement dated 29.9.2021 was executed between the Applicant/Financial Creditor, Respondent/Corporate Debtor, Corporate Gurantor-M/s Supertech Limited, Mr. R.K Arora and Mr. Mohit Arora



whereby it had been agreed by the Corporate Debtor to pay the total outstanding amount owed to the Applicant herein by way of settlement which comprised of conveyance of identified assets i.e. various units in the Project Cape Town within the stipulated timeline equivalent to the settlement amount agreed therein.

12. In terms of the Settlement Agreement, the Corporate Debtor was obligated to convey to the Applicant various units (as identified and set out in the Settlement Agreement) within the stipulated time lines as detailed below:

- i.** On or before the Tranche 1 Long Stop Date (that is October 04, 2021, being 5 (Five) days from the execution date), the Corporate Debtor was obligated to duly convey to the Applicant the Tranche 1 Cape Town Units listed in Part A of Schedule 3 of the Settlement Agreement; and
- ii.** On or before the Tranche 2 Long Stop Date (that is December 28, 2021, being 90 (Ninety) days from the execution date), the Corporate Debtor were obligated to duly convey to the Applicant the Tranche 2 Cape Town



Units listed in Part B of Schedule 3 of the Settlement Agreement.

- 13.** It is alleged by the Applicant in the application that instead of complying with the terms of the Settlement Agreement, to discharge its liability, the Corporate Debtor tried to forge certain documents to show discharging of its liability as agreed in the Settlement Agreement and also it has been found that the Corporate Debtor has been siphoning off funds from other units mortgaged in favor of the Applicant. As the Corporate Debtor failed to comply with the terms of the Settlement Agreement, the said agreement was terminated vide Notice of Termination dated 05.4.2022 and as per clause 10.1 of the Settlement Agreement, the Corporate Debtor became liable to pay the total outstanding amount forthwith to the Applicant as per the Facility Agreement.
- 14.** In view of the aforesaid events, the corporate debtor became liable to repay outstanding amount of Rs.482,76,24,531/- which comprises principal amount of Rs.225,10,43,610/- and interest amount of Rs.2,02,10,87,175/- and default interest of Rs.55,54,93,746/- as on 31.03.2023.



15. In support of the above default by the Corporate Debtor to re-pay the financial debt, the Applicant has also filed report of the Information Utility i.e. National E-Governance Services Ltd. (hereinafter referred as “**NeSL**”) as regard the Record of Default pertaining to the Corporate Debtor i.e. Supertech ORB Project Pvt. Ltd. dated 20.12.2022, annexed as **Annexure No. 23** with the application.
16. In view of the aforesaid default by the Corporate Debtor in repaying the financial debt, **the Applicant proceeded with filling the present application under Section 7 of the I&B Code, 2016 stating that the total outstanding amount is Rs. 482,76,24,531 with date of default being 25.03.2022.**

WRITTEN SUBMISSION/REPLY ON BEHALF OF THE RESPONDENT/CORPORATE DEBTOR

17. The Respondent has filed the Written Statement vide Dairy No. 25011 dated 20.09.2023 wherein it has made the following submissions which are as follows:-

- i. It is contended by the Respondent that Manish Kumar Manav who has filed the present application, acting as Authorized Representative does not hold valid



authorization, which is evident from Board Resolution dated 25.02.2023.

- ii.** It is also contended by the Respondent that Applicant has failed to disclose the fact that an appeal has been filed before the Hon'ble NCLAT, New Delhi in Company Appeal No. 406/2022 tiled as R.K Arora versus UBI & Anr., against the Order dated 25.03.2022 of NCLT, New Delhi passed in CP(IB) No. 204/2021 titled as Union Bank of India versus Supertech Limited wherein CIRP was initiated against the Supertech Limited before the Hon'ble NCLAT, New Delhi. The Hon'ble NCLAT, New Delhi vide an interim order dated 10.06.2022 held the CoC would be constituted only with respect to the Eco- Village Project-II under the supervision of IRP and further directed as under:-

“.....

21. We are conscious of the fact that ‘CIRP’ has been initiated against the Corporate Debtor. ‘CIRP’ has commenced against all the projects of the Corporate Debtor. ‘CIRP’ encompasses all the assets of the Corporate Debtor including all Bank Accounts. The IRP has already been appointed and has taken steps by informing all concerned including Banks to add the name of IRP for operation of the Account. The Learned



Counsel for the Appellant made submissions and also filed an I.A. No. 1468 of 2022 by which Resolution cum Settlement Proposal has been submitted by the Management with an object to carry out the construction of all the projects.

