

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No. 4476/MB-VI/2019

*[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]*

IN THE MATTER OF:

ASSETS CARE AND RECONSTRUCTION ENTERPRISE LIMITED

(Erstwhile "Altico Capital India Limited")

[CIN- U65993DL2002PLC115769]

Registered Office: 2nd Floor, Mohandev Building 13

Tolstoy Marg, New Delhi -110001.

...Financial Creditor

V/s

MID-CITY SUPERSTRUCTURES PRIVATE LIMITED

[CIN- U45400MH2015PTC267260]

Registered Office: Link Corner Mall, Junction Of

24th & 33rd Road, Bandra West

Mumbai-400050, Maharashtra.

...Corporate Debtor

Pronounced: 19.04.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Financial Creditor : Adv. Rohit Gupta a/w Huzan Bhumgara a/w Umag Thakar
i/b Desai and Diwanji.

Corporate Debtor : None (*ex-parte*).

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. **BACKGROUND**

1.1 This is an Application bearing C.P. (IB) No. 4476/MB/C-VI/2019 originally filed by Altico Capital India Limited (presently Asset Care Reconstruction Enterprise Limited), on 25.11.2019 under section 7 of Insolvency and Bankruptcy Code, 2016(IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Mid-City Superstructures Private Limited (erstwhile Orbit Ventures Developers), the Corporate Debtor (CD). Post filing of this Application, Altico Capital India Limited assigned the loan assets disbursed in favour of the CD under the underlying financing documents, including security interest and pledges in respect of the loan assets, to Assets Care and Reconstruction Enterprise Limited, *vide* Assignment Agreement dated 04.03.2021 executed between Altico Capital India Limited and Assets Care and Reconstruction Enterprise Limited, the Financial Creditor (FC) herein. IA 1499/2021 was filed for substituting the name of the FC in place of Altico Capital India Limited, which was allowed *vide* order dated 26.08.2021. The total amount of the alleged default as on 15.11.2019 is Rs. 257,52,97,623/- (i.e. overdue and guarantee invocation amount).

2 CONTENTIONS OF FC

2.1 The FC had granted loan to the CD under two facility agreements dated 30.06.2016 and 12.10.2018 aggregating to Rs.265,00,00,000/- and Rs.95,00,00,000/- respectively to Orbit Venture Developers, (the principal borrower) and the repayment of the same was guaranteed by the CD herein (the Corporate Guarantor).

2.2 A Facility Agreement dated 30.03.2016 (Facility 1) was executed among Orbit Ventures Developers (principal borrower); Mr. Rajen Dhruv and Mr. Hiren Dhruv, Partners of Orbit Ventures Developers; Mid-City Superstructures Private Limited (CD); Mid-City Infrastructure Private Limited; Orbit Ventures and Company; and the FC, under which, a loan facility aggregating to Rs.2,65,00,00,000/- (Two Hundred Sixty-Five Crores Rupees) was made available to the principal borrower by the FC. Under the said Facility Agreement, the following agreements were executed to secure the repayment of the loan facility granted to the principal borrower –

- a) Deed of Guarantee dated 30.03.2016 executed between Mr. Rajen Dhruv, Mr. Hiren Dhruv and CD in favour of the FC;
- b) Amended and Re-stated Share Pledge Agreement dated 30.03.2016 executed between Mr. Rajen Dhruv, Mr. Hiren Dhruv and CD in favour of the FC; and

- c) Subordination Agreement and an Indenture of Mortgage dated 30.03.2016 executed between Mr. Hiren Dhruv, Mr. Rajen Dhruv and the principal borrower in favour of the FC.
- 2.3 Another Facility Agreement dated 12.10.2018 (Facility 2) was executed between Orbit Ventures Developers; Mr. Rajen Dhruv and Mr. Hiren Dhruv, Partners of Orbit Ventures Developers; Mid-City Superstructures Private Limited (CD); Mid-City Infrastructure Private Limited; and the FC, under which a loan facility aggregating to Rs. 95,00,00,000 was made available to the principal borrower by the FC.
- 2.4 Under the said Facility Agreement, the following agreements were executed to secure the repayment of the loan facility granted to the principal borrower -
- a) Deed of Guarantee dated 12.10.2018 was executed by Rajen Dhruv, Mr. Hiren Dhruv, CD and Mid-City Infrastructure Private Limited in favour of FC. Another Deed of Guarantee dated 12.10.2018 was executed under the said facility by the Sahyog Homes Limited in favour of the FC;
- b) Amended and Re-stated Share Pledge Agreement dated 12.10.2018 was executed under the said facility between Mr. Rajen Dhruv and Mr. Hiren Dhruv and the FC and the Mid-City Superstructures Private Limited;
- c) Subordination Agreement dated 12.10.2018 executed under the said facility amongst Mr. Rajen Dhruv; Mr. Hiren Dhruv; the Mid-City

