

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.1147/MB-IV/2020

Under Section 7 of the I&B Code, 2016

In the matter of:

Lichfl Trustee Company Private Limited

[CIN: U67190MH2008PTC179718]

...Financial Creditor/ Applicant

V/s

Anudan Properties Private Limited

[CIN: U70100MH1988PTC047822]

...Corporate Debtor / Respondent

Order Dated: 15.03.2021

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mrs. Suchitra Kanuparthi
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Senior Advocate, Mr. Mustafa
Doctor a/w Mr. Nooruddin
Dhillal, Mrs. Sukhada Wagle
Kamat & Mr, Zubin Narielwala
i/b Hariani and Co., Advocates.

For the Respondent(s) : Mr. Shyam Kapadia a/w Mr.
Abhishek Kale, Mr. Avdhoot
Prabhu, Ms. Nisha kaba i/b Naik
Naik & Co., Advocates.

ORDER

Per: Rajesh Sharma, Member (Technical)

1. This is an application being **C.P. (IB) No. 1147/NCLT/MB/C-IV/2020** filed by **Lichfl Trustee Company Private Limited**, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against **Anudan Properties Private Limited**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).
2. The Application is filed by Mr. H.S. Shashikumar, Chief Executive Officer (CEO) of Financial Creditor vide its Board Resolution dated 10.05.2019, claiming a total default of Rs.144,79,36,325/- (Rupees one hundred forty-four crore seventy-nine lakh thirty-six thousand three hundred twenty five only) which includes the Principal amount of Rs.1,27,82,04,640/- (Rupees one hundred and twenty-seven crore eighty-two lakh four thousand six hundred forty only) and interest @ 18% *p.a.* from 01.04.2019 to 31.05.2020 of Rs.16,97,31,685/- (Rupees sixteen crore ninety-seven lakh thirty-one thousand six hundred eighty five only). The Date of Default is 31.03.2019.
3. The case of the Financial Creditor is as under:
 - a) A Share Subscription cum Debenture Subscription and Shareholders Agreement dated 13.10.2016 was executed between the Financial Creditor, Corporate Debtor and other Investors had invested an amount of Rs.79,90,00,000/- (Rupees seventy nine crore ninety lakh only) by subscribing to the Equity Shares and Series A Optionally Fully Convertible Debenture. The said Agreement is attached to pp.234-364 as Exhibit 'K' of the Petition.

- b) The parties to the said Agreement executed the following Deeds/Agreements namely:
- i) Debenture Trust Deed dated 13.10.2016 for appointing Vistra ITCL (India) Limited as Debenture Trustee which is at pp.379-505 as Exhibit 'M' of the Petition.
 - ii) Escrow Agreement dated 13.10.2016 for appointing Axis Bank Limited as Escrow Agent which is at pp.617-685 as Exhibit 'R' of the Petition.
 - iii) Share Pledge Agreement dated 21.10.2016 which is at pp.160-198 as Exhibit 'H' of the Petition.
 - iv) Guarantee Agreement by the Promoters dated 21.10.2016 which is at pp.199-226 as Exhibit 'I' of the Petition.
 - v) Power of Attorneys by each Promoters dated 21.10.2016 which is at pp.729-758 as Exhibit 'T' of the Petition.
 - vi) Indenture of Mortgage dated 11.11.2016 which is pp.56-113A as Exhibit 'E' of the Petition.
 - vii) Supplemental Deed of Mortgage dated 20.03.2018 which is at pp.114-133A as Exhibit 'F' of the Petition.
 - viii) First Supplemental to the Subscription Agreement dated 11.04.2018 which is at pp.365-378 as Exhibit 'L' of the Petition.
 - ix) First Supplemental to the Subscription Agreement dated 11.04.2018 which is at pp.506-514 as Exhibit 'M' of the Petition.