22. As noted above, the consequence of 'CIRP' is that all assets of the Corporate Debtor come in the control and management of the IRP. All bank accounts are to be operated with the counter signature of the IRP. No amount from any account can be withdrawn without the counter signature and permission of the IRP. IRP under the IBC has responsibility to run the Corporate Debtor as a going concern. Further when Promoters are ready to extend all cooperation with all its staffs and employees to the IRP, we see no reason for not to direct the IRP to proceed with construction of all the projects under the overall supervision and control of the IRP. We by an Interim Order dated 12th April, 2022 directed not to constitute the 'CoC' which Interim Order is continuing as on date.

23. In the facts of the present case and keeping in view the submissions raised by the Learned Counsel for the parties, we are of the view that in 'CIRP' Process, Project-Wise Resolution to be started as a test to find out the success of such Resolution. Keeping an eye regarding construction and completion of the projects, we at present, are of the view that Interim Order dated 12th April, 2022 staying the constitution of CoC be modified to the extent that CoC be constituted for the Eco Village II Project only with all Financial Creditors including Financial Creditors/Banks/Home Buyers. The Committee of Creditors of Eco Village II Project shall start process for Resolution of Eco Village II Project. The IRP shall separate the claims received with regard to the Eco Village II Project and prepare



an 'Information Memorandum' accordingly and proceed for meeting of the CoC as per the Code. It is further directed that even for Eco Village II Project, the IRP shall carry the Project and continue the project as ongoing project by taking all assistance from the ex-management, employees, workmen etc. We however make it clear that other projects apart from the Eco Village II Project shall proceed as ongoing project basis under the overall supervision of the IRP. IRP in his report stated that with regard to the projects, there are separate accounts as per 'RERA' Guidelines. Detail account of all the inflow and outflow with regard to each project shall be separately maintained as per the 'RERA' Guidelines. 70% of the amount received with regard to the project shall be utilized for construction purpose only with regard to the disbursement of rest 30 % amount, we shall issue appropriate direction after receiving further Status Report and after hearing all concern subsequently.

24. The Promoters of the Corporate Debtor has submitted that they shall arrange for Interim Finance to support the ongoing construction of the different projects by arranging finances as submitted in their Settlement cum Resolution Plan. Annexure 3 to the I.A. No. 1468 of 2022, with an object to complete the projects and clear the outstanding of all Financial Institutions including the Financial Creditors on the basis of 100% ledger balance and also payment to the Operational Creditor. The pendency of this proceeding shall in no manner hinder the Appellant to approach the Financial Creditors for entering into Settlement with the Financial Creditors. With regard to the disbursement to the Financial Creditors, out of 30% of the amount, we shall issue necessary direction after receiving the status report and receiving the progress of the projects.



25. In view of the foregoing discussions, we issue following Interim Directions:

i. The Interim Order dated 12th April, 2022 continuing as on date is modified to the extent that IRP may constitute the CoC with regard to the Project Eco Village II only.

ii. After constitution of CoC of Eco Village II Project, the IRP shall proceed to complete the construction of the project with the assistance of the ex-management, its employees and workmen.

iii. With regard to the Eco Village II Project, the IRP shall proceed with the completion of the project, Resolution and shall be free to prepare Information Memorandum, issue Form -G, invite Resolution Plan however no Resolution Plan be put for voting without the leave of the Court.

iv. All receivables with regard to the Eco Village II Project, shall be kept in the separate account, earmarked account and detail accounts of inflow and outflow shall be maintained by the IRP.

v. That all other projects of the Corporate Debtor apart from Eco Village II Project shall be kept as ongoing project. The Construction of all other projects shall continue with overall supervision of the IRP with the assistance of the ex-management and its employees and workmen.

...”

- iii.** The Order dated 10.06.2022 passed by the Hon’ble NCLAT was further challenged before the Hon’ble Supreme Court by Union Bank of India and Indiabulls Asset Reconstruction Company. Regardless, the



challenged a subsequent order dated 10.01.2023 passed by the Hon'ble NCLAT vide **Civil Appeal No. 1975 of 2023**. In view of the appeals arising from similar proceedings, all the above-mentioned appeals were heard together before the Hon'ble Supreme Court.

