

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III

C.P.(IB)-248(MB)/C-III/2022

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016.)

In the matter of

Indiabulls Housing Finance Limited

Having Registered Office at: M-62 & 63, First Floor, Connaught Place, New Delhi-110001.

.....Financial Creditor/Petitioner

Vs

Essel Homes Private Limited

Having Registered Office at: 135, Continental Building, Dr. A. B. Road, Worli Mumbai, Mumbai City, Maharashtra- 400018.

.....Corporate Debtor/Respondent

Order Pronounced on: 25.04.2024

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Financial Creditor: Adv. Ahsan Allona i/b JSA

For the Corporate Debtor: Adv. Vinita Melvin i/b ANB Legal

ORDER

Per: - Smt. Lakshmi Gurung (Judicial Member).

1. The Present **Company Petition (IB)-248(MB)/2022** has been filed under section 7 of Insolvency and Bankruptcy Code, 2016 (**“IBC/Code”**) by **Indiabulls Housing Finance Limited, (“Financial Creditor/Petitioner”)** for initiating Corporate Insolvency Resolution Process (**“CIRP”**) against **Essel Home Private Limited (“Corporate Debtor/ Respondent”)** for default in repayment of Rs. 2,60,98,26,700/- (Rupees Two Hundred and Sixty Crores Ninety-Eight Lakhs Twenty-Six Thousand and Seven Hundred only).

Brief Relevant Facts:

2. The Petitioner had sanctioned a loan of Rs. 190,00,00,000/- (Rupees One Hundred and Ninety Crores) vide sanction letter dated 03.06.2020, which is annexed as Annexure-2 to the petition.
3. The parties entered into a loan agreement dated 03.06.2020 between the Petitioner on one side and M/s Gnex Realtech Private Limited (as borrower), the Corporate Debtor (as co-borrower) and Pricomm Media Distribution Ventures Private Limited (as co-borrower) on the other side. Copy of the said Loan agreement is annexed as Annexure-3 to the petition.
4. The loan facility was also secured *interalia* by the Corporate Debtor by pledging 2,16,00,050 equity shares of M/s. Gnex Realtech Private Limited to the Petitioner vide pledge agreement dated 10.09.2020.
5. The entire amount of Rs. 190,00,00,000/- was disbursed to M/s Gnex Realtech Private Limited (referred to as **Gnex**) on 23.06.2020.
6. It is submitted that the Corporate Debtor failed to pay the interest and/or principal payable on the due dates under the loan agreement and an Event of Default occurred in accordance with Clause 12.1.1 of the

Loan Agreement. Therefore, in accordance with the Prudential guidelines issued on the Assets Classification by the Regulatory Body, the account of the Corporate Debtor was classified as a Non-Performing Asset (NPA) on 30.09.2021.

7. The Petitioner issued a notice dated 20.01.2022, addressed to all borrowers including the Respondent herein co-borrower and guarantor under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Despite receipt of the aforesaid notice, neither the Borrower nor the co-borrowers made full payment of the outstanding amounts. Accordingly, it is stated that a total default amount of Rs. 2,60,98,26,700 (Rupees Two Hundred and Sixty Crores Ninety-Eight Lakhs Twenty-Six Thousand and Seven Hundred Only) (as on January 28, 2022) including interest, TDS, Non- SCC charges, penal charged, etc. is due and payable by the Corporate Debtor.

Reply of the Corporate Debtor:

8. The Corporate Debtor has filed his Affidavit in Reply dated 17.05.2022 and raised following defense:
 - a. The debt in question has been disbursed to Gnex and not to the Corporate Debtor. Therefore, as per section 5(7) and 5(8) of IBC there is no debt existing and payable by the Respondent. The Respondent has merely pledged shares of Genex Realtech Pvt. Ltd. as security against the loan to Gnex. Such creation of security does not fall within the category of “financial debt” under Section 5(8) of the Code. The Petitioner is therefore, not a financial creditor and cannot maintain this instant Petition.
 - b. It is further submitted that even if assuming that Respondent is liable to pay amounts to the Petitioner, the cause of action to file a Petition under Section 7 of the Code starts on and from the date of first date of default. Schedule II of the Loan Agreement lays down

Payment/ Repayment Schedule with various due dates and corresponding interest/ principal payable. It is stated that Gnex had with some delay cleared the first two instalments towards interest as laid down under the repayment schedule, however, the principal due on 05.01.2021 Rs.9,50,00,000/ (Rupees Nine Crores Fifty Lacs Only) has not been paid and the first date of default has occurred on 05.01.2021. Hence, the petition is hit by bar of Section 10A of the Code.

