



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.266/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

**Edelweiss Asset Reconstruction Company
Limited**

[CIN: U67100MH2007PLC174759]

...Financial Creditor/Applicant

V/s

Tulasi Refrigerators Private Limited

[CIN: U29191MH1991PTC063506]

...Corporate Debtor/Respondent

Order Dated: 17.03.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) :

Mr. Rohit Gupta a/w
Ms. Suchitra Valjee & Ms. Riya
Kadar i/b Manilal Kher Ambalal
and Co., Advocates.

For the Respondent(s) :

Mr. Ankit Lohia a/w Mr. Digant
Bhatt, Mr. Akshay Sawant &
Ms. Shivani Lakhepatil i/b I.V.
Merchant & Co., Advocates.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application being C.P. (IB) No. 266/NCLT/MB/C-IV/2021 filed by Edelweiss Asset Reconstruction Company Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Tulasi Refrigerators Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).
2. The Application is filed by Ms. Aayushi Chaudhary, Authorised Representative of Financial Creditor vide its Board Resolution dated 09.07.2020, claiming total default amount of Rs.1,06,28,22,398/- (Rupees one hundred six crore twenty-eight lakh twenty-two thousand three hundred ninety-eight only).
3. The date of Default is 28.07.2019. The Petition is filed on
4. The case of the Financial Creditor is as under:
 - a) In 2016, Champalalji Finance Private Limited issued 6300 Secured Redeemable Non-Convertible Debentures bearing face value of Rs.1,00,000 (Rupees one lakh only) each for an aggregate amount of Rs.63,00,00,000/- (Rupees sixty-three crore only).
 - b) Trustee Agreement dated 01.07.2016 was executed by the Corporate Debtor appointing IDBI Trusteeship Limited as the Debenture Trustee on behalf of Debenture Holders with respect to the issuance of the Debentures.

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- c) In order to secure the due repayment of the amounts under and in respect of the Debentures, the Corporate Debtor executed the Guarantee Agreement dated 26.09.2016 in favour of the Debenture Trustee. The Corporate Debtor vide Indenture of Mortgage dated 27.06.2016, created mortgage of its development rights in the Project Property in favour of the Debenture Trustee to secure the said Debentures. The Shares of the Corporate Debtor were also pledged in favour of the Debenture Trustee vide Agreement of Pledge of Shares dated 26.07.2016 in order to secure repayment of the said Debentures in accordance with the terms of the Debenture Trust Deed.
- d) On 30.09.2019, an Assignment Agreement was executed by ECL Finance Limited in favour of the Applicant for Assignment of debt with respect to the Debentures along with all Securities or documents executed in respect thereof.
5. The Debenture Trustee also issued Notice for Invocation of Guarantee dated 20.04.2020 to call upon the Corporate Debtor and the Corporate Guarantor Nos. 1 to 7 to pay the Debenture Trustee the total outstanding amount together with the further interest at the contractual rate with all other costs, penal interest, charges and incidental expenses due and payable under the Debenture Trust Deed and other Debenture Documents.

6. The Corporate Debtor has filed its Affidavit in Reply and submits as under:
- a) The Guarantee Agreement dated 26.07.2016 executed by and between the Corporate Debtor and IDBI Trusteeship Services Limited. As per Clause 2 and Clause 7 of the said Guarantee Agreement, it is the Debenture Trustee who shall have the power to enforce the outstanding amounts in terms of the Debenture Documents or any part thereof or interest or other monies due to the Debenture Trustee from the Principal Borrower. There does not exist a legal Assignment of the powers of the Debenture Trustee as stated under the said Guarantee. The Assignment Agreement is executed between ECL Finance Limited and the Financial Creditor. ECL Finance Limited is not a party to the said Guarantee and in view thereof, could not have assigned the rights and powers of the rights and powers of the Debenture Trustee under the Assignment Agreement.
 - b) The Financial Creditor has neither produced any documentary evidence recording the date of default nor explained in its Affidavit in support of the said Petition as to how the Financial Creditor arrived and mentioned the said date of default.
 - c) The Financial Creditor claiming to act in its capacity as a 'Trustee' of EARC Trust – SC 392 has failed to annex any such authority/copy of the Board Resolution passed by the Board of Trustees of EARC Trust-SC 392 thereby authorising/permitting acquisition of the Non-Performing Asset vide Assignment Agreement dated 30.09.2019. The Financial Creditor has miserably failed to annex any such documentary evidence whereby the EARC

Trust – SC 392 has approved the Assignment Agreement prior to its execution.