- iv.** That in the Civil Appeal No. 1975/2023 preferred by the Applicant, it had preferred an I.A. No. 73156 of 2023 seeking substantially the same prayers as in the suit in Re: CS (COMM) NO. 353 of 2023. The prayers specifically dealt with the properties under the unattested deed of hypothecation dated 20.12.2017 executed between the Respondent herein, the Supertech Limited and Security Trustee (IDBI Trusteeship). As informed by the Respondent in the appeal the Civil Appeal No. 1975/2023 is pending before the Hon'ble Supreme Court and is listed for further direction on 24.08.2023. As contended by the Respondent in the reply that since the appeal of the Applicant has not been decided and is still pending before the Hon'ble Supreme Court of India, the Applicant has not approached this Hon'ble Court with



clean hand, while suppressing the aforementioned facts and circumstances. It is also contended that the application filed by the Applicant in this case is a tactical move on part of the Applicant to induce pressure on the Respondent by initiation of litigation on various forums for the same cause and abuse the process of law to harass the Respondent.

- v. It is also contended that Applicant has hidden these facts from this tribunal while filing the said application under section 7 before this tribunal despite knowing the fact that applicant has already filed its claim before the Interim Resolution Professional (IRP) who has been appointed in the CIRP of M/s Supertech Limited (the *Corporate Guarantor in the present case*) and simultaneously settlement talks are also undergoing and parties are hopeful that substantial outcome can be achieved. The fact about an ongoing settlement has been suppressed in the Application, it is evident that the present Application like the various other litigations initiated by the Applicant has solely been intended to coerce the Respondent into agreeing to



terms favourable to the Applicant. That it is humbly submitted that, it is merely a method of hanging a sword on the Respondent and is in bad faith.

- vi.** It is further contended by the Respondent that the instant application which has been filed by the applicant is barred by limitation because as per the covenant default notice dated 21.11.2019, default date is 20.12.2017 according to the Facility Agreement. Even as per the Assignment Agreement dated 04.3.2021, w.e.f. 10.03.2021, M/s Altico Capital Limited assigned all its rights and security interest in the Facility Agreement to the Applicant as per the default date 20.12.2017. After this assignment, the Applicant issued an Acceleration and Enforcement Notice dated 06.09.2021 whereby the entire amount of Rs.357,46,85,097 (Rupees Three Hundred Fifty Seven Crore Forty Six Lakhs Eighty Five Thousand and Ninety Seven Only) was recalled by the Applicant under the Facility Agreement as on 31.08.2021.
- vii.** Therefore, in view of the aforesaid submissions, it has been pleaded by the Respondent that the date of



default is 20.12.2017 as per the facility agreement and hence, the present application under Section 7 of the I&B Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, is barred by time as articulated under Article 137 of the Limitation Act, 1963, which provides a period of limitation of 3 years from the date when the right to apply accrues.

viii. In support of above submissions, the Respondent has placed reliance on Judgments passed by the Hon'ble Supreme Court in ***Gaurav Hargovindbhai Dave v Asset Reconstruction Company (India) Ltd. (2019) 10 SCC 572; B.K Educational Services Private Limited v Parag Gupta and Associates, Civil Appeal No. 23988 of 2017 MANU/SC/1160/2018; Babulal Vardharji Gurjar vs Veer Gurjar Aluminium Industries Pvt. Ltd & Ors. MANU/SC/0589/2020 and Sabarmati Gas Limited vs Shah Alloys Limited.*** In all these cases, it has been categorically held that Application filed by the applicant under section 7 and 9 of the I&B Code, shall



be government by the Article 137 of the Limitation Act, 1963 for computing the period of limitation of 03 years. Therefore, the Corporate Debtor in its reply contended that in view of the above ground solely, this Application should be dismissed, as it is time barred.