- x) Revised Escrow Agreement dated 07.08.2019 to amend and modify all the Escrow Agreements dated 13.10.2016 in order to ensure compliance under the RERA which is at pp.686-728 as Exhibit 'S' of the Petition.
- c) In the year 2016, a proposal was made to the Financial Creditor to make an investment in the Corporate Debtor by subscribing to the Ordinary Equity Shares, Differential Equity Shares, and Optionally Fully Convertible Debentures of the Corporate Debtor. It was represented by the Corporate Debtor that it owns land bearing Final Plot No. 43, TPS-1, Panchpakhadi, Thane (West) under the Slum Redevelopment Scheme of the Thane Municipal Corporation on 2.21 Acres of land, and is in process of developing and constructing a residential project with minor components of shops and offices named "Silver Spring" ("Project") comprising of 24,968.25 Sq. mtrs. of approved built-up area for the entire project, which after deducting for rehabilitation area amounts to a saleable area of 2,26,013 Sq.ft. across three sale buildings namely S1, S2 and S3 ("Project Buildings") and partly in two buildings for the rehabilitation of the slum dwellers, namely R1 and R2 ("Rehab Buildings"). An additional 3,087.5 Sq. mtrs. of the built up area is yet to be approved, which after deducting for rehab area amounts to a saleable area between 35,000 to 45,000 sq.ft. (i.e. the carpet area of approx. 23,000 sq.ft. to 30,000 sq.ft.).
- d) After considering the proposal of the Corporate Debtor, an agreement being Share Subscription Cum Debenture Subscription and Shareholders Agreement dated 13 October 2016 was executed between the Financial Creditor, the Corporate Debtor and other investors. Pursuant to which the Financial Creditor had invested an

amount of Rs.79,90,00,000/- (Rupees seventy-nine crore ninety lakh only) by subscribing to the Equity Shares and Series A Optionally Fully Convertible Debentures of the Corporate Debtor.

e) The investment in shares is as under:

No	Date of Issuance	Security	Amount (INR.)
1.	15.11.2016	10 ordinary equity shares of Rs.100 each	1,000/-
2.	15.11.2016	1,211 voting equity shares of Rs.100 each having only voting rights to the extent of 19.47%	1,21,100/-
3.	15.11.2016	44,98,779 Series A1 OFCD of Rs.100 each, bearing interest @ 18.001% per annum	44,98,77,900/-
4.	28.03.2017	18,00,000 Series A2 OFCD of Rs.100 each, bearing interest @ 18% per annum.	18,00,00,000/-
5.	29.01.2018	8,00,000 Series A3 OFCD of Rs.100 each, bearing interest @ 18% per annum.	8,00,00,000/-
6.	12.04.2018	8,90,000 Series A4 OFCD of Rs.100 each, bearing interest @ 18% per annum	8,90,00,000/-
Total			79,90,00,000/-

f) The Financial Creditor has summarised the clauses relating to default in the following manners:

- As per clause 7 of the Subscription Agreement, the Company was liable to annually accrue the interest at the rate of 18.001% per annum on Series A1 OFCD, and at the rate of 18% on remaining OFCDs. Further, as per clause 7.1(b), the Company was liable to pay the interest on the OFCDs to the Investor on

or before 31 March of each financial year, unless the same is waived off by the Investor upon written request of the Company.

- Clause 8 of the Subscription Agreement provides for the Security for Investment by the Investor. As per the aforesaid clause, in order to honour Series A OFCDs interest, Exit Redemption Amount, Participation Redemption Amount, Put Option, etc., the Company and the Promoters shall maintain the security, and maintain a minimum of 1 time of the Investor investment amount as a continuing security.
- As per clause 10.2 of the Subscription Agreement, the Company shall have to redeem all or part of the Series A OFCDs for a consideration equal to the Participation Redemption Amount [as per the formula provided in clause 10.2(b)], by utilizing the entire sales proceeds arising from entire sales in the Project at the Applicable Minimum Price excluding certain amounts more particularly defined in the Subscription Agreement, not later than 31 March 2019.
- The Subscription Agreement provides for the Company's Event of Default ("EOD") under Clause 21. The EODs are divided under Category I, II, and III. As per clause 21.1(b) of the Subscription Agreement, if the Company defaults in discharging the Participation Redemption in accordance with the Subscription Agreement, then it will be a Category I EOD committed by the Company.

- In the event of occurrence of Category - I EOD, the Investor shall have the right to exercise one or more of the options as provided under clause 22.2 of the Subscription Agreement.
- g) Since the Corporate Debtor failed to make payment of the Participation Redemption Amount as stipulated under clause 10.2 of the Subscription Agreement, LICHFL-AMC issued a letter dated 01.08.2019 to the Corporate Debtor and the Promoters calling upon them to pay the investment amount by Redemption of Debentures as per clause 10.2 of the Subscription Agreement, on or before 31 August 2019. The Corporate Debtor had replied to the said letter vide its letter dated 29.08.2019 admitting the delay in execution of the Project but also expressed its inability to pay the Participation Redemption Amount on some baseless and flimsy grounds, and made a request to extend the due date till 31 December 2019.
- h) The Financial Creditor has further replied vide its letter dated 19.09.2019 to the reply of the Corporate Debtor dated 29.08.2019 highlighting various issues and default at company's end and request them to take step for amicable closure.
- i) The Corporate Debtor again issued a letter dated 30.12.2019 to LICHFL-AMC in reply to the letter dated 19.09.2019 requesting for further time up to 60 to 70 days for financial closure of the project under the Subscription Agreement. The Participation Redemption Amount was due and payable as on 31.03.2019.
- j) Since the Corporate Debtor as well as the Promoters failed to redeem the OFCDs on or before 31.03.2019 as per clause 10.2 of the Subscription Agreement, the Investor through its Advocate issued a Notice dated 18.02.2020 to the Corporate Debtor as well as the

Promoters calling upon them to pay an amount of Rs.127,82,04,640/- (Rupees One Twenty Seven Crore Eighty Two Lakh Four Thousand Six Hundred and Forty Only) as on 31st March, 2019 towards the Participation Redemption Amount in terms of clause 10.2, plus Rs.12,68,57,433/- (Rupees Twelve Crore Sixty Eight Lakh Fifty Seven Thousand Four Hundred and Thirty Three Only) from 1st April, 2019 to 17th February, 2020 towards the interest accrued on the Series A OFCDs as per clause 7 of the Subscription Agreement along with further interest at the rate of 18% till actual payment.

4. The Corporate Debtor has submitted in the reply as under:
 - a. The Financial Creditor is the sole Financial Creditor of the Corporate Debtor and through the IBC mechanism intends to take full and absolute control and charge over the Corporate Debtor's assets worth of Rs.340 crore against its alleged claim of Rs.1,44,79,36,325/- (Rupees one hundred forty-four crore seventy-nine lakh thirty-six thousand three hundred twenty five only) by coercing the Corporate Debtor into liquidation and/or winding up. Efforts were taken undertaken by the Corporate Debtor for providing the Financial Creditor with an exit, the same is not accepted by the Financial Creditor on some or the other frivolous grounds.
 - b. The Corporate Debtor's assets comprise of land parcel admeasuring 96,291 sq.ft. and structure thereon i.e. two buildings for the rehabilitation of the slum dwellers, namely R1 (G+21 floors) and R2 (G+17 floors) and three (3) saleable buildings namely S1 (2B+Gr+1st to 20th floors) , S2 (1B+Gr+1st to 21st floors + 22nd part)

and S3 (Gr+1st to 21st floors). The Corporate Debtor has successfully completed the construction of R2 building and handed over the possession to the slum dwellers after obtaining requisite occupation certificate and Fire No Objection Certificate. Approximately 70% of the construction work is completed for R1 building. Further, work is completed for S2 till 13th Floor and 6th Floor brick work is in progress. Work is completed for S2 till 13th Floor and 6th Floor brick work is in progress. Work for S1 and S3 is completed till plinth level.

- c. The Corporate Debtor has undertaken and continues to efforts to provide and exit to the Financial Creditor and in this regards the Corporate Debtor had several rounds of discussion with various financial consultants/intermediaries, financial institutions/Non-Banking Financial Institutions viz SBI Cap-SWAMIH Investment Fund, Suhas Kurlkarni, M/s. BBM Profin Advisors Pvt. Ltd., Sanctum Wealth Management, Ajmera, Kolte Patil, Mr. Wankhede, DHFL House, Realvalue Finloans Services Pvt. Ltd. etc. with the intent to pay the Applicant's alleged outstanding. The Financial Creditor is fully aware and cognizant about the efforts undertaken by the Corporate Debtor from time to time.
- d. The Financial Creditor has participated in several meetings held with such investors, financial institutions and financial intermediaries. The Board Meeting of the Corporate Debtor dated 26.12.2019 was held in which Mr. Ashutosh Hedge nominee director of the Financial Creditor was present, during which it was informed to the Board that the Corporate Debtor has approached several investors and is in talks with some of them. In the said meeting the Corporate Debtor also stated that a detailed working

will be sent to the Financial Creditor. The copy of the said Board Meeting is attached to pp. 09-15 as Exhibit 'A' of the reply filed by the Corporate Debtor.

- e. The SBI Cap sent an email dated 22.04.2020 to the Corporate Debtor and the Financial Creditor wherein they circulated a term sheet for the project "Silver Spring" undertaken by the Corporate Debtor. The said copy of email is attached to pp.16-23 as Exhibit 'B' of the reply filed by Corporate Debtor.
- f. The Corporate Debtor sent email dated 20.11.2020 to the Financial Creditor stating that a letter issued by Mr. Suhas kulkarni, Finance Consultants & Facilitators to the Respondent. The said letter also provides for repayment of the Applicant's alleged outstanding. The copy of the said email is attached at pp.24-26 as Exhibit 'C' of the reply filed by the Corporate Debtor.
- g. In the interim, one M/s. BBM Profin Advisors Pvt. Ltd. had proposed three alternate proposals to provide an exit to the Financial Creditor, which was placed on record vide Finreq's email dated 18.02.2020 which apparent that the Corporate Debtor has all times intended to make payment and in the said regards always intimated the Financial Creditor of the same. The copy of the said email attached to p27 as Exhibit 'D' if the reply filed by the Corporate Debtor.
- h. During last few years the real estate industry has been in great slump on account of fluctuating economic conditions including demonetization. Further, on account of change in policies including the enactment of Real Estate (Regulation and Development) Act, 2006 there has been delay from the statutory authorities in clearing

the Corporate Debtor's file. The Corporate Debtor was also constrained to undertake and complete the construction of a road adjacent/abutting to the project, as the same was one affecting the construction activity. Further the delayed disbursements on the part of the Financial Creditor affected the cash flows and operational flexibility of the Corporate Debtor. Such delays cannot be attributable to the Corporate Debtor. When the Corporate Debtor was striving to come of such uncertainties, the global pandemic COVID-19, which has had its own effect on the real estate segment hit the Corporate Debtor business as well.

- i. The regulators including Reserve Bank of India, Securities and Exchange Board of India, Insolvency and Bankruptcy Board of India have *inter alia* announced certain regulatory measures to mitigate the burden of debt servicing brought about by disruption on account of COVID-19 pandemic to easing financial stress, strengthening credit disciplines, improving the flow of credit, ensuring continuity of viable business of the Code. Efforts have been undertaken and continued to be undertaken by the Corporate Debtor to give the Financial Creditor and exit by making various proposals. Despite the same, the Financial Creditor for the reasons best known to them has chosen not to accept the same.
- j. Further the alleged outstanding is not in accordance with clause 10.2 of the Subscription Agreement dated 13.10.2016 and the calculation annexed to the Notice dated 18.02.2020 to the Petition is incorrect and contrary to what was agreed between the parties and as recorded in the Agreement.

- k. As per Clause 27 of the Subscription Agreement it is expressly agreed between the parties that they shall settle any dispute, controversy arising out of, in connection with or relating to the enforcement, performance, interpretation Agreement through good faith negotiation. If the parties are unable to resolve such disputes through negotiation within 30 days of the dispute having arisen, the parties are required to refer the matter for arbitration in accordance with the provision of the Agreement. As the liability to make payment is disputed, Clause 27 of the Agreement to be given effect to. The Applicant is stopped from recovering the disputed claim through the mechanism of IBC.
5. The Learned Counsel for the Petitioner has filed its Re-joinder and submitted as under:
- a. The Petitioner denied that the Corporate Debtor has taken substantial efforts to provide the Financial Creditor with an exit and the same is not a defence to the present action as there is a financial obligation on the Corporate Debtor to pay the outstanding debt.
 - b. The Petitioner denied that the Financial Creditor is coercing the Corporate Debtor into liquidation and/or winding up also denied that the Financial Creditor has not accepted the exit offered by the Corporate Debtor on any frivolous grounds. Despite the monies becoming payable on 31.03.2019, the Financial Creditor had co-operated with the Corporate Debtor on their representation that they would be providing exit to the Financial Creditor. However, the Corporate Debtor never provided any concrete proposal for exit to the

Financial Creditor and thus the Financial Creditor was left with no other option but to initiate the CIRP after providing substantial time to the Corporate Debtor in July 2020. It is also denied by the Financial Creditor that any additional time ought to be given to the Corporate Debtor for making payment to the Financial Creditor. The status of the development work of the buildings being constructed by the Corporate Debtor is no defence to the present Application.

- c. None of the offers received by the Corporate Debtor have fructified and the Corporate Debtor has failed to raise additional capital required for the purpose of completing construction of the project and repaying the Financial Creditor and the promoters of the Corporate Debtor also have not infused the required additional capital in the Corporate Debtor.
- d. The default of the Corporate Debtor was nearly one year prior to the occurrence of the Covid-19 pandemic and none of the measures announced by the regulatory bodies come to the Corporate Debtor's aid. The Financial Creditor has at all times been ready and willing to exit the Corporate Debtor against payment of monies in terms of the Subscription Agreement and its Supplement Agreement. However, the Corporate Debtor has failed/neglected to make payment in terms of the said Agreements.
- e. The Corporate Debtor has admitted that it is cash strapped and has been scouting for investors since late 2019 to aid it paying the Financial Creditor and completing the project. As

such, the project is already in peril and CIRP may ensure its completion benefiting not only the Corporate Debtor but also slum dwellers, who have been removed from their hutments for the construction of the Buildings. The Corporate Debtor is only opposing the present Application to prevent the Project form being acquired by a third party in the CIRP.

