

IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

Company Petition (IB)No.61/ALD/2019

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

IN THE MATTER OF

EDELWEISS ASSET RECONSTRUCTION COMPANY LTD

.....Applicant/Financial
Creditor

VS.

BIG BEN DEVELOPERS PRIVATE LIMITED.

.....Respondent/Corporate Debtor

ORDER DELIVERED ON :28.07.2021

CORAM:

Hon'ble Mr. Justice (Retd.) Rajesh Dayal Khare, Member, Judicial

For the Applicant/ Financial Creditor: Mr. Saurabh, Adv

For the Corporate Debtor : None

Per se: Mr. Justice (Retd.) Rajesh Dayal Khare, Member (Judicial)

Order

1. The present petition has been filed by the financial creditor (herein referred as "petitioner")i.e. "*Edelweiss Asset Reconstruction Company limited*" under Section 7 of the Insolvency & Bankruptcy Code,2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Corporate debtor i.e "*Big Ben Developers Private Limited.*" on grounds of its financial debt out of its guarantee obligations.
2. As per averments made in the petition, the present application has been filed by the Financial Creditor as Adel Landmarks Ltd. (formally known as Era Landmarks Ltd.) has availed rupee term loan of Rs. 170.0 (Rs. One Hundred and Seventy Crores) from ECL Finance Ltd. The ECL Finance Ltd has assigned the debt, along with all the rights, title and interest in the underlying securities and

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guarantees to the Financial Creditor vide assignment agreement dated March, 23rd 2017 executed between ECL Finance Ltd. and Financial Creditor.

3. It is further stated that the Corporate Debtor had guaranteed the repayment of the total debt aggregating to Rs. 170 Crores together with interest, additional interest and other monies on behalf of the Adel Landmarks Ltd. and further the Corporate Debtor in order to secure the debt had also mortgaged all those piece and parcel of land admeasuring 12 canal and 18 Marla situated at Revenue Estate in the State of Harayana.
4. It is contended that the facilities availed from the financial creditor by Adel Landmarks Limited and guaranteed by the corporate debtor is outstanding and the total amount in default is Rs. 4,20,12,98,440/- as on December 31,2018. The rupee term loan sanctioned to Adel Landmarks Ltd. has been recalled vide recall notice dated 02.07.2018 and the corporate guarantee issued by the corporate guarantor for securing the amount extended to Adel Landmarks Limited has been invoked by the financial creditor vide notice for invocation of corporate guarantee dated 10.07.2018 seeking payment of an amount of Rs. 265,02,50181.47/- (Rs. Two Hundred and Sixty Five Crores, 2 Lakhs, Fifty Thousands, One Hundred and Eighty One and Fourty Seven Paisa) as on February, 28th 2017 together with interest, default interest and other charges from 01.03.2017 till payment in full.
5. In view of the existence of the financial default on part of the Corporate Debtor, the Financial Creditor is filing the present application under Section 7 of the IBC to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.



6. The Corporate debtor has been duly served by the speed post and the order dated 23.09.20219 shows that the notice was also published in the newspaper, circulated over the area where the registered office of the respondent is situated but none has put in appearance on behalf of the corporate debtor. Hence the case is fixed for exparte hearing and after that also the matter was deffered on various occasions due to some reason or the other, but the respondent opted not to appear, and then on 16.03.2021 , the matter was heard ex partee and was reserved for orders.

7. It is observed that that separate Applications under Section 7 of IBC has filed against various Guarantors and the Application against the principal borrower i.e “Adel Landmarks Limited” has also been admitted by the NCLT , Special Bench vide order dated 05.12.2018 in C.P. No. IB-172(PB)/2019 and in all the proceedings, same amount was claimed and the debt amount and amount of default and date of default are same.

8. In a recent judgment , the Hon’ble Supreme Court of in the case of “ ***Laxmi Pat Surana vs. Union Bank of India & Anr.*** Civil Appeal No. 2734 OF 2020, the Hon’ble Apex Court observed that :

“19. ...Indubitably, a right or cause of action would ensure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the



obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the 18 Code to mean non payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be."

9. Further referring to the Hon'ble NCLAT judgment in the matter of **State Bank of India v Athena Energy Respondent Ventures Private Limited (Company Appeal (AT) (Ins) No.633 of 2020** in which it was held that:

"19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority".

