



IN THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.208

IA/164(MP)2022 & (MP) CP(IB) 16 of 2020

Proceedings under Section Rule 55 of NCLT Rules, 2016

IN THE MATTER OF:

IA/164(MP)2022

Ashoka Hi-Tech Builders Pvt Ltd

.....Applicant

V/s

L&T Housing Finance Ltd

.....Respondent

(MP) CP(IB) 16 of 2020

Edelweiss Asset Reconstruction Company Ltd

.....Applicant

V/s

Ashoka Hi-Tech Builders Pvt Ltd

.....Respondent

Order delivered on 06/01/2023

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

Sd/-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

Braj Mohan

Sd/-

**DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**



**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH**

IA/164(MP)2022 & CP(IB) 16 of 2020

IA/164(MP)2022

(An application under Rule 55 of the NCLT Rules, 2016)

**Ashoka Hi-Tech Builders
Private Limited**

Applicant

Versus

L&T Housing Finance Limited

Non-Applicant

CP(IB) 16 of 2020

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

**Edelweiss Asset Reconstruction
Company Limited**

Edelweiss House, Windsor Ln
Kolivery Village, MMRDA Area
Kalina, Bandra East
Mumbai-400098

**Applicant/
Financial Creditor**

Versus

**Ashoka Hi-Tech Builders Private
Limited**

302-A, City Plaza
564, M.G. Road
Indore-452003

**Respondent/
Corporate Debtor**

**Order reserved on: 08.12.2022
Order pronounced on: 06.01.2023**

**Coram: Dr.Madan B. Gosavi, Member (J)
Kaushalendra Kumar Singh, Member (T)**



Present:

For the Applicant: Ld. Counsel Mr. Nipun Singhvi [CP(IB)16/2020]
Ld. Counsel Mr. Nilesh P. Udernani (IA 164/2022)

For the Respondent: Ld. Counsel Mr. Nilesh P. Udernani [CP(IB)16/2020]
Ld. Counsel Mr. Nipun Singhvi (IA 164/2022)

ORDER

1. The instant Application CP(IB) 16 of 2020 is filed on 13.12.2019 by L&T Housing Finance Limited under section 7 of the Insolvency and Bankruptcy Code, 2016 (**'Code'**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiation of Corporate Insolvency Resolution Process (**CIRP**) against Ashoka Hi-Tech Builders Private Limited (**Respondent**) for the default amount of Rs.57,48,58,016/- as on 30.11.2019, wherein the outstanding principal amount is Rs.33,52,01,818/- and the balance being the interest, overdue/charges and TDS amounting to Rs.23,96,56,198/-. The date of default is 24.11.2017.

During the pendency of the proceedings under the instant application the financial debt was assigned by L&T Housing Finance Limited to Edelweiss Asset Reconstruction Company Limited through assignment agreement dated 29.09.2022. An application being IA 214 of 2022 was filed to amend the cause title and the same was allowed by the Adjudicating Authority vide order dated 11.11.2022. The Edelweiss Asset Reconstruction Company Limited (**Applicant/financial creditor**) stepped into the shoes of the L&T Housing Finance Limited and also filed an affidavit dated 06.12.2022 stating to adopt the contentions and pleadings as made by L&T Housing Finance Limited.



Whereas the application IA 164 of 2022 is filed by Ashoka Hi-Tech under Rule 55 of the National Company Law Tribunal Rules, 2016 to bring on record certain documents.

2. The financial creditor gave loan of Rs.38,00,00,000/- to JSM Devcons Private Limited (Principal Borrower) for which corporate guarantee was given by the corporate debtor. The corporate guarantee deed dated 30.11.2015 was entered into between financial creditor and the corporate debtor. However, on account of failure to repay the debt and interest by the principal borrower, the financial creditor sent a notice dated 23.11.2017 to the corporate debtor invoking the guarantee.

The name of the Interim Resolution Professional (IRP) proposed through additional affidavit dated 30.11.2022 is Mr. Gajesh Labhchand Jain having registration No.IBBI/IPA-001/IP-P-01697/2019-20/12588 and the consent of the IRP is also placed on record.

3. The objections raised by the Respondent/Corporate Debtor are summarized hereunder:

(i) The loan was advanced by the financial creditor to the principal borrower which was primarily secured by guarantee of Mr.Ashish Das and Mr.Pushpendra Badera, however the same are not made the parties to the present case. The business of the corporate debtor is not to provide guarantee against the financial assistance and therefore the same cannot be considered as financial debt under section 5(8) of the Code.

