

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P.(IB)No.49/BB/2017
U/sec.7 of I&B Code

IN THE MATTER OF:

Edelweiss Asset Reconstruction Co. Ltd. **Applicant**

Versus

BJN Hotel Pvt. Ltd. **Respondent**

Order Delivered on: **25th September 2017**

Coram: Hon'ble Shri RatakondaMurali, Member (Judicial)
Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

For the Petitioner: 1. Mr. Vikram Trivedi, Ms.Anuparna Bordoloi ,Advocates
Manilal Kher Ambalal & Co., MKA Chambers,
British Hotel lane, Off Bombay Samchar Marg, Fort,
Mumbai 400-001.

Per: **Hon'ble Shri RatakondaMurali, Member (Judicial) - Author**

O R D E R

This Company Application has been filed on behalf of the Applicant Company i.e. Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code 2016, praying to initiate Corporate Insolvency Resolution process against the Respondent Company.

The Applicant Company is **EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED** acting in its capacity as Trustee of EARC Trust SC 19 (Series IV) has filed the present Application. The Applicant Company was incorporated on 5th October, 2007 bearing CIN No.U67100MH2007PLC174759. The Registered Office of the Applicant Company is Edelweiss House, off. C.S.T Road, Kalina, Mumbai Maharashtra- 400 098.

The Corporate Debtor is **BJN HOTELS LIMITED** incorporated on 19th August, 1999 bearing CIN No.U55101KA1999PLC025622. The Authorised Share Capital of the Corporate Debtor is Rs. 100,000,000/- and the paid up Share Capital is Rs.4,51,73,710/- (as per the last Audited Financials for period ending March, 2015). The Registered Office of the Corporate Debtor is No.1 Museum Road, Off. M.G. Road, Bangalore, Karnataka – 560001, India.




The Applicant Company i.e. Financial Creditor has proposed the name of Interim Resolution Professional Sh.Vikram Bajaj, Email: bajaj.vikram@gmail.com and bearing Registration No.IBBI/IPA-002/IP-N00003/2016-17/10003. We have verified the details of the proposed Interim Resolution Professional from the website of Insolvency and Bankruptcy Board of India and it is seen that the details given above are correct, with regard to email and Registration number allotted by the Board.

The Applicant Company has averred the details of Financial Debt against the Corporate Debtor as follows:

PARTICULARS OF FINANCIAL DEBT														
1	Total amount of Debt granted Date(s) of Disbursement	<p>LOAN OF RS.96,50,00,000/- (RUPEES NINETY-SIX CRORE, FIFTY LAKHS ONLY)</p> <p>Details of disbursement:</p> <p>Date of Disbursement</p> <table border="1"> <thead> <tr> <th>Date of Disbursement</th> <th>Amount Disbursed (Rs)</th> </tr> </thead> <tbody> <tr> <td>23.09.2008</td> <td>Rs. 96,50,00,000/-</td> </tr> <tr> <td>Total</td> <td>Rs. 96,50,00,000/-</td> </tr> </tbody> </table> <p>2. Overdraft for working Capital facility to an extent of Rs 4,35,00,000/- (Rupees Four Crores Thirty-Five Lakhs only) and</p> <p>Details of Disbursement.</p> <table border="1"> <thead> <tr> <th>Date of Disbursement</th> <th>Amount Disbursed (Rs)</th> </tr> </thead> <tbody> <tr> <td>21.09.2008</td> <td>Rs. 4,35,00,000/-</td> </tr> <tr> <td>Total</td> <td>Rs. 4,35,00,000/-</td> </tr> </tbody> </table> <p>3. Fund Interest Term Loan for Rs.4,50,00,000/- (Rupees Four Crore, Fifty Lakhs only)</p> <p>Date of Disbursement</p>	Date of Disbursement	Amount Disbursed (Rs)	23.09.2008	Rs. 96,50,00,000/-	Total	Rs. 96,50,00,000/-	Date of Disbursement	Amount Disbursed (Rs)	21.09.2008	Rs. 4,35,00,000/-	Total	Rs. 4,35,00,000/-
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Total	Rs. 4,35,00,000/-													