Further, in the case of Edelweiss Asset Reconstruction Company Financial Creditor Ltd. v. Gwalior Bypass Projects Ltd. Company Appeal (AT) (Ins) No.1186 of 2019 dated 08.03.2021 the Hon'ble NCLAT held that :

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“8. For above reasons discussed by us in the matter of “Athena Energy”, we find that the present Appeal is required to be allowed. We do not find that there is bar for the Financial Creditor to proceed against the principal borrower as well as Corporate Guarantor at the same time, either in CIRPs or file claims in both CIRPs”

10. In the present case, as per clause 3 of the ‘Guarantee Agreement’ dated 07th October, 2013, it is stated that “in the event of any default on part of the borrower in payment/ repayment of any of the monies referred to or in the event of any default on the part of the borrower to comply with or perform any of the terms, conditions and covenants contained in the loan agreement, the guarantors shall, upon demand, forthwith pay to the lender without demur all the amounts payable by the borrower under the loan agreement.”, thus it shows that the guarantor is liable to pay the amount stated in the demand made by financial creditor to thereby invoking the guarantee.
11. Perusal of the documents shows that, the guarantee was invoked by ‘Edelweiss Asset Reconstruction Company Limited’ against all the guarantors including ‘Big Ben Developers Pvt. Ltd.’ and demand was raised on 10.07.2018 calling upon ‘Big Ben Developers Pvt. Ltd.’ to pay the amount due within 7 days from the date of notice. Thus, from the perusal of the loan agreement dated 07.10.2013 between the financial creditor and Adel Landmarks Ltd. (formally known as Era Landmarks Ltd.) and the guarantee agreement dated 07.10.2013 between the financial creditor and corporate guarantor “referred as corporate debtor” shows that there is existence of debt and non payment of the same which has not even been disputed by the principal borrower shows the default.



12. Mere plain reading of the provision shows that in order to make an application under Section 7 (1) the financial creditor / petitioner is required to establish:
- i.) Whether there is duly established financial debt.
 - ii.) Whether there is default in payment by the corporate debtor.
 - iii.) Whether the documents attached with the applicant shows that there is default in payment of debt and name of resolution professional is proposed to act as IRP and no disciplinary proceedings are pending against the proposed resolution professional.
13. Based on the submissions made by the Applicant and the documents produced and placed on record before this Adjudicating Authority, the Bench is of the opinion that there is a 'default' on the part of the Corporate Guarantor by not fulfilling the debt owed to the Corporate Debtor, i.e., Adel Landmarks Limited" as per the Deed of Guarantee entered between the parties .
14. Further relying on the judgement of the Ho'ble Supreme Court and the Hon'ble Appellate Tribunal , this Adjudicating Authority is of the view that the insolvency proceedings can be triggered on the application filed on behalf of financial creditor/Applicant against the corporate Guarantor who is the corporate debtor in the present matter under Section 7 of IBC which is is found complete and maintainable.
15. Considering the facts and circumstances of the case, this adjudicating Authority is inclined to admit this petition and initiate CIRP of the Respondent Company being a corporate Guarantor. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith stating:

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(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off 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 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 the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.]



2) *The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

(3) The provisions of sub-section (1) shall not apply to —

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.


16. The Financial Creditor has proposed the name of **Mr. Rattan Chaudhry**

Registration Number IBBI/IPA-002/IP-N00325/2017-18/10930 email id :



rattan_chaudhary@yahoo.co.in for appointment as Interim Resolution Professional (IRP). Further IRP has filed a declaration in form 2 affirming that he is registered insolvency professional and no disciplinary proceedings are pending against him. We accordingly confirm his appointment as the IRP. He shall take such other and further steps as are required under the statute, more specifically in terms of Sec 15,17 and 18 of the Code and file his report.

17. The registry is directed to communicate this order to Financial Creditor, as well as to Corporate Debtor and to IRP.
18. Urgent Photostat certified copies of this order, if applied for, be supplied to parties upon compliance of requisite formalities.
19. List on 27.08.2021 for the filing of the progress report.


JUSTICE RAJESH DAYAL KHARE
MEMBER (J)

Date: 28.07.2021
Swati Gupta
(LRA)