- d) The Financial Creditor has failed to produce following documents:
- i. The Debenture Subscription Agreement executed by and between the Financial Creditor and/or the Debenture Holder and the Corporate Debtor proving that the Debentures have been issued in the name of the Debenture Holder and/or the Debenture Holder;
 - ii. Letter of Allotment indicating the allotment of Debentures issued to Debenture Holders as contemplated under Clause no. 5.9 of Disclosure Documents dated 01.07.2016;
 - iii. Any such Authority or the Board Resolution passed by the Board of Directors of EARC Trust-SC 392 thereby authorising acquisition of the Non-Performing Asset of the Corporate Debtor;
 - iv. Trust Deed dated 25.03.2019, as amended on 23.09.2019 claimed to have been executed by the Financial Creditor;
 - v. Certificate/Letter/Correspondence evidencing declaration of Non-Performing Asset of the Corporate Debtor.
- e) The Financial Creditor has failed to prove the existence of Debt and have also failed to produce any such documentary proof to show the date of default as mentioned in the Petition.
- f) The Financial Creditor has failed to place on record any documentary evidence calling upon the Principal Borrower to pay



redemption price after obtaining the said rights, title and interest of the Debenture Holders vide Assignment Agreement dated 30.09.2019. The said Assignment is not executed between the Financial Creditor and the Principal Borrower or the Corporate Debtor as a confirming party.

- g) The Financial Creditor has filed the present Petition in its capacity as a Trustee of EARC Trust – SC 392. Since the Assignment Agreement does not exhibit the Trust Deed dated 25.03.2019 as amended on 23.09.2019 as claimed by the Financial Creditor to have been executed by EARC Trust – SC 392, the authority under the Assignment is non-binding on the Principal Borrower as well as the Corporate Debtor.
- h) Clause 16 of the Indenture of Mortgage dated 27.07.2016 states that the security created by the Mortgagor in favour of the Mortgagee shall become enforceable by the Mortgagee (i.e. the Debenture Trustee) in accordance with Clause 10 r/w Schedule II of the Indenture of Mortgage. As per Clause B to the Schedule II of the Indenture of Mortgage dated 27.07.2016 it is the Debenture Trustee alone who is conferred with the right to enforce the security created in favour of the Mortgagee. Neither the Financial Creditor nor ECL Finance Limited is a party to the Indenture of the Mortgage Deed dated 27.07.2016.
- i) As the Indenture of Mortgage, the Debenture Trustee alone is entitled to invoke the Guarantee and enforce the securities. The Debenture Trustee has not assigned the power of enforcement to the Financial Creditor.

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- j) Clause 2.4 (i) and Clause 6.1 of the Agreement for Pledge of Shares dated 26.07.2016, it the Debenture Trustee who is vested with the power to invoke the Pledge on the collateral and to transfer or register the Pledge in the name of the Debenture Trustee or Debenture Holder.
- k) From the bare perusal of the Agreement of Pledge of Shares dated 26.07.2016 it can be seen that the Appendix A and B which consists of the particulars of Initial Pledged Securities and From of Letter addressed to the Debenture Trustee does not contain any inputs as to the number of shares Pledged by the Pledgors and therefore it can be said that since the Agreement is silent on the aspect of number of shares Pledged by the Pledgors the Agreement is incomplete and therefore this Agreement cannot be termed as complete Agreement.
- l) The present Petition in the event of documents mentioned as annexure nos. 7, 9 and 133 are liable to be impounded for want of payment of deficit Stamp Duty payable as per Maharashtra Stamp Act, 1958 for enforcement of the contract.
- m) The Financial Creditor has annexed the Balance Sheet of the Corporate Debtor where the Financial Creditor has failed to prove that the debentures were held in the name of ECL Finance Limited.
- n) The Corporate Debtor was not aware of the Assignment Agreement dated 30.06.2019. The Debenture Trustee was not made a party to the said Assignment Agreement. In the Loan Recall Notice dated 28.02.2020 r/w Addendum Recall Notice dated 24.08.2020, there is no mentioning of the execution of the Assignment Agreement.

