



**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

(IB) No. 1027(PB)/2018

In the matter of:

**M/s Omkara Asset Reconstruction
Private Limited**

...Financial Creditor/Applicant

Having Registered Office At:

9, M.P. Nagar, 1st Street
Kongu Nagar Extension
Tirupur, Tamil Nadu- 641607

Versus

**M/s Vikas Multiplex Developers
Private Limited**

...Corporate Guarantor

Having Registered Office At:

Bhagwan Sahai Palace
Second Floor, Naya Bans Main Market,
Sector-15, Noida, Gautama Buddha Nagar
UP-201301

Order pronounced on: 15.06.2023

**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.**

CORAM:

**CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**



Appearances

For the Financial Creditor : Mr. R. Parthasarathy, Mr. Adarsh Ramanujam, Mr. Lafeer Ahmad B.F., Mr. Skanda Shekhar, Advs.

For the Corporate Debtor : Mr. Sunil Fernandes, Mr. Siddharth Sharma, Ms. Diksha Dadu, Advs.

ORDER

1. This is an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 by Applicant/Financial Creditor (M/s L & T Finance Limited), a Non-Banking Finance Company incorporated under the provisions of the Companies Act, 1956 having its registered office at **7th Floor, A- Wing, Plot No. 4, Block- BP, Sector- V, Salt Lake, Kolkata, West Bengal- 700091**, acting through its **Branch Office at 5th Floor, DCM Building, 16, Barakhamba Road, Connaught Place, Delhi 110001**. On **24.09.2019**, L& T Finance assigned several debts to M/s Omkara Assets Reconstruction Private Limited (Omkara).
2. Omkara filed CA 4087/2021 seeking to substitute itself and revive **CP 1027/2018** against **M/s Vikas Multiplex (the Corporate Guarantor)** in view of change of law arising from the Hon'ble NCLAT judgement dated **24.11.2020 in the Athena Energy Case. This Adjudicating Authority vide order dated 02.02.2022** allowed the revival of Section 7 application against the guarantor expressly noting the change in law.
3. The Corporate Guarantor ('CG') was incorporated under the Companies Act, 1956 having CIN: U45201UP2006PTC032578. Its registered office is at Bhagwan Sahai Palace, 2nd Floor, Naya Bans Main Market, Sector-15, Noida, Gautam Buddha Nagar, UP 201301.. The Authorised Share capital of CG is Rs1,60,00,000/- and its paid-up share capital is Rs. 1,54,80,000/-.



**BRIEF SUBMISSIONS OF LEARNED COUNSEL APPEARING FOR THE
FINANCIAL CREDITOR ARE AS FOLLOWS:**

4. On **10.11.2014**, a deed of hypothecation was executed by Zillion Infra Projects Private Limited (the Principal Borrower or Borrower) in favour of L&T Finance for the purposes of securing the loan facility amounting to **Rs. 13,00,00,000/-**. On **15.12.2014**, L& T Finance Limited extended Loan of **Rs. 13 Crores** to Principal Borrower. On **11.12.2015 & 14.12.2015**, L & T Finance extended further loan facility (second loan) of upto Rs. 6 crores and upto **Rs. 12 crores** (third loan) respectively to CD. On **22.10.2016**, a supplementary agreement was executed in respect of second and third loan. The second loan was revised to **Rs. 4 crores** and third loan remained at **Rs. 12 crores**.
5. On **02.12.2016**, a guarantee was given by Vikas Multiplex Developers Private Limited, (Corporate Guarantor) for an amount not exceeding Rs. 29 crores. True copies of three loan agreements, deed of Hypothecation along with guarantee agreements are annexed as **Annexure 7 (colly)**.
6. Applicant submits that the Principal Borrower defaulted with respect to all the three loans. L & T Finance declared all three loan accounts as NPA on **10.08.2017**. L& T issued loan recall/termination notice qua all three loan accounts vide three separate letters. On **14.03.2018**, L& T Finance invoked the guarantee and demanded repayment of the defaulted amount from the Corporate Guarantor since Principal Borrower and Corporate Guarantor were jointly and severally liable. The amount demanded was **Rs. 22,70,65,810/-** as on **12.03.2018**.
7. L & T Finance filed a section 7 application against Principal Borrower on **04.06.2018** which was admitted (**CP no 694(PB)/2019**) by this Adjudicating Authority on **05.02.2019**. Simultaneously, on **9.08.2018** L&T Finance filed a section 7 petition against Corporate Guarantor. Financial Creditor/Applicant (Omikara) is claiming **Rs. 23,45,58,486/-** (Rupees Twenty Three Crores Forty Five Lakhs Fifty Eight Thousand Four Hundred Eighty Six only). Details regarding the date, amount and days of default with respect to the facilities granted by Financial Creditor to the Principal Borrower are annexed as **Annexure A-6 (Colly)**. Statement of Account of Principal Borrower under the Banker's Books Evidence Act, 1891 dated **29.05.2018** is



