THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-COURT-I

C.P.(IB) No. 291/MB/2023

In the matter of

Section 7 of the Insolvency and Bankruptcy Code, 2016

Omkara Assets Reconstruction Private Limited

...Financial Creditor

Vs.

Gstaad Assets Reconstruction Pvt Ltd.

.... Corporate Debtor

AND

I.A. 3705 OF 2023

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016

Gstaad Assets Reconstruction Pvt Ltd.

.... Applicant

Vs.

Omkara Assets Reconstruction Private Limited

Order delivered on: 09.01.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Gaurav Joshi, Sr. Advocate

For the Respondent : Mr. Ajesh Kumar Shankar, Advocate

ORDER

Per: Prabhat Kumar (Technical)

1. This Company Petition C.P. (IB) 291/2023 is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 **("IBC/Code**") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **Omkara Assets Reconstruction Private** Limited **CIN:U67100TZ2014PTC020363** ("hereinafter referred to as Applicant/ Financial Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s Gstaad Hotels Private Limited CIN:U55101MH2003PTC143481** ("hereinafter referred to as Respondent/Corporate Debtor").

2. The Applicant has claimed a default of total amount of Rs. 6,65,74,77,237/- (Rupees Six Hundred and Sixty-Five Crores Seventy-Four Lakhs Seventy-Seven Thousand Two Hundred and Thirty-Seven Only) as on 27.02.2023. The date of default in respect of Loan & ECLGS facility is stated to be 11.11.2022.

3. The Applicant has submitted that on 26.12.2017, the Piramal Finance Limited had executed a loan agreement with the Corporate Debtor and Neo Capricorn Plaza Private Limited("NEO") granting a loan facility Upto Rs. 600.00 crores (Rupees Six Hundred Crore), out of which the Corporate Debtor was granted a term loan of Rs. 450.00 Crores. accordingly,

the following documents were executed by the Corporate Debtor in favor of the Applicant to secure the ECLGS Facility-1, which was required to maintain in favour of the Security Trustee (for the benefit of the Lender) ("Security") to secure the Outstanding Amounts until the final maturity date, the borrower shall be required to maintain the following security as set out below in favour of the Security Trustee (for the benefit of the Lender):

a. First an exclusive charge by way of an equitable mortgage over CP Land and Crown Plaza Hotel under a memorandum of deposit of title deeds ("Crown Plaza MODT");
b. First charge by way of an equitable mortgage over JW Land and JW Marriott Hotel under a memorandum of deposit of title deeds ("JWM MODT"). It is clarified herein that a charge has been created in favour of Global Hospitality Licensing S.A R.L. and such charge over the JW Land and JW Marriott Hotel in favour of Global Hospitality Licensing S.A R.L. will be modified to be a second charge pursuant to creation of a first charge in favour of the Lender;
c. First charge by way of hypothecation over the Receivables and the Escrow Accounts to be created under a deed(s) of hypothecation ("Deed of Hypothecation"). It is clarified herein that a charge has been created over the GHPL Receivables in favour of Global Hospitality Licensing S.A R.L. and such charge in favour of Global Hospitality Licensing S.A R.L. will be modified to be a second charge pursuant to creation of a first charge in favour of the Lender;
d. First and exclusive charge by way of pledge over the Pledged Shares under a share pledge agreement ("Share Pledge Agreement");
e. Corporate guarantee by ARHPL ("Corporate Guarantee");
f. Personal guarantee by the individual Promoters ("Personal Guarantee") and

g. Demand promissory note executed by the Borrowers for the benefit of the Lender DPN").

3.1 On 06.04.2018, the Piramal Finance Limited and PCHFL were got merged pursuant to Order passed by this Tribunal and Piramal Finance Limited's name was changed to Piramal Capital PCHFL The Financial Debt, in question, was disbursed by M/s Piramal Capital and Housing Finance Limited ("PCHFL"), and consequent to merger, the Corporate Debtor became creditor of PCHFL.

3.2 By an Assignment dated 22.03.2019 entered into between PCHFL and PHL Finvest Private Limited ("PHL"), {which subsequently amalgamated into Piramal Enterprises Limited ("PEL")}, the rights pf PCHLF inter-alia under the loan Agreement and the various security documents were assigned in favor of PHL. Both PCHFL and PEL assigned the said loan in favour of the applicant assigning all rights of PCHFL and PHL under the Loan Agreement and ECLGS Agreement.

