IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/345/KOB/2023
IN
CP(IBC)/54/KOB/2022

(Under Section 60(5)(b) of the IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

In the matter of:
M/s. Asten Realtors Private Limited.

Memo of Parties:

M/s. Piramal Capital and Housing Finance Limited, having registered office at 601, 6th Floor, Amiti Bldg., Agastya Corporate Park, Kamani Junction, Opp. Fire Station, LBS Marg, Kurla (W), Mumbai-400 070.

… Applicant.

-Versus-

1. Mr. Rajendran P.R., Agasti & Associates, Chartered Accountants, 1st Floor, CNRWA- 6, Cherupushpam Lane, Kadavanthra, Kochi- 20.

2. HDFC Bank, HDFC Bank House, Senapati Bapat Marg, Lower Parel, Mumbai- 400 013.

3. Piramal Trusteeship Services Private Limited, 4th Floor, Piramal Tower Annexe, Ganpatrao Kadam Marg, Lower Parel, Mumbai- 400 013.

… Respondents.

In the matter of: -

Mr. Chandy John Samuel & Ors. … **Financial Creditor.**

-Versus-

M/s. Asten Realtors Private Limited … **Corporate Debtor**

Order delivered on: 05.12.2023

Coram:

Hon'ble Member (Judicial) : TMT. Justice (Retd.) T. Krishna Valli.

Hon'ble Member (Technical): Shri. Shyam Babu Gautam.

Appearances:

For the Applicant	: Mr. Joseph Kodianthara, Senior Adv.,
For the Respondent No. 1	: Mr. Vinod P.V., Adv.
For the Respondent No. 2	: None appeared.
For the Respondent No. 3	: None appeared.

O R D E R

Per: Coram

1. The present application is filed by the Applicant M/s. Piramal Capital and Housing Finance Limited under Section 60(5)(b) of the IBC, 2016 read with Rule 11 of the NCLT Rules, 2016 for the following reliefs: -

i. To declare that the that the Applicant has valid and subsisting lien on account bearing No. 57500000294860 titled as Asten Realtors Private Limited Escrow Account Asten Aurumwood

("Distribution Escrow Account AurumWood"), account bearing No. 57500000295198 titled as Asten Realtors Private Limited Escrow Account Asten Campus Court ("Distribution Escrow Account Campus Court") and account bearing no. 5700000295389 titled as Aston Realtors Private Limited Retention Escrow Account with the Escrow Bank ("Cash Retention Account").

ii. The Respondent No. 1 be restrained from withdrawing any monies from account bearing No 57500000294860 titled as Asten Realtors Private Limited Escrow Account Asten Aurumwood ("Distribution Escrow Account Aurumwood"), account bearing No. 57500000295198 titled as Asten Realtors Private Limited Escrow Account Asten Campus Court ("Distribution EsCrow Account Campus Court") and a0count bearing no. 5700000295389 titled as Asten Realtors Private Limited Retention Escrow Account with the Escrow bank ("Cash Retention Account").

iii. The Respondent Nos. 1 and 2 be directed to abide with the terms and conditions of the Escrow Agreement dated 22nd January 2019;

iv. The Respondent No. 1 be directed to re-instate the debit and standing instructions as mentioned under the Escrow Agreement dated 22nd January 2019;

v. The Respondent No. l in terms of the Escrow Agreement, be directed to deposit all the receivables from the Project

Aurumwood and Project Campus Court in their respective Master Escrow Accounts bearing nos. 57500000294870 and 57500000294844;

vi. The Respondents be directed to re-transfer the amount it had received in RERA Escrow Account No 57500000294857 to the Master Escrow Account No. 575000002948411 for project Campus Court;

vii. The Respondent Nos. 1 and 2 be directed to re-deposit/re-transfer to the Applicant, the amounts withdrawn by them from Cash Retention Account No. 5700000295389 and/or any other Escrow accounts pertaining to project, Campus Court;

viii. The Respondent Nos. 1 and 2 be restrained from unilaterally withdrawing/transferring any amounts from the Account bearing nos. 57500000294844, 57500000294857, 57500000295198, 57500000294870, 57500000295376, 57500000294860, 5700000295389 & 57500000303831 without express permission of the Applicant.

