

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KOCHI**

CP(IBC)/12/KOB/2024

*(Under Section 7 of the Insolvency and
Bankruptcy Code, 2016)*

In the matter of:

M/s. Asten Properties and Developers Pvt.
Ltd.

Memo of parties: -

1. Mr. Nizam Saleem Tharakandathil,
residing at 13-B, Mather E1- Castilo,
Jawahar Nagar Avenue, Kadavanthara,
Ernakulam- 682 020.
2. Mr. Kim George residing at Malikayil,
Oliyappuram, Koothattukulam,
Ernakulam- 686 679.
3. Mr. Anish Khalid, Yashika,
Thottakattukara, Ernakulam- 683 108.
4. Mr. Mibu John, Paduthoottu Manjadi P.O.,
Tiruvalla- 689 105.

... Financial Creditors.

-Versus-

M/s. Asten Properties and Developers Pvt.
Ltd., 28, 2nd Floor, Asten NH Bye Pass,
Opposite Spices Board, Ernakulam, Vennala
P.O., Kerala, India- 682 028.

... Corporate Debtor.

Order delivered on: 13.06.2024

Coram:

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

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

Appearances:

For the Financial Creditors : Mr. Akhil Suresh, Adv.

For the Corporate Debtor : Ms. Stiya Sivan, Adv.

ORDER

Per: Coram

1. Under consideration is Petition No. CP(IBC)/12/KOB/2024 filed by the Financial Creditors, Mr. Nizam Saleem Tharakandathil & 3 Others against the Corporate Debtor M/s. Asten Properties and Developers Pvt. Ltd., invoking Section 7 of the Insolvency and Bankruptcy Code, 2016 to initiate a Corporate Insolvency Resolution Process for the total default amount of **Rs. 2,34,77,072/- (Rupees Two Crore Thirty-Four Lakh Seventy Seven Thousand and Seventy-Two Only)** in respect of credit facility availed by them from the Financial Creditors. The date of default is 29.10.2017.
2. The facts as narrated in the petition and explained by the Financial Creditors are summarized hereunder:

- i. The Petitioner stated that the Corporate Debtor is constructing apartments, villas and other real estate. The Corporate Debtor had launched its project namely “Dew Dale” situated at Kanjirappally, Kottayam District, Kerala and according to the corporate debtor having made various advertisements and representations regarding the project and ensuring that the project includes quality amenities and offered timely delivery of property, the financial creditors showed interest in buying some units.
- ii. The 1st Financial Creditor agreed to buy unit 14 C in “Dew Dale” Kanjirappally. The 1st Financial Creditor and Corporate Debtor after due deliberations executed a Land Agreement for the acquisition land measuring 129.10 cents (52.25 Ares) comprised of 40.47 Ares in Re-Survey No. 45/1-1 and 11.73 Areas in Resurvey No. 45/1-2, 0.05 Ares in Re-Survey No. 44/4 all of Kanjirappally Taluk, Kottayam District as per sale deed No. 1725 of the year 2013 registered at Kanjirappally Sub Registry. The 1st Financial Creditor also agreed to buy 1810/10000 of undivided interest in land from the Corporate Debtor to hold Apartment 14 C in Dew Dale for a total consideration of Rs. 8,75,000/-. The 1st Financial Creditor also entered into an Agreement with the Corporate Debtor under which the latter is to construct Apartment No. 14 C in Dew Dale for a total amount of Rs. 80,79,830/- which included the consideration for

construction which amounts to Rs. 70,05,400/- along with statutory charges of Rs.10,74,430.30/- which includes Stamp Duty, Registration and related charges, deposit and service connection charges for KSEB.

- iii. It is stated that the 1st Financial Creditor, the Corporate Debtor and Indiabulls Housing Finance Limited thereby entered into a Tripartite Agreement for the purchase and construction of the appartement of the 1st Financial Creditor. The 1st Financial Creditor has been diligently paying the installments to the bank as well.
- iv. As per the Construction Agreement the Corporate Debtor agreed to construct and hand over the said unit within 30 months. The Corporate Debtor failed to fulfill their promise. The 1st Financial Creditor had sent repeated letters to the Corporate Debtor expressing concern about the delay in the completion and handover of the said unit. In reply to the letter dated 04.03.2022, the Corporate Debtor sent a reply on 10.03.2022 stating that an investor is ready to take over the project that legal and technical scrutiny is going on and the project will be completed within a short period, and that a handover would be made to the 1st Financial Creditor.
- v. The 2nd Financial Creditor also agreed to buy a unit 11 C in “Dew Dale” Kanjirappally. The 2nd Financial Creditor and Corporate Debtor after due deliberations executed a Land