3.3 In addition to the Loan Agreement, on 30th December 2020 executed between the Piramal Enterprises Limited and the Corporate Debtor, the Corporate Debtor availed ECLGS Facility Loan I & II. In respect of the ECLGS Facility, the Corporate Debtor, IDBI and PHL executed a security trustee appointing IDBI as security trustee and a demand promissory note for an amount of Rs. 98,00,00,000 in favour of IDBI on 30.12.2020. The obligations of the Corporate Debtor under the said Agreement were secured by creation of Security Interest in favour of the Applicant by and until the Final Maturity Date, the Borrower is required to maintain the following Security as set out below in favour of the Security Trustee (For the benefit of the Lender)

3.3.1 Second ranking charge by way of an equitable mortgage over JW Land and JW Marriott hotel under a

memorandum of deposit of title deeds ("JWM MODT")

3.3.2 Second ranking charge by way of hypothecation over the Receivable and Escrow Accounts to be created under a deed(s) of hypothecation ("Deed of Hypothecation").

3.3.3 Second ranking charge by the way of pledge over the Pledged shares under a share pledge agreement (Share Pledge Agreement"); and

3.3.4 Demand promissory note executed by the Borrower for the benefit of the Lender ("DPN").

3.4 The Corporate Debtor and its directors/guarantors created all the above securities in terms of sanction conditions. The Corporate Debtor, IDBI and PHL also executed a security trustee agreement dated 30.12.2022 appointing IDBI as security trustee in respect of ECLGS facility and Corporate Debtor also executed a Demand Promissory Note of Rs. 98,00,00,000/- in favor of IDBI, which is equivalent to the ECLGS facility amount.

3.5 The Corporate Debtor was liable to make payment towards interest on the last day of each interest period i.e. month in terms of Clause 4.1. Consequent to default of Corporate Debtor in month of January 2020, IDBI Trusteeship Services Limited filed a Company Petition No. CP IB 1292 of 2021 before this Tribunal seeking initiation of CIRP and the same was subsequently withdrawn by it vide order dated 13.12.2022.

3.6 In addition, and without prejudice, it is also stated by the Applicant that the Corporate Debtor and Neo addressed two letters dated 23.12.2022 and 11.01.2023 to PCHFL and PEL pertaining to, inter-alia, alleged non-disbursal of balance ECLGS amount and requesting for considering a One-Time Settlement, which are stated to have been responded by PCHFL and PEL vide their letter dated 14.02.2023.

3.7 Subsequent to default in the loan amount by the Corporate Debtor under the Loan Agreement and ECLGS Facility, the Financial Creditor issued a recall notice against Corporate Debtor on 15th February 2023, calling upon the Corporate Debtor to pay an amount of Rs.666,53,26,968/-(Rupees One Hundred Nineteen Crores Ninety-Nine Lakhs Twenty-Three Thousand Three Hundred and Twenty Only) within Three (3) days from the date of receipt of the said recall notice.

4. The Learned Counsel for Applicant submits that the present application is being filed without admitting to any facts pleaded by the Corporate Debtor and without prejudice to the rights and conditions of the Corporate Debtor except to the extent as admitted herein.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

5. The Learned Counsel for the Respondents has challenged the present application stating that -

a. That as on date, there is no Financial Creditor before this Tribunal, in view of the validity of same being decided by the Hon'ble High Court of Karnataka.

b. There is no default as contended by the Applicant herein.

c. There are no material particulars in support the Application of the Applicant to contend any Default.

d. The present Application is barred by Res Judicata and Issue Estoppel.

e. The Respondent is seeking to redeem their mortgage and close the loan with the Lender – Piramal, which is being frustrated in spite of the Orders and submissions made before the Hon'ble High Court of Karnataka and this Hon'ble Tribunal.

f. The stress, in any, of the financials of the Respondent, is induced by the Lender – Piramal, in view of the sums being granted under the ECLGS Scheme, used to service its own debts and dues.

g. The Respondent Company has been paying sums even on a daily basis to the Applicant (under protest) and has paid large sums of monies to the Lender – Piramal, even during COVID and times of any stress.

h. The Applicant herein has filed the present case, to engage in asset stripping of the valuable assets of the Respondent and is seeking to recover monies through the present Code and its process, which is nothing but an abuse of process and law.