- ix.** The Respondent further contends that the Applicant on 25.03.2022 unilaterally ended the settlement agreement executed on 29.09.2021, citing reason that the Respondent violated the conditions of the agreement's conditions. Subsequently, the Applicant issued a notice on 05.04.2022 as a part of procedural requirements, seeking payment of the outstanding amounts. It has been argued by the Respondent that even if it is assumed that the Respondent has committed a breach of of the terms of the Settlement Agreement, this will also not entitle the Applicant to file an application under section 7 of I&B Code, 2016. In this regard, the Respondent has placed reliance on the Judgment passed by the Hon'ble NCLAT, New Delhi in the matter of ***Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd 2020 SCC OnLine NCLT***



1838, wherein it was observed that a mere obligation to pay does not bring the liability within the ambit of 'financial debt' as defined under IBC. The debt, along with interest, if any, should be disbursed against the consideration for the time value of money. Mere breach of terms of any agreement including a Settlement Agreement by a party, whereby some payment was due, would not fall within the scope of Section 5(8) of IBC, so as to constitute a 'Financial Debt'..... it was further observed that mere obligation to pay under a Settlement Agreement would not amount to disbursement of amount for consideration against the time value of money, and thus, breach of such obligation would not entitle a party to invoke CIRP against the other party. It was also observed that dishonour of cheques handed over pursuant to the settlement agreement cannot be termed as a financial debt. Respondent has also placed reliance on the judgement passed by the Hon'ble NCLT Delhi in **Nidhi Rekhan v. Samyak Projects Pvt Ltd** held that a debt obligation arising out of a settlement agreement cannot be attributed as a



*financial debt. That the New Delhi Bench of the **Hon'ble National Company Law Tribunal (NCLT) in Ahluwalia Contracts (India) Limited v. Logix Infratech Private Limited (Ahluwalia)**, while dealing with an operational debt held that a default under the terms and conditions of a settlement agreement does not constitute an 'operational debt' for the purposes of the Insolvency & Bankruptcy Code, 2016 (IBC).*

- x.** Furthermore, it is stated by the Respondent that another litigation is pending before the appropriate judicial forum in a suit numbered as CS (COMM) No. 352 of 2023.

REJOINDER FILED BY THE APPLICANT

18. The Applicant has filed rejoinder vide dairy no. 2413 dated 06.9.2023 wherein applicant has denied all the allegations raised by the respondent in its reply and made the following submissions in support of its claim which are as under:-

- i.** It is contended by the applicant that respondent has falsely stated the date of default as 20.12.2017



whereas date of default has rightly been stated in Part-IV of the Application which is 25.03.2022.

- ii.** It is also contended by the Applicant that the Corporate Debtor has admitted its liability towards the outstanding amount as per the Facility Agreement in the Settlement Agreement which is in itself constitute fresh period of limitation. The same finds support in Section 18 of the Limitation Act, 1963, the relevant portion of which is extracted below:

*"18. Effect of acknowledgment in writing-
(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."*

- iii.** The above law was recently reiterated by the Hon'ble Supreme Court in ***Dena Bank Vs. C. Shivkumar Reddy and Anr., (2021) 10 SCC 330*** wherein it was ***held that*** "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.”

- iv.** The judgements relied upon by the Respondent has ***Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd 2020 SCC OnLine NCLT 1838***, is not applicable to the present matter as the principal borrower was not party to the settlement agreement and there was no consideration for the time value of money and ***Ahluwalia Contracts (India) Limited v. Logix Infratech Private Limited (Ahluwalia)*** is also not applicable in the present matter as the same is with respect section 9 of the I&B Code,2016 which was set aside by the Hon’ble NCLAT vide order dated 08.09.2022. The another judgement which has been relied upon by the Respondent is regarding investment made in the real estate project in ***Company Appeal (AT) (Insl.) No. 696 of 2022*** which is not pertaining to the issues raised in the present application.



- v.** The another judgement relied upon by the Respondent/ Corporate Debtor is Nidhi Rekhan vs. Samyak Project Private Limited which is also not applicable to the issues raised in the present case as the said matter is about speculative investment made by the allottee who cannot be categorized as Financial Creditor under the Code.
- vi.** The Respondent has not provided any documentation to demonstrate that they have made payments as per the terms of the Facility Agreement. Conversely, the Applicant has submitted several documents on record including Record of Default issued by NeSL that clearly highlight the Respondent's defaults in paying up the financial debt. Furthermore, the Applicant has also presented multiple documents outlining the security arrangements put in place to secure the facility.
- vii.** It is finally contended by the Applicant that in light of the undisputed fact that the Respondent is obligated to make payments under the Facility Agreement and subsequently as per the Settlement Agreement, which they failed to comply with resulting into the entire



outstanding amount as per the Facility Agreement becoming due for payment, the present application filed under Section 7 of the I&B Code, 2016 may be allowed to initiate CIRP against the Corporate Debtor.

