

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)**

**PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 28.10.2022 AT 10.30 AM**

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.08/7/AMR/2020	IA(IBC)/40/2022	7 of IBC	Shiram City Union Finance Ltd Vs Ramakrishna Housing Pvt Ltd

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP(IB) No.08/7/AMR/2020 is admitted and IA(IBC)/40/2022 is dismissed, vide separate common order.

SD/-
**JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL**

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI**

*** **

CP (IB) No. 8/7/AMR/2020

**In the matter of a Petition 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**

AND

In the matter of

M/s. RAMAKRISHNA HOUSING PRIVATE LIMITED

Between:

Shriram City Union Finance Limited,
123, Angappa Naicken Street, Parrys,
Chennai -600001

... Petitioner/Financial Creditor

AND

M/s. Ramakrishna Housing Private Limited,
(U70101AP2014PTC092285)
D.No.54-15-20, Srinagar Colony,
Ring Road, Vijayawada,
Andhra Pradesh – 520 008.

... Respondent/Corporate Debtor

AND

**IA(IBC) No.40/2022 IN
CP (IB) No. 8/7/AMR/2020**

**Application filed under Section 60 (5) of Insolvency and
Bankruptcy Code, 2016**

AND
In the matter of
M/s. RAMAKRISHNA HOUSING PRIVATE LIMITED

Between:

M/s. Ramakrishna Housing Private Limited,
(U70101AP2014PTC092285)
D.No.54-15-20, Srinagar Colony,
Ring Road, Vijayawada,
Andhra Pradesh – 520 008.

...Applicant/ Corporate Debtor

AND

Shriram City Union Finance Limited,
123, Angappa Naicken Street,
Parrys, Chennai -600001

... Respondent/Financial Creditor

Date of pronouncement of order: 28.10.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Financial Creditor : Mr.Raja Shekar Rao Salvaji, Advocate.
For Corporate Debtor : Mr.Kabilan Manoharan, Advocate.

COMMON ORDER IN CP(IB) No.8/7/AMR/20222 AND
IA(IBC)/40/2022 IN CP(IB)No.8/7/AMR/2022

1. This Company Petition is filed by M/s.Shriram City Union Finance Limited, Financial Creditor (hereinafter referred to as FC)

against the M/s. Ramakrishna Housing Private Limited, Corporate Debtor (hereinafter referred to as CD) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (CD) for the default committed by the CD in discharging the debt that is due to the FC.

2. The facts of the case briefly are as follows:
 - i). The CD has offered collateral security of property and deposited the title deeds. The Guarantors of the CD offered collateral security of the property and mortgaged the said property with the FC for the finance taken by the CD, which is to an extent of Rs.20 Crores, for the purpose of working capital and allied business activities. The CD entered into two loan agreements with the FC.
 - ii). The guarantors guaranteed the due performance of the obligations under the aforesaid agreement by the Borrower/CD. The Loan amount was disbursed and was repayable in monthly instalments on every 10th day of the month without any demand. Though the CD undertook to repay the amount in 3 years, after paying the amounts upto the first 20 instalments, committed default from 21st instalment which fell due on 10.06.2019 and thus committed default.

- iii). The CD issued cheques, which were dishonoured. Hence a notice was issued terminating the agreement entered into between the CD and the FC and the CD and the guarantors were called upon to settle the contract. In spite of the said notice, neither the CD nor the Guarantors cleared the arrears. An amount of Rs.18,71,63,369/- is due as the said debt stands undischarged. Hence, this Company Petition, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the CD.
3. The CD filed counter, contending that the FC has suppressed the material facts and there is non-joinder of parties for which, the Company Petition is liable to be dismissed. IA(IBC) No.40/2022 has been filed regarding the maintainability of this Company Petition, which both the parties sought to be decided along with the main Company Petition. With respect to the claims and cross-claims from the terms of the Loan Agreement, the FC chose to invoke the Arbitration Clause under the Loan Agreement and an Arbitrator was also appointed. The proceedings before the Arbitrator are going on. While the arbitration proceedings are pending, this Company Petition came to be filed. There is no Insolvency Commencement or Moratorium with respect to the CD during the time, the arbitration proceedings has commenced. The

Supreme Court, in a judgement, held that Arbitration Proceeding initiated after moratorium are *non est* in law. In another judgment, the NCLAT held that an Arbitral Proceeding can continue for deciding the Counter Claim of the CD. The Superior Courts have on many occasions clarified the scope of moratorium being dependent on the nature of the proceedings and whether it is in favour of the CD and diminishes the Debtor's Assets. The Supreme Court also held that the contractual disputes are outside the purview of IBC and jurisdiction of NCLT. Citing all the above judgments, the CD further contends that the two loans were secured by third party assets under mortgage executed by the third parties which could be sold off, under the terms of the Mortgage Deed, in the event of the failure of the CD to make full or part repayment. The third parties who executed the Mortgage Deed in favour of the Financial Creditors did it on a non-commercial basis with the CD Company that was promoted and owned by the CD who is their good friend, for keeping the CD Company as a going concern. The FC holding valuable security of third parties under mortgage has moved this Company Petition for defeating the very purpose of the third party mortgage. The fact of the charge over valuable third party assets is suppressed by the FC. The third party mortgagors in the above circumstances are necessary parties to the proceedings, who are left out intentionally. Hence, this Company Petition is liable to be dismissed.