2. The Brief facts of the case are as follows: -

3. This application is seeking directions from this Tribunal for compliance with provisions of the Kerala Real Estate (Regulation and Development) Act, 20l5 and the Escrow Agreement dated 22nd January 2019 entered between the Corporate Debtor, the Respondent No. 2 and the Respondent No. 3 in the capacity of a security trustee of the Applicant, and restraining the Resolution Professional/Respondent No. 1 from withdrawing monies from

the escrow account created as per the Escrow Agreement wherein the Applicant has a lien.

4. The Corporate Debtor had requested the Applicant for a project loan to the tune of Rs. 55,00,00,000/- (Rupees Fifty-Five Crores Only) for carrying out construction activities for its projects known as “Aurumwoods” and “Campus Court”. The Applicant accepting the request of the Corporate Debtor vide sanction letter dated 19th November 2018, had sanctioned financial facility to the tune of Rs. 55,00,00,000l- (Rupees Fifty-Five Crores only), on terms and conditions. Subsequently, the loan agreement was executed on 22nd January 2019. On 15th February 2019, a Deed of Hypothecation (“Hypothecation Deed”) was executed between the Corporate Debtor and the Applicant. According to the Hypothecation Deed, the Corporate Debtor hypothecated, assigned, charged and assured all amounts owing to and received by the Corporate Debtor in favor of the Applicant.

5. To secure and facilitate the due repayment of the outstanding amounts payable by the Corporate Debtor and others to the Applicant under the Loan Agreement the Corporate Debtor had agreed to enter into the Escrow Agreement; for the deposit of all receivables in the escrow account to be opened and operated in accordance with the provisions of the Escrow Agreement. The Escrow Agreement, Respondent No. 2 i.e., HDFC Bank had agreed to hold and administer the monies deposited in the escrow

accounts maintained in accordance with the terms of the Escrow Agreement and as per the provisions of the RERA Act in the Escrow Agreement, the Corporate Debtor was supposed to maintain three (3) escrow accounts for each project and also a cash retention escrow account and project operating account. The details of the escrow accounts are as follows: -

a) Project Campus Court

   As per the terms of the Escrow Agreement, the Corporate Debtor had opened a special segregated and irrevocable non-interest-bearing escrow account: (a) escrow account bearing no. 57500000294844 and titled as Asten Realtors Private Limited Master Collection Escrow Account Asten Campus Court ("Master Escrow Account Campus Court"), (b) escrow account bearing No. 57500000294857 and titled as Asten Realtors Private Limited 'RERA Escrow Account Asten Campus Court ("RERA EsCrow Account Campus Court") and (c) escrow account bearing No. 57500000295198 and titled as Asten Realtors Private Limited Escrow Account Asten Campus Court ("Distribution Escrow Account Campus Courts").

b) Project Aurumwoods

   As per the terms of the Escrow Agreement, the Corporate Debtor had opened a special segregated and irrevocable non-interest-bearing escrow account: (a) escrow account bearing no. 57500000294870 and titled as Asten Realtors Private

Limited Master Collection Escrow Account Asten Aurumwood ("Master Escrow Account Aurumwood"), (b) escrow account bearing No. 57500000295376 and titled as Asten Realtors Private Limited RERA Escrow Account Asten Aurumwood ("RERA Escrow Account Aurumwood") and (c) escrow account bearing No. 575000002948 60 and titled as Asten Realtors Private Limited Escrow Account Asten Aurumwood ("Distribution Escrow Account Aurumwood").

6. The Corporate Debtor also opened an escrow account bearing no. 5700000295389 titled Asten Realtors Private Limited Retention Escrow Account with the Escrow Bank ("Cash Retention Account") and current account bearing no. 57500000303881 and titled as Asten Realtors Private Limited with the HDFC Bank ("Project Operating Account"). Based on the charge created by the Corporate Debtor, the Applicant disbursed a Sum of Rs.54,99,00,000/- (Rupees Fifty-Four Crores Ninety-Nine Lakhs Only) to the Corporate Debtor. The Applicant further also disbursed a sum of Rs. 11,50,00,000/- (Rupees Eleven Crore Fifty Lakhs Only) to the Corporate Debtor under the ECLGS scheme.