FINDINGS AND ORDER

- 19.** We have perused the documents available on record and also heard the arguments of the Ld. Counsels of both parties.
- 20.** The first issue for consideration before us is whether the application filed by the Financial Creditor is admissible in the light of the fact that CIRP has already been initiated against the Corporate Guarantor i.e. M/s Supertech Ltd.
- 21.** A contention has been raised by the Respondent/Corporate Debtor that this application filed under Section 7 is not maintainable as Corporate Guarantor i.e M/s Supertech Limited is undergoing Corporate Insolvency Resolution Process vide an order dated 25.03.2022 passed in CP (IB) No. 204/2021 tilted as Union Bank of India versus M/s Supertech Limited passed by the NCLT, New Delhi-IV. Even the Ld. Counsel for the Corporate Debtor during the Course



of hearing has argued that this Petition is not maintainable on the ground of multiple proceedings.

- 22.** As discussed in the pleadings, an appeal has been filed against the said order before the Hon'ble NCLAT, New Delhi that is titled as ***R.K Arora versus UBI and Anr- Company Appeal No. 406/2022***. It is pertinent to note that the CIRP has been initiated against M/s Supertech Limited by the Union of Bank of India and India Bulls Asset Reconstruction Limited for credit facility of Rs. 150 crores granted for Eco-Village Project-II. The Hon'ble NCLAT while reversing the order dated 25.03.2022 passed by the NCLT, New Delhi directed to initiate the CIRP for a particular Project and to constitute CoC for the said project only, vide an interim order dated 10.06.2022. This order has been upheld by the Hon'ble Supreme Court vide order dated 11.05.2023 in Civil Appeal No. 1975 of 2023. The Hon'ble Apex Court vide order dated 11.05.2023 directed to keep the other projects to continue under the supervision of IRP. Infusion of funds in the ongoing projects by the promoters shall be treated as interim finance. Decision of the Hon'ble Supreme Court in the main matter is still pending adjudication. It may also be



noted that CoC has been constituted in relation to the Eco-Village-Project-II of the M/s Supertech Limited which was funded by the Creditors namely, Union Bank of India and India Bulls Asset Reconstruction Limited.

The Respondent/Corporate Debtor while raising the issue of initiating CIRP simultaneously against the Principal Borrower and the Corporate Guarantor, placed reliance on a judgment passed by the Hon'ble Appellate Tribunal in the case of **Dr. Vishnu Kumar Agarwal vs M/S Piramal Enterprises Ltd- Company Appeal (AT) (Insolvency) No. 346 of 2018** wherein it held that “.....*There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though*



there is a provision to file joint application under Section 7 by the ‘Financial Creditors’, no application can be filed by the ‘Financial Creditor’ against two or more ‘Corporate Debtors’ on the ground of joint liability (‘Principal Borrower’ and one ‘Corporate Guarantor’, or ‘Principal Borrower’ or two ‘Corporate Guarantors’ or one ‘Corporate Guarantor’ and other ‘Corporate Guarantor’), till it is shown that the ‘Corporate Debtors’ combinedly are joint venture company.....”

- 23.** In the present matter, the Project namely, North Eye Cape Town is funded by M/s Altico Capital Limited under the Facility Agreement which was later on assigned to the present Applicant/Financial Creditor. The CIRP initiated against M/s Supertech Ltd. is by different financial creditors for different projects under the separate agreement. We have noted that CIRP was initiated against M/s Supertech Limited that is though Corporate Guarantor of the present Corporate Debtor i.e. Supertech ORB Project Private Ltd. (principal Borrower in the instant case) but it is initiated by the different Financial Creditor namely, Union Bank of India and India Bulls Asset Reconstruction Assets Private Limited