As

		Date of Disbursement	Amount Disbursed (Rs)
		29.06.2011	Rs.4,50,00,000/-
		Total	Rs. 4,50,00,000/-
		Total amount of Debt granted is Rs.1,05,35,00,000/-	
3	Amount claimed to be in default and the date on which the default occurred. (attach the working for computation of amount and days of default in Tabular Form)	<p>The amount of default under the Fully secured Loan under the Term Loan Facility, Over Draft Working Capital Facility and Fund Interest Term Loan is Rs. 1,29,02,28,945.24 (Rupees One Hundred and Twenty Nine Crore, Two Lakh, Twenty-Eight Thousand Nine Hundred and Forty Five and Twenty Four Paise only) as on 23.05.2017.</p> <p>The Computation of Amount of Default and Date of Default have been annexed herewith at Annexure C. The date of default by the Respondents is 31st March, 2013.</p> <p>Liability is admitted by the Respondent in clear and unequivocal terms in its annual Report for the Financial Year ended as on 31st March 2015.</p>	

The Financial Creditor has place on record the Particulars of the Securities held by Applicant in respect of the facilities. The details of the Security Interest has been given in Part V and date of Creation of Security are as under:

1. Immovable property as per Memorandum of Entry dated 17th November, 2008 at **Annexure D**.
2. Continuing Oral Assent dated 16th June, 2011 at **Annexure E**.
3. Deed of Hypothecation dated 22nd August, 2008 at **Annexure F-1**.
4. Supplemental Deed of Hypothecation dated 16th June 2011 at **Annexure F-2**.
5. Supplemental Deed of Hypothecation dated 30th March, 2013 at **Annexure F-3**.

The Applicant Company has also furnished the copy of the Charge Register in respect of B.J.N. Hotels Ltd evidencing creation of charge bearing Charge Id No.10124171 (Sr.No.2) and 10135997 (Sr.No.1) along with the index of charges as appearing on the registrar of Companies Records in respect of modification and creation of charge in favour of the Applicant is shown as **Annexure G**. The 2 Forms filed in respect of the aforesaid 2 charges are shown as **Annexure H1 & H2** respectively.

The Applicant Company has furnished the estimated value of the aforementioned securities as follows:




1. **For Immovable Property at Bangalore:**

Approx. Rs.19.54 Crores (Rupees Nineteen Crores and Fifty Four Lakhs only)


2. **Movable / Hypothecated Properties**

Estimated value of the movable assets as per the Annual Return of 2015 is Rs.20,00,95,558/- (Rupees Twenty Crores, Ninety- Five thousand, Five Hundred and Fifty Eight only)

The Applicant Company has filed the copy of the Judgment/Decree dated 27th May, 2017 passed by the Debt Recovery Tribunal, Mumbai inter alia allowing the Original Application filed by the Financial Creditor and directing the Corporate Debtor and the Guarantors to jointly and severally make payment of a sum of Rs.100,15,88,343.20 ps with subsequent interest from 4th March 2015 as stated therein is shown as **Annexure I**.

The Applicant has further produced the latest and complete copy of the financial Contract reflecting all amendments and waivers to date:

1. Sanction Letter dated 6th August, 2008 for Term Loan of Rs.96,50,00,000/- and Overdraft for Working Capital Rs.3,50,00,000/- duly signed and acknowledged by the Authorized Signatories of the Corporate Debtor is shown as **Annexure J**.
2. Term Loan Agreement dated 22nd August, 2008 executed between Bank of India and the Respondent for the Term Loan Facility of Rs.96,50,00,000/- is shown as **Annexure K**.
3. Demand Promissory Note dated 22nd August, 2008 for Rs.3,50,00,000/- is shown as **Annexure L**.
4. Sanction Letter dated 3rd May, 2011 issued by Bank of India, modifying the credit facilities to the extent of Rs.81.45 Crores (Term Loan of 7345 Lakhs, Fund Interest Term Loan of Rs. 450 Lakhs and Overdraft for Working Capital of Rs.350) duly signed and acknowledged by the Authorized Signatories of the Corporate Debtor is shown as **Annexure M**.
5. Term Loan Agreement dated 16th June, 2011 executed between Bank of India and Respondent for a Fund interest Term Loan Advance of Rs.4,50,00,000/- is shown as **Annexure N**.
6. Demand Promissory Note dated 16th June 2011 for Rs.450 Lakhs is shown as **Annexure O**.
7. Supplemental Term Loan Agreement dated 16th June, 2011 in respect of charge in the repayment Schedule of the principle amount of Rs.73,45,00,000/- is shown as **Annexure P**.

8. Sanction Letter dated 30th March, 2013 wherein Bank of India reviewed and sanctioned the Term Loan of Rs.7333 Lacs, Overdraft for Working Capital Rs.435 Lacs and FITL for Rs.450 Lacs to the Respondent on the terms and conditions specified therein is shown as **Annexure Q**.
9. Demand Promissory Note dated 30th march, 2013 for Rs.85,00,00,000/- is shown as **Annexure R**.

The Copies of entries in the Bankers book in accordance with the Bankers Books Evidence Act, 1891 is shown as **Annexure S**.

The other documents that prove the existence of financial debt have been listed below:

1. Letter of Acknowledgement of Debt dated 1st December, 2010 in respect of Overdraft Facility availed by the Respondent is shown as **Annexure T**.
2. Letter of Acknowledgement of Debt dated 1st December, 2010 in respect of Term Loan Facility availed by the Respondent is shown as **Annexure U**.
3. Letter of Acknowledgement Debt dated 1st June, 2011 in respect of Overdraft Facility for rs.3,50,00,000/- availed by the respondent is shown as **Annexure V**
4. Letter of Acknowledgement of Debt dated 1st June, 2011 in respect of Term Loan facility for Rs.73,45, 00,000/- availed by the Respondent is shown as **Annexure W**.
5. Letter of Acknowledger Debt dated 30th March, 2013 in respect of the Term Loan Facility extended to the extent of Rs.73,45,00,000/- availed by the Respondent is shown as **Annexure X**.
6. Letter of Acknowledgement of Debt dated 30th March, 2013 in respect of Funded Interest Term Loan Facility of Rs.4,50,00,000/- availed by the Respondent annexed and marked as **Annexure Y**.
7. Letter of Acknowledgement of Debt dated 30th March, 2013 in respect of Overdraft Facility reviewed and extended to the extent of Rs.4,35,00,000/- availed by the Respondent is shown as **Annexure Z**.
8. Relevant Extract of the Balance Sheet for the year ending at 31stMarch, 2015 is shown as **Annexure AA**.
9. Notice u/s 13(2) of the SARFAESI Act, 2002 dated 14th June, 2013 issued by Bank of India (assignor) to the Respondent for an outstanding amount of Rs.82,01,86,432.66 together with further interest from 14th June 2013 at the contractual rate as contained therein shown as **Annexure BB**.
10. Registered Assignment Agreement dated 29th March, 2014 between is Bank of India on the Applicant shown as **Annexure CC**.

The Applicant Company had filed an Application for substituted service under Rule 11 of the National Company Law Tribunal Rules, 2016 stating that the Applicant Company had dispatched by RPAD a copy of the Application at the Registered Office of the Corporate Debtor as required under the Code. The Copy of Postal Receipt is shown as Annexure A.