Findings and Decision:

6. Heard the Learned Counsel and perused the material available on record.

7. We find that the primary defense raised by the Respondent is that it has no jural relationship with the Applicant, as the assignment deed is in challenge before the Hon'ble Karnataka High Court; the part of ECLGS loan was not disbursed; the present application is hit by Res-Judicata; and the Corporate Debtor is a solvent company and is willing to redeem the mortgage by paying the outstanding amount equivalent to consideration paid by Applicant to the PEL, the erstwhile Creditor.

8. We find that it is undisputed fact that the Loan amount exists and there are defaults in payment thereof. The Ld. Counsel for Corporate Debtor argued that no default has actually taken place and the present application is another attempt to initiate CIRP on same set of facts, which ought not be permitted by this Tribunal.

9. As regards challenge to the Assignment Deed dated 27.12.2022 by the Corporate Debtor, before the Hon'ble High Court of Karnataka in Writ Petition No. 6037/2023, we find that the Hon'ble High Court has not stayed the present proceedings. It is undisputed fact that the challenge to Assignment Deed cannot make the existence of debt to disappear, even if the said Assignment Deed is held to be invalid. The fact that the

Assignment has taken place and the Applicant has stepped into the shoes of the predecessor creditor, is undisputed. Accordingly, this Tribunal is of the considered view that the challenge to Assignment Deed is not relevant consideration in the present proceedings, as long as there exists a debt dehors such Assignment, though it may have bearing on the maintainability of present application by the Applicant. However, in the light of purported assignment deed, we are of considered view that the present proceedings are in nature of Resolution Proceedings for and in benefit of a Corporate Debtor and such proceedings deals with the Resolution of Debt. Accordingly, we do not find any merit in this argument.

10. As regards the validity of Assignment Agreement, we find that in terms of Master Direction as amended on 05.12.2022, all stressed loans which are in default in the books of the transferors are permitted to be transferred to asset reconstruction companies. Therefore, the rights under the Loan Agreement, ECLGS Loan Agreement 1 and ECLGS Loan Agreement 2 were capable of being assigned to the Financial Creditor, as RBI guidelines does not mandate that the account should be NPA for capable of being assigned. The Ld. Counsel for Corporate Debtor emphasized that the Hon'ble High Court of Karnataka in the said aforesaid Writ Petition, on hearing the Parties, on 24.11.2023, has reserved the same for Orders, therefore, the present Adjudication of the dispute as claimed by the purported Financial Creditor, ought to be only after such decision by the Hon'ble High Court of Karnataka, in order to avoid multiplicity of proceedings and the *locus standi* of the purported Financial Creditor, itself being decided. However, as stated earlier, there is no stay from the Hon'ble High Court asking us to refrain from proceeding in the matter.

11. We find that the Applicant has denied the existence of Cash Management Agreement or any correspondence between the parties to substantiate the existence thereof. The Corporate Debtor has not

placed on record any such agreement or document, accordingly this argument also does not have a force.

12. As regards allegation that the ECLGS credit proceeds were used towards servicing of interest outstanding on the Loan Account, we find that the Corporate Debtor had furnished an end use Certificate stating that the proceeds were utilized towards working capital expenses. Nonetheless, the allegation of the Corporate Debtor, itself, confirms the fact that it was under financial distress that it was not able to service its interest obligations arising on Loan facility and that the proceeds of ECLGS credit came to be appropriated towards that. This is sufficient ground to conclude that there existed a default in payment of debt.

13. As regards issue of Res Judicata, we find that the present application is stated to be filed for defaults arising under the Loan as well as ECLGS facility. The earlier application was filed by IDBI Trusteeship Services on the basis of default arising under the Loan agreement and it came to be withdrawn on account of settlement reached between the PEL and Corporate Debtor whereby another facility in form of ECLGS came to be sanctioned. The present application has been filed by the Applicant lender itself, who was not a party to earlier application in CP (IB) 1287 of 2021, and the application is based on the defaults, other than made ground by the IDBI Trusteeship Services Limited. It is trite law that the principles of res judicata is meant to estop a party from raising the same grievance before a court of law once it has been conclusively determined or withdrawn. In the present case, the application has been filed on the basis of the total amount of claimed to be in default occurring on 27.02.2023, and the earlier application by IDBI Trusteeship Services Limited was filed on the basis of default occurring in January 2020. Therefore, we do not find any merit in this argument also.

