

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH, COURT -III**

**IA-389-2024  
And  
IB-297/ND/2021**

Order 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 IB-297/ND/2021:**

**M/s. ASSETS CARE & RECONSTRUCTION ENTERPRISE LIMITED**

Acting in its capacity as trustee of ACRE-107-Trust

*Having its registered office at:*

2<sup>nd</sup> Floor, Mohan Dev Building 13,

Tolstoy Marg, New Delhi-110001.

**.... Financial Creditor**

**Versus**

**M/s. ATS INFRASTRUCTURE LIMITED**

*Having its registered office at:*

711/92, Deepali, Nehru Place,

New Delhi, Delhi-110019.

**.... Corporate Debtor**

**IN THE MATTER OF IA-389-2024:**

**M/s. ATS INFRASTRUCTURE LIMITED**

**..... Applicant**

**Versus**

**M/s. ASSETS CARE & RECONSTRUCTION ENTERPRISE LIMITED**

**..... Respondent**

**Order Delivered On: 22.03.2024**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)  
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCES:**

For Applicant : Mr. Abhyudai Singh, Ms. Swati Sharma, Advs.  
For Respondent : Mr. Divyansh Rai, Mr. Krish Kalra, Advs.

**IA-389-2024 And IB-297/ND/2021  
Date of Order: 22.03.2024**

## **ORDER**

### **PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. This Application has been filed by M/s. Assets Care & Reconstruction Enterprise Limited, the Applicant/Financial Creditor before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), against M/s. ATS Infrastructure Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of Rs. 41,92,52,419/- along with Interest/Penal Interest amounting to Rs. 7,82,52,824/- totaling to Rs. 49,75,05,243/- as on 15.06.2021.

#### **2. Submissions of the Applicant/Financial Creditor:**

- i.** The Corporate Debtor and Mr. Getamber Anand (Director of the Corporate Debtor) (together as "Borrowers") entered into a Loan Agreement dated 29.09.2017 for a rupee term loan facility to the extent of Rs. 50,00,00,000/- (Rupees Fifty Crores Only) in aggregate ("Loan") with M/s. Xander Finance Private Limited ("Assignor") executed inter-alia amongst the Borrowers, S T G Softek Private Limited ("SSPL") and the Assignor. It is pertinent to mention herein that the Assignor entered into an assignment agreement dated 13.04.2021 to assign all the loans and underlying securities in favour of the Financial Creditor.
- ii.** Further, an escrow agreement dated 29.09.2017 was also executed amongst the Borrowers, the Assignor, SSPL, and HDFC Bank Limited to appoint HDFC Bank Limited as the escrow bank pursuant to the terms of the Loan Agreement. As per the terms of the Loan Agreement, the payment of the interest was to be commenced from 01.01.2018 and the principal amount of the Loan was to be repaid in 8 (eight) instalments payable every quarter starting from 01.01.2020.

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- iii.** As per Clause 18.10(b) of the Loan Agreement, the Assignor is entitled to assign its rights and, or, transfer its obligations without any approval from the Borrowers. As per Clause 18.11 of the Loan Agreement, the Assignor is entitled to assign any of its rights or transfer by novation any of its rights and obligations to another person who is engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets without prior consent.
- iv.** As per Clause 16.3 of the Loan Agreement, upon the occurrence of an event of default, the Financial Creditor has, inter-alia, a right to (i) declare that all or part of the Outstanding amounts is immediately due and payable; (ii) enforce the security in its favour; (iii) appoint a concurrent auditor for the Corporate Debtor; (iv) exercise such other rights available under the applicable law, etc.
- v.** It is submitted by the Applicant that a sum of Rs. 4,11,46,137/- was overdue towards the principal amount of the Loan till the quarter ended September, 2020. Further, a sum of Rs. 1,18,58,850/- was overdue as interest payable on the Loan for the quarter ended September 2020. Therefore, to settle the aforesaid amounts and the instalments that were due to the Assignor, on 31.12.2020, an Agreement to Sell (ATS) was executed amongst the Borrowers, NIPL and the Assignor in relation to the sale of Greater Noida Property to the Assignor ("ATS"), for a total sale consideration of Rs. 14,25,00,000/-.
- vi.** All the material obligations as per the Agreement to Sell (ATS) were required to be completed by the Borrowers and NIPL by 31.03.2021. However, since the Borrowers and NIPL failed to fulfil their obligations under the ATS to the satisfaction of the Assignor, the transaction contemplated under the ATS could not be completed by 31.03.2021. Further, it was categorically specified in Clause 13 that the same was without prejudice to the rights of the Assignor under the Loan Agreement, the finance documents in relation to the Loan and or the applicable law.

- vii.** It is submitted by the Applicant that Clause 7 provides that in case the Borrowers and NIPL are unable to obtain the necessary permission from GNIDA, GHIPL and any other authority and are unable to register the transfer deed, then the Assignor shall have the right to claim the amounts set off under the ATS and claim the same from the Borrowers as if the ATS was never entered.
- viii.** A sum of Rs. 48,01,73,121/- is outstanding towards the Loan availed by the Corporate Debtor as of 13.04.2021. Furthermore, the Corporate Debtor failed/defaulted to pay the amount of Rs. 6,15,90,909/- as per the Loan Agreement towards the instalment due on 31.03.2021 as well as the amounts that were overdue and payable in relation to the earlier instalments as per the Loan Agreement, aggregating to an amount of Rs.13,24,65,894/- (post benefit of reversal of the interest on interest). Accordingly, the Borrowers continued to be in default of the payment of their dues as per the Loan Agreement on 13.04.2021.
- ix.** On 13.04.2021, the Assignor entered into an assignment agreement dated 13.04.2021 to assign all the loans and underlying securities i.e., all amounts due and payable by each of the Borrowers under the Loan Agreement and the security documents, including but not limited to past overdue, future payments, interest charges for delay payments, indemnities and damages or other charges and, or, all other monies, if any, to be received by the Assignor under the Loan Agreement and the security documents, in favour of the Financial Creditor. The Assignor vide an email dated 14.04.2021 and vide a letter dated 20.05.2021 intimated the Borrowers, SSPL and NIPL regarding the assignment of the Loan Agreement and all securities, rights and obligations in relation thereto by the Assignor in favour of the Financial Creditor.
- Hence the present Application.

### **3. Submissions of the Respondent/Corporate Debtor:**

- i.** The Respondent has filed a reply affidavit denying the allegations made by the Applicant and stated that neither any alleged debt nor any alleged default exists which are necessary ingredients to be satisfied before preferring the present application. Rather, the present application is an abuse of the process of law with an ulterior motive to arm-twist the Respondent & M/s. Nischaya Infrabuild Private Limited to succumb to its demands & to wriggle out of the obligations created in terms of the agreement to sell dated 31.12.2020.
- ii.** In order to settle the amounts and the installments that were due to M/s. Xander Finance Private Limited on 31.12.2020, an Agreement to Sell was executed amongst the Respondent, Mr. Getamber Anand, NIPL and M/s. Xander Finance Private Limited in relation to the sale of the property to M/s. Xander Finance Private Limited for a total sale consideration of Rs. 14,25,00,000/-.
- iii.** It is submitted by the Respondent that the alleged Financial Creditor and M/s. Xander Finance Private Limited has acted in bad faith and against the terms and conditions of the agreement to sell, whose non-performance has led to the present conundrum. The act of assigning the purported loan agreement dated 29.09.2017 without the agreement to sell dated 31.12.2020 exhibits the collusion between the alleged Financial Creditor and M/s. Xander Finance Private Limited to cause wrongful gains to themselves and wrongful loss to the Respondent.
- iv.** Since M/s. Xander Finance Private Limited deliberately did not perform its obligations under the agreement to sell, the Respondent herein is under no contractual obligation to pay any sums either to M/s. Xander Finance Private Limited or the alleged Financial Creditor can be stated to have committed any alleged default.
- v.** The entire case of the Financial Creditor is squarely covered and governed by the terms and conditions of the Agreement to sell dated

30.12.2020, which substituted and novated the loan agreement dated 29.09.2017 as well as all previous ancillary agreements and arrangements entered into between the parties. The Respondent failed to perform its obligations under the agreement to sell, M/s. Xander Finance Private Limited was entitled to seek payment of the outstanding amount of Rs. 6,15,90,909/- as outstanding dues in terms of the loan agreement.