7. As per the Kerala RERA Act and the Escrow Agreement, it is imperative that all the receivables from the projects were supposed to be first deposited in the Master Escrow Account and thereafter, 70% of the receivables to be utilized towards the project, based on the certificates to be provided to escrow bank as required under Kerala RERA Act, and balance 30% can be utilized

by the promoter to carry administrative cost and/or repayment of the loan.

8. On 25.01.2023 this Tribunal admitted the Corporate Debtor under Corporate Insolvency Resolution Process and Respondent No. 1 was appointed as the Interim Resolution Professional. Thereafter the Applicant filed its claim of Rs. 68,16,00,006/- (Rupees Sixty-Eight Crore Sixteen Lakhs and Six Only) including interest, penal interest and TDS with the Respondent No. l.

9. The ECGLS Loan was sanctioned to the Corporate Debtor to ensure the completion of the project Campus Court. The funds were disbursed into the Retention Account in order to have control of the utilization. Funds were thereafter transferred directly to the vendors for which requests Were provided by the Corporate Debtor along with supporting documents. While this process of payment to vendors was underway, the Corporate Debtor was admitted to the Corporate Insolvency Resolution Process and the remaining amount in the retention account couldn’t be utilized further for payment to vendors.

10. In April 2023, Respondent No. 1 has been transferring several monies from the Cash Retention Account, without taking any express permission of Respondent No. 3 as is required under the Escrow Agreement. The Applicant has a charge and lien on the Cash Retention Account and Respondent Nos. 1 and 2 are duly aware of the same; however, still the money has been withdrawn

and transferred from the Cash Retention Account. Thereafter on 06th June 2023, Respondent No. 3 received an email from the HDFC Bank, referring to the letter dated 13th April 2023, wherein the HDFC Bank in the said email stated that in order to have the charge/control of said Cash Retention Account bearing no. 57500000295389 under the instructions of Respondent No. 3 instead of Respondent No. 1, it shall require a court order/notice in order to oblige with same. The Applicant states that the said stand of the HDFC Bank was in gross violation of the terms and conditions of the Escrow Agreement.

11. The HDFC Bank has failed to acknowledge the fact that Respondent No. 1 has stepped in the shoes of the Corporate Debtor and therefore, it has to abide by the obligation as contemplated by the Escrow Agreement on the Corporate Debtor. The HDFC Bank further failed to consider that it is also under an obligation to abide by the terms of the Escrow Agreement and that the receivables were charged to the Applicant. Subsequently, on 15th June 2023, Respondent No. 1 requested HDFC Bank to change the operation mechanism of all the escrow accounts of the Corporate Debtor. That 2nd Respondent though bounded by the terms and conditions of the Escrow Agreement, has accepted the request of Respondent No. l vide its email dated 15th June 2023.

12. The Applicant stated that recently Respondent No. 1 has asked homebuyers to deposit the receivables from the projects to RERA

Escrow Accounts rather than the Master Escrow Accounts for the relevant projects, which is completely against the law and the terms agreed upon between the parties.

13. On 27.09.2023, the Respondent No. 1 filed his reply statement and stated that under Section 17(1)(a) and (d) of the IBC, from the date of appointment of the Interim Resolution Professional, clause (a) reads that the management of the Corporate Debtor shall vest in the Interim Resolution Professional and clause (d) states that *"the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.* ". It is stated that under Section 18(d) and (f) of the IBC, the Interim Resolution Professional shall have such duties including clause (d) which reads as the duty *to monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors and clause (f) which reads as the duty to take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets.* It is stated that the Resolution Professional appointed under Section 22, shall exercise the same duties and function of the Interim Resolution Professional under Section 23 and 25 of the IBC. Therefore, the right to control and manage the

assets of the Corporate Debtor including the bank accounts of the Corporate Debtor lies with the Resolution Professional and the Applicant has no authority or right to give instruction to the Bank to control the bank accounts of the Corporate Debtor.

