

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. 5

CP No. 1390/IBC/NCLT/MB/MAH/2020

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 r.w. Rule 4 of
the Insolvency and Bankruptcy
(Application to Adjudicating
Authority) Rules, 2016

In the matter of

Beacon Trusteeship Limited

4C & D, Siddhivinayak Chambers,
Gandhi Nagar, Opp. MIG Cricket
Club, Bandra (east), Mumbai – 400
051

.....Petitioner

V/s

Radius Estates and Developers
Private Limited

One BKC, A wing 1401, Plot No. C-
66, G Block, Bandra Kurla Complex,
Bandra (east), Mumbai – 400 051

..... Corporate Debtor

AND

IA 212/2021 in

CP

No.

1390/IBC/NCLT/MB/MAH/2020

Under Section 60 of the Insolvency
and Bankruptcy Code, 2016 r.w. Rule
11 of the Insolvency and

Bankruptcy (Application to
Adjudicating Authority) Rules, 2016

In the matter of

Beacon Trusteeship Limited

.....Applicant

V/s

Radius Estates and Developers
Private Limited

..... Corporate Debtor

Order pronounced on: 30.04.2021

Coram :

Hon'ble Smt. Suchitra Kanuparthi, Member (J)

Hon'ble Shri. Chandra Bhan Singh, Member (T)

For the Petitioner : Mr. Nirman Sharma, Amogh Joshi, Sneha Jaisingh,
Aastha Kaushal, Advocates.

For the Respondent : Mr. Vibhav Krishna, Devang Lakhotia, Tahir Prande,
Anmol Bartaria, Advocates i/b Juris Consillis.

Per: Chandra Bhan Singh, Member (T)

ORDER

1. The Petitioners/Applicants viz. 'Beacon Trusteeship Limited' (hereinafter as Petitioner) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as Rules) in the capacity of "Financial Creditor" by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as Code) against 'Radius Estates and Developers Private Limited' (hereinafter as 'Corporate Debtor').

2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt granted by way of Debentures is stated to be Rs. 65,00,00,000/-, and the amount claimed to be in default is Rs. 22,35,75,376/- including interest. The date of default is stated to be 12.11.2019. Under Clause 6 of Annexure "2" of the Debenture Trust Deed, the Debentures were to be redeemed in four instalments each quarter, commencing from the 5th quarter, i.e. 12.02.2020.

3. The Petitioner had filed the present Petition on 20.11.2020 for the default which occurred due to failure in repayment of 1st installment.

BRIEF HISTORY OF THE CASE

4. The Corporate Debtor was in need of funds for repayment of its existing debts and for expenses related to residential project being developed under the name "Ten BKC" in Mumbai by the Corporate Debtor. For above mentioned purposes the Corporate Debtor issued 6,500 secured, unlisted, unrated redeemable, non-convertible debentures for a nominal amount of Rs. 1,00,000/- each, aggregating up to Rs. 65,00,00,000/- for a maximum period of 24 months. The said Debentures were subscribed by 167 Debenture Holders on 13.11.2018. Pursuant to which the Debenture Trust Deed (**DTD**) was executed amongst the Corporate Debtor, the Petitioner on behalf of the Debenture Holder Mr. Sanjay Chhabria and Mrs. Ritu Chhabria and the Promoters of the Corporate Debtor.

5. Security was created in respect of the Debentures. The DTD along with the other security documents are collectively hereinafter referred to as the "**Transaction Documents**".

6. In terms of Article 1.1.34 read with Article 8.2.1 of the DTD, on 13.11.2018, the Petitioner received from the Debenture Holders an aggregate amount of Rs. 65,00,00,000/- towards subscription of the Debentures. The said amount was deposited into the Subscription Account which was transferred in escrow account in terms of an Escrow Agreement dated 02.11.2018.

7. Under Clause 5 of Annexure "2" read with Article 1.1.17 and 1.1.18 of the DTD, the interest @16.01% p.a., being the Coupon Rate, was due quarterly.

8. Under Clause 6 of Annexure "2" of the DTD, the Debentures were to be redeemed in four instalments each quarter, commencing the 5th quarter, i.e. 12.02.2020.

9. Under Clause 8 of Annexure "2" of the DTD, interest @1% p.m., compounded annually was payable in the event of default of the Coupon Rates or the Redemption Amount.

10. In terms of Clause 11.1.4 failure to pay the Debenture Payments constitutes an Event of Default, upon which a Default Notice must be issued to the Issuer Company. Upon receipt of the Default Notice, if the Issuer Company fails to cure such default within 30 days, an Event of Default is deemed to have occurred.