Agreement for land admeasuring 129.10 cents (52.25 Ares) comprised of 40.47 Ares in Re-Survey No. 45/1-1 and 11.73 Ares in Resurvey No. 45/1-2, 0.05 Ares in Re-Survey No.44/4 all of Kanjirappally Taluk, Kottayam District as per sale deed No. 1725 of the year 2013 registered at Kanjirappally Sub Registry. The 2nd Financial Creditor also agreed to buy 1810/10000 of undivided interest in land from the Corporate Debtor to hold the Apartement 11 C in Dew Dale for a total consideration of Rs.8,75,700/-. The 2nd Financial Creditor also entered into an Agreement with the Corporate Debtor under which the latter is to construct Apartment No 11 C in Dew Dale for a total amount of Rs 80,79,830/- which included the consideration for construction which amounts to Rs. 70,05,400/- along with statutory charges of Rs.10,74,430.67/- which includes Stamp Duty, Registration and related charges, deposit and service connection charges for KSEB.

- vi. The 2nd Financial Creditor, the Corporate Debtor and Indiabulls Housing Finance Limited thereby entered into a Tripartite Agreement for the purchase and construction of the apartment of the 2nd Financial Creditor. The 2nd Financial Creditor has been diligently paying the installments to the bank as well.
- vii. As per the Construction Agreement the Corporate Debtor agreed to construct and hand over the said unit within 30 months. The Corporate Debtor failed to fulfill their promise.

The 2nd Financial Creditor had sent repeated letters to the Corporate Debtor expressing concern about the delay in the completion and handover of the said unit. In reply to the letter dated 28.03.2022, the Corporate Debtor sent a reply letter on 06.04.2022 stating that an investor is ready to take over the project that legal and technical scrutiny is going on and the project will be completed within a short period and that handover would be made to the 2nd Financial Creditor.

- viii. The 3rd Financial Creditor agreed to buy unit 14 B in “Dew Dale” Kanjirappally. The 3rd Financial Creditor and Corporate Debtor after due deliberations executed a Land Agreement for land measuring 129.10 cents (52.25 Ares) comprised of 40.47 Ares in Re-Survey No. 45/1-1 and 11.73 Ares in Resurvey No. 45/ 1-2, 0.05 Ares in Re-SurveyNo.44/4 all of Kanjirappally Taluk, Kottayam District as per sale deed No. 1725 of the year 2013 registered at Kanjirappally Sub Registry. The 3rd Financial Creditor would like to buy 1615/10000 of undivided interest in land from the Corporate Debtor to hold Apartment 14 B in Dew Dale for a total consideration of Rs, 7,85,400/-.
- ix. It is stated that the 3rd Financial Creditor also entered into an Agreement with the Corporate Debtor to construct Appartement No 14 B in Dew Dale for a total amount of Rs. 72,77,579.5/- which included the consideration for construction which amounts to Rs.63,08,800/- along with

statutory charges of Rs.9,68,779.50/- which includes Stamp Duty, Registration and related charges, deposit and service connection charges for KSEB. The 3rd Financial Creditor, the Corporate Debtor, and ICICI Bank Ltd. thereby entered into a Tripartite Agreement for the purchase and construction of the apartment of the Applicant. According to the Tripartite Agreement made between the 3rd Financial Creditor, Corporate Debtor, and ICICI Bank Ltd an amount of Rs. 56,00,000/- was sanctioned. The loan based on the Tripartite Agreement by the 3rd Financial Creditor was paid off and the loan was closed.

- x. As per the Construction Agreement the Corporate Debtor agreed to construct and hand over the said unit within 30 months. The Corporate Debtor failed to fulfill their promise. The 3rd Financial Creditor had sent repeated letters to the Corporate Debtor expressing concern about the delay in the completion and handover of the said unit. In reply to the letter dated 02.04.2022, the Corporate Debtor sent a reply on 12.04.2022 stating that an investor is ready to take over the project that legal and technical scrutiny is going on that the project will be completed within a short period and that handover would be made to the 3rd Financial Creditor.
- xi. The 4th Financial Creditor agreed to buy unit 14 A in “Dew Dale” Kanjirappally. The 4th Financial Creditor and Corporate Debtor