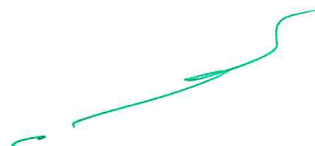
It is further averred that the Applicant has dispatched notice to the Registered Office. It was brought to the Notice of this Tribunal that on 17th October, 2016, the Applicant as secured Creditor under the provisions of (SARFAESI) Act, 2002 has taken possession of the Registered Office of the Corporate Debtor. The copy of possession notice dated 17th October, 2016 is shown as **Annexure B**. The Applicant Company had in compliance with the provisions of the code also served the copy of Application by Speed Post AD to the alternate Addresses of the Corporate Debtor.

The Applicant Company prays to grant leave to the Company to publish notice qua filing of the present Application under Section 7 of the Code in the Newspaper having wide circulation and treat the same as notice of service upon Respondents.

This Tribunal vide Order dated 7th September, 2017 allowed the Application to have an Advertisement in "The Hindu" and fixed the next date of hearing as 19th September, 2017. The Applicant Company had carried out the paper Publication on 8th September, 2017 and filed the **Memo dated 19th September, 2017** of the same.

The Learned Counsel would contend that even though Applicant obtained an order from DRT Mumbai and Applicant has not taken any further action. The Counsel would contend that there is an acknowledgement of liability i.e. the Balance Sheet of the Company for the period ended 31st March, 2015 shown @ Pages 309 to 314 which is in effect extend the limitation.

In this connection, the Learned Counsel for the Applicant Company has relied upon the decision of the Apex Court reported in *Income Tax v. Shri Vardhman Overseas Ltd. 2011 SCC Online Del 5599 (2012) 343 ITR 408; ITA No.774/2009* wherein Apex Court held that in a Balance Sheet of a Company where defendants had shown a particular amount as due to the plaintiff would constitute an acknowledgement under Sec.18 of the Limitation Act.



The Learned Counsel for the applicant further contended even though applicant initiated action under SARFAESI Act yet Applicant Company can initiate proceedings under this "Code".

The Counsel would contend that the Applicant Company obtained Judgment/Decree dated 27th May, 2017 passed by DRT Mumbai in T.O.A.No.1006/2016. Yet, the Applicant Company can initiate action under I&B Code against the Corporate Debtor. In this connection the Counsel has relied on judgement of NCLT Principle Bench, New Delhi in *Company Petition 1086/2016 Order dated 8th August, 2017; MANU/NC/0719/2017*. The facts of the decision there, an Operational Creditor obtained decree against corporate debtor and operational creditor further initiated action under I&B code and the Tribunal appointed IRP.

The next contention of the learned Counsel of the Applicant Company is initiating action under I&B code is to revive the respondent company which is possible only under the code. Therefore Financial Creditor initiated action against the Corporate Debtor.

On Perusal of the documents filed by the Applicant Company, it is evident that the Corporate Debtor defaulted in repaying the Loan availed. None appeared on behalf of the Corporate Debtor despite issuance of notices and carrying out Paper Publication.

Evidently, it is established by the Financial Creditor that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that admittedly there is a "default" as defined under section 3(12) of the code on the part of the Corporate Debtor. On the basis of the material on record the Petitioner/financial Creditor has established that the loan was sanctioned and duly disbursed to the Corporate Debtor but there is non-payment of Debt on the part of the Corporate Debtor.

Accordingly, this Bench hereby admits this Application declaring Moratorium with the following directions as mentioned below:


- i. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in

respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

- ii. 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.
- iii. 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.
- iv. That the order of moratorium shall have effect from 25th September, 2017 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, whichever is earlier.
- v. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the code.
- vi. The Applicant Company i.e. Financial Creditor has named Sh.Vikram Bajaj bearing Registration No. IBBI/IPA-002/IP-N00003/2016-17/10003, Email: bajaj. Vikram @ gmail.com who is appointed as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code as Interim Resolution Professional and the Applicant Company certifies that the above said Resolution Professional is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated Rules and Regulations.

Accordingly, this Petition is admitted.


(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL


(RATAKONDA MURALI)
MEMBER, JUDICIAL