11. While the Corporate Debtor serviced the Coupon Rates for the first three quarters though belatedly, the Corporate Debtor failed to make payment of the Coupon Rate for the quarters ending 12.11.2019. Consequently, on 09.01.2020, a Default Notice was issued by the Petitioner. Since then, not only has the Corporate Debtor failed to cure the default towards the Coupon Rate payable on 12.11.2019 but has also

defaulted in payment of the Coupon Rate for the quarters ending 12.02.2020, 12.05.2020, 12.08.2020 and 12.11.2020 amounting to Rs. 9,13,57,623/-.

12. The Corporate Debtor has also defaulted in payment of TDS in respect of the Coupon Payments payable for the Financial Year 2019-2020. Further the Corporate Debtor has failed to make Debenture Payments towards the Redemption Amounts for the quarters ending 12.02.2020, 12.05.2020, 12.08.2020 and 12.11.2020 amounting to Rs. 65,00,00,000/-.

13. In light of the moratorium imposed under Section 10A, the Petitioner filed this present application in respect of defaults made on or before 23.03.2020 i.e. failure to pay the Coupon Rate for the quarters ending 12.11.2019 and 12.02.2020 and failure to pay the Redemption Amount for the quarter ending 12.02.2020 amounting to an aggregate of Rs/ 21,49,60,164/- together with the contractual rate of interest from the date of default till 23.03.2020. The liability of the Corporate Debtor is admitted and undisputed and the Petitioner being constrained by the non-payment of the said sums by the Corporate Debtor, prefer the instant Application for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

14. Following are the proofs of subscription of the Debentures:

- a. Private Placement offer letter dated 06.11.2018 issued by the Corporate Debtor.
- b. Bank statement of HDFC Bank Account No. 57500000289946 attached with the affidavit of authorised representative, Ms. Nitiksha Porwal, affirmed on 28.01.2021 and filed with the Tribunal pursuant to Order dated 17.12.2020.
- c. Form PAS-3 filed with Registrar of Companies, Mumbai.

- d. List of Allottees described under Form PAS 3 filed by the Corporate Debtor with the Registrar of Companies, Mumbai.

SUBMISSIONS BY THE CORPORATE DEBTOR IN REPLY:

15. The present petition is not maintainable and that there is no default in payment by the Corporate Debtor. There is no existence of default. The company is solvent, is in position to service its debt, feasible, viable and in process of executing the construction of large real estate project of over 10 lakhs sq.ft. at Bandra along with the co-promoters MIG (Bandra) Realtors and Builders Pvt. Ltd. and has executed work orders and availed financial facilities, sanction from various financial institutions and therefore the fundamental requirement of initiating process under the IBC is absent and the Petitioner is not entitled to maintain the present petition and is not entitled to initiate this application.

16. Radius Estate and developers Pvt. Ltd., the Corporate Debtor is engaged in the business of construction and development of real estate including construction of residential and commercial properties. The Corporate Debtor has development rights in the immoveable property on the MHADA leasehold land admeasuring 20,149.40 sq. mtrs. bearing CTS Nos. 649(pt) and 649/1 to 649/48 on the Gandhinagar Layout of MHADA, Bandra (east), Mumbai – 400 051 in Municipal 'H (east)' Ward, Mumbai Suburban District and is in the process of constructing and developing the project "TEN BKC", Bandra (east), Mumbai.

17. On 23.10.2018 the Petitioner is appointed as Debenture Trustee by Consent letter.

18. Thereafter on 06.11.2018 the Corporate Debtor issued Private placement offer letter for 6500 secured, unlisted, unrated, redeemable,

NCD's of Rs. 1,00,000/- each aggregating Rs. 65,00,00,000/- for a maximum period of 24 months.

19. On 31.01.2019 Debenture Trustee Deed executed between the Corporate Debtor, Sanjay Chhabria, Ritu Chhabria and the Petitioner.

20. The Corporate Debtor made payment of Coupon Rates on 12.02.2019, 12.05.2019. And on 20.12.2019 made payment for 12.08.2019 with requisite penal interest.

21. On 09.01.2020 the Petitioner issued default notice in terms of Clause 11.1.4 of DTD.

22. Thereafter on 14.01.2020 the Corporate Debtor vide letter informed Debenture holders about delay in payment of interest due on 12.11.2019 and sought extension till 28.02.2020.

23. On 24.01.2020 the Petitioner vide an email to Debenture holders, informed that the Corporate Debtor is seeking an extension for payment of interest due on 12.11.2019 till 28.02.2020.

24. Thereafter the Corporate Debtor vide email dated 12.02.2020 requested for setting meeting with Petitioner and sought extension for payment. On 12.02.2020 the Petitioner sent an email to the Corporate Debtor scheduling meeting on 19.02.2020 only, if the Corporate Debtor paid the interest and part principal due.

25. On 26.02.2020 the Petitioner sent an email for payment of outstanding dues on 12.11.2019 and 12.02.2020.

26. On 28.02.2020 the Corporate Debtor vide email requested more time to make payment. And also issued a letter proposing to provide additional security of Unit No. W-54 in the project.

27. On 12.03.2020 in Debenture holder's meeting, the Corporate Debtor proposed time till July 2020 for full redemption of Debentures along with coupon interest and penal interest and agreed to sign proposal by April, 2020.

28. Thereafter the Petitioner sent several emails on 08.05.2020, 11.05.2020, 09.06.2020, 13.06.2020, 19.06.2020 and 01.07.2020 as a reminder to the Corporate Debtor.

29. Thereafter on 07.07.2020 the Corporate Debtor sent a letter to the Petitioner for a request on account of unpredicted economic setbacks and covid-19 for

- i. Reduction of rate of interest on investment.
- ii. Revocation of penal charges on interest and principal payment.
- iii. Repayment of principal and interest for the outstanding amount by September, 2021 as bullet payment.

To substantiate the request, the Corporate Debtor had assured to share the business plan on or before 31.10.2020.

30. On 09.10.2020 a statutory notice under Section 138 of Negotiable Instruments Act was sent from the Petitioner for dishonour of cheque aggregating to Rs. 17,56,15,041/-.

31. The Corporate Debtor vide letter dated 09.10.2020 informed the Petitioner that advance discussions are going on with an investor to aid finishing the construction of the project Ten BKC and the first tranche disbursement is expected on 30-60 days and intimation that the time

lines shall be payments in 180 days by new investor and by external mezzanine funds to fully refinance the retail investors who have subscribed NCD's.

FINDINGS

32. The Bench notes that the Financial Creditor (Debenture Trustees), the Corporate Debtor and the Promoters of the Corporate Debtor entered into a Debenture Trust Deed for issuance of 6,500 secure Non-Convertible debentures for an amount of Rs.1,00,000/- each aggregating to Rs. 65 crores. The debentures as per the submission made in the Petition were issued on 13.11.2018.

33. The Bench notes that as per the Petition the interest was payable from 1st quarter onwards till the 8th quarter, however, the principal amount was repayable from 5th quarter to 8th quarter as per the terms and conditions of the Debenture Trust Deed, a copy of which is attached with the Petition.

34. The Bench notes that the Corporate Debtor has to pay a quarterly interest at 16.01% per annum on the redemption amount into the Corporate Debtor's escrow account from the expiry of each quarter i.e. on the following dates: 12.02.2019; 12.05.2019; 12.08.2019; 12.11.2019; 12.02.2020; 12.05.2020; 12.08.2020 and 12.11.2020.

35. As per the Debenture Trust Deed (DTD), in the event of default an additional interest of 1% per month compounded annually was payable over the coupon rate.

36. As per the Petition the Corporate Debtor defaulted in making coupon payment due on 12.11.2019 and therefore, the Debenture Trustee on 09.01.2020 addressed a letter calling upon the Corporate

Debtor and promoters to make payment of the coupon rate. Subsequently, the Corporate Debtor again defaulted in paying coupon as well as redemption amount on 12.02.2020.

37. The Corporate Debtor in writing has admitted the liability and the default which is evident from the letter dated 23.12.2019 from the Corporate Debtor seeking an extension till February 2020 to repay the coupon rate due on 12.11.2019. Similarly, Petitioner has placed several other letters/ email dated 14.01.2020, 12.02.2020, 28.02.2020 and 07.07.2020 regarding admission of liability and failure to make payment.

38. The Petitioner mentions that when on 20.11.2020 the Petitioner had filed the present Petition, the default was for the period as on 23.03.2020. However, subsequent to that the redemption amount on 12.02.2020, 12.05.2020, 12.08.2020 and 12.11.2020 have also become due and along with the coupon rate and default interest, amounts to Rs.91,48,46,065/-. The Bench further notes that this information of total default, is also reflected with the Information Utility as on 16.02.2021. The NeSL record in this regard is produced which confirms the total outstanding amount of Rs.91,48,46,065/- as on 16.02.2021.