- vi.** The Respondent submitted that since the application of Clause 7 does not extend to cover a situation wherein the transfer could not take place due to the default committed by M/s. Xander Finance Private Limited. It was only to apply in a situation/condition wherein necessary cooperation and support were extended by M/s. Xander Finance Private Limited to Respondent to aid transfer of the subject property, and despite the same, the Respondent or NIPL failed to transfer and get the subject property registered in favor of M/s. Xander Finance Private Limited.
- vii.** The purported sums being claimed by the alleged Financial Creditor to be due do not constitute a 'debt' within the meaning of the Code. Moreover, no purported default of any kind has been committed by the Respondent. In the present case, the amount alleged to be outstanding as on 31.03.2021 had merged to become a part of the sale consideration towards the agreement to sell dated 31.03.2020 and therefore, no amount was due and payable by the Respondent to either M/s. Xander Finance Private Limited then or is payable to the alleged Financial Creditor now.

#### **4. Analysis and Findings:**

- i.** We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Respondent. We have also perused the records.
- ii.** The following issues arise for consideration:

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- (a) Whether the Applicant falls in the category of Financial Creditor as per Section 5(7) of the Code or not?
- (b) Whether the amount claimed by the Applicant as per Part IV of the Application is a Financial Debt under Section 5(8)(f) of the Code or not?
- iii. Admittedly, the Financial Creditor has crystalized the date of default of the Corporate Debtor as 01.04.2021 and 12.04.2021.
- iv. It is an admitted fact that the Applicant/Financial Creditor sanctioned a rupee term loan facility vide Loan Agreement dated 29.09.2017 to the extent of Rs. 50,00,00,000/- (Rupees Fifty Crores Only). From the perusal of the clauses of the Loan Agreement dated 29.09.2017, we find that the agreement between the parties is a financial facility and is not a 'financial debt' as defined under the Code. The said sum was not disbursed against the time value of money.
- v. At this stage, it is pertinent to refer to the definition of the expression "Financial Creditor" in sub-section 7 of Section 5 of the Code.  
Section 5 of sub-section 7 reads as follows:  
*"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"*
- vi. From the perusal of Loan Agreement dated 29.09.2017, we do not find any clause which would show that any "Financial Debt" is owed to the present Applicant and therefore by no means the present Applicant can be called as a "Financial Creditor".
- vii. At this stage, it is also pertinent to refer to the definition of the expression "Financial Debt" in sub-section 8 of Section 5 of the Code.  
Section 5 of sub-section 8 "Financial Debt" reads as follows: -  
*"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*  
*(a) money borrowed against the payment of interest;*

(b) \*\*\*\*\*

(c) \*\*\*\*\*

(d) \*\*\*\*\*

(e) \*\*\*\*\*

(f) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

(g) \*\*\*\*\*

(h) \*\*\*\*\*

(i) \*\*\*\*\*”

- viii.** Further the terms and conditions of the Loan Agreement dated 29.09.2017 and the Agreement to Sell dated 31.12.2020 do not show that the amount involved in the transaction has the commercial effect of borrowing.
- ix.** On the basis of the above analysis, we are of the considered view that the amount involved in the present case cannot be considered as a Financial Debt within the definition of sub-section 8 of Section 5 of the Code. We are also of the opinion that the Applicant is not a Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor.
- x.** It is a settled law that the pre-requisites for an application under Section 7 of the Code are the existence of 'financial debt' and a 'default', and as evident from the facts in the preceding paragraphs, it cannot be said that there is any financial debt, much less any default and therefore the present application is not maintainable.

## 5. **Order**

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

- i. The Application bearing **(IB)-297(ND)/2021** filed by the Applicant under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent, is **dismissed**.
  - ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
  - iii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
- No order as to costs.

#### **6. IA-389-2024**

- i. The Present Application has been filed by the Applicant/Corporate Debtor under Rule 11 of the National Company Law Tribunal Rules, 2016 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016 to recall/set aside the order dated 19.01.2024 passed by the Adjudicating Authority in Company Petition (IBC)/297(ND)/2023 and for seeking necessary orders and directions. The Applicant seeks the following reliefs:
  - a. To recall the order dated 19.01.2024, de-reserving the matter in the captioned matter; and*
  - b. To stay the present proceedings until the pendency of the Company Appeal No. 707 of 2022 before the Hon'ble NCLAT; or*
  - c. To pass any other order in the interest of justice and in favour of the Applicant.”*
- ii. In view of the order passed in IB-297/ND/2021, we do not deem it appropriate to pass any order in the present application. Accordingly, IA-389-2024 stands **dismissed**.

Sd/-  
**(ATUL CHATURVEDI)**  
**MEMBER (TECHNICAL)**

Sd/-  
**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**