

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB)993/MB/C-IV/2020

Under section 7 of the I&B Code,
2016

In the matter of

Beacon Trusteeship Limited

...Financial Creditor

v/s.

**Neptune Ventures and Developers
Private Limited**

[U45202MH2009PTC189590]

...Corporate Debtor

Order Delivered on: 07.10.2021

Coram:

Shri Rajesh Sharma

Smt. Suchitra Kanuparthi

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

For the Petitioner: Mr. Amit Shah, Advocate

For the Respondent: Ms. Geeta Lundwani, Advocate

ORDER

Per: Suchitra Kanuparthi, Member (Judicial)

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 **(IBC)** by **Beacon Trusteeship Limited** ("the Financial Creditor"), seeking to

initiate Corporate Insolvency Resolution Process (CIRP) against **Neptune Ventures and Developers Private Limited** ("the Corporate Debtor"). The Financial Creditor claiming a sum of Rs.32,08,76,450/- (Rupees Thirty-Two Crore Eight Lakhs Seventy-Six Thousand Four Hundred Fifty Only) as on 31st December, 2019 which is said to be the debt and default.

BRIEF FACTS:

1. The Petitioner and the Corporate Debtor executed the Debenture Trust Deed cum Indenture of Mortgage. The Corporate Debtor with a view of raising debt for the purposes of purchase of FSI, undertakings constructions of duties, creation and maintenance of internet services, meeting issue expenses and another general corporate purposes.
2. The said Debenture Trust Deed was registered on 10th January, 2018 and also registered as charged with Ministry of Corporate Affairs.
3. Both the parties further executed a supplementary Debenture Trust Deed dated 20th September, 2019 to amend terms and conditions of debenture interest rate. The Corporate Debtor defaulted the payment terms of Debenture and Supplementary Debenture Trust Deed and hence an amount of Rs.32,08,76,450/- is claimed by the Financial Creditor as on

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the debt and default on 31st December, 2019. The Petitioner of Principal amount and Interest in default is as follows:

Sr. No.	Particulars	Amount
1	Principal Amount	25,00,00,000
2	Interest Due @ 16.5% P.A.	2,76,88,356
3	Default Interest @ 36% P. A.	4,31,88,093
	Total Amount Due	32,08,76,450

4. The Corporate Debtor issued Series A and Series B Debenture amount of Rs.25,00,00,000/- in offer past for the list of documents attached to the application are as follows:

- a. Offer in pass-4 for issue of Series A and Series B Debentures amounting to Rs.25,00,00,000/-.*
- b. The allotment of Series A and Series B Debentures amounting to Rs.25,00,00,000/- in pass-3.*
- c. Copy of Debenture Trust deed between Financial Creditor and Corporate Debtor.*
- d. The Corporate Debtor registered the secured charge with MCA in CHG-9 on 20th January, 2020.*

5. The Petitioner claimed that the Debenture Trust Deed cum Indenture of Mortgage thus evidences that the Corporate

Debtor failed to repay the said amount and hence sought to initiate the CIRP proceedings against the Corporate Debtor.

REPLY OF THE CORPORATE DEBTOR

6. The Corporate Debtor denied the allegations made by the Petitioner in the application as being misconceived in law and as well as on facts. The Financial Creditor pursuant to Debenture Trust Deed cum Indenture of Mortgage dated 10.01.2018 has been appointed as a Trustee for the benefit of Debenture Holder.
7. The Corporate Debtor issued a correct placement of a letter dated 08.01.2018 and issued to Series of Debenture namely Series A constituting 60 Debentures of face value of Rs.10 Lakhs an amounting of Rs. 6 Lakhs and Series B constituting 190 debenture of face value of Rs.10 Lakhs an amounting to Rs.19 crores. The Corporate Debtor had raised of Rs.25 crores from the Debenture Holder. The Debentures carry interest of 16.5% per annum. The Debentures were secured by the registered mortgage of a commercial premises admeasuring 4,011 sq. mtrs. Of carpet area of “Eastern Business District” situated at L.B.S. Marg, Bhandup (West), Mumbai. Further, the receivable from the aforesaid premises were also

hypothecated and Personal Guarantee of two promoters has been given.