Superstructures Private Limited; Mid-City Infrastructure Private Limited; the Principal Borrower and the FC; and

d) Indenture of Mortgage dated 12.10.2018 executed in favour of the FC by the principal borrower and Mid-City Infrastructure Private Limited.

2.5 The total amount of debt disbursed under Facility 1 and Facility 2 collectively is Rs.3,45,00,00,000/- between the period from 31.03.2016 to 26.03.2019. The FC states that the total amount of debt in default (i.e. overdue and guarantee invocation amount) from the CD as a Borrower and Guarantor is Rs.257,52,97,623/- as on 15.11.2019, which is inclusive of principal amount, default interest, penal interest and pending TDS amount.

2.6 The FC has annexed the Acceleration and Enforcement Notice dated 11.10.2019 pertaining to the said credit facilities addressed to the principal borrower, thereby recalling the outstanding amount as on 09.10.2019 under both the credit facilities, which aggregated to Rs.251,54,70,041/-, and informed the principal borrower about its NPA status. A copy of the same was marked to both the partners, viz. Mr. Rajen Dhruv and Mr. Hiren Dhruv, of the principal borrower.

2.7 The FC has also annexed the Guarantee Invocation Notice/ Demand Certificate dated 11.10.2019, sent to the CD (Corporate Guarantor), Orbit Ventures Developers (the Principal Borrower) and Mr. Rajen Dhruv and Mr. Hiren Dhruv (the Personal Guarantors and Partners of

the principal borrower), thereby demanding the outstanding amount under the abovementioned two credit facilities, aggregating to Rs.251,54,70,041/- as on 09.10.2019.

3 CONTENTIONS OF CD

3.1 The CD entered appearance on 16.01.2020 and Counsel undertook to file reply by 31.01.2020. Although the CD was represented on 20.02.2020; 13.03.2020; and 23.07.2021, it remained absent thereafter. On 21.08.2023, final opportunity was given to the CD to file reply within a period of two weeks. When the matter was listed on 06.09.2023, again the CD did not appear in spite of receiving information, as regards listing, served on it by the FC *vide* email dated 01.09.2023. Finally, on 12.09.2023, the CD was set *ex parte* as having failed to enter appearance and file any reply to the Application. Hence, the matter is decided based on the materials and records as available.

4 ANALYSIS AND FINDINGS

4.1 We have perused and analysed all the documents and pleadings and heard the Counsel for the FC.

4.2 We find that the present Application is filed by one Mr. Rupesh Talmale, authorised representative by a Resolution passed by the members of the Credit Committee of the FC on 14.11.2019. The Board of Directors of the FC *vide* Board Resolution dated 09.11.2017 had delegated the

authority to initiate proceedings on behalf of the FC. Hence, this Application is filed by the person having lawful authority to institute proceedings on behalf of the FC. The same is not disputed by the CD as there is no reply of the CD available on record.

- 4.3 The date of default is not clearly mentioned in Part IV of the Application. The FC has calculated the outstanding amount as on 15.11.2019, without clearly explaining how it arrived at such a date. The Application is filed on 25.11.2019 and the amount is calculated is up to 15.11.2019, which enables us to assume that the later date is taken to show the continuing default. Upon perusal of Clause 7 of the Facility Agreement dated 30.03.2016 which deals with repayment of the loan, we find that the repayment was to be done in ten equated quarterly instalments starting from 31.12.2017 to 31.03.2020. The last date for repayment was 31.03.2020, being the end of quarterly instalments; however, the present Application is filed on 25.11.2019, as the amount of default stood more than one lakh rupees (as the threshold then was) comprising of principal loan and interest as on 30.06.2019. The default as shown in the table provided in Part IV, first occurred in June, 2019 (on 30.06.2019). Hence, it would be appropriate to state that even though the date of default is not clearly mentioned in Part IV of the Application, it can be determined from the document forming the basis for the Application is filed. Further, Clause 18 of the Facility Agreement dated 30.03.2016 clearly states that failure by any obligor in making a

payment under the finance documents on the relevant due date (30.06.2019) shall be constituted to be the event of default. We, therefore, determine 30.06.2019 as the date of default. The Application was filed on 25.11.2019, and hence, we can safely conclude that it is filed within the period of limitation.