- c. Further, the record of default has not been provided in accordance with Section 7(3) of the Code. The claim is neither based on the record of default recorded with the Information Utility nor is it based on any other record or evidence demonstrating default as per Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. No Statement of Account certified in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 has been annexed to the Petition. Therefore, the Present Petition is clearly defective and deserves to be dismissed with costs.
- d. The Petitioner under "Particulars of Financial Debt" in Part IV alleges the amount in default to be Rs. 2,60,98,26,700/- as on 28.01.2022, however the break-up provided thereunder aggregates only to Rs. 1,53,31,43,970/-. No computation or basis for the Petitioner's claim for the excess balance of Rs. 1,07,66,82,730/- has been given. These figures are also inconsistent with the Petitioner's Statement of Account at Annexure 4. Moreover, in the notice under section 13(2) of the SARFAESI Act issued on 20.01.2022, the Petitioner claimed the outstanding amount to be Rs. 2,56,40,34,374/- as on 19.01.2022. Therefore, due to uncertainty in the alleged claims by the Petitioner the instant Petition is defective and not maintainable.
- e. The Loan Agreement dated 03.06.2020 is insufficiently stamped under the provisions of the Maharashtra Stamp Act, 1958 and is

liable to be impounded by this Hon'ble Tribunal. The Loan Agreement therefore is legally inadmissible and unenforceable.

- f. As per Section 7 of the Code read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, an application seeking initiation of a corporate insolvency resolution process against a corporate debtor must mandatorily furnish details of 'person authorized to submit application' but such details are not furnished.

Observations & Findings

9. Heard the Ld. Counsel for the Parties, perused the pleadings and daily orders. Plea not taken in the reply affidavit or at the time of oral hearing, but may be contained in written submission which does not go to the root of the matter is not being dealt with being inconsequential in nature.
10. Some of the daily orders are worth noting where the parties pleaded settlement, which are reproduced below:

Date	Order
06.06.2023	<i>“and requested for an adjournment on the ground that both parties have entered into an amicable settlement and they will file appropriate application for withdrawing the main company Petition before the next date of hearing. List this matter on 20.06.2023 for reporting settlement.”</i>
20.06.2023	<i>“Corporate Debtor are present and requested for an adjournment on the ground that both parties have entered into an amicable settlement and they will file appropriate application for withdrawing the main</i>

	<i>company Petition before the next date of hearing. List this matter on 28.06.2023.”</i>
30.08.2023	<i>“2. Ld. Counsel appearing for the Respondent submits that the settlement talks are going on between the parties and they have already made the part payment and the next installment will be paid by 25.09.2023. However, no settlement agreements placed on record. 3. Be that as may be, ld. Counsel appearing for the Petitioner consented for listing of this matter after 25.09.2023, therefore, list this matter on 19.10.2023 for reporting settlement.”</i>
19.10.2023	<i>“and requested time on the ground that settlements talks are going on between the parties. List this matter on 02.01.2024 for reporting settlement.”</i>

11. On 28.02.2024, the Court was informed that settlement failed and parties are ready to argue the matter.
12. From the aforementioned daily orders, it is evident that there were a number of adjournments on the ground of some kind of settlement between the parties. Moreover, Ld. Counsel for the Corporate Debtor has even mentioned that the they have already made the part payment and the next installment will be paid by 25.09.2023. In our considered view, admission of part payments towards loan repayment and further promise to pay next instalment by 25.09.2023 amounts to acknowledgement of existing financial debt.
13. Further, as can be seen from the Loan Agreement dated 03.06.2020 the Corporate Debtor is borrower/co-borrower. The relevant clauses and Schedule are mentioned below:

“Clause 1.1 (iii) :

“Borrower(s)” means the company(ies)/ person(s)/ firm(s) named in the Schedule I hereunder as the Borrower(s) and whose address(s) and other details are also mentioned in Schedule I hereunder. **The term “Borrower(s)” shall include the Co-Borrower(s),** if any, named in Schedule I hereunder.”