14. The Respondent No. 1 stated that the amount received in the Master Collection Account has been transferred to Corporate Debtor's ESCROW A/C ASTEN CC and RERA Escrow Account of the Company. It is submitted that total amount withdrawn by the Resolution Professional is Rs. 13,12,043/- from the Cash Retention Account and used for Salaries and Allowances, towards head load workers for materials handling and also towards other CIRP related and project related expenses. It is stated that the Resolution Professional has also obtained certificate from the chartered accountant as required under law since the project is registered with RERA. It is stated that since 94.11% work is completed, the Corporate Debtor is entitled to withdrawal Rs.1,92,36,76,287.00/- of the amount from the Accounts towards non project related matters. As on the date of the said certificate, the Corporate Debtor had withdrawn Rs. 20,25,05,789.86/- and Net Amount which can be withdrawn from the Designated Bank Account under the certificate is Rs. 1,72,11,70,497.14/ -.

15. It is stated that the 1st Meeting of COC held on 25th February 2023, RP has placed an agenda Item No. 3 to approve the ongoing cost of the CIRP. The COC also discussed the continuing employees and

their payment of salary in the meeting. Thereafter, COC with 68.55% voting *"Resolved to approve the proposal authorizing RP to incur various expenses which are necessary to complete the resolution process, subject to the ratification by the COC in the subsequent meeting".* It is stated that Resolution Professional has incurred all expenses as per the approval of the COC and all future expenses has been ratified by the COC.

16. The Respondent No. 1 stated that the 3rd COC held on 12th May 2023 also resolved with 81.69% voting rights to continue the ongoing work at the Project site and receive money from the home buyers to the escrow account. It is stated that the Applicant holding 21.76 % voting also voted in favour of the Resolution.

17. The Respondent No. 1 further stated that he has used the amount towards meeting the necessary and essential costs in relation to the CIRP and also to keep the Corporate Debtor as a going concern. It is stated that once the Corporate. The Applicant has filed its claim for its entire dues and cannot have any lien or control over the accounts of the Corporate Debtor. The claim of the Applicant that it has charge on the assets of the Corporate Debtor and is a secured creditor is also not correct as the Applicant has not registered charge with the ROC and therefore, the applicant has rightfully been treated as an unsecured creditor of the Corporate Debtor.

18. On 03.10.2023, the Applicant filed his rejoinder and stated that Respondent No. 1 vide his letter dated 15.06.2023, had requested

for the discontinuation of the sweep of Distribution Escrow Account Campus Court and Distribution Escrow Account Aurumwoods. It is further stated that Respondent No. 2 agreeing to the request of the Respondent No. 1 had modified the instructions of the distribution accounts as per their mail dated 15.06.2023. The amounts collected in such distribution accounts have to be utilized as per clause 4.3.2 of the Escrow Agreement. The Applicant became aware of such a request of the Resolution Professional only after Respondent No. 2 marked a copy of the e-mail. The 30% of the amount received in the said account has to be kept aside as per the escrow agreement for servicing the debts of the Applicant. Therefore, the said act of utilizing 100% amount received from the homebuyer for construction by the Resolution Professional is a dereliction of his duty as provided under the IBC.

FINDINGS: -

19. We have heard the arguments of the learned counsel for both parties at length and perused the entire case records/documents. We have also seen the Deed of Hypothecation dated 15.02.2019 between M/s. Asten Realtors Private Limited and the Escrow Agreement dated 22.01.2019 between M/s. Asten Realtors Private Limited and M/s. Piramal Trusteeship Services Private Limited and HDFC Bank.