- f. Clause 7 of the Subscription Agreement provided that the Corporate Debtor was liable to accrue and pay annually (i.e. on or before 31st March of each Financial Year) the interest at the rate of 18.001% *p.a.* on Series A1 OFCD, and at the rate of 18% *p.a.* on remaining OFCDs from the date of Subscription of Series A OFCDs till redemption/conversion of the relevant series A OFCDs. As per clause 10.2 (a) of the Subscription Agreement, the Corporate Debtor was obligated to redeem all or part of the Series A OFCDs not later than 31.03.2019 for a consideration equal to the Participation Redemption Amount, i.e. the amount to be calculated as per the formula provided in clause 10.2 (b). As calculated by the Financial Creditor, the Participation Redemption Amount payable by the Corporate Debtor to the Financial Creditor aggregated to Rs.1,27,82,04,640/- (Rupees one hundred and twenty-seven crore eighty-two lakh four thousand six hundred forty only) as on 31.03.2019. Despite its obligation, the Corporate Debtor failed to redeem the Series A OFCSs on or before 31.03.2019.
- g. Clause 21.1 (b) of the Subscription Agreement treated the Corporate Debtor failure in discharging the Participation Redemption as a Category I Event of Default. Clause 22.2(d)

of the Subscription Agreement provided that, upon the occurrence of a Category I Event of Default, the Financial Creditor could avail any remedy available to the Financial Creditor under the Transactional Documents and Applicable Law.

h. In response to the Financial Creditor's letters dated 01.08.2019, 13.08.2019 and 19.09.2019, the Corporate Debtor addressed letters dated 29.08.2019 and 30.12.2019 to Financial Creditor, wherein the Corporate Debtor did not deny its liability to pay the Financial Creditor but only expressed its inability to pay to the Financial Creditor on some baseless and flimsy grounds and requested the Financial Creditor to grant further time to make payments.

6. We have heard the arguments of the Learned Counsel for both the parties and perused the records.
7. It is observed that there is unequivocal admission of liability on the part of the Corporate Debtor where the Corporate Debtor didn't deny the Subscription Agreement entered between the Financial Creditor, Corporate Debtor and the other Investors nor denied the liability to pay the debt. It is evident from the documents placed on record that the Corporate Debtor has not paid the debt amount instead the Corporate Debtor was asking for further time to pay the debt amount to the Financial Creditor. Hence, the Bench is of the view that the Application under section 7 of IBC, 2016 filed by the Financial Creditor is complete and therefore deserves to be admitted.
8. On perusal of the documents submitted by the Applicant, it is clear that financial debt amounting to more than ₹1,00,000/- (Rupees One Lakh

Only) is due and payable by the Corporate Debtor to the Applicant. There is default by the Corporate Debtor in payment of debt amount. Therefore, we do not have any objection on record against the application filed for initiation of CIRP against the corporate debtor. Hence, the Application filed by the Financial Creditor is hereby admitted.

9. The application is complete and has been filed under the proper form. The debt amount is more than Rupees One Lakh and default of the Corporate Debtor has been established and the application deserves to be admitted.
10. The Applicant has proposed the name of Mr. Jayesh Natvarlal Sanghrajka, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00216/2017-2018/10416] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him

ORDER

This Application being **C.P. (IB) No. 1147/NCLT/MB/C-IV/2020** filed under Section 7 of I&B Code, 2016, presented by **Lichfl Trustee Company Private Limited**, Financial Creditor/ Applicant against **Anudan Properties Private Limited**, Corporate Debtor for initiating corporate insolvency resolution process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:

- 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 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 the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date 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 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VI. That this Bench appoints Mr. Jayesh Natvarlal Sanghrajka, a registered insolvency resolution professional having Registration Number IBBI/IPA-001/IP-P00216/2017-2018/10416 as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

k) The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or Whats App. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

Rajesh Sharma
Member (Technical)

15.03.2021

Sd/-

Suchitra Kanuparthi
Member (Judicial)