8. The Corporate Debtor further pointed out that it is admitted position that the value of Security provided by the Corporate Debtor exceeds the claim of the Debenture Holder. The value of property and the security interest is more than Rs.57 crores. However, the Corporate Debtor mentions that default alleged by the Financial Creditor does not tantamount to default under the provisions of IBC.
9. The perusal of document pertains to debentures issued by the Corporate Debtor the Private Placement of Offer Letter dated 08.01.2018, the allotment of Series A and Series B debentures dated 05.01.2018 and the Debenture Trust Deed cum Indenture of Mortgage dated 10.01.2018 indicate that the transaction between the Debenture Holder and the Corporate Debtor is not simpliciter loan or finance transaction.
10. Perusal of Debenture Trust Deed cum Indenture of Mortgage clearly held that the parties have reached to an understanding with respect to the debentures including the consequences of default and in redemption of debentures. The Debenture Trust Deed cum Indenture of Mortgage is a complete understanding

between the parties with sets out events of defaults at Clause 17 events to reach is as follows:

17.1: Event of Default

An event of default shall mean the occurrence and continuance of any of the events as specified in the Schedule 7 (Events of Default) hereto (each an “Event of Default”), whether voluntary or involuntary or resulting from the operation of law or otherwise subject to the applicable Cure Period, with each event being determined by the Debenture Trustee at its sole and absolute discretion.

17.2: Remedies

17.2.1 The security created hereunder or any other transaction document in favour of the Debenture Trustee shall become enforceable by the Debenture Trustee upon the occurrence of an Event of Default”

17.2.2 In an Event of Default has occurred subject to the applicable to Cure Period, the Debenture Trustee may, without prejudice to any other rights it may have under applicable law:

- a. To cause the Promoter(s) to purchase the debentures from the Debenture Holder at such price that would enable the Debenture Holders to receive the outstanding amount of principal of the debentures, Coupon, and the default interest, if any;*
- b. To cause the Promoter(s) to buy out unsold Mortgaged Units from the Issuer at a price that enables the Issuer to redeem the debentures at a price which enables the debenture Holders to receive the outstanding amount of principal of the debentures, Coupon, and the default interest, if any;*
- c. Accelerate the maturity of the debentures and declare on the amounts of outstanding on the debentures (including but not limited to any coupon accrued thereon) as on that debt due and payable, whereupon they shall become so due and payable;*
- d. Enforce the security created under this Agreement and sell, call in, collect, convert into money or otherwise deal with or disposed of*

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the mortgaged properties or any part thereof on an installment basis or otherwise and generally in such manner and upon such terms whatever as the Debenture Trustee may consider and the right to enforce the security as stated hereinabove shall available only in case of an Events of Default relating to the payment of Secured Obligations;

- e. Exercise any and all powers which a Receiver could exercise hereunder or by law;*
- f. Appoint by writing any person or persons to be a Receiver of all or any part of the Mortgaged Properties, from time to time determine the remuneration of the Receiver and remove the Receiver (except where an order of the Court is required thereof) and appoint another in place of any Receiver, whether such Receiver is removed by the Debenture Trustee or an order of the Court or otherwise ceases to be the Receiver of one or two or more Receivers;*
- g. Substitute itself or its designee for the issuer under any or all of the contracts and arrangements in relation to the business of the issuer which are charged hereunder;*
- h. The debenture holders shall have an irrevocable right to bid change/ effect sale of the Mortgaged Property at a rate determined appropriate by them (to be determined at the sole discretion of the majority Debenture Holders) and Issuer and or Promoter hereby covenant and undertake to provide all necessary corporation to the Debenture Holders for enforcing the aforesaid right including issuing letters of allotment and/ or executing sale agreements in respect of thereof in favour of the Debenture Holders'*
- i. Enter into and take possession of the Mortgaged Properties in these presents and after the taking of such action the Issuer and/ or any Security Providers shall take no action inconsistent with or prejudicial to the rights of Debenture Trustee quietly to possess, use and enjoy the same and receive the income, profits and benefits thereof without interruption or hindrance by the Issuer and/ or the Security Providers or any person or persons*

whomsoever, and upon the taking of such action the Debenture Trustee shall be freed and discharged from or otherwise the Issuer well and efficiently saved and kept harmless and indemnified of, from and against all former and other estates, titles, claims, demands and encumbrances whatsoever, unless caused by gross negligence and willful misconduct of the Debenture Trustee, provided that Debenture Trustee may at any time afterwards give a possession of the Mortgaged Properties or any part or parts thereof to the Issuer and/ or any other Security Prover either unconditionally or upon such terms and conditions as they may be specified in such resolution or consent;

- j. Enforce the security created under the security document and sell, call in, collect, convert into money or otherwise deal with or dispose of the security or any part thereof in such manner and upon such terms whatever as the Debenture Trustee may consider fit and the right to enforce the security as stated hereinabove shall be available only in case of an Event of Default relating to the payment of Secured Obligations;*
- k. Shall have the right to review the management setup or organization of the Issuer and to require the Issuer to appoint Nominee Director(s) on the Board of the Issuer without prejudice to the right to appoint Debenture Holders' Nominee Director(s), Additional Directors as contemplated under the Transaction document shall be appointed by the debenture Trustee on the Board of the Issuer; and*
- l. Take all such other actions expressly or impliedly permitted under the transaction documents or under applicable law;*

17.2.3 The Debenture Trustee shall have the authority to act upon and enforce the provisions of this Agreement in accordance with these presents or to adopt appropriate remedies in that behalf as it deems fit and may in that behalf adopt remedies in relation thereto and shall exercise all powers under the Agreement in accordance with applicable law.