before the NCLT, New Delhi and not the present Financial Creditor i.e. M/s Altico India Ltd. later the Asset Reconstruction Enterprises Ltd. as Assignee. The Hon'ble NCLAT order in the ***Dr. Vishnu Kumar Agarwal (Supra)*** applies in such case where there is same Financial Creditor that has filed separate application against the Principal Borrower and once one application has been admitted, the second application by the 'Same' Financial Creditor for same set of default and claim cannot be admitted. However, in the present case, it is not the "Same" Financial Creditor that has got CIRP initiated against the M/s Supertech Limited. The Present Applicant/Petitioner is altogether different Financial Creditor seeking initiation of the CIRP for different set of claim and default against the present Corporate Debtor who is Principal Borrower of the financial facilities provided by the different set of Financial Creditor. The Contentions of the Ld. Counsel representing the Corporate Debtor relying upon the judgement passed by the Hon'ble NCLAT in ***Dr. Vishnu Kumar Agarwal (Supra)*** is thus not legally tenable and therefore, we are not in agreement with

-Sd/-

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this contention of the Corporate Debtor and therefore, the same is rejected.

24. The Ld. Counsel representing the Corporate Debtor contended that the Applicant has already submitted its claim in FORM-C dated 08.04.2022 before the Resolution Professional (RP) of M/s Supertech Ltd. being the Corporate Guarantor of the present Corporate Debtor and therefore, the present application is not maintainable. In our opinion, this contention of the Corporate Debtor is not sustainable, as filing of claim before the RP in the ongoing CIRP against the Corporate Guarantor i.e. M/s Supertech Limited does not preclude the Applicant from filing this present application against the Corporate Debtor for a particular default is in accordance with the provision of the Code. Moreover, the present Financial Creditor is not the one who has got CIRP initiated against M/s Supertech Limited. Therefore, Financial Creditor in the present case cannot be precluded from seeking to initiate CIRP against the Principal Borrower.

25. The second issue raised in the matter is whether the present application is barred by limitation. The contention



of the Corporate Debtor/Respondent raised in the reply is that this petition is barred by limitation as the date of default is 20.12.2017 as per the facility agreement and on the basis of such default date, Acceleration and Enforcement Notice dated 06.09.2021 was issued to the Corporate Debtor. It is thus contended that due to this situation, the Applicant has already exceeded the period of limitation of 03 years as provided under Article 137 of Limitation Act, 1963 for the purpose of filing this application.

- 26.** We have considered the objections raised by the Ld. Counsel representing the Corporate Debtor that present petition being barred by limitation. However, on perusal of the factual matrix, we found that the Corporate Debtor has signed the Settlement Agreement dated 29.09.2021 which was terminated on 25.03.2022 wherein the total outstanding amount of Rs. 353,25,23,202/- is shown as due and payable forthwith by the Corporate Debtor. The Ld. Counsel representing the Financial Creditor has relied upon the judgement passed by the Hon'ble Supreme Court in ***Dena Bank (Supra)*** in their Rejoinder Affidavit, thereby



holding that Section 18 of the Limitation Act, 1963 is applied in the proceedings initiated under the IBC, 2016.

- 27.** The Hon'ble NCLAT also while relying on the judgement of the Hon'ble Supreme Court passed in the matter of ***Dena Bank (Supra)*** has held in the matter ***Ishita Halder Vs. Mr. Siba Kumar Mohapatra (2021) ibclaw.in 398 NCLAT*** that offer of OTS can be relied upon for the purpose of considering acknowledgement under Section 18 of Limitation Act. We also observe that in the present matter, settlement agreement was executed on 29.09.2021 for discharge of entire financial liability which however, the Corporate Debtor failed to comply with leading to termination of the Settlement Agreement on 25.03.2022 which therefore, clearly brings the provision of Section 18 of Limitation Act, 1963 into consideration for the purpose of reckoning the limitation period. Accordingly, the present application under Section 7 has been found to be filed within the limitation period.
- 28.** The next issue for consideration before us is whether the Corporate Debtor has committed default in repayment of the loan amount disbursed under the Facility Agreement.



29. It is significant to mention here that in the Settlement Agreement, the Corporate Debtor has specifically mentioned that

“The Company has availed a term loan facility of an aggregate principal amount of up to INR 430,00,00,000/- (Rupees Four Hundred Thirty Crores only) from Altico (defined hereinunder) pursuant to the Financing Documents (defined herein under) ("Facility"). The Company has created security set out in Schedule 1 hereof in favour of the Security Trustee, to secure the Facility pursuant to the Financing Documents (hereinafter collectively referred to as "Security").

Thereafter, Altico (defined hereinunder) assigned to ACRE, the Facility it disbursed under the Financing Documents (defined hereinunder) together with all the rights, title and interest in the Facility, the Financing Documents and the underlying security interest and pledges in respect of the Facility vide Assignment Agreement dated March 4, 2021. The Total Outstanding Dues (defined hereinunder) of the Company as on September 15, 2021 under the Financing Documents were as under:

Particulars	Amount (INR)
Principal Outstanding	2522,769,801
Other Dues including interest, penal interest, maturity premium, other recoverables etc.	1,009,753,401
Total	3,532,523,202

The Company has been in breach of the covenants of Financing Documents since November 2019 Since then, Altico (defined hereinunder) in exercise of its rights under the Financing Documents has issued: (a) Covenant Default Notice dated November 21, 2019; (b) First Payment Default



Notice dated October 19, 2020; (c) Second Payment Default Notice dated December 11, 2020; and (d) Non-performing asset classification notice dated January 08, 2021 to the Obligors inter alia making them aware of the amount due and outstanding in connection with the Facility.

ACRE in accordance with the terms of the Financing Documents and the Assignment Agreement dated March 4, 2021 has issued an Acceleration Notice dated September 6, 2021 thereby recalling the Facility and declaring the Total Outstanding Dues as due and payable forthwith.

Pursuant to the above, the Company has proposed a settlement offer to ACRE whereby the Company and STL will discharge the Total Outstanding Dues of the Company under the Financing Documents by way of a settlement consisting of conveyance of asset equivalent amounting to INR 1,77,71,60,025 /- (Rupees One Hundred Seventy Seven Crores Seventy One Lakhs Sixty Thousand and Twenty Five only) in favour of ACRE/ its nominee. The fair market value of the assets being offered by the Company and STL as part of the settlement has been assessed by an independent valuer, CBRE vide its final valuation report dated September 29, 2021 and basis this valuation report, parties have agreed upon the value of the assets stated above. ACRE is agreeable to accept the said settlement offer on certain terms and conditions. Accordingly, the Company and ACRE are executing this Agreement to record the terms and conditions for the full and final discharge of Total Outstanding Dues (defined hereinunder) payable by the Company to ACRE in terms hereof.

- 30.** The aforesaid agreement executed by the parties clearly states that Company i.e. Corporate Debtor has been in breach of financing terms. The contentions raised by the Corporate Debtor in its reply that respondent has



committed no breach of the settlement agreement is not sustainable in the light of the fact that same has been admitted by the Corporate Debtor in the Settlement Agreement itself wherein the total amount due is Rs. 353,25,23,202 as on 15.09.2021. Even Corporate Debtor has agreed to settle the dues in lieu of the Settlement Agreement under para (xxi) of the Reply filed by the Corporate Debtor.

- 31.** On perusal of the Record of Default of the Corporate Debtor maintained by the Information Utility namely National E-Governance Services Limited (NESL) dated 20.12.2022, we find that this is the record w.r.t. the status of authentication by the debtor shown along with the date of default as 30.11.2020, which is further extended up to 25.03.2022 in view of the Settlement Agreement being defaulted on 25.03.2022 due to not complying with its terms and conditions and the outstanding debt being due on the date of default coming to Rs.482,76,24,531/- as mentioned in the Part IV of the application. Therefore, we are satisfied that there exists debt and default and the same is corroborated by the Information Utility certificate filed along



with the application. Copy of Record of Default Report dated 20.12.2022 has been annexed as **Annexure- A/23** with the Application.

- 32.** In case of ***Innovative Industries Limited vs ICICI Bank reported in 2018 1 SCC 407***, it has been clearly held by the Hon'ble Supreme Court that if there is a debt and default in repayment of debt and application filed by the Applicant/Financial Creditor is complete in all respect, the application under Section 7 of I & B Code 2016, is to be admitted. In the present case, we have clearly found that there is a debt and also there is a clear default in payment of debt amount as per the Facility Agreement as well as the Settlement Agreement which is more than the threshold limit as well as the default in payment of entire loan amount after issuing of recall notice, has also occurred. Therefore, we are convinced that the present application filed under Section of 7 of I & B Code 2016, deserves to be admitted.
- 33.** As regards the objection of the Respondent in the reply that Mr. Manish Kumar Manav was not authorized to file the application has not been found correct as he is Associate Vice President of the Applicant Company and in resolution



dated 25.02.2023, the Associate Vice President of the Applicant Company has been authorized to file the application, petition etc. in a legal proceedings, which will cover the application filed u/s 7 of the I&B Code as well also. Therefore, this objection of the Respondent is also tenable and is hereby rejected.

- 34.** As regards the plea taken by the Respondent that application u/s 7 is not maintainable on breach of the Settlement Agreement relying on the decision of NCLAT in case of ***Amrit Kumar Agarwal (supra)***, the same is not applicable in the present case as in the above cited case the original application filed u/s 7 was withdrawn by the petitioner on entering into a settlement agreement with the Corporate Debtor and later, another application was filed after breach of the terms of the said settlement agreement hence, for such breach of settlement after withdrawal of original application u/s 7, it was held by the Hon'ble NCLAT that *a mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against time value of money and breach thereof would not entitle the Appellant (the Financial Creditor) to trigger CIRP*



against the Respondent (the Corporate Debtor). The same is not the case here. Other cases laws cited are also not applicable in the present case as one is relating to speculative transaction and second one is in respect of the Operational Debt u/s 9.

- 35.** In view of our above findings, we are satisfied that the Applicant/Financial Creditor has proved the debt and the default, which is more than the threshold limit of one crore. The application is also filed within limitation period and complete in all respect and a resolution professional is also proposed as per section 7(3)(b). Accordingly, the present application under Section 7, has been found fit to be admitted as per Section 7(5) of the I & B Code, 2016.
- 36.** In Part III of the application, the Financial Creditor has proposed the name of Mr. Shailendra Ajmera as Interim Resolution Professional. His Registration Number is IBBI/IPA-001/IP-P00304/2017-2018/10568, R/o Ernst & Young LLP, 3rd Floor, Worldmark 1, Aerocity Hospitality, New Delhi, National Capital Territory of Delhi, 110037, Email: shailendra.ajmera@in.ey.com. He has duly given the consent in Form No.2 dated 05.04.2023 annexed as



Annexure 26 (Colly) with the Application. The Law Research Associate of this Tribunal, Ms. Ankita Sharma, has checked the credentials of Mr. Shailendra Ajmera, and found that there are no disciplinary proceedings pending against the proposed Resolution Professional and also, there is nothing adverse against him. Upon verification from the website of IBBI, it is found that IRP holds valid authorization till 16 May 2024. After considering these details, we appoint Mr. Shailendra Ajmera, Registration No. IBBI/IPA-001/IP-P00304/2017-2018/10568, as Interim Resolution Professional (IRP).

- 37.** In the given facts and circumstances of the case as per our above findings, the present application u/s 7 being complete in all respect and having established the default in payment of the Financial Debt for the default amount being above the threshold limit and an IRP also having been appointed as per above para 31, the application is admitted in terms of Section 7(5) of the I & B Code, 2016 against the Corporate Debtor i.e. M/s Supertech ORB Project Private Limited and accordingly, moratorium is declared in terms of Section 14 of the Code.

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- 38.** The IRP is directed to take steps as mandated under section 13 and 15 of the IBC for making public announcement about the commencement of CIRP against the Corporate Debtor and moratorium against it u/s 14, and also take necessary actions as per sections 17, 18, 20 and 21 of IBC, 2016.
- 39.** The IRP shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors (CoC) and shall file a report certifying the constitution of the CoC to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the CoC within seven days of filing the report of Constitution of the CoC. The IRP is further directed to send regular progress reports to this Tribunal every month.
- 40.** As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

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- (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)** It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period.

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- (f) The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.
- (g) The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33 as the case may be.”

41. We direct the Financial Creditor to deposit a sum of Rs.2,50,000/- 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 amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the IRP on the conclusion of CIRP.

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42. A certified copy of the order shall be communicated to both the parties. The learned counsel for the petitioner shall deliver a certified copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a certified copy of this order to the IRP at his e-mail address forthwith.

43. List the matter on 23rd November, 2023 for filing of the progress report/further proceeding.

44. Ordered Accordingly.

-Sd/-

**(Ashish Verma)
Member (Technical)**

Dated : 13.10.2023

Ankita Sharma
(LRA)

-Sd/-

**(Praveen Gupta)
Member (Judicial)**