annexed as Annexure A-9 (Colly).

8. Applicant submitted that the issue of parallel proceedings cannot be re-agitated as this Adjudicating Authority vide order dated **02.02.2022** had already considered this issue. Financial Creditor further submitted that this order is *res Judicata* since it was not challenged and has attained finality. It is further submitted by the Financial Creditor that the existence of default by the Principal Borrower cannot be challenged as the Hon'ble NCLT has already accepted such default by admitting CIRP against Principal Borrower.
9. Applicant further submitted that parallel CIRP against Corporate Guarantors has been consistently allowed since *Athena Energy*. It has relied upon various judgements delivered by this Adjudicating Authority and by Hon'ble NCLAT wherein simultaneous proceedings against the principal borrower and Corporate guarantor were held to be valid.
10. Financial Creditor in its written submissions submits that existing pending arbitration is irrelevant in section 7 application.

BRIEF SUBMISSIONS ON BEHALF OF THE CORPORATE GUARANTOR ARE AS FOLLOWS:

11. Corporate Guarantor (CG) submits that the present Application is premature in view of the fact that the extent of liability has not yet been crystallized. It is further submitted by the counsel of CG that arbitration proceedings between the L & T Finance and CG under the deed of guarantee are currently pending.
12. Corporate Guarantor cited few provisions of the facility agreements and contended that L & T finance was required to exercise necessary due diligence before disbursing monies to the Principal Borrower. Further L & T Finance was to ensure compliance with the following procedure prior to making any disbursements under the Facility agreements:
 - (i) certification/ approval by the buyers/customers of the invoices raised by the Borrower upon the buyers;



- (ii) written confirmations by the buyers/customers to the Financial Creditor regarding the amounts due and payable;
 - (iii) approval of the invoices by the Financial Creditor; and
 - (iv) irrevocable instructions from the Borrower to the buyers/customers to remit the amounts payable under the invoices into an escrow account in favour of the Financial Creditor;
 - (v) written confirmations by the buyers/customers to the Financial Creditor that the amounts payable under the invoices would be remitted into the said escrow account.
- 13.** Corporate Guarantor further submitted that L& T Finance has acted in willful breach of the terms and conditions of the Facility agreements. It is the contention of the Corporate Guarantor that facility agreements were extended to the Borrower for specific purposes and for specified limits, with well-defined procedures and further submitted that statement of accounts filed by the L & T Finance shows that monies have been disbursed in an indiscriminate, irregular and unauthorized manner.
- 14.** Corporate Guarantor submitted that L & T Finance and the Borrower (Zillion) unilaterally varied the terms of the Facility Agreements without any intimation to the Corporate Guarantor or without obtaining the consent of the Corporate Guarantor. The same amounts to variance of the terms of the Facility Agreements and the Corporate Guarantor thus stands discharged of its liabilities as surety.
- 15.** It is further contended that the security created by way of hypothecation was liable to be enforced consequent to default on the part of borrower and that the L & T Finance failed to act in a prudent manner in bringing the said assets to sale at the first instance and at the earliest.

ANALYSIS AND FINDINGS

- 16.** We heard the learned Counsels appearing for the Applicant and the



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Corporate Guarantor and perused the record.