39. The Bench notes that Corporate Debtor has mentioned in his reply that as per the Debenture Trust Deed consent of 51% debenture- holders is required in the event of the default. It further mentions that since Petitioner has not placed any authorization in writing by 51% of debenture- holders for declaring default, an event of default doesn't occur and therefore an event of default cannot be said to have occurred. The Bench notes that this is an erroneous argument extended by the Corporate Debtor as there are several provisions under Article 11 which clearly defines an event of default that;

"11.1 Each of the following shall constitute an Event of Default:

11.1.1 -- --- ---

11.1.4 Payment Default

Default is committed by the Company in payment of the Debenture Payments in respect of the Debentures under the Transaction Documents

11.1.5 Failure to Redeem Debentures

Default is committed by the Company in Redemption of Debentures on the Redemption Date"

40. It is very clear from the above provision of the DTD that default has been committed by the Corporate Debtor, when it failed to pay the coupon rate in terms of section 11.1.4 and again when it failed to redeem debentures on the first installment. The Corporate Debtor also defaulted to meet the payment obligation in terms of section 11.2.2, reproduced below:-

"11.2 Cure Period

11.2.1 --- --- ---

11.2.2 Upon it coming to the knowledge of the Debenture Trustee that any of the Event of Default as stated in ARTICLES 11.1.4, 11.1.5, 11.1.6, 11.1.7, 11.1.8, 11.1.9, 11.1.10 and 11.1.20 has occurred, the Event of Default shall deemed to have been occurred without the Debenture Trustee providing any cure period to the Company to rectify such Event of Default and the Consequences of Event of Default as mentioned in ARTICLE 11.3 shall follow immediately from the date of occurrence of such an Event of Default."

Therefore, the event of default is not conditional to 51% of the debenture holders agreeing to declaration of default for a payment of default but is guided by what is described in the DTD in terms of non-payment of coupon rate and quarterly redemption of debentures.

41. The contention of the Corporate Debtor that the written consent of the majority debenture holders has not been taken for filing the present Application has also no merit as the Debenture Trustee vide letter dated 03.08.2020 had clearly sought the consent of all Debenture-Holders to permit initiation of action against the Corporate Debtor/ Promoters in terms of DTD. The Bench also notes that the Debenture Trustee had mentioned that in case of non-receipt of any response/ objection from debenture-holder within 15 days from the date of email it shall be deemed that such debenture-holder has consented to the agenda item. Therefore, in view of this, the Bench is of the view that the contention of the Corporate Debtor that 51% approval of Debenture-holders should have been taken in writing is incorrect. The very fact that the Debenture Trustee has written to all debenture-holder to give their consent and that a non-receipt of any response would constitute as 'deemed approval', is totally correct. The Bench in this regard places reliance on the test laid by the Hon'ble Supreme Court as enshrined in the matter of "*Innoventive Industries Vs. ICICI Bank and Ors.*", the relevant portion of which is as follows:-

"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

42. In this judgment the Hon'ble Supreme Court has clearly mentioned that in case where a Corporate Debtor commits a default of financial debt, the Adjudicating Authority has to merely see the records of the

Information Utility and other evidence produced to satisfy itself that a default has occurred.

43. The above facts clearly reveal that the Corporate Debtor who has defaulted in making the payment to the Petitioner is liable to pay the Petitioner.

44. Considering the above facts, we come to conclusion that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e. existence of 'debt' and 'default', for admission of a petition under section 7 of the I&B Code, have been met in this case. Besides, the Company Petition is well within the period of limitation.

45. As a consequence, keeping therefore said facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves '**Admission**'.

46. Further that, we have also perused the Form - 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.

47. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, Mr. S. Gopalakrishnan, having registration No. IBBI/IPA-002/IP-N00151/2017-

18/10398, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

48. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

49. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.

50. That the Interim Resolution Professional shall perform the duties as assigned under Section 18 and Section 15 of the Code and inform the progress of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

51. The Petition is hereby **"Admitted"**. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.

52. The Bench notes that an Interlocutory Application (IA No.212 of 2021) has been filed under Section 60 of Code r.w. Rule 11 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in this Company Petition by the Financial Creditor seeking ad-

interim relief against the Corporate Debtor which is mainly for refraining the Corporate Debtor from encumbering, disposing of or creating any third party right in the assets by the Corporate Debtor. Since the Bench is "Admitting" the main Petition u/s. 7 and commencing the CIRP of the Corporate Debtor Company from the date of pronouncement of this order, this particular IA becomes infructuous. By "Admitting" CP 1390/2020, this **IA 212/2021** filed by the Petitioner seeking interim relief becomes **"Infructuous"**.

53. Ordered Accordingly.

SD/-
Chandra Bhan Singh
Member (Technical)

SD/-
Suchitra Kanuparthi
Member (Judicial)