20. The Real Estate (Regulation and Development) Act, 2016 makes it mandatory for real estate developers to maintain a separate

account, which is also referred to as an 'Escrow Account'. This necessitates that 70% of the funds raised from real estate projects be deposited in a different RERA-designated bank account to offset the land and construction cost for the given project. Remarkably, an escrow account is for more than just money. It can be used for various assets such as money, stocks, and funds. It is seen from the record that the Escrow Agreement was entered by the parties before the commencement of CIRP of the Corporate Debtor. We have also gone through the Escrow Agreement dated 22nd January 2023 filed by the Applicant. In this connection, it is profitable to quote clauses of the Escrow Agreement which are as under: -

"4.1 Operation of Master Escrow Account

4.1.2 Withdrawals

Notwithstanding any other obligations undertaken by the Borrower with respect to the Receivables, the Escrow Bank shall on a daily basis, without any instructions, apply all and any proceeds lying in the Master Escrow Account in the manner set forth below:

a) Firstly, the Escrow Bank shall, without any instructions from any party, transfer 70% (Seventy Percent) of all balances, to the RERA Escrow Account.

b) Secondly, the balance 30% (Thirty Percent) amount remaining in the Master Escrow Account shall thereafter be transferred by the Escrow Bank to the Distribution Escrow Account.

c) The Borrower agrees that at no time shall the Borrower be permitted to make withdrawals from the Master Escrow Account and the Escrow Bank shall not act on any instructions received from the Borrower in respect of the Master Escrow Account and shall necessarily transfer the monies in the manner set out above."

"4.2 Operation of RERA Escrow Account

4.2.2 Withdrawals

The Borrower shall ensure that copies of appropriate certificates from practicing chartered accountants, architects and consultants and/or self-declarations as required in terms of the Kerala RERA Rules (as applicable), are submitted to the Escrow Bank and the Escrow Bank shall ensure that all such monies, as can be transferred from the RERA Escrow Account, is transferred to the Distribution Escrow Account. The Borrower hereby agrees and acknowledges that, as and when requested by the Security Trustee, copies of such certificates from Practicing Chartered Accountants, architects and consultants and/or self-declaration or such other documents submitted under RERA Act and/ or Kerala RERA Rules (as applicable), shall also be submitted to the Security Trustee.

It is hereby clarified that all withdrawals from the RERA Escrow Account shall be made in accordance with the terms of the Agreement and if the Borrower requires that any amounts withdrawn under the RERA Escrow Account are to be deposited in any account other than the Distribution Escrow Account, the Escrow Bank shall not act on any such instructions of the Borrower, until the Borrower has obtained prior written consent of the Security Trustee (acting on the instructions of the Lender) and a copy of such consent has been furnished to the Escrow Bank."

"4.3 Operation of Distribution Escrow Account.

4.3.2 Withdrawals

Notwithstanding any other obligations undertaken by the Borrower with respect to the Receivables, the Escrow Bank shall on a daily basis, without any instructions, apply all and any proceeds lying in the Distribution Escrow Account in the manner set forth below,

a) Firstly, the Escrow Bank shall, without any instructions from any party, transfer the Project Distribution Percentage, to the Retention Account.

b) Secondly, the balance amount remaining in the Escrow Account after transferring the Project Distribution Percentage *to the Retention Account shall thereafter be transferred by the Escrow Bank to the Operating Account.*

c) The Borrower agrees that at no time shall the Borrower be permitted to make withdrawals from the Distribution Escrow Account and the Escrow Bank shall not act on any instructions received from the Borrower in respect of the Distribution Escrow Account and shall necessarily require an instruction from the Security Trustee (acting on the written instructions of the Lender).

The aforesaid order of priority/percentages may be changed upon the occurrence of an Event of Default by the Lender at its sole discretion which shall be communicated by the Lender to the Security Trustee. In such event, the Security Trustee (acting on the written instructions of the Lender) shall intimate the Escrow Bank of the new order of priority/revised percentages, and the Escrow Bank shall act in accordance with these instructions. "

4.4 Operation of the Cash Retention Account

<u>4.4.1 Deposits</u>

a) All funds being released from the Distribution Escrow Account (as stated in Clause 4.3.2) shall be released from the Distribution Escrow Account and deposited in the Cash Retention Account on a daily basis.

b) Notwithstanding any transfers and deposits in the Cash Retention Account as aforesaid, the Borrower shall be liable to ensure that sufficient amounts are deposited in the Cash Retention Account at all times for meeting the Secured Obligations and the Borrower shall make good the shortfall (if any) in the Cash Retention Account immediately and in any event before 1 (One) day prior to any scheduled principal/interest repayment date in terms of Loan Agreement.

