

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CP No.: 870/I&BP/NCLT/MB/MAH/2017

Under section 7 of the Insolvency & Bankruptcy
Code, 2016

In the matter of

M/s. Milestone Real Estate Fund

.... Applicant Company/Petitioner

v/s

M/s Chaubey Realities Pvt. Ltd.

.... Respondent

Order delivered on: 10.11.2017

Coram :

Hon'ble M. K. Shrawat, Member (J)

Hon'ble Bhaskara Pantula Mohan (J)

For the Petitioner :

1. Mr. Parimal Shroff, Counsel for Petitioner Company.
2. Mr. Cherag Balsara,)
3. Mr. D. V. Devkar,)
4. Miss. Jashine Upadhye,) i/b Parimal K. Shroff & Co.
5. Miss. Sana Ahmed,)
6. Miss. Ankita Roy,)

For the Respondent :

1. Adv. Mulan Pandey, Advocate for Respondent
2. Adv. Akhilesh Chaubey, Director
3. Mr. Vijay Tripathi, Director
4. Mr. Mukesh Pandey.

Per: M.K. Shrawat, Member (J)

1. This is a transferred Petition from the Hon'ble High Court. The Petitioner had earlier moved before the Hon'ble High Court for "Winding Up" under the old provisions Section 433, 434 of Companies Act 1956. On transfer the creditor has filed this Petition on 24th April 2017 on Form no. 1 by the Financial Creditor pertaining to a financial debt of ₹20,00,00,000/- as on 25th March 2013 and defaulted amount of ₹45,49,03,541/- as per the following statement :-

Statement of Claim Amount (as on February 23, 2017)	Rs.
Principal	20,00,00,000
Interest due and not paid for the period 01-04-2014 to 31-03-2015	2,40,00,000

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Redemption Premium till the due date of redemption i.e. till 24-03-2016	11,12,91,037
Sub-Total (A)	33,52,91,037
Redemption Premium @ 23% from 25-03-2016 till 23-02-2017	7,03,81,811
Default Interest on Rs. 33,52,91,037 till 23-02-2017	4,92,30,693
Total	45,49,03,541

2. As per the facts of the case there was an "investment agreement" dated 25th March 2013 executed between "Chaubey Realities Pvt. Ltd.", referred as "Company" on one part and "The persons listed in schedule", referred as "Promoters" and "Milestone Real Estate Fund" referred as "Investor". The Company is engaged in the business of real estate development. The Promoters held 100% paid-up share capital of the Company. The company at that point of time was in the process of developing a construction project. The company and the promoters have requested the investor to put an investment in the company in order to meet the cost and expenses of the development of the project. Relying upon the warranties, undertakings, indemnities provided by the promoters, the investor has agreed to invest in the company by subscribing to the investor securities. As per the terms First tranche subscription amount payable by the investor was ₹20,00,00,000/-. As per the agreement there was "Investor subscription amount" in total was ₹35,00,00,000/-, in two tranches payable by the investor in terms of the Definitive Agreement. In addition to the said agreement there was a "Debenture Trust Deed" dated 25th March 2013 wherein M/s Milestone Real Estate Fund (Petitioner) was referred as investor. As per the terms the OFCDs i.e. fully paid-up optionally convertible debentures of the company having face value of ₹100/- were issued on a Private Placement basis to the investors for an aggregate amount of ₹35,00,00,000/- subject to the investment by the investor that a sum of ₹20,00,00,000/- as a First tranche and ₹15,00,00,000/- in the second tranche. A Deed of Guarantee was also executed on 25th March 2013.
- 2.1 There was a default on the part of the debtor hence on 5th May 2015 a letter was issued by the creditor wherein it was stated that the outstanding amount of ₹2,40,00,000/- was to be paid immediately which was due for payment on 31st March 2015. Again on 25th June 2015 a letter was issued by the financial creditor that despite the reminder the payment was not cleared. On 13th July 2015 a notice was issued by the advocate of the financial creditor due to dishonour of cheque of ₹2,40,00,000/-. The cheque was returned by the bank with the remark "funds insufficient". On 29th July 2015 a reply of the said notice was given by the Debtor Company wherein it was stated that the said cheque was given as a security however misused. It was informed that as per the debenture trust deed dated 25th March 2013 the investor was required to disburse ₹15,00,00,000/- in favour of the Company and due to the reason that the obligation was not fulfilled the demand raised by the creditor through the notice was allegedly bad in law. From the side of the creditor it was strongly

objected and also informed to the debtors that OFCDs were also required to be redeemed on 24th March 2016 by the Company however failed. Another notice was issued by the creditor's advocate dated 8th July 2016 wherein it was informed that a cheque of ₹30,57,56,557/- was dishonoured and returned on 23rd June 2016 by the Bank. The compilation contains another notice of 16th September 2016 issued for non-payment of outstanding dues. All these correspondence and notices have been referred by the Petitioner with the pleadings that the Petition is fit for "**Admission**" under the Insolvency and Bankruptcy code.

3. An important development took place during the pendency of the proceedings. The matter was listed for the first time in the month of May 2017 before NCLT, Mumbai bench and thereafter by consent adjourned time to time. In the month of August 17th it was informed that a negotiation for settlement was in progress and an offer had been made by the "Respondent Debtor", therefore as a consequence, again adjourned. On 18th August 2017 a Consent Term is placed before the Bench. Considering the request of both the sides and acknowledging the existence of the Consent Term dated 18th August 2017 an interim order was passed, reproduce verbatim below :-

"The Company has on the execution of these Consent Terms handed over Cheque for Rs. 27,00,00,000/- (Rupees Twenty-Seven Crores Only) in favour of the Applicant and drawn on HDFC Bank and Shree Krishna Nagar, Borivali East Branch bearing No. 506101 with further undertaking to this Hon'ble Court that the said Cheque when deposited by the Applicant will be honoured by the Bankers of the Company and shall be encashed by the bankers of the Applicant without any objection or demur either by the Company or its Bankers in any manner whatsoever. Mr. VIJAY TRIPATHI, Director of the Company who is present before the Hon'ble Court and who has executed these Consent Terms personally undertakes that the said Cheque for Rs. 27,00,00,000/- will be honoured by the Bankers of the Company upon deposit of the said Cheque by the Applicant without any delay or default."