- 17.** On perusal of the documents placed on the record, it is seen that CIRP proceedings against the Principal Borrower (Zillion Infrastructures) was admitted vide order dated 05.02.2019. Corporate Guarantor was jointly and severally liable along with Principal Borrower. Hence the question of existing default is not disputed. This Adjudicating Authority vide its order dated 02.02.2022 had fairly considered the issue of parallel proceedings against the Corporate Guarantor after relying upon the judgement of Athena Energy (supra). Order dated 02.02.2022 is extracted below:

ORDER

IA-4087/2021

An application filed by the assignee of the original Financial Creditor seeking two separate prayers one being the restoration of the main IB-1027(PB)/2018 to its original number and second allowing the substitution of the name of the original applicant which was L&T Finance Ltd. by the present applicant namely M/s. Omkara Assets Reconstruction Pvt. Ltd who is the assignee of the debt of the original Financial Creditor, L&T Finance Ltd. The Ld. Counsel states that the L&T Finance Ltd. has assigned its debt to the present applicant by deed of assignment dated 24.09.2019. The copy of deed of assignment is annexed with the application. The Ld. counsel further states that the original application filed by L&T Finance Ltd. against the Corporate Debtor namely Vikas Multiplex Developers Pvt. Ltd. was disposed of vide order dated 21.10.2019 by this Bench relying on the judgment of the Hon'ble NCLAT in ***Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Ltd., Company Appeal (AT) (Insolvency) No. 346 of 2018*** decided on 08.01.2019. The order further records that if there is change in law the parties will have



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liberty to take recourse accordingly. The copy of order is also annexed with the application. The Ld. Counsel for Applicant further states that thereafter in view of the order passed by the Hon'ble NCLAT dated 24.11.2020 in **State Bank of India v. Athena Energy, Company Appeal (AT) (Ins) No.633 of 2020** where the view taken in the case of **M/s. Piramal (supra)** was deviated from and it was laid down that the order in **M/s. Piramal (supra)** was not upheld and further observed that "It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor." Relying on this judgment, the present applicant prays that the main application filed under Section 7 of IBC, 2016 be restored. The copy of order dated 24.11.2020 passed by the Hon'ble NCLAT is annexed.

Considering the documents placed before us along with the orders passed by the Hon'ble NCLAT and submissions made by Ld. counsel for the applicant, we allow the application in terms of prayer 'a' & 'b' thereby restoring IB-1027(PB)/2018 to its original number and further direct that in view of the assignment of the debt in favour of the present applicant through properly stamped deed of assignment, the name of the original applicant, L&T Finance Ltd. be substituted by the name of the present applicant which is Omkara Assets Reconstruction Pvt. Ltd.

IA-4087/2021 is allowed and disposed of.

RA-42/2021 is allowed and disposed of in terms of above order.

Notice be issued to the Corporate Debtor, through all modes.

List the main matter for hearing on 16.03.2022.

18. Relevant extract of the Judgement of **Athena Energy** (supra) is extracted below:

We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the



Creditor receives debt due from the Borrower/ Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in both the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard.

19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor.

- 19.** Applicant had also submitted a chart of cases to establish that parallel proceedings against the corporate guarantor has been consistently allowed since Athena Energy(supra) by various benches of NCLT. Hence, we do not find any reason to differ as the law is very well settled and is no more Res Integra.
- 20.** Corporate Guarantor has also contended the pendency of Arbitration Proceedings between the Financial Creditor and Corporate Guarantor. In our opinion, pendency of arbitration proceedings does not prevent this Adjudicating Authority from initiating the CIRP Proceedings against the Corporate Guarantor as the provisions of the IBC shall have effect notwithstanding anything contained in any other law for the time being in force. For that purpose Part V 'Miscellaneous', Section 238 of IBC, 2016 is relevant which is extracted below:

Section 238: Provisions of this Code to override other laws

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

- 21.** It is a settled law that liability of the Guarantor co-exists with that of Principal Borrower. CIRP proceedings have already been initiated/ admitted against the Principal Borrower (Zillion Infra Projects) by NCLT Bench, New Delhi. On perusal of the records, it is found that an application has been filed by RP of Zillion Infra Projects for approval of resolution plan which is currently pending before this Adjudicating



Authority. We find it pertinent to mention here that the amount to be received by this Financial Creditor in CIRP of Zillion Infra Projects is much less than its admitted claim. Hence, CIRP against CG will enable the Financial creditor to near realize its total Claim.