<u>4.4.2 Withdrawals</u>

The amounts lying in the Cash Retention Account shall be transferred to the Designated Account of the Lender on monthly intervals by the Escrow Bank acting upon the written instructions *of the Security Trustee (acting on the instructions of the Lender) in the following manner:*

a) Firstly, towards any costs, charges and expenses incurred by the Security Trustee and/or the Lender for the purposes of the Loan,
b) Secondly, towards payment of any Default Interest or any other additional interest that is payable as per the terms of the Finance Documents.
c) Thirdly, towards servicing the shortfall, if any, in the past payment of (i) the Interest (ii) principal amount on the Loan in accordance with this Agreement.
d) Fourthly, towards replenishment of the Debt Service Reserve Amount, if disbursed and there is any shortfall;
e) Fifthly, towards payment of the Interest (whether accrued and/or payable) on the Loan;
f) Sixthly, towards the repayment of the principal amount of the Loan where there is due;
g) Lastly, towards mandatory prepayment of the principal amount of the Loan at the discretion of the Lender,

4.5 Operation of Project Operating Account

4.5.2 <u>Withdrawals</u>

a) Save and except, in case of occurrence of an Event of Default, the Borrower shall be entitled to operate the Project Operating Account on a day-to-day basis for the purposes (i) towards replenishment of the Debt Service Reserve Amount, if disbursed and there is any shortfall; and/or (ii) of undertaking the construction and development of the Project only. The Borrower cannot operate the Project Operating Account for any other purpose whatsoever;

b) The Borrower will be entitled to avail the cheque facility with respect to Project Operating Account and shall be allowed to instruct the Escrow Bank to make payments through any modes of transfer. "

21. We have also gone through the aforementioned clauses regarding withdrawals and seen that the clauses in the agreement describing that the operations of the accounts were governed by the terms and conditions of the Escrow Agreement which was agreed by M/s. Asten Realtors Private Limited and M/s. Piramal Trusteeship Services Private Limited and HDFC Bank.

22. We have the considered opinion that Sections 17 and 18 of the Code, no doubt authorise Respondent No. 1 to operate the affairs of the Corporate Debtor only for the purpose of making it a going concern. Prior to the commencement of CIRP when there were Agreements between the Corporate Debtor and the Applicant herein the clauses in the Agreements must be adhered to by the parties and the Resolution Professional representing the Corporate Debtor.

23. From the above, it is clear that the Applicant has a lien over the receivable and it cannot be termed as an asset of the Corporate Debtor and the terms of the Deed of Hypothecation and Escrow Agreement cannot be nullified on any subsequent event. Therefore, this Adjudicating Authority restrained Respondent Nos. 1 and 2 from withdrawing/ transferring any amounts from the Account bearing nos. 57500000294844, 57500000294857, 57500000295198, 57500000294870, 57500000295376, 57500000294860, 5700000295389 and 57500000303881. Respondent Nos. 1 and 2 are directed to re-transfer the amount

withdrawn from the Escrow Accounts within four weeks from the receipt of this Order. This Adjudicating Authority also directs Respondents to abide by the terms and conditions of the Escrow Agreement dated 22nd January 2019. The other reliefs are consequential reliefs. Accordingly, this **IA(IBC)/345/KOB/2023** is hereby Allowed and disposed of.

24. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.

25. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

26. File be consigned to records.

SHYAM BABU GAUTAM Digitally signed by SHYAM BABU GAUTAM Date: 2023.12.05 15:12:37 +05'30'

SHYAM BABU GAUTAM

(MEMBER TECHNICAL)

T.KRISHNAVALLI Digitally signed by T.KRISHNAVALLI Date: 2023.12.05 15:13:02 +05'30'

T KRISHNA VALLI

(MEMBER JUDICIAL)

Signed on this the 05th day of December, 2023.

Rajasree R. Nair/LRA