(ii) The corporate debtor purchased a land on 23.03.2009 admeasuring 11.40 acres in Indore vide two registered sale deeds. Following that it had entered into an agreement with the principal borrower on 01.04.2009 for development and construction of



multistoried township consisting of 11 towers namely “Pinnacle D Dreams” on the said land admeasuring 11.40 acres and accordingly the corporate debtor was to get 32% of the constructed flats in lieu of contribution of land and the period for completion of the project was 60 months including grace period of six months.

The principal borrower was to construct real estate units on the land of the corporate debtor and such units were to be shared by the principal borrower and the corporate debtor in the ratio of 68:32. The revenue generated from the sale of such units was to be shared as per the said agreed ratio.

(iii) Further, the principal borrower and corporate debtor entered into consent cum admission deed on 07.04.2015 wherein, various flats and various towers were divided between them. Moreover, the corporate guarantee was given by the corporate debtor for which the corporate guarantee deed was executed on 30.11.2015 between the financial creditor and the corporate debtor for sanctioning loan of Rs.38,00,00,000/- by the financial creditor to the principal borrower and a facility agreement was also executed on the same date.

Indemnity deed dated 11.12.2015 was also executed between the principal borrower and the corporate debtor according to which the principal borrower agreed to indemnify the corporate debtor as regards to various prakoshts of the share mortgaged.

(iv) Out of 11 towers only 3 towers were fully constructed and other 3 were in the construction process. Further, out of total saleable area of 1257792 sq. ft. the principal borrower already sold 858514 sq. ft. and the remaining area was to be divided as per the agreed ratio of 68:32 between the principal borrower and the



corporate debtor. The sale of 858514 sq. ft. at an average rate of Rs.2,500 per sq. ft. amounts to Rs.2,14,62,85,000/- and the share of the corporate debtor being 32% amounts to Rs.68,68,11,200/- , however the corporate debtor received an amount of Rs.25,95,27,010/- and therefore, Rs.42,72,84,190/- excluding interest remains outstanding from the principal borrower.

Further the principal borrower fraudulently sold an area of 394278 sq ft. at an average rate of Rs.3,000 per sq. ft. and the share of the corporate debtor being 32% amounts to 38,41,23,000/- excluding interest remains outstanding.

(v) The corporate guarantee deed contains an arbitration clause and the financial creditor vide notice dated 27.11.2018 invoked the said clause appointing Mr.Fathan P. Dubash as a sole arbitrator for adjudication of disputes between the parties. However, the appointment of the same as an arbitrator was refused by the corporate debtor. Subsequently, on an application filed by the financial creditor the Bombay High Court vide its order dated 25.03.2019 appointed Hon'ble Justice (Retd.) Mrs. R.P. Sondurbaldota as the prospective sole arbitrator and therefore the present application filed under section 7 of the Code is not maintainable and matter should be referred to the arbitrator as appointed and the corporate debtor being a solvent and profit-making company should not be placed under CIRP.

(vi) Further during the pendency of the present application, one Motel Rahans filed an application CP(IB) 56 of 2021 under section 7 of the Code against the principal borrower and the same was admitted into CIRP vide order dated 17.03.2022. Thereafter, the corporate debtor filed its claim as financial creditor in the said



application and was allowed and made the member of CoC with 58% voting rights.

4. The financial creditor through its rebuttal affidavit dated 19.03.2021 submitted that the financial creditor can initiate proceedings either against the principal borrower or against the guarantors at his own discretion and that the proceedings initiated by the financial creditor under the Arbitration & Conciliation Act, 1996 are for the purpose of recovery and section 8 of the said Act is not applicable to the proceedings initiated under the Code.

5. The application IA 164 of 2022 is filed by Ashoka Hi-Tech under Rule 55 of the National Company Law Tribunal Rules, 2016 stating that in view of Vidarbha Industries Power Limited V. Axis Bank Limited the admission of a corporate debtor in CIRP under section 7 is a discretionary matter and since Ashoka Hi-Tech is a profitable company CIRP should not be initiated against it. Further the balance sheet of the company also reflects the profit generated by the company of Rs.1,27,71,740/- and Rs.2,17,30,321/- for the year ended 31.03.2020 and 31.03.2021 respectively.

6. We have heard the learned counsel for the financial creditor as well as for the corporate debtor and perused the relevant documents available on record. It is noted that the corporate debtor purchased a land 11.40 acres on 23.03.2009 and subsequently it had entered into a development agreement with the principal borrower JSM Devcons Private Limited on 01.04.2009 for construction of the multistoried township in the name of "Pinnacle D Dreams" consisting of 11 towers over the said land. It was also agreed to share the real estate units (flats) or the revenue generated from the sale of constructed flats in the ratio



of 64:32 between the principal borrower and the corporate debtor- Ashoka Hi-Tech.

