

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
(C.P. NO. 21/I & BP/NCLT/MB/MAH/2017)
IN THE MATTER OF INSOLVENCY AND BANKRUPTCY CODE, 2016
SECTION 9

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

IN THE MATTER OF

URBAN INFRASTRUCTURE TRUSTEE LTD.

...FINANCIAL CREDITOR

Versus

NEELKANTH TOWNSHIP AND CONSTRUCTION PVT. LTD.

...CORPORATE DEBTOR

Applicant Counsel: Shri. Navroz Seervai, Sr. Counsel, Mr. Arif Doctor, Counsel a/w Advocate Ms. Nirali Chopr, Advocates for the Applivant.

Respondent Counsel: Shri. J. P. Sen, Sr. Counsel a/w Mr. Rohan Rajadhyaksha, Ms. Nidhi Singh, Ms. Chaitrika Patki, Advocates for the Respondent.

ORDER

(Heard on 28.02.2017)

(Pronounced on: 01.03.2017)

1. The Petitioner namely, Urban Infrastructure Trustees Ltd., filed this Petition against the corporate debtor namely Neelkanth Township and Construction Pvt. Ltd. to initiate corporate insolvency resolution process u/s. 7 of the Insolvency and Bankruptcy Code 2016 on the footing that the corporate debtor failed to redeem the debenture certificates issued by the corporate debtor on 26.12.2007, 15.02.2008 and 30.03.2009.

2. The Petitioner submits that the corporate debtor company issued debenture certificate comprising 127000 debentures of 0% optionally fully convertible debentures of ₹100 each of the aggregate value of ₹1.27 crores all ranking pari pasu inter se made the authority of memorandum and articles of association of the company and the resolution passed by the Board of Directors of the company at its Board meeting held on 26.12.2007.

3. Likewise, the corporate debtor on 15.02.2008 issued another debenture certificate comprising 124000 debentures comprising 0% optionally fully convertible debenture of ₹100 each of the aggregate value of ₹1.24 crores all ranking pari passu inter se made the authority of memorandum and articles of association of the company and the resolution passed by the Board of Directors of the company at its Board meeting held on 15.02.2008.

4. Again, the corporate debtor on 30.03.2009 issued another debenture certificate comprising 4849000 debentures comprising 1% optionally fully convertible debenture of ₹100 each of the aggregate value of ₹48.49 crores all ranking pari passu inter se made the authority of memorandum and articles of association of the company and the resolution passed by the Board of Directors of the company at its Board meeting held on 30.03.2009.

5. So the total money the petitioner invested in all these debentures have come to 51 crores. In the terms and conditions of the debenture certificate, a redemption clause has been inserted saying that in the event the debentures are not converted within a period of 60 months from the date of allotment the company shall redeem the same together with interest, if any payable thereon. The Petitioner says these debentures have not been redeemed despite due date of maturity has been lapsed and the company has not even converted these shares into equity.

6. The Petitioner has submitted in part IV of Form 1 that the amount claimed to be in default as ₹226,16,79,437 as to date on which default occurred is shown as 26.12.2012 for debentures issued on 26.12.2007, 14.02.2013 for the debentures issued on 15.02.2013, and 30.04.2011 for the debentures issued on 30.03.2009.

7. Now the case of the Petitioner is that though the principal and the interest has come to ₹226,16,79,437, since default occurred to the principle amount of ₹51crores, the Counsel says, the Petitioner filed this company petition showing default occurrence to the principal amount alone i.e. ₹51crores. But in the form that has been filed by the Petitioner, in column no.2 of part 3, the petitioner has categorically mentioned the amount claimed to be in default is ₹226,16,79,437

making an annexure to this company petition showing principal amount as ₹51crores and principal amount along with interest of ₹226,16,79,437 as claim amount in default.

8. To make it clear what the petitioner has asked in the petition, I hereby place column no.2 of part 4 hereunder,

Form No.1
Part - IV

Particulars of Financial Debt		
1.	Total amount of debt granted	₹51,00,00,000 Being The Aggregate Value of: (i) 1,27,000 Optionally Fully Convertible Debentures of ₹100 Each Are Unsecured; (ii) 1,24,000 0% Optionally Fully Convertible Debentures of ₹100 each are unsecured; and (iii) 48,49,000 1% Optionally Fully Convertible Debentures ('OFCDs') of ₹100 each are unsecured.
2.	Amount claimed to be in default and the date on which the default occurred (Attached the workings for computation of amount and days of default in tabular form)	₹ 226,16,79,437 See <u>Annexure - "2"</u>

9. By looking at column 2, the amount claimed to be in default and the occurrence of default cannot be different to each other, both have to be one and the same, because the word "*the default occurred*" is in reference to "*the amount claimed to be in default*" mentioned above. Thereby the Petitioner cannot split the amount claimed to be in default in to two and show one amount as default occurred and the remaining amount as default not occurred. It is no doubt true that it has been mentioned in the Annual Report of the company and the balance sheet of 2013-2014 that company failed to repay the debentures already matured thereby the company has been in default in respect to ₹51crores but here the relief sought by the Petitioner is for entire amount of ₹226,16,79,437.

10. If default is occurred to ₹51 crores only, then the Petitioner ought to show default occurred for 51 crores only but not for ₹226,16,79,437. The petitioner shall not explain away simply by saying that since this Petition is simply for initiating corporate insolvency resolution process, the petition is maintainable if default is in relation to the part of the amount mentioned in the application. I doubt it is correct proposition of law for two reasons, one – it is doubtful as to whether financial creditor is entitled to make claim for part payment out of the total amount in default, two – it makes no difference as to whether it is a claim petition or a petition for initiating corporate insolvency resolution process since this application is solely based on occurrence of default, therefore the petitioner must specify the amount to which default occurred, the petitioner cannot say one as default amount, to part of it, as default occurred.

11. In respect to occurrence of default it is evident on record that the company failed to repay the debentures already matured. If this petition is on the basis of occurrence of default for 51 crores the petitioner would have mentioned the default has occurred for 51 crores but not for ₹226,16,79,437. Above this, this remedy is a harsh remedy pre-empting every other person to make a claim against the company and also excluding the corporate debtor from the administration of the company, in such a case, the Petitioner has to show and specify the amount to which default occurred stating that the petition has filed on occurrence of default for such and such amount. For this has not been reflected in the petition that occurrence of default is for 51 crores, this Petition is not maintainable in the form before this Bench, whereby this Petition is dismissed by giving a liberty to the Petitioner by restricting occurrence of default for an amount of ₹51 crores that is the amount the Petitioner entitled to from corporate debtor as on the date of filing this company petition.

12. The corporate debtor company counsel vehemently argued that the Petitioner filed a company petition with an allegation that conduct of the directors of debtor company is prejudicial and oppressive to the interest of the petitioner and also filed an application for appointment of an arbitrator in relation to the affairs of the debtor company whereby this Petition is not maintainable.

13. The Bench has not been impressed upon by the argument of the counsel of debtor company that other legal proceedings pending because this code has overriding effect against all acts and proceedings pending before various forums in respect to the petition filed by financial creditor, the only requirement the petitioner has to show is that the default has occurred to the amount that is mentioned in the application, if at all this Bench is satisfied that occurrence of default is in existence as on the date of filing financial creditor petition, that petition is maintainable. Accordingly, this Bench will admit with consequential directions as mentioned under the provisions of Insolvency and Bankruptcy code.

14. However, for having the present Petitioner failed to specify the default occurred in the company, this petition is dismissed with the liberty as mentioned above.

Sd/-

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