after due deliberations executed a Land Agreement for land admeasuring 129.10 cents (52.25 Ares) comprised of 40.47 Ares in Re-Survey No. 45/1-1 and 11.73 Areas in Resurvey No. 45/1- 2, 0.05 Ares in Re-Survey No.44/4 all of Kanjirappally Taluk, Kottayam District as per sale deed No. 1725 of the year 2013 registered at Kanjirappally Sub Registry. The 4th Financial Creditor would like to buy 1615/10000 of undivided interest in land from the Corporate Debtor to hold Apartment 14 A in Dew Dale for a total consideration of Rs, 8,75,000/-. It is stated that the 4th Financial Creditor also entered into an Agreement with the corporate Debtor to construct the Appartement No 14 B in Dew Dale for a total amount of Rs 72,77,579.5/- which included the consideration for construction which amounts to Rs. 63,08,800/- along with statutory charges of Rs.9,68,799.50/- which includes Stamp Duty, Registration and related charges, deposit and service connection charges for KSEB.

- xii. The 4th Financial Creditor, the Corporate Debtor and Indiabulls Housing Finance Limited thereby entered into a Tripartite Agreement for purchase and construction of the appartement of the 4th Financial Creditor. According to the Tripartite Agreement made between the 4th Financial Creditor, Corporate Debtor, and India Bulls Housing Finance Limited an amount of

Rs 50,33,155/- was sanctioned. The 4th Financial Creditor has been diligently paying the installments to the bank as well.

- xiii. As per the Construction Agreement the Corporate Debtor agreed to construct and hand over the said unit within 30 months. The Corporate Debtor failed to fulfill their promise. The 4th Financial Creditor had sent repeated letters to the Corporate Debtor expressing concern about the delay in completion and handover of the said unit.
- xiv. In reply to the letter dated 07.03.2022, the Corporate Debtor sent a reply on 07.03.2022 stating that an investor is ready to take over the project that legal and technical scrutiny is going on and the project will be completed within a period of 6 to 7 months and handover would be made to the 4th Financial Creditor.
- xv. However the Corporate Debtor has not completed the project to date neither has kept the promises repeatedly given or the Financial Creditors. Hence, the present application has been filed by the Financial Creditors to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor under Section 7(4) of the Insolvency and Bankruptcy Code, 2016.

FINDINGS: -

3. We have heard the learned counsel for both parties and perused the entire case records/documents. We have also gone through the evidence on record. On hearing both sides and with an appreciation of the papers produced, the following two issues are framed: -
- i. Whether the application is barred by limitation?
 - ii. Is there a Creditor-Debtor relationship between the Financial Creditors and Corporate Debtor herein?
4. **Issue No. i:-** To arrive at a definitive conclusion, concerning this issue, we have gone through Section 238A of the IBC, 2016 which defines "Limitation": -

Section 238A: Limitation.

238A. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, as the case may be.

5. To get further clarity on this issue, we have gone through Article 137 of the Limitation Act, 1963 which reads as under:

PART II—OTHER APPLICATION

137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.
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6. It is settled law as decided by the Hon'ble NCLAT in its order in ***Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd. (Company Appeal (AT) (Insolvency) No. 44 of 2017)*** that, those provisions of the IBC cannot be shackled by the Limitation Act. It was observed that: “There is nothing on record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the appellant also failed to lay a hand on any of the provisions of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I&B Code, 2016 is not an Act for recovery of money claim, it relates to the initiation of the Corporate Insolvency Resolution Process. ***If there is a debt which includes interest and there is default of debt and having a continuous cause of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.***” We, therefore, are not agreeable with the submissions

made by the Corporate Debtor regarding the limitation in filing this application.

7. We have also gone through the Judgment of the Hon'ble National Company Law Appellate Tribunal in ***Vidyasagar Parchuri vs. State Bank of India & Other*** (Company Appeal (AT) (CH) (INS.) No. 184 of 2023) wherein the Hon'ble NCLAT held that:

76. An 'Acknowledgement of Liability', is to be in 'Writing', signed by a 'Party', against whom, the 'Property' or 'Right', is claimed, and the same is to be within the 'Limitation Period'. An 'Acknowledgement', must relate to an 'Existing Liability', as per decision *Rangasami v. Thangavelu*, 42 Mad 637.

77. It cannot be brushed aside that the statement on which an 'Acknowledgement Plea', is resting upon, need not amount to 'promise' and need not include the 'exact nature' of the 'liability', as per decision of Hon'ble Supreme Court of India in *Lakshmiratan Cotton Mills Co. Ltd. v. Aluminium Corporation of India Ltd.*, AIR 1971 SC Page 1482.

78. In Law, an 'Acknowledgement', extends the 'Period of Limitation', as per decision *P. Sreedevi v. P. Appu*, AIR 1991, Ker 76. No wonder, the 'burden', lies upon the 'Creditor', to establish that an 'Acknowledgement', was made in time, as per decision *Gur Saran v. Shib Singh*, reported in AIR 1943 ALL 393 (FB).

8. In this case we have seen that there are letters of communication between the Financial Creditors and Corporate Debtor regarding the delay in the completion of the project as per agreement. We have also seen that the Corporate Debtor has replied to the letters on 10.03.2022, 06.04.2022, 12.04.2022, 07.03.2022. Therefore we are of the considered opinion that the Company Petition is not barred by limitation.
9. **Issue No. ii:-** From the records produced, we could find that there is a Creditor- Debtor relationship between the Financial Creditors and the Corporate Debtor through various documents produced before this Tribunal and the Corporate Debtor has no case that they have repaid the money received from the Financial Creditors.
10. We are of the view that the present application filed by the Financial Creditors satisfies all the definitions of “Financial Creditor”, “Default” and “Financial Debt” and qualifies for applying for Insolvency and Bankruptcy Code. Hence, there is a Creditor-Debtor relationship with them. So, we are of the considered opinion that the present application of the Petitioner/ Financial Creditors may be admitted under Section 7 of the IBC, 2016 and CIRP initiated against the Corporate Debtor.
11. In view of the aforesaid observations, we hereby pass the following Orders.
 - i. The petition bearing CP(IBC)/12/KOB/2024, filed by Mr. Nizam Saleem Tharakandathil, Mr. Kim George, Mr. Anish Khalid, Mr. Mibu John the Financial Creditors, under Section 7 of the Insolvency and Bankruptcy Code 2016 for initiating CIRP against

the Corporate Debtor M/s. Asten Properties and Developers Pvt. Ltd., is **ADMITTED**.

- ii. There shall be a moratorium under Section 14 of the Code.
- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until the Adjudicating Authority approves the Resolution Plan under Sub-Section (1) of Section 31 of IBC or passes an order for liquidation of Corporate Debtor under Section 33 of the Code, as the case may be.
- iv. Public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations 2016.
- v. The Financial Creditor has proposed the name of **Mr. Rajendran P.R.**, having Registration Number: **IBBI/IPA-001/IP-P01748/2019-2020/12717** is appointed as the Resolution Professional, to carry out functions as mentioned under the Insolvency and Bankruptcy Code, 2016. The proposed IRP is directed to produce Form B, authorization for Assignment, and his consent in the prescribed format within 2 days from the date of receipt of this order. The designated IRP must take any additional actions in this regard that are mandated by the law, more specifically specified in Sections 15, 17, and 18 of the Code. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP

concerning the Corporate Debtor in terms of the provisions of IBC, 2016. The fee payable to IRP or as the case may be, the RP shall comply with such Regulations, Circulars and Directions as may be issued by the Insolvency and Bankruptcy Board of India (IBBI). The IRP shall carry out its functions as contemplated by Sections 15 and 21 of the Code.

- vi. During the CIRP period the management of the Corporate Debtor shall vest with the IRP or, as the case may be the RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor 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.
- vii. The IRP/RP shall submit to this Adjudicating Authority periodical reports as per Regulations/Rules concerning the progress of the CIRP in respect of the Corporate Debtor.
- viii. The Financial Creditors shall deposit a sum of Rs.2,00,000/- (Two Lakhs Only) with the IRP to meet the expenses arising out of issuing publication and inviting claims, etc. These expenses are subject to approval by the Committee of Creditors (CoC).
- ix. In terms of Section 7 (5)(a) of the Code, the Registry is hereby directed to communicate a copy of this Order to the Financial Creditors, the Corporate Guarantor and IRP by Speed Post & e-mail

immediately, and in any case, not later than two days from the date of this order.

- x. Additionally, the Financial Creditors shall serve a copy of this Order on the IRP and the Registrar of Companies, Kerala, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Tribunal within seven days from the date of receipt of a copy of this order.

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this the 13th day of June, 2024.

Rajasree R. Nair/LRA