SCHEDULE I

S. No.	Items	Information to be Inserted
7.	Borrower(s)	Name: M/ s. Gnex Realtech Private Limited Construction: Company Address/Registered Office Address: B-10, Lawrence Road, Industrial Area, Delhi- 110035. Corporate Identity Number: U70101DL2012PTC244685 Permanent Account Number: AAECG9631Q
8.	Co-Borrower(s)	<p>1. Name: M/s. Essel Home Private Limited Construction: Company Address/Registered Office Address: 135, Continental Building, Dr. A. B. Road, Worli, Mumbai, Maharashtra-400018. Corporate Identity Number: U70102MH2015PTC270269 Permanent Account Number: AAECE1188N</p> <p>2. Name: M/s. Pricomm Media Distribution Ventures Private Limited Construction: Company Address/Registered Office Address: 613, 6th Floor, Kohinoor City, Kiroh Road, Kurla west, Mumbai, Maharashtra- 400070 Corporate Identity Number: U74999MH2018PTC312446 Permanent Account Number: AAKCP0042J</p>

3. Repayment/Payment**Clause 3.1.1:**

The Borrower(s) shall repay/pay the entire Loan and interest thereon to the Lender in such manner as agreed/specified by the Lender from time to time and/or as per the Payment/Repayment Schedule.”

14. Clause 1.1(iii) of the Loan Agreement clearly stipulates that **'Borrower'** means the company(ies)/person(s)/firm(s) named in Schedule 1 of the Loan Agreement, and it specifically **includes co-borrowers**. Further, Sr. No. 8 (Co-Borrower) of Schedule 1 of the Loan Agreement specifically indicates the name of the Corporate Debtor. Moreover, The Respondent has affixed its signatures and stamp on each and every page of the Loan Agreement confirming its liabilities as borrower/co-borrower.
15. Therefore, the first defense of the Corporate Debtor that there is no existence of financial debt is rejected.
16. The Petitioner has placed on record Revised Repayment Schedule letter dated 12.10.2022 in respect of loan of Rs. 190 Crores to Gnex. The said Repayment Schedule has not been disputed by the Respondent. According to the Repayment Schedule, 1st EMI instalment of Rs. 5,70,00,000/- became payable on 05.01.2021. It is submitted that this instalment was paid by the Corporate Debtor on various occasions till 02.04.2021. Thereafter, 2nd EMI instalment of Rs. 34,20,00,000/- became payable on 05.04.2021. Part Payments were made for this end EMI till 21.06.2021. The 3rd EMI became payable on 05.07.2021 which the Corporate Debtor failed to honour. During the hearing of the matter, this aspect has not been denied by the Corporate Debtor. Thus, we note that default has occurred on 05.07.2021 and is clearly not barred under Section 10 A of IBC.
17. The next contention of the Corporate Debtor that the claim is neither based on the record of default recorded with the Information Utility nor based on any other record or evidence demonstrating default as per Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Here it would be profitable to refer to section 7(3)(a) of the Code reproduced below:

“7(3) The Financial Creditor shall along with the application furnish-

- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
- (b) the name of the resolution professional proposed to act as an interim resolution professional; and*
- (c) any other information as may be specified by the Board.”*

18. From the bare perusal of the statutory provisions, it is clear that the financial creditor can furnish any of the following to prove debt:
- a. record of default recorded with the Information Utility (IU); or
 - b. such other record; or
 - c. evidence of default as may be specified.

Evidence of default has been specified as per Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which can be gainfully reproduced below:

“2A. Record or evidence of default by financial creditor

For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-

(a) certified copy of entries in the relevant account in the bankers’ book as defined in clause (3) of section 2 of the Bankers’ Books Evidence Act, 1891 (18 of 1891);

(b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.”

19. Admittedly, the financial creditor has not annexed record of default recorded with IU nor any evidence as specified under Regulation 2A. However, financial creditor has annexed the loan sanction letter dated 03.06.2020, loan agreement dated 03.06.2020 duly executed by the

Corporate Debtor co-borrower, statement of account evidencing the disbursement of Rs. 190 crores on 23.06.2020 through RTGS No. PID0010824 copy of notice dated 20.01.2022 issued under section 13(2) of SARFAESI Act, 2002, revised payment of schedule dated 12.10.2022. We are of the considered view that these documents constitute **“such other record”** as required under section 7(3)(a) of the Code. Corporate Debtor has not denied any of the above record, rather had submitted before this Court that part payment of loan has already been made and that next instalment would be paid on 25.09.2023. Therefore, this contention of the Corporate Debtor is also rejected.