4. Heard the arguments of both the Counsel and perused the written submissions. In the written submissions of the CD, the contentions of the counter were reiterated. The important contentions raised are that while the arbitration proceedings are pending, this Company Petition is not maintainable and as per Section 14 (3) (b) of IBC, all proceedings involving Surety in Contract in a contract of guarantee to a CD are exempted from Moratorium. The non-joinder of the third party collateral security is fatal to the Company Petition.
5. As regards exemption of the surety in a contract of guarantee to a CD, there is no quarrel and FCs counsel does not insist upon the moratorium operating against the continuation of proceedings before the Arbitrator.
6. As regards the merits of the case, the CD does not succeed in proving that the nonexistence of debt and default. His arguments revolved around the fact of the 3rd party security being given in respect of loan taken by the CD. But the liability of the principal borrower and the securities is coextensive. Hence the fact that a surety is given for the loan taken by the CD does not absolve the CD from being subjected to the proceedings under IBC, which are independent in nature.

7. The pendency of the arbitration proceedings is endeavoured to be projected as a pre-existing dispute. But the fact remains that the arbitration clause was invoked by the FC but not the CD. There is no dispute as such raised by the CD. In the light of the said fact, the judgment of Supreme Court in the matter of *Vidarbha Industries Power Limited vs. Axis Bank Limited in Civil Appeal No.4633/2021, DoJ:12.07.2022*, which held that admission of CP is discretionary even with an existence of a default and Adjudicating Authority has to consider the grounds made out by the CD against the admission of CP does not help the CD from facing the consequences of the default. The existence of the 3rd party collateral security and arbitration proceedings do not come in the way of the Adjudicating Authority dealing with an application under Section 7 of IBC, since the right of the FC to move the tribunal under section 7 IBC is independent of the other available remedies.

8. A judgment was relied upon by the counsel for the FC, which is rendered by the High Court of Delhi in the matter of *Millennium Education Foundation vs. Educomp Infrastructure and School Management Limited 2022 LiveLaw (Del) 449*, wherein the Delhi High Court relied on the judgment of the Supreme Court in *Indus Biotech Private Ltd. Vs. Kotak India Venture (Offshore), (2021) 6 SCC 436*, which held that the proceedings under the Insolvency

and Bankruptcy Code would take precedence and NCLT would have to adjudicate the Petition filed before it on its merit without being influenced by the pendency of the application filed under Section 8 of the Arbitration Act. It was further held by the Supreme Court that the Adjudicating Authority i.e., NCLT has a duty to advert to the contentions put forth on the application filed under the Insolvency and Bankruptcy Code and to examine the material placed before it and record its satisfaction as to whether there is a default or not. It was further held that if a Petition under the Insolvency and Bankruptcy Code is admitted, upon the adjudicating authority recording its satisfaction, then an application under Section 8 of the Arbitration Act would not be maintainable and the application under the Insolvency and Bankruptcy Code has to be decided first and the natural consequence of the same would befall on the application under Section 8 of the Arbitration Act. It was held by the Delhi High Court that the proceedings under the Insolvency and Bankruptcy Code would take precedence and any moratorium issued therein would automatically bind the proceedings under the Arbitration Act. In case the Petition filed before NCLT is admitted and moratorium comes into play, the legal consequences of the same would automatically apply to the proceedings under the Arbitration Act. It was clarified that so long as the petition is merely pending and not admitted and no moratorium has

commenced, there can be no embargo on the proceedings under the Arbitration Act and on the petitioner seeking reference of disputes and appointment of an Arbitral Tribunal.

9. However, there is no prayer before the Tribunal for appointment of Arbitral tribunal, hence the same is not relevant for the facts of this case. But however from the above judgment it is clear that the pendency of the Arbitration Proceedings would not have any impact on the jurisdiction of the NCLT in deciding an Application under Section 7 of IBC. There is no denial of the fact that a loan agreement was entered into between the FC and the CD and that the loan sanctioned was disbursed in favour of the CD. There is also no tenable argument with regard to the failure of the CD in discharging the debt which has become due. No reply notice was also issued by the CD to the demand notice issued by the FC. The Statements of Account showing the default are filed before the Tribunal. Hence from the above it is clear that the CD has committed default in discharging the debt which became due to be payable to the FC.

10. As regards the plea of non-joinder of the sureties, the argument can be brushed aside. Since there is no relief claimed against the sureties or the guarantors, they are not necessary parties to this application.

11. Hence, I am of the considered view that it is a fit case to admit and order initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. Consequently, IA(IBC)40/2022 is dismissed. The FC suggest one Mr.Sriram Parthasarathy, (Registration No.**IBBI/IPA-002/IP-N00292/2017-2018/10895**) as Insolvency Resolution Professional (IRP) and sought the Tribunal to appoint him as IRP. Mr. Sriram Parthasarathy appointed as Insolvency Resolution Professional (IRP).

ORDER

The CP(IB)No.8/7AMR/2020 is admitted. Hence, IA(IBC)/40/2022 is dismissed. The Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

- i. Mr.Sriram Parthasarathy, (Registration No.**IBBI/IPA-002/IP-N00292/2017-2018/10895**), having office at 10/17, Anandam Colony, South Canal Bank Road, Mandaveli, Chennai-600028; Mobile:**9940336666**; e-mail: **srirampcs@gmail.com**; is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.

- ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.
- iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.
- iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.
- v. The Registry shall communicate the order to the Financial Creditor and the Corporate Debtor forthwith.
- vi. The Financial Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

Sd/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu