

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI

C. P. NO. 61/I & BP/NCLT/MAH/2017

Coram: *B.S.V. Prakash Kumar, Member (Judicial)*
V. Nallasenapathy, Member (Technical)

In the matter of u/s 7 of Insolvency and Bankruptcy Code, 2016 and Rule 4 of the I&B (Application to Adjudicating Authority), Rules 2016)

And

M/s. Nisus Finance & Investment Managers LLP Applicant/
Financial Creditor

vs.

M/s. Lokhandwala Kataria Constructions Pvt. Ltd. Corporate
Debtor

Applicants' Counsel:

Mr. Mustafa Kachwala, Solicitor a/w. Mr. Karl Saroff, a/w. Mr. Anirudh Hariani, i/b. Kanchwalla & Misar & Co.

Corporate Debtor's Counsel:

Ms. Priyanka Desai, a/w. Mr. Parth Gokhale, and Ms. Sanika Gokhale, i/b. Khaitan & Co.

ORDER

(Heard on 02.05.2017)

(Pronounced on 15.06.2017)

Per B.S.V. Prakash Kumar, Member (Judicial)

1. It's a Company Petition filed u/s 7 of The Insolvency & Bankruptcy Code, 2016 by this Financial Creditor (*namely M/s. Nisus Finance & Investment Managers LLP, since shown as facility agent in Trust Deed dated 5.10.2015, herein after called as facility agent*) against the Corporate Debtor (*M/s. Lokhandwala Kataria Constructions Pvt. Ltd. - it is one of the guarantor companies (obligor-5) agreed in the Debenture Trust Deed (DTD) to redeem the debentures in the event principal debtor namely Vista Homes Pvt. Ltd., (herein after called as Vista) - a Group Company of the Corporate Debtor, failed to repay to the debenture holders as agreed in the Trust Deed*) for Vista availed ₹27,86,00,000 through the Debenture Trust Deed dated 5.10.2015 by issuing debentures

having face value of ₹1,00,000 to the Debenture Holders and thereafter failed to repay as agreed upon, to which, the Corporate Debtor having stood as a Guarantor, since this facility agent is agreed upon to act on the debenture holders behalf, it has filed this case to initiate Insolvency Resolution Process against the Corporate Debtor.

2. The business understanding in this case is – to set up a real estate project, funds required, to which, Vista being a group company of Lokhandwala, raised funds through subscribing debentures, to which Lokhandwala companies stood as guarantors to pay back to the debentures with interest in the event of default, it appears, this financial creditor, who is termed as facility agent, pooled up this money from various persons, and caused it paid to Vista, in doing so, the rights and obligations in this case arose out of the Debenture Trust Deed dated 5-10-2015, wherein this corporate debtor stood as guarantor, and this financial creditor stood as facility agent acquiring rights to ensure returns are reached to the debenture holders, to achieve this, this facility agent is allowed to act on behalf of the debenture holders, ultimately when Vista failed to repay as agreed upon, this facility agent filed this case against this corporate debtor. It appears this money indeed gone into the project of the corporate debtor. Though this corporate debtor is labelled as guarantor, by looking at the DTD, it can be ascertained that this money has gone into the coffers of the corporate debtor.

3. The Financial Creditor submits that Vista desired to acquire 10 units in a project from the Corporate Debtor Company. They being group companies, Vista engaged in the business of Builders, Developers and the Real Estate Agent whereas Corporate Debtor engaged in the business of Real Estate Construction and development. Vista being desirous of buying and the Corporate Debtor being desirous of selling the units forming part of the project, since finance was required for that purpose, Vista came out to issue

3000 secured redeemable debentures of face value of ₹1,00,000, as the facility agent was ready and willing to raise the same, a Debenture Trust was executed on 5.10.2015 among Vista, which issued debentures, Axis Trustee Services Ltd. which stood as Debenture Trustee, Lokhandwala Infrastructure Pvt. (Obligor 1), Mr. Mohamad Lokhandwala (Obligor 2), Mr. Alia Sagar Lokhandwala (Obligor 3), Mr. Moiz Lokhandwala (Obligor 4), Lokhandwala Kataria Construction Pvt Ltd, (Corporate Debtor – Obligor 5) and the Facility Agent agreeing that Vista would repay the money coming into it through debentures on the respective dates as mentioned in the Trust Deed, in the event, Vista failed to repay as agreed, the Obligors, including the corporate debtor, gave unconditional and Corporate Guarantee in the same Trust Deed to pay all the secured obligations on the redemption dates.

4. As per the repayment schedule, ₹7,25,39,000 was to be paid on 30.9.2016, ₹7,93,16,000 to be paid on 31.3.2017, ₹13,02,09,000 to be paid on 30.9.2017, ₹14,23,17,000 to be paid on 30.3.2018. According to the covenants in DTD, these debentures shall be redeemed at the minimum internal rate of return (IRR) of 19.82%, this premium redemption shall be calculated daily on the Day Count Basis and shall be payable in the manner set out in Part-III of second schedule and if the due outstanding is not paid within one day from the due date, Vista shall have to pay additional interest @ 30% per annum payable monthly, compounded quarterly on the defaulted amount will become payable. It is further clarified that the default interest will be paid over and above the redemption premium. In addition to the above on the occurrence of event of default, Vista shall have to pay default interest till such time the default is rectified. On occurrence of default, the debenture trustee on the directions and instructions of the facility agent/debenture holders for and on behalf of the secured parties shall exercise the rights as mentioned in the Debenture Trust Deed. By reading clause 23.1.1 of DTD, it appears that interest on redemption premium could be collected @23% on

total investment outstanding. The default clause triggers into action immediately on the day Vista failed to make payment of 1st instalment. That, Vista failed to make, and the post dated cheque has been dishonoured. Nonetheless, as to financial creditor petitions, two points are to be complied with, one - availing funds, two - default, since these two aspects are admittedly proved, if at all any variance in respect to interest component, it is still open to the corporate debtor to raise this issue before IRP and if not settled, then also, this corporate debtor can place grievance before this adjudicating authority as set out in The Insolvency and Bankruptcy Code.

5. When Vista failed to redeem the debentures as agreed upon, a notice of default was issued on 4.10.2016 indicating that there was already an event of default therefore recalled the entire amount of subscription amount with interest but there was no response despite notice was served upon the Vista and the Obligors mentioned in the Debenture Trust Deed. This Financial Creditor, appointed as a Facility Agent to act for the benefit of the Debenture Holders and powers being conferred with rights, powers and duties as Debenture Holders to take legal action on behalf of the Debenture Holders, this facility agent is empowered to file this Petition. Since all the Obligors, the Corporate Debtor, Debenture Trustee and the Financial Creditor being privy to the Debenture Trust Deed, today this Corporate Debtor cannot back out saying that this facility agent cannot act as financial creditor on behalf of or as Debenture Holders to initiate these proceedings against the Corporate Debtor. Moreover some of the debenture holders have even given independent authorisation to proceed against the corporate debtor.

6. As to particulars of the financial debt, the total amount disbursed towards the debentures is ₹27,86,00,000, this disbursement started on 6.10.2015 and ended on 14.09.2016. Since first instalment redemption was not done on agreed date i.e., on 30.9.2016, according to the Trust Deed, that date itself has to be taken into record as occurrence of default. For the

Financial Creditor is entitled to claim repayment of entire amount in the event of default in making repayment of first instalment, the Financial Creditor claimed repayment of entire amount plus interest which comes to ₹42,65,55,267. The amount Rs 1,60,82,485/- that has come to escrow account has been deducted from the claim amount. To prove that there is an Agreement between the Financial Creditor and this Corporate Debtor, to repay the entire claim in the event Vista defaulted to make repayment as agreed between them, the Financial Creditor placed material showing that Vista and the Obligors mortgaging 10 units totally admeasuring a saleable area 25,100 sq.ft. along with space for parking 20 cars forming part of 84 storey tower having two wings i.e. A and A1 forming part of the residential project known as Minerva and a part of land of 8,021.29 sq. mtrs., situated at Lower Parel Division and J. R. Bharucha Marg, Office N. M. Joshi Marg, Mahalaxmi, Mumbai. Apart from this, Financial Creditor also placed post-dated cheques issued by Obligor-5 for the amounts agreed to be payable on the restrictive dates as mentioned above. To show due outstanding, the Financial Creditor filed National Securities Depository Ltd statements disclosing issuance of Debentures to the Debenture Holders with face value of ₹1,00,000 each. When the post-dated cheques submitted to HDFC Bank, the said Bank issued cheque return memo dated 23.12.2016 to reflect that the post-dated cheques given by the Vista have been bounced. Likewise the Financial Creditor filed copy of certificate of the charge issued by the list of companies' form No. CHG 9 to prove that charge has been created to the debentures issued by Vista.

7. In the above case, the Corporate Debtor has raised two objections, one is about locus of the Facility Agent and another is about quantification of the financial debt.

8. The Corporate Debtor Counsel submits that the applicant cannot become a Financial Creditor to file this petition, because no liability has been shown as owed to this applicant. It is a company merely shown as facility agent in the Debenture Trust Deed dated 5th October 2015. Moreover, this applicant has only shown 15 out of 69 debenture holders authorizing the applicant to proceed against the corporate debtor, therefore authorization cannot be taken as 51% of the debenture holders authorizing the facility agent to file this Company petition. Moreover, this applicant has not filed this petition as an authorized agent/Power of Attorney holder but has purported to have filed in the capacity as a Facility Agent, which is not permitted under law. As per the Trust Deed, either the Debenture Trustee or the debenture holders can file this petition but not this applicant in the capacity as facility agent, therefore, the petition is liable to be dismissed.

9. The corporate debtor further submits that this applicant has falsely claimed that ₹1,60,82,485 was only deposited in the escrow account but whereas the escrow account statement and the bank account statement of the corporate debtor reflects that an amount of two crores was deposited in the escrow account. Though the original rate of return in the Trust Deed is shown as 19.82%, the applicant has claimed interest of internal rate of return as 23%. The present petition is filed on the basis that an amount of 2,78,60,000 is owed towards additional redemption premium calculated @10% after the total principal outstanding. There is no provision in any of the documents relied upon by the Applicant to claim interest by way of additional redemption premium, therefore, the calculation made by the Applicant is arbitrary. The present petition is filed on the basis that an amount of ₹4,68,56,507 is owed towards default interest @30% on a compounded basis i.e. principal and interest, since the claim for 30% is over and above the interest/redemption premium @23% internal return rate claimed by this applicant, in total, the purported claim of interest

approximating to 44%, which is not permissible under law. To give justification to this argument, the Corporate Debtor Counsel relied upon *Sanat Kumar Das & Others v/s Indra Nath Barman & others* (AIR 1917 Calcutta 502) and *Central Bank of India v/s Ravindra & Others* ((2002) 1 SCC Page No. 367). In view of these submissions, the Corporate Debtor Counsel sought for dismissal of this Company petition.

10. On hearing of the submissions on either side, the points to be decided are as to whether this Applicant has locus to file this Company Petition or not and as to whether the computation of the claim is correctly reflected or not, if it is not correctly reflected whether this petition is maintainable or not.

11. **Point 1 for consideration:** - Whether the applicant has locus to file this Company Petition or not.

12. The document that has created jural relationship between the principal Debtor, the present Corporate Debtor, the Debenture Trustee and this applicant is a Trust Deed executed by all the aforesaid parties and also other parties shown as obligors 1 to 4 creating right for the principal debtor to arise funds by issuing Debentures for an amount of ₹ 30,00,00,000 to issue 3000 debentures at the face value of ₹1,00,000 each and also to redeem those debentures on the dates mentioned in the Trust Deed, on the top of it, the document has also set out the rate of interest in the event of default. It has also been recited in the said Trust Deed that the Facility Agent (the Applicant) is specifically authorised (Clause 29.1) by the debenture holders to be the duly constituted lawful Attorney of the debenture holders for all rights and power granted to the debenture holders which is nothing but assignment of rights of the debenture holders to the facilitating agent. When this Facility Agent was appointed for the benefit of debenture holders under Clause 4 of the DTD, all actions of the Facility Agent are binding upon the

debenture holders (Clause 29). In terms of the corporate guarantee, the Corporate Debtor is bound and liable to make payment to the debenture holders, which includes the Facility Agent in the event of default. For repayment of the debenture redemption amount on due dates mentioned at the time of execution of DTD, the post-dated cheques were issued to realise redemption amount on the respective dates as mentioned above. In fact, these cheques were given by this Corporate Debtor. Under Clause 10.3, the vista was obliged to redeem the debentures by routing payment through an escrow account, since Vista failed to do so; it amounted to event of default. Upon the event of default, the entire outstanding amount was called back calling upon Vista and also the corporate debtor indicating that there being already an event of default, entire subscription amount with interest should be paid back, but there was no response to the said notice.

13. In the backdrop of this factual situation, for one thing is clear that any liability in respect of any guarantee or indemnity to any of the items referred to in sub-clauses (a) to (h) of definition Clause of financial debt (Section – 5(clause-8)) will amount to financial debt. Taking of funds by issuing debentures being construed as financial debt under Clause (c) of the same clause, for this Corporate Debtor having admittedly given guarantee to repay the entire liability in the event default committed by Vista in making repayment, the liability fastened upon the Corporate Debtor to repay the entire financial debt as agreed between the parties will amount to due outstanding against this Corporate Debtor as well. It is an undisputed fact that Vista issued debentures on subscription of the aforementioned money and also defaulted in redeeming the first tranch of debentures fell due on 30th September 2016.

14. Since this Corporate Debtor has not disputed its stand as guarantor to the above financial debt, now the point left to this Bench to decide is as to

whether this Applicant, in the capacity of Facility Agent, can file this petition or not. On perusal of the document filed, the rights and duties for issuing debentures and for collection of funds having arose out of Debenture Trust Deed; it is the foundational document to find out what rights are accrued to this Facility Agent to file this Company Petition. Though debentures were issued basing on this Trust Deed, these debenture holders were not directly made as parties to the debenture Trust Deed. The person acted for the benefited of the debenture holder is this facilitating agent only, and it is a party in DTD. The Corporate Debtor being a party to the same document and having said that Facilitating Agent would act on behalf of the debenture holder, today it cannot be said that this applicant cannot file an application as a Financial Creditor in respect to the claim mentioned above. If we go through Sec. 7, Financial Creditor either by itself or jointly along with other financial creditors can make a claim, unlike in the case of Operational Creditor. For there being an exclusive authority given by this Corporate Debtor, Debenture trustee, and the principle debtor and other obligors to the facilitating agent to proceed against any of them in the event of default, this Corporate Debtor could not have said that this Facilitating Agent cannot file a petition on behalf of the Debenture Trustees. Moreover, no debenture holder has come forward saying that this facilitating agent acting against the interest of them or it is not given authority to file this case. Therefore, we are of the view that this Facility Agent being a person authorised to act for the beneficial interest of the debenture holders, it is competent enough to file this Company Petition as a Financial Creditor.

15. As to another point i.e. about computation of the debt, the interest rate has been set out in the debenture Trust Deed, the Corporate Debtor and others agreed to pay internal rate of return of 23% as a redemption premium and thereafter to pay penal rate to include redemption value, henceforth this levy of interest being as agreed by the parties to the debenture trust deed,

today the corporate debtor cannot go back from the covenant stating that the interest is to be calculated basing on a ratio decided by Hon'ble Supreme Court over a dispute in respect to awarding damages u/s. 73 & 74 of Indian Contract Act. Awarding damages is not a contractual obligation; it is only an eventuality that crops up when right for claiming damage is accrued to the party. Here, there being an exclusive understanding between the parties to pay interest as agreed upon in the event of default, this Bench has no discretion to compute the interest ignoring the contractual arrangements entered between the parties.

16. In respect to these citations *Sanat Kumar Das & Others v/s Indra Nath Barman & others (AIR 1917 Calcutta 502)* and *Central Bank of India v/s Ravindra & Others ((2002) 1 SCC Page No. 367)*, one is over damages case decided in the year 1917 and another over interest pendent lite and post decree interest u/s 34 of CPC, not on any contractual interest rates, therefore in our opinion, they will not have any bearing with regard to the interest rates claimed as agreed upon till before filing this case.

17. It is very much evident on the record the first cheque issued for redemption of the part of the debenture being dishonoured, it is evident that default has occurred and the Corporate Debtor is under obligation to make repayment to the debenture holders, the same not being made, this application is fit for initiating corporate Insolvency resolution process. Accordingly, this application is hereby admitted.

17. On perusal of the documents placed and the reasons given above, this Bench being satisfied that the debtor company defaulted in repaying its debt to the financial creditor, this Bench hereby admits this application prohibiting all of the following of item-I, namely: -

- 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 15.06.2017 till 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, 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 the Code.

(VI) That this Bench hereby appoints, **Mr.Dushyant Dave**, 1101, Dalamal Tower, Nariman Point, Mumbai- 400 021, IBBI/IPA-003/IP-00043/2016-17/1343, as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

18. Accordingly, **this CP 61/I & BP/NCLT/MAH/2017 is admitted.**

19. The Registry is hereby directed to communicate this order to the Financial Creditor and the Corporate Debtor within seven days from the date order is made available.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)