- 3.1 Thereafter on 10th October 2017 it was informed that there was some difficulty in the clearance of the said cheque hence the corporate debtor sought extension of time. A revised Consent Term dated 10th October 2017 is again placed on record. An undertaking of the Respondent debtor was recorded in the order sheet that the cheque of ₹27,00,00,000/- shall be cleared on or before 30th October 2017. By consent of both the parties the matter thereafter listed today i.e. on 10th November 2017 so that the Petitioner can revert back the information of cheque clearance.
- 3.2 Through an affidavit the Petitioner's representative has informed that the debtor was required to honour the impugned cheque of ₹27,00,00,000/- however it was dishonoured. In this affidavit the

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deponent has affirmed that the debtor was under for strict obligation to fulfil the term of the Consent Terms and also to follow the directions of this Hon'ble Bench however again failed. A prayer has been made that not only the Insolvency Proceedings be initiated against the defaulter but a contempt proceedings u/s 425 of the Companies Act, 2013 be initiated against the defaulter company and the directors. It is also prayed that the Petitioner be permitted to initiate Criminal proceedings u/s 138 of the Negotiable Instrument Act, 1881 against the defaulter.

Findings: -

4. In the light of the above factual matrix we have heard both the sides. From the side of the Petitioner Ld. Counsel has vehemently pleaded that this is a clear cut case of wilful default of the debtor company and disobedience on the part of the directors who had given assurance of repayment of the outstanding financial debt. He has also informed that the conditions as prescribed for "**Admission**" of this Petition u/s 7 has been complied with and name of the IRP has been proposed hence the Insolvency proceedings be allowed against the Debtor.
- 4.1 One of the Director in person namely Mr. Akhilesh Chaubey alongwith his advocate on record appeared. Mr. Chaubey appeared in the advocate's robes. One more director Mr. Vijay Tripathi also appeared and his affidavit is placed on record. It is pleaded that an additional 30 days' time be granted. It is further pleaded that a "Joint Venture Partner" is interested in the project therefore finance can be arranged shortly. It has also been pleaded that this is not a case of dishonoured cheque but the account of the company is blocked by the Revenue Department due to which the said cheque could not be cleared. It is informed that as per one of the term of JVA the debt amount is to be transferred by Rajesh Life Space directly in favour of the Petitioner hence the payment shall be cleared within 30 days' time. When the impugned Joint Development Agreement is confronted to the Petitioner's advocate he has strongly objected that the same is nothing but a draft and not to be relied upon. According to him sufficient opportunity was granted and the Petitioner has accommodated the debtor even for a less amount of debt but never complied with.
5. We have heard the respective sided at some length. We have perused the contents of the compilation and the proceedings recorded by us in the past. The Respondent debtor has not objected that the amount in question has not been advanced in terms of the agreements executed between the parties. It has also not been denied that the due date of repayment has not been honoured. Not only this the Respondent debtor had agreed before this Bench to make a payment of ₹27,00,00,000/- due to which on 18th August 2017 we have reproduced the terms of the Consent Deed, as reproduced supra. Even on accepting the default in repayment of the debt in question and even on promise to make a payment of ₹27,00,00,000/- so as to settle the dispute; it is unfortunate that the corporate debtor had

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failed to accomplished its commitment. For non-compliance or disobedience of the directions this Bench shall take the cognisance as per law separately. For admission of this Petition and the requisite directions are recorded herein below:-

- 5.1 The Petitioner has proposed the name of the "Interim Resolution Professional" Mr. Prakash Karunashankar Pandya, Reg. No. IBBI/IPA-002/IP-00127/2016-2017/1215, Add: 16, 1st Floor, Star Trade Centre, Sodawala Lane, Borivali (West), Mumbai - 400092, Email: info@pkpandya.com . The IRP has also given his consent in Form No.2.
- 5.2 Having considered the totality of the circumstances and the Application for initiation of Insolvency Resolution Process under the I&BP Code, 2016 and having considered the default of the Corporate Debtor in making the payment as discussed supra, it is hereby pronounced that "Moratorium" as prescribed under Section 14 of the Code 2016 shall come into operation. Since the Application is "Admitted", therefore, this Bench prohibits all of the following viz.:-
- (I) (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);
 - (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.
- (II) That 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) 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 the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of

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section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be acted upon immediately as specified under section 13 of the Code.

6. Accordingly, this Tribunal appoints the said Mr. Prakash Karunashankar Pandya, as Interim Resolution Professional to initiate the Insolvency Resolution Process on the above Corporate Debtor forthwith, with the following directions: -

6.1 The Interim Resolution Professional shall perform the duties as assigned under Section 18 of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench.

6.2 The IRP so appointed shall also comply the other provisions of the Code including section 15 of The Code. Further, the IRP is hereby directed to inform the progress of the Resolution Plan to this Bench and submit a compliance report within 30 days of the appointment. A liberty is granted to intimate even at an early date, if need be.

7. Accordingly, this CP 870/I&BC/NCLT/MAH/2017 stood admitted.

8. The Insolvency Resolution Process is commenced from the date of this order.

Sd/-

Bhaskar Pantula Mohan
Member (J)

Sd/-

M.K. Shrawat
Member(J)

Dated: 10th November, 2017