14. As regards reliance placed on certain observation of this Tribunal in its order in CP (IB) 981 of 2021 and CP (IB) No. 527/2021 that the Corporate Debtor is earning profits, we are of considered view that merely earning profits by a Corporate Debtor cannot lead to a conclusion that the Corporate Debtor cannot commit a default in the repayment of its debts. This Tribunal had taken note of profit earning of the Corporate Debtor in those Applications, which were filed by another set of shareholders for initiating CIRP, and this Tribunal came to conclusion that in the fact of earning profits also weigh in favor of the Corporate Debtor to say that the Applications by another set of shareholders, who were creditors also, is motivated by other considerations. In the present case, this is not in dispute that there exists debt and the Corporate Debtor is in default. Accordingly, we do not find any merit in this argument also.

15. The fact that the original creditor has written off certain amounts recoverable from the Corporate Debtor does not help the case of Corporate Debtor, as such write off does not reduce the obligations of the Corporate Debtor and such write offs take place in accordance with the sound accounting principles, which mandate recognition of any potential loss in the books of accounts on estimation without waiting for its actual happening. The consideration payable under the Assignment Agreement by the Applicant to assignee is a commercial arrangement between two parties and that also cannot reduce the obligations of the Corporate Debtor in so far total outstandings in terms of credit facility agreements are concerned.

16. As regards default in repayment of ECLGS-2 is concerned we find that the repayment was to begin from 05.04.2024, however the interest was payable monthly after the first disbursement. Nonetheless the default in relation to the outstanding loan and ECLGS-1 is clearly established. Accordingly we do not find any merit in the contention that this application cannot be maintained as principal repayment under

ECLGS-2 has not fallen due as yet.

17. As regards contention of Corporate Debtor that the present application is filed with an object of recovery, we do not find any force in the argument. Undisputed facts placed before records that the Corporate Debtor has failed to stand on its own feet despite restructuring of loan and thereafter grant of ECLGS facility by the lending bank. As regards contention that the Corporate Debtor is a solvent company and is willing to discharge whole of its obligations, we find that the Hon'ble Supreme Court in in case of **M. Suresh Kumar Reddy v. Canara Bank & ors., Civil Appeal no. 7121 of 2022** has categorically stated at Para 10 that

"*Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7.Further at Para 13 it was held that "Hence , the decision in the case of Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innoventive Industries and E.S Krishnamurthy. The view taken in the case of Innoventive still holds good"*

18. From the perusal of records, it is abundantly clear that there exists a debt and default of more than Rs. 1,00,00,000/- (Rupees One Crores only). The Application is within Limitation period and is complete in all respects. The essential ingredients required to initiate Corporate Insolvency Resolution Process ("CIRP') against the Corporate Debtor such as Financial Debt as defined u/s 5(8) & Default as defined u/s 3(12) of the Code are proved by the Financial Creditor beyond reasonable doubt in the present case.
19. In view of foregoing, **I.A. 3705 OF 2023** is **dismissed**. **CP (IB) 291/2023** is **allowed**.

20. The Financial Creditor has proposed the name of Mr Jayesh Natvarlal

Sanghrajka, Registration No. IBBI/IPA-001/IP-P00216/2017-2018/10416, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

21. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing CP (IB) 291/(MB) 2023 filed by **Omkara Asset Reconstruction Private Limited Limited**, the Financial Creditor, under section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **GSTAAD Hotels Private Limited.** [CIN: U55101MH2003PTC143481], the Corporate Debtor, is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(i) 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;

(ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) 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 (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium: -

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) Mr.Jayesh Natvarlal Sanghrajka, Registration No. IBBI/IPA-001/IP-P00216/2017-2018/10416, having registered address at 405-407, Hind Rajasthan Building. Phalke Road, Dadar East, Mumbai 400014 Email ID: jayesh@jsaandco.in is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor 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 Corporate Debtor 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.

(h) The Financial Creditor shall deposit a sum of Rs.3,00,000/- (Rupees Three Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). The remuneration of the IRP shall be such as is fixed by the Applicant till constitution of CoC and thereafter the constituted CoC shall decide the remuneration payable to the IRP.

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, 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 Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

SH. Prabhat Kumar
Member (Technical)

Sd/-

Justice SH. V.G. Bisht
Member (Judicial)