7. It is also noted that the loan amounting to Rs.38,00,00,000/- was given by the L&T Housing Finance Limited to the principal borrower and such loan was secured on the land for the project through a corporate guarantee deed executed by the land owner i.e corporate debtor as a guarantor. Further on account of failure to pay the dues by the principal borrower, the financial creditor invoked the guarantee by issuing notice dated 23.11.2017. The financial creditor also initiated proceedings under the Arbitration & Conciliation Act, 1996 and Hon'ble Justice (Retd.) Mrs. R.P. Sondurbaldota was appointed as the sole arbitrator by the Bombay High Court, however the financial creditor did not proceeded with the arbitration and filed the present application under section 7 of the Code.

8. It is further noted that an application IA 164 of 2022 is filed by Ashoka Hi-Tech to place on record the balance sheets depicting the profit generated by the company for the year ended 31.03.2020 and 31.03.2021. The same is considered and taken on record. With this **IA 164 of 2022** stands disposed of.

9. Pursuant to an application CP(IB) 56 of 2021 filed by one of the financial creditor Motel Rahans against the principal borrower, this Adjudicating Authority vide order dated 17.03.2021 initiated CIRP against the principal borrower and the corporate debtor filed its claim as a financial creditor in the CIRP of the principal borrower and the same was admitted with 58% voting rights. However, the Adjudicating Authority vide order dated 03.11.2022 has in the said matter held that the Ashoka Hi-Tech Builders Private Limited (corporate debtor) cannot



be considered as a financial creditor and had directed the resolution professional to exclude Ashoka Hi-Tech from the member of the CoC.

10. We are of the considered view that even though the corporate debtor is a profit making company the corporate debtor failed to discharge its liability towards the financial creditor and therefore the ratio of the judgment of Hon'ble Supreme Court in the case of Vidarbha Industries Power Limited Vs. Axis Bank Limited does not attract in the present case. Further corporate guarantor cannot take the shield contending that the financial creditor has instead of realising the debt from the principal borrower has invoked the corporate guarantee and filed the present application. Since the liability of the principal borrower and its guarantors are co-extensive, the financial creditor at its own discretion can initiate proceedings either against the principal borrower or the guarantor individually or simultaneously.

11. In view of the material available on record, the corporate debtor committed default of the financial debt of Rs.57,48,58,016/- including interest and other charges. The same is more than the threshold limit of Rs.1 crore as per Section 4 of the IBC. The Financial Creditor has established the existence of financial debt payable by the corporate debtor and its default by the corporate debtor. This application is filed within limitation and is defect free; and the same deserves to be admitted.

12. In view of the above, we admit this application and pass the following order as under:

- (i) The Corporate Debtor M/s Ashoka Hi-Tech is admitted in Corporate Insolvency Resolution Process under Section 7 of the Insolvency and Bankruptcy Code, 2016.



(ii) The moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.

- 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 Securitisation 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.*

(iii) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.

(iv) We hereby appoint Mr. Gajesh Labhchand Jain having registration No. IBBI/IPA-001/IP-P-01697/2019-20/12588, having address at: D-501, Clifton Society, Raviraj Oberoi Marg, Shastri Nagar, Andheri (West), Mumbai- 400053 to act as an Interim Resolution Professional under Section 13(1)(c) of the Code.



She shall conduct the Corporate Insolvency Resolution Process as per the provisions of Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder.

(v) The IRP shall perform all her functions as contemplated, inter-alia, by Sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extending every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or co-operate the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

(vi) This Adjudicating Authority directs the IRP to make a public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1)(b) of the Code.

(vii) It is further directed that the supply of goods/service to the Corporate Debtor Company, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

(viii) The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' and manage the operations of the Corporate Debtor as a going concern as a part of obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016. The Financial Creditor is directed to pay an advance of **Rs.1,00,000/-** (Rupees One Lakh Only) to the IRP within two



weeks from the date of receipt of this order for the purpose of smooth conduct of Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

(ix) The Registry is directed to communicate a copy of this order to the Financial Creditor, Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on website immediately after pronouncement of the order.

13. Accordingly, **CP(IB) 16 of 2020** stands admitted.

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Kaushalendra Kumar Singh
Member (Technical)

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Dr.Madan B. Gosavi
Member (Judicial)

Swati