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- o) As per Clause 2.1.2 of the Assignment Agreement, the Assignor has claimed to have assigned in favour of the Assignee all its rights, title and interest in the 'Financial Documents' all agreements, deeds and documents as more particularly mentioned in the Assignment Agreement. The Assignor has claimed to have assigned rights, title and interest that of the Debenture Trust Agreement dated 01.07.2016, Indenture of mortgage dated 27.07.2016, Debenture Trust Deed dated 05.07.2016, Indenture of Mortgage dated 08.02.2017, all the Pledge Agreements to which ECL Finance Limited is not even a party. The Debenture Agreement dated 01.07.2016 was executed by and between the Corporate Debtor and the Debenture Trustee.
- p) The Assignment Agreement is an unregistered document and shall not bind the Corporate Debtor or affect the immovable properties mentioned therein or confer any power to adopt or be received as evidence of any transaction affecting such property or conferring such power in terms of Section 49 of the Registration Act, 1908. The Financial Creditor failed to issue statutory Notice under section 13(2) of the SARFAESI Act, 2002 which is pre-requisite before demanding or recalling any securities.
- q) Under the Debenture Trust Deed. ECL Finance Limited was appointed to act only as a Monitoring Agent in order to monitor and verify the project works and various obligations of the Corporate Debtor. The obligations and responsibilities of the Monitoring Agent are enumerated in Monitoring Agent Agreement dated 22.07.2016.

- r) The Credit Information Report only reflects that the account of the Corporate Debtor had been declared as SMA-1 on August, 2019. However, as per the RBI Guidelines dated 26.02.2014, the Debenture Trustee/Holder ought to have transferred the account of the Corporate Debtor to SMA-2 and thereafter declare the account as NPA as per the guidelines.
- s) The date of default as mentioned in Form-1 is 28.07.2019 whereas the alleged date of declaration of the account of the Corporate Debtor as NPA is 16.09.2019. The total outstanding claimed by the Financial Creditor is Rs.1,06,28,22,398/- (Rupees one hundred six crore twenty-eight lakh twenty-two thousand three hundred ninety-eight only). The Financial Creditor has not specified the time period for which the claim has been filed.
7. This Bench asked the counsel for Financial Creditor to clarify the queries regarding the following, vide order dated 17.02.2023 in view of specific grounds taken by the Corporate Debtor. The queries raised by the Bench were regarding :
- 7.1. In whose favour debt has been assigned ? whether in the favour of the Trust or in the favour of Edelweiss Asset Reconstruction Co. Ltd
- 7.2. How this debt is legally assigned in view of non-payment of stamp duty by EARC Trust, as the Certificate of stamp paper names Edelweiss Asset Reconstruction Co. Ltd
- 7.3. Whether Edelweiss Asset Reconstruction Co. Ltd is a sole Trustee of EARC Trust? If not, whether Edelweiss Asset Reconstruction Co. Ltd was authorized to take or intimate any proceeding or action by the Board of Trustee(s) of EARC Trust, as the petition or submissions do not indicate to the effect.

