

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C.P. NO. 69/I&BP/NCLT/MAH/2017

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

In the matter of under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule 2016)

URBAN INFRASTRUCTURE TRUSTEE LTD. ... Applicant
V/s.
NEELKANTH TOWNSHIP AND CONSTRUCTION PVT. LTD. ...CORPORATE
DEBTOR

Applicant Counsel: Mr. Arif Doctor, Counsel a/w Ms. Nirali Chopra, Advocates for the Applicant.

Corporate Debtor Counsel: Ms. Chaitrika Patki, Advocates for the Corporate Debtor.

ORDER

(Heard & Pronounced on 21-04-2017)

Per B S V Prakash Kumar Member (Judicial)

This Bench having pronounced the order of admission in the open court after hearing this Application; the reasons for passing such order are as follows.

2. The financial creditor filed this CP against the corporate debtor, viz. Neelkanth Township and Construction Pvt. Ltd to initiate Corporate Insolvency Resolution Process u/s 7 of Insolvency and Bankruptcy Code, 2016 (I&BC) stating that the corporate debtor defaulted in redeeming the debenture certificates issued by the corporate debtor on 26.12.2007, 13.2.2008 and 30.3.2009 on the dates of maturity mentioned in the debenture certificates issued by the corporate debtor.

3. It is pertinent to mention that this financial creditor had filed CP 21/I&BP/2017 seeking the relief as sought now, but whereas this Bench, by looking at the variation between the claim amount and default amount, dismissed that application with an observation that application was filed showing claim amount as ₹226,16,79,437 basing on the record and information disclosing default for repayment of principal amount of ₹51crores. While dismissing the above application, this Bench gave liberty to the financial creditor to file fresh application restricting its claim to ₹51crores to which record is available showing the corporate debtor defaulted in redeeming the debentures as agreed.

4. In pursuance of the liberty given above, the financial creditor has now filed this Company Application limiting its claim to ₹51crores as against the default showing in the records placed by the creditor. Now the present Application is filed stating that corporate debtor, in consideration to the debt of ₹51crores given by the financial creditor, issued certificate dated 26.12.2007 comprising of 1,27,000 zero percent optionally fully convertible debentures of ₹100 each of the aggregate value of ₹1,27,00,000; certificate dated 15.2.2008 comprising of 1,24,000 zero percent optionally fully convertible debentures (OFCDs) of ₹100 each of the aggregate value of ₹1,24,00,000; and another certificate dated 30.03.2009 comprising of 48,49,000 one percent optionally fully convertible debentures of ₹100 each of the aggregate value of ₹48,49,00,000, with terms and conditions in respect to rate of interest, conversion, redemption, payment of debentures on the back of each of the certificates stating as regards the debenture certificate for 1,27,000 debentures, they shall be redeemed within 60 months from the date of allotment (maturity date would be 25.12.2012); as regards the debenture certificate for 1,24,000 debentures, they shall be redeemed within 60 months from the date from the date of allotment (maturity date would be 14.02.2013); as regards the debenture

certificate for 48,49,000 debentures, they shall be redeemed on 30th April 2011 with a redemption premium on the date of maturity. Since the corporate debtor has defaulted in repayment of the aggregate principal amount of ₹51crorestowards OFCDs on the respective dates of maturity, and for the same being acknowledged in the balance sheets of the corporate debtor for the financial year ended 31.03.2012, 31.03.2013, 31.03.2014 and unaudited balance sheets of financial year ended 31.03.2015 and 31.03.2016 showing that OFCDs has matured and the same are overdue, the financial creditor filed this company Application for initiation of Insolvency Resolution Process.

5. The financial creditor further submits that the corporate debtor company has only three shareholders, i.e., the financial creditor, and two individual promoters, out of these three; it is this financial creditor, who made 98% of the funding to the corporate debtor company through these OFCDs subscribed by the financial creditor.

6. On the application moved by the financial creditor, the corporate debtor raised objections for admission of this Application on the ground that there is no evidence of proof to show that the corporate debtor committed default and no record has been placed to specify the default purported to have been committed. The corporate debtor further submits that since sufficient stamp duty has not been paid over the debenture certificates, they cannot be taken into consideration to pass any order as those certificates have been hit by Section 35 of Indian Stamp Act, 1899. The corporate debtor has gone further saying that since three years limitation for seeking remedy basing on debenture certificates is expired since the date of maturity, this petition is liable to be dismissed. The Corporate Debtor counsel says that default showing in the Balance Sheets does not amount to acknowledgment of debt. The counsel appearing on behalf of the

corporate debtor further submits that since this claim has already been disputed under Section 21 of Arbitration and Conciliation Act, 1996, no order could be passed simply by looking at the claim made in this application. The last objection of the corporate debtor counsel is since this applicant has been in a dual capacity as a shareholder of the debtor company and also as a financial creditor, this financial creditor cannot make any claim against the debtor company wherein this applicant itself is continuing as a shareholder.

7. On hearing the submissions of either side, the points for consideration are as follows:

1. Whether enough evidence as mandated u/s 7 of the Code has been placed by the applicant for admission of this company Application or not.
2. Whether deficiency of stamp duty will invalidate the debenture certificates or not.
3. Whether the debt is time barred or not.
4. Whether the pendency of arbitration proceeding between the parties will have any bearing on adjudication of this application or not.
5. Whether the applicant herein can file this application as a financial creditor when the applicant is continuing as one of the shareholders of the Company.

Point .1: -Whether enough evidence as mandated u/s 7 of the Code has been placed by the applicant for admission of this company Application or not.

8. It is a fact that the applicant herein subscribed for issuing debenture certificates mentioned above, on consideration, the corporate debtor issued debenture certificates on the dates mentioned above and the same has not only been showing in the debenture certificates placed before this Bench but also in the Balance Sheets of the debtor company for the years 2012 to

2016 reflecting that the amounts in respect to the debenture certificates fell overdue. It is not the case of the corporate debtor company that the debenture certificates have not been issued and the money against them has not come to the company, and it is also not the case of the corporate debtor it is not reflecting in the balance sheets of the corporate debtor company. In the earlier application dismissed with a liberty to the applicant to claim for the principal amount, the corporate debtor did not raise any objection stating that record of default has not been recorded with information utility and record of evidence of default is not as specified under the Board Regulations governed by section 240 of this Code.

9. However, the corporate debtor counsel has submitted that an application u/s 7 could be filed only when the record of default is recorded with information utility or such other record or evidence of default as may be specified. He says that section 240 sub section 2 (f) envisages that the other record or evidence of default under clause (a), under any other information under clause (c), of sub section 3 of section 7 shall be taken into consideration as mentioned in the Regulation-8 of I & B Board of India (Insolvency Resolution Process for Corporate Persons) Regulations. In pursuance of the said provision, for there being Regulation 8(2) saying existence of debt due to the financial creditor has to be proved on the basis of either on the records available on the information utility or other relevant documents including (i) a financial contract supported by financial statements as evidence of the debt, (ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor; (iii) financial statements showing that the debt has not been repaid; or an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any, satisfaction under any of the heads is sufficient.

10. In conjunction to the same, the corporate debtor referred rule 4 of I&B (application to adjudicating authority) Rule 2016 to say that the documents accompanied with Form-1 shall be as specified in the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulation 2016. He further submits the use of words "record or evidence of default" appearing in section 7(3)(a) cannot in any manner be read to mean any other document or any other evidence except as specified in the Regulations, whereby the procedure laid under the Rules and Regulations cannot be waived of in granting relief under this section.

11. When this proposition raised by the corporate debtor counsel placed as against the record of record placed by financial creditor, it is very much evident that the financial creditor filed debenture certificates issued by the corporate debtor on receipt of consideration of ₹51crores from the financial creditor and also annual reports for F.Y. 2011-12, 2012-13, 2013-14 and also unaudited annual reports for the F.Y. 2014-15 and 2015-16 reflecting the corporate debtor company issuing debenture certificates to the money received thereafter consistently showing the same in the annual report and also notes of the financial statement stating that the company failed to make payment to the debenture holder despite the debentures matured on the respective dates as mentioned above. Therefore, the corporate debtor counsel cannot now say that record or evidence of default as specified under the regulation and rules has not been produced.

12. The Regulation 8 only says that the Financial Creditor has to place either the record available with an information utility or relevant documents including a financial statement showing evidence of debt and records showing that facility has been availed by the corporate debtor and also the record showing financial statement showing that the debt has not been repaid or order of court or tribunal that has been adjudicated upon the

non-payment of the debt. So there are three kinds of showing is required to prove default, one is recording by the information utility, since the information utility has not come into existence it can't be an argument of the corporate debtor that since information utility has not yet been created, this Bench cannot pass an order. Second option is that this Bench can pass an order by looking at the financial contract showing the claim as debt, a record evidencing the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor, if that evidence is also not available then third option is the financial creditor can show any court order adjudicating non-payment of a debt. Since these categories have been disjointed by using the word "or", if the financial creditor is able to produce any of these three records showing default, then this Bench has invariably to consider that default of payment of debt has been proved. Here in this case for the financial creditor has produced the debenture certificate showing financial contract and thereafter financial statements of the company reflecting the payment above mentioned as remained over-due till date of filing this company application.

13. In view of that evidence let in by the financial creditor, we believe that the record placed by the financial creditor is sufficient enough to prove that the corporate debtor has defaulted in repayment of the aggregate principal amount of ₹51 crores to which OCDs have been issued by the corporate debtor.

Point 2: Whether deficiency of stamp duty will invalidate the debenture certificate or not.

14. Whether argument advanced by the corporate debtor counsel is that the debenture certificates issued by the Corporate Debtor are not duly stamped as required under the provisions of the Indian Stamp Act 1899 and/or the Maharashtra Stamp Act 1985 conferring it as security. To justify

this argument, the corporate debtor counsel relied upon Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another (2013) Sec.1 to say that it is a hybrid security as the same is convertible into equity because, according to the aforesaid case, OFCDs have been characteristics of shares as well as debentures falling within the definition of securities section 2 (h) of the SCR Act, which continue to remain debentures till they are converted. Because, thereby convertible debentures are to be treated as securities marketable.

15. To this argument, the financial creditor counsel has submitted that debentures, being a marketable security, they are governed by Indian Stamp Act 1899. It is true that debentures are marketable security when such security is marketable in nature, but the corporate debtor being a private limited company, these OCDs are not marketable security whereby they do not require to be stamped either under Article 27 of the Schedule I of the Indian Stamp Act or under Section 74 of Maharashtra Stamp Act.

16. Since it is evident that the corporate debtor company is a private limited company, for these debentures cannot be transferred like in a public limited company, these debentures cannot be called as marketable security and since the corporate debtor company already defaulted in making repayment after maturity date it can't in any way be considered as a security asking stamp duty. Hence this Bench has not found any merit in the argument of the Corporate Debtor counsel on this point.

Point No.3: Whether the debt is time barred or not.

17. The corporate debtor counsel argued because this three debenture certificates were due for redemption as far back as 2011, 2012 and 2013, since this application is filed in the year 2017, this claim is ex-facie time barred, hence this Tribunal ought not entertain or proceed with or decide

the same. He further submits that the purported acknowledgment by the corporate debtor in the Annual Returns is subject to the qualification contained in the Directors report, which clarified to the Notes on Account contained in the auditor's report. Since the said acknowledgement being qualified by the Directors report, it can't be treated as an admission for extension of limitation basing on section 18 of the Limitation act.

18. Looking at the argument of the corporate debtor counsel, it is clear that it is not his case that the debenture certificates have not been issued. It is also not his case that admission of default is not present in the financial statements. The only twist that is given to that admission is that it is a qualified admission for it has been mentioned in the director's report that it is in dispute. As to this point it need not be newly propound to say that the admission appearing in the financial statement of the company is an acknowledgement covered by section 18 of the limitation act, an acknowledgement need not be given to the financial creditor stating that debt is owed to him. If such debt is shown as due in the financial statements of the company which are rem in nature, it is to be construed as an acknowledgement of default. Since there has been express admission that the company has defaulted in repayment of principal toward the money received by issuing debenture certificates, this debt cannot be called as time barred debt. Thereby this bench has not found any merit in the argument taken by the corporate debtor counsel.

Point No.4. Whether the pendency of arbitration proceeding between the parties will have any bearing on adjudication of this application or not.

19. The corporate debtor counsel argues that section 21 of Arbitration and Conciliation Act 1996 in relation to the same debentures pending before Hon'ble High court of Bombay; therefore, the financial creditor

cannot raise this dispute before this Bench on the same issue pending before the Hon'ble High Court of Bombay.

20. Before answering this point, we believe it is pertinent to mention what sections 63 and 231, 238 of the Code are saying. On perusal of these three sections, it is evident that no civil court shall have jurisdiction in respect of any matter in which the adjudicating authority is empowered by or under this court to pass any order, thereby it is clear that pendency of any proceeding before any court will not have any bearing on the proceedings initiated under this Code provided that dispute is covered under the respective section of this Code. Since this case is covered u/s 7 of the Code, pendency of section 21 proceedings under Arbitration Act will not have bearing on this case. Hence, we do not find any merit in the argument advanced by the corporate debtor counsel.

Point No.5: Whether the applicant herein can file this application as a financial creditor when the applicant is continuing as one of the shareholders of the Company.

21. Since this court has not said anywhere if the financial creditor happens to be shareholder as well, the shareholder in the capacity of financial creditor cannot initiate insolvency resolution process, since it is the case of the financial creditor that 90% of the funding arisen by the company is only through this claim, this applicant claim cannot be shut on the ground the applicant continuing as shareholder. As there is no legal bar against this applicant to make his claim as a financial creditor, this Bench cannot read into such proposition to deprive the right of this applicant. Therefore, we do not find any merit in the argument of the corporate debtor.

22. When a Company is unable to pay the debt or refuse to pay the debt, the financial creditor or the operational creditor, as the case may be, can initiate insolvency proceedings since the corporate debtor defaulted in repaying the debt admittedly showing in the financial statement of the debtor Company, this application deserves admission.

23. In view of the reasons above, this Bench admitted this petition. The order for appointment of Insolvency Resolution Professional and other consequential directions will follow within fourteen days from the date of admission.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

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