20. The Corporate Debtor has failed to place on record any document or bank statement to establish that repayment of the loan demanded as per SARFEISI Notice dated 20.01.2022 has been fully made.
21. The Corporate Debtor next argued that the Loan Agreement is not adequately stamped and hence, proceedings based thereon cannot be maintained. We rely on the judgement ***Ashique Poonamparambath vs. Federal Bank - 2021 SCC OnLine NCLAT 1769*** and hold that there are sufficient documents like loan sanction letter, loan disbursement proof, notice under section 13(2) of SARFESI Act, 2002, Revised Repayment Schedule dated 12.10.2022 and Corporate Debtor own conduct of making statement before this Court about part payment of the loan, which establish the existence of debt and default.
22. In view of the fact that existence of debt and default has been established, default amount is more than threshold limit of Rs. 1 crore, the contention of mentioning different amount in the notice and in the part IV of the petition is inconsequential. Even then we examined the petition and found that the complete break-up is provided in the Foreclosure Statement at Annex.5 of the Company

Petition and the amount mentioned therein does tally with the amounts mentioned in Part IV of the petition. Therefore, this contention of the Corporate Debtor is also rejected.

23. Further, the Corporate Debtor has raised the contention that the corporate debtor must mandatorily furnish details of 'person authorized to submit application' but such details are not furnished and therefore the signatory to the petition is not authorized to initiate specific proceedings under IBC. However, it is observed that the Board Resolution at Annexure 8 clearly states that Mr. Uttam Kumar is authorised on behalf of Indiabulls Housing Finance Limited to appear for and/or represent the Petitioner before the National Company Law Tribunal ("NCLT"), National Company Law Appellate Tribunal ("NCLAT") or such other authorities/forums/courts for the cases pertaining to the Code. We are satisfied that petition has been lawfully initiated on the strength of the board Resolution 14.08.2020. Therefore, this contention of the Corporate Debtor is also rejected.
24. In view of the above discussions, we are of the considered view that the Petitioner has proved the debt and default and the same was also admitted during the hearing of this petition by the Corporate Debtor.
25. We rely on the judgement of the Hon'ble Supreme Court in the ***Innoventive Industries Limited vs. ICICI Bank and Another (2018)1 SCC 407***, it was held that-

"The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days receipt of a notice from the adjudicating authority.

*30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, **the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has***

occurred. *It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”*

(Emphasis Provided)

26. In view of the aforementioned judgement it is clear that the Adjudicating Authority only has to determine whether the “debt” was due and remained unpaid. If the adjudicating authority is of the opinion that a “default” has occurred, it has to admit the application. In the present case, sufficient evidence has been adduced by the Petitioner to prove the debt and default.
27. The default is to the tune of Rs. 260 Crores (which is much above the threshold of Rs.1 Crore). We are of the considered view that the Financial Creditor has proved existence of debt and default. Further the debt is in excess of Rs. 1 Crore and thus above the threshold limit mandated in Section 4(1) of the Code. Also the Petition filed is within limitation. Therefore, we hereby admit this company petition and also looking at the consent given by the Insolvency Professional, we hereby appoint **Mr. Ravi Prakash Ganti** as an IRP, with a direction to the Financial Creditor to pay remuneration to the IRP and his expenses until the constitution of CoC.
28. Accordingly, this Company Petition is **admitted** with the following directions:
- a. **The above Company Petition (IB) 246(MB)/2022 is allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s. Essel Home Private Limited.**
 - b. This Bench appoints **Mr. Ravi Prakash Ganti**, *having Registration No: **IBBI/IPA-002/IP-N-00102/2017-18/10245**, email: gantrip@gmail.com; Address: **Flat no.2, Ashiana CHS, Plot no. 60-A, Sector 21, Khargar, Navi Mumbai-410210*** as the Interim

Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

- c. The Financial Creditor shall deposit an amount of Rs. 5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby directs operation of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016 and prohibits the following:
 - 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 Securitization 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.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the

resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
 - i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
29. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.
30. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately. The Registry is further directed to send a copy of this order to the Insolvency and bankruptcy Board of India for their record. The Petitioner is also directed to forthwith communicate this order to the IRP.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Sd/-

LAKSHMI GURUNG
(MEMBER JUDICIAL)

Arpan, LRA