7.4. The Board Resolution has been passed by Board of Directors of Edelweiss Asset Reconstruction Co. Ltd authorizing one of its employees to file any petition under the IBC, but it nowhere mentions that this authority is delegated to them for initiating or taking any action/proceeding on behalf of or for the benefit of the Trust, of which Edelweiss Asset Reconstruction Co. Ltd is Trustee

8. The Financial Creditor has filed Additional written submission dated 23.02.2023 stating that –
- a. adequacy of stamp duty is to be considered at the time of adjudication of claims and not at the time of adjudication of petition and relied upon decision of Bombay High in the matter of *Classic Diamonds (India) Ltd. v. ICICI Bank Ltd. (2016 SCC Online BOM 15573)* wherein it was held that the issue of stamping cannot be raised in Company Petition filed for the purpose of winding up of the company. It was also submitted this law has been followed by NCLT and NCLAT in the matter of *Satra Properties (India) Ltd v. Vistra ITCL India Ltd 2022 SCC Online NCLT 23 and Company Appeal (AT) (CH) (Insolvency) No. 22 of 2021 in Ashique Poonamparambath v. The Federal Bank Limited. various judgments* respectively;
 - b. The assignment of debt is a permissible activity u/s 5 of SARFAESI Act, 2002 whereby any Asset Reconstruction Company (“ARC”) may acquire any Financial asset of any bank or Financial institution by entering into an agreement with such bank or Financial Institution for transfer of such Financial asset of such Company on such terms and conditions as may be agreed upon between them;
 - c. SARFAESI Act, 2002 provides issuance of security/fund by the ARCs for the purpose of acquisition of these Financial assets as

provided u/s 7 thereof which also provides, *inter alia*, that ARC shall hold the assets so acquired in trust for the benefit for the Qualified buyers holding security receipts or from whom the funds are raised and makes provisions of Indian Trust Act applicable thereto;

- d. Clause 2.1 of the assignment agreement provides that the assigned Financial Assets shall be held absolutely in trust for the benefit of holders of the security receipts issued by the assignee pursuant to the EARC Trust – SC 392, and the assignee shall hereafter be the full and absolute legal owner, and the only person legally entitled to such assets; and
- e. Clause 4.1.2 of the Trust deed dated 25.03.2019 empowers Trustee to institute any legal or other proceeding for or on behalf of the Trust or in the name of Trust/ Trustee. Further clause 4.3 empowers the Trustee to delegate any of its power to any committee or person.

Findings:

9. We have heard the arguments of the Learned Counsel for both the parties and perused the records.

9.1. It is observed that, the said Application is filed within Limitation and thus, this Bench has jurisdiction to adjudicate on the matter.

9.2. We have prudently gone through the pleadings available on record. Champalalji Finance Private Limited *i.e.* Principal Borrower issued 6300 Secured Redeemable Non-Convertible Debentures bearing face value of Rs.1,00,000 (Rupees one lakh only) each for an aggregate amount of Rs.63,00,00,000/- (Rupees sixty-three crore only) securing the Debentures, various Project properties including the Development rights. To secure the due repayment of the amounts under and in respect of the Debentures, the Corporate Debtor

executed Guarantee Agreement dated 26.07.2016 in favour of Debenture Trustee which is at pp 408-425 of the Petition.

9.3. The Financial Creditor has filed the computation of default amount as on 31.10.2020 which is at p. 19 as Annexure '4' and the same is as under:

Particulars	Amount (in Rs.)
Principal Overdue	42,21,00,000
Default on Principal	11,71,02,115
Add. Int Due (Gross)	43,22,82,604
Default on Add. Interest due	7,99,35,467
TDS Certificate not received	1,14,02,212
Total	1,06,28,22,398

9.4. There is no dispute that the Corporate Debtor has defaulted in repayment of amounts due on Secured Redeemable Non-Convertible Debentures and the interest thereon upon default of Principal Obligor i.e. the issuer of debentures. It is settled law that in case of default in payment money due on debentures either of debenture holder or debenture Trustee can proceed against the defaulting party.

9.5. The defence of Corporate Debtor as to validity of assignment deed between ECL Finance Limited and the Financial Creditor is not tenable in view of provisions contained in section 5(1)(b) of SARFAESI Act, 2002. Further there is no obligation on the assignor

either to intimate the borrower/its guarantors or to make them a party to the assignment deed.