- 4.4 Further, Clause 8 of the Deed of Guarantee dated 30.03.2016 executed by the CD in favour of the FC states that “Each of the Guarantor undertakes that if the Borrower does not pay the liabilities in accordance with the transaction documents, the guarantor shall, on demand, pay such amount as if each of the Guarantors are the principal debtors of the lender.” Hence, it is clear that the Corporate Guarantor had agreed to pay the principal borrower’s debt in case it failed to repay it, upon demand made by the FC. The Deed of Guarantee was executed by the CD for both the credit facilities granted to the principal borrower vide Facility Agreements dated 30.03.2016 and 12.10.2018. The FC invoked the guarantee vide notice dated 11.10.2019.
- 4.5 The Hon’ble Supreme Court in *Laxmi Pat Surana Vs. Union Bank of India & Anr. [Civil Appeal No. 2734 of 2020]* held that the status of the guarantor metamorphoses into a debtor or corporate debtor, if it happened to be corporate person, within the meaning of Section 3(8) of the IBC. Thus, the moment principal borrower commits default in payment of debt which had become due and payable, action under Section 7 of the Code could be legitimately invoked against a corporate

guarantor being a corporate debtor. In light of the aforesaid judgement by the Hon'ble Apex Court and several other evolved jurisprudences, it is a settled position in law that Section 7 Application can be filed against a corporate guarantor, who has guaranteed the payment of the credit facilities in favour of a principal borrower, and when the borrower defaults in payment and the guarantee is invoked.

- 4.6 Considering the facts and law as discussed above, this Bench is of the view that in such circumstances, it is imperative that the CIRP be initiated in respect of the CD. There exists a "financial debt" as defined under Section 5(8) of the IBC by the CD.
- 4.7 We, therefore, find merit in the documents submitted and the arguments advanced by the Ld. Counsel for the FC. The FC has proved the existence of the debt and default and the debt remains unpaid. In view of the above, the present Application filed under Section 7 of the IBC to initiate CIRP in the matter of the CD deserves to be admitted.
- 4.8 The Applicant had proposed the name of Mr. Ajit Gyanchand Jain, a registered Insolvency Professional having Registration Number-IBBI/IPA-001/IP-P00368/2017-2018/10625 and E-mail-ajit@vcanca.com as the Interim Resolution Professional (IRP), to carry out the functions as mentioned under the IBC and has also given his declaration in Form 2 dated 25.11.2019. However, no valid Authorisation for Assignment (AFA) is reflected on the website of IBBI. Hence, the FC was given notice under Section 7(5)(b) proviso of the

IBC to rectify the defect. On 18.04.2024, when the matter was listed for clarification, the Counsel for FC has provided Form-2 containing written communication by another IP, viz., Mr. Vinod Tarachand Agrawal, for and on behalf of M/s VCAN Resolve IPE LLP having valid AFA.

ORDER

This Application being **C.P. (IB) No. 4476/NCLT/MB/C-VI/2019** filed under Section 7 of the IBC by the FC for initiating CIRP in the case of MID-CITY SUPERSTRUCTURES PRIVATE LIMITED, the CD, is **admitted.**

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

- I. We prohibit-
 - a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.

II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.

IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.

V. That this Bench hereby appoints Mr. Vinod Tarachand Agrawal, a registered Insolvency Professional having Registration Number-IBBI/IPA-001/IP-P00641/2017-2018/11090 and e-mail – ca.vinod@gmail.com, for and on behalf of M/s VCAN Resolve IPE LLP, a registered Insolvency Professional Entity, having AFA valid up to 30.06.2025, as the IRP to carry out the functions under the IBC. The

fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

- VI. During the CIRP period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- VII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the FC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors.
- VIII. A copy of this Order be sent by the Registry to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD.
- IX. A copy of this Order shall also be sent by the Registry to the IBBI for record.

X. The Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.

XI. **Compliance report of the order by Designated Registrar is to be submitted today.**

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

// Akshata //