- 22.** Corporate Guarantor contended that Financial Creditor and Principal Borrower unilaterally varied the terms of the contract without intimation to the Corporate Guarantor and therefore it stands discharged of its liabilities as surety. However, there is nothing on record to show the variance of terms of contract between Financial Creditor and Principal Borrower. In fact a notice **14.03.2018** was issued by the Financial Creditor informing the Corporate Guarantor about the failure of the Principal Borrower to honour its obligation and Financial creditor called upon the Corporate Guarantor to make payment towards the outstanding amount. Reply (if any) to the notice dated **14.03.2018** has not been submitted by the Corporate Guarantor. However, Corporate Guarantor filed reply dated **17.03.2018** to three separate notices under Section 13(2) of the SARFAESI Act, 2002, contending that Financial Creditor has not acted in due diligence while disbursing the loan. Contentions has been already recorded in para 12, 13 & 14 (supra). In our opinion, the contention of not exercising due diligence by Financial Creditor does not in itself suffice to discharge the liability of surety towards the financial creditor. When the Financial Creditor sent the notices under Section 13(2) of SARFAESI Act, 2002 followed by Notice dated **14.03.2018** invoking the bank guarantee, it is only then Corporate Guarantor raised the issue of variance of terms and lack of due diligence on part of Financial Creditor. These issues were raised when Financial Creditor called upon the Borrower to pay its obligation and do not hold ground as liability of guarantor co-exists with that of Principal Borrower and CIRP has been admitted in respect of Principal Borrower.
- 23.** The question of existence of default has already been answered as the proceedings against the principal borrower has already been initiated. Further, the application for initiating CIRP against the Corporate Guarantor is within the period of limitation.
- 24.** In view of the abovementioned reasons, we do not find any hurdle in admitting the application of the Financial Creditor to initiate the CIRP



Proceedings against the Corporate Guarantor.

25. In Application IA 4087/2021, Applicant has prayed for the replacement of IRP and proposes the name of Mr. Sandeep Mahajan as the proposed IRP. IA 4087/2021 was allowed vide order dated 02.02.2022.

ORDER

26. In light of the above facts and circumstances, it is hereby ordered as follows: -

- i.** The Application bearing **(IB)-1027(PB)/2018** filed by the applicant under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating CIRP against the Corporate Guarantor i.e. **M/s Vikas Multiplex Developers Private Limited**, is hereby **ADMITTED**.
- ii.** As a consequence of the Application being admitted in terms of Section 7 of the Code, the moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Corporate Guarantor as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.
- iii.** The Applicant has proposed the name of **Mr. Sandeep Mahajan**, as IRP whose registration number IBBI/IPA-001/IP-P00991/2017-18/11631, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 annexed as **Annexure-A-6 (IA 4087/2021) page num 91 to 93**. Accordingly, **Mr. Sandeep Mahajan, Registration number IBBI/IPA-001/IP-P00991/2017-18/11631; Address: C2/288, Janak Puri, New Delhi- 110058; is appointed as the Interim Resolution Professional ("IRP")**.



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- iv.** In pursuance of Section 13(2) of the Code, we direct the IRP to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v.** During the CIRP period, the management of the CD shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no further opportunity given in this regard.
- vi.** The IRP is expected to take full charge of the CD's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- vii.** The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the CD.
- viii.** The Applicant shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to the approval of the Committee of Creditors ("CoC").
- ix.** The Registry is hereby directed to communicate a copy of the order to the Applicant, the Corporate Guarantor, the IRP and the Registrar of Companies, NCR, New Delhi, by Speed Post and by email, at the earliest but not later than seven days from today, and



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upload the same on website immediately after pronouncement of the order. The Registrar of Companies shall update his website by updating the status of the Corporate Guarantor and specific mention regarding admission of this petition must be notified.

20. The Registry is further directed to send the copy of the order to the IBBI also for their record.
21. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

-sd/-

(RAMALINGAM SUDHAKAR)
PRESIDENT

-sd/-

(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)