9.6. The contention as to the insufficiency of stamp duty paid on assignment agreement, we find that the Applicant has paid stamp duty of Rs. 1,00,000/- + 15,000/- towards assignment of deed and it is immaterial whether the trustee pays stamp duty or the trust. Nonetheless assignment document executed by Bank or Financial Institution under the provisions of SARFAESI Act, 2002 is specifically exempted from Stamp duty in accordance with Section 8F of Indian Stamp Act 1899.

9.7. The contention as to lack of authority to file present Application also does not have any merit. In terms of section 7 of SARFAESI Act, 2002 ARC can either hold the assigned debt in a trust or have a separate account. In the present case, the Applicant has created a specific trust for holding the debt in question and it is the sole trustee thereof. The Trust deed empowers the Applicant to institute any legal proceeding for or on behalf of Trust and also to delegate such power of institution of proceeding. From the perusal of documents appended to the Application, the Applicant has annexed one Board Resolution authorizing the signatory to the Application to sign the Application u/s 7 of the Code on its behalf. Since the Trustee is a corporate person, its powers can be exercised through a Natural person, hence, we do not find any infirmity in the authority to file present Application.

9.8. The money owed on the debentures is recoverable by the assignee and said assignee steps into the shoes of debenture holder on record of Corporate Debtor. Mere fact that its name is not recorded cannot

disentitle the assignee to claim the amount in default. Further, the assignee is not under obligation to issue a notice calling upon the defaulting party to pay after assignment has taken place in case such party is already in default prior to such assignment.

9.9. The date of default is clearly stated in part IV as 28.07.2019. The Applicant has submitted that the Principal borrower failed to make coupon payments and redeem debentures on their respective due dates, in accordance with the terms of the Debenture Trust Deed and has determined date of default accordingly. There is no dispute that the Principal borrower has committed default in payment of debt. On perusal of document annexed to the Application, it is seen that the Corporate Debtor was issued a notice 28.02.2020 recalling all loan facility extended to Champalalji Finance Private Limited, Principal Borrower, and asking it to pay within 7 days from the date of said recall notice, failing which the debenture holders were entitled to invoke the guarantee.

9.10. Clause 2 of guarantee agreement dated 26.07.2016 executed by the Corporate Debtor provides that “*In the event that any default on part of the company in payment/repayment of any of the monies referred to above, or in the vent of any default on the part of the Company to comply with or perform any of the terms, conditions and covenants contained in the Debenture Trust Deed or in the Debenture Documents, the Guarantor shall, upon demand, forth-with pay to the Debenture Trustee without demur all the amounts payable by the Company under the Debenture Documents.*” In pursuance of clause 2, the guarantee of the Corporate Debtor was invoked vide notice dated 20.04.2020 by the Debenture trustee asking the Corporate Debtor to make good the default of the Principal Borrower immediately upon receipt of the notice and enclosed a copy

of recall notice dated 28.02.2020 asking Principal Borrower to pay a total sum of Rs. 83,44,69,053/- outstanding as of 31.01.2020 together with further interest within 7 days from the date of said recall notice. In view of this, the default of the Corporate Debtor arose on receipt of notice dated 30.04.2020, which is presumed to have been delivered to the noticee within 48 hours of its despatch. Accordingly, the date of default will fall in first week of May of 2020. The said period falls between the period stated in section 10A of the Code which prohibits filing of any Application u/s 7,9 or 10 of the Code on account of default falling between 25.03.2020 to 24.03.2021.

10. In view of the forgoing discussion, though there exists a financial debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) due and in default owed to the Applicant, The Application is not maintainable in view of the date of default i.e. 1st week of May, 2020 falling between period stated in section 10A of the Code. Hence, present Application deserves to be dismissed.

ORDER

1. This Application being C.P. (IB) No. 266/NCLT/MB/C-IV/2021 filed by Edelweiss Asset Reconstruction Company Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Tulasi Refrigerators Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP) is **dismissed** as not maintainable under Section 10A of the Code.
2. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of

dismissal of the present petition as it barred by the law, in view of insertion of Sec 10A of IBC 2016.

Sd/-

Prabhat Kumar
Member (Technical)
17/03/2023

Sd/-

Kishore Vemulapalli
Member (Judicial)