19. ENFORCEMENT

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19.1 *The security created hereunder in favour of the Debenture Trustee for the benefits of Debenture Holders shall become enforceable by the Debenture Trustee and/ or the Debenture Holders upon the occurrence of an Event of Default.”*

11. Upon the perusal Clause 17.1 and 17.2.1 which is clear that the Petitioner is bound to enforce the security on behalf of the Debenture Holders. Various options have been given to the Financial Creditor to enforce the security including option to sell the premises in the aforesaid circumstances, it is submitted that in view of the clear understanding about the consequences of default the Financial Creditor without any security cannot claim that the Corporate Debtor is in default. Further, it is clearly understood between the parties that the consequences of non-payment by the Corporate Debtor trigger enforcement of security. A specific recourse addresses the consequences of non-payment wherein without enforcing security and realizing the secured assets the Financial Creditor is not entitled to claim default as contemplated under the provisions of IBC. In the event, after enforcing the security, if any amount is still due the Corporate Debtor, then it can be said it is default of receiving amount. However, until completion of process as contemplated in the Debenture Trust Deed, the Corporate Debtor cannot be said to have committed default.

12. The Corporate Debtor further objected that the Financial Creditor cannot exceed authority under the Debenture Trust Deed and that the Trustee is liable to act, as per the provisions of Clause 17.2 read with Clause 19. A plain reading of Debenture Trust Deed indicates that the Financial Creditor has recourse to the mortgage and in case of default and to recover the amount due and payable to the Debenture Holder.

Rejoinder by the Petitioner

13. The Petitioner denied that the petition is not maintainable due to the authority of Financial Creditor is a feeble defense, as per the Debenture of Trust Deed cum Indenture of Mortgage, it was agreed between the parties that the Debenture Trustee will have right to bring action against the defaulting party.
14. Clause 17.2.3 of read clauses to the Petitioner to bring the actions against the Corporate Debtor and the clause states as follows:

“The Debenture Trustee shall have the authority to act upon and enforce the provisions of this Agreement in accordance with these presents or to adopt appropriate remedies in that behalf as it deems fit and may in that behalf adopt remedies in that behalf as it deems fit and may in that behalf adopt remedies in relation thereto, and shall exercise all powers under this Agreement in accordance with applicable law.”

15. The Petitioner also denied the fact that there is no default and that the security tendered is much higher than the amount of default.
16. The Petitioner further mentions that he is free to pursue the remedy of initiations of CIRP against the Corporate Debtor and hence is filed the petition u/s 7 of the I & B Code 2016, initiating the CIRP against the Corporate Debtor.

FINDINGS

17. The terms and conditions or the Debenture Trust Deed cum Indenture of Mortgage, evidences the fact that the Corporate Debtor in view of the raising finance for the purposes of purchasing FSI, undertaking construction activities, creation and maintenance interest service deserve, meeting issue expenses and another general corporate purposes have issued correct placement of fully secured creditor and unlisted fully transferable non-convertible Debenture having face value of Rs.10 Lakhs into two series after grant substitution amount of Rs.25 Crores. It was envisaged under the Debenture Trust Deed cum Indenture of Mortgage that by way of Private Placement of a letter the Issuer has offered for issuance by way of Private Placement of debentures.

18. The Debenture Trust Deed cum Indenture of Mortgage further provides grant and transfer the mortgaged property to Petitioner. Clause 13.1.1 as follows;

“on execution of this Deed, as continuing security for the redemption and payment and discharge of all Secured Obligations, hereby Secured or intended to be hereby secured and/ or payable by Issuer to the Debenture Holders and/ or the Debenture Trustee in connection with the Debenture the Security Providers hereby create a first ranking sole and exclusive English Mortgage in favour of the Debenture Trustee for the benefit of the Debenture Holders, the Security Providers cloth hereby grant, convey, assign, assure and transfer.”

19. In as per Clause 13, it is clear that the English Mortgage is created in favour of the Debenture Trustee for the benefit of Debenture Holders and therefore, the title, ownership possession, interest, benefits, claim and demand including and lease hold rights or for the mortgaged units were transferred to the Debenture Trustee absolutely.

20. The Debenture Trust Deed cum Indenture of Mortgage, further envisages right to cause sale of certain Mortgage Property at Clause 16.4 is as follows;

“The Security Providers agree and undertake that commencing from the occurrence of an Event of Default till the Final Settlement debt, if the business of the Security Providers is being carried out in a manner prejudicial to the interest of the Debenture Holders and/ or the Security Interest in any manner as determined at the sole discretion of the Debenture Trustee , after giving a prior written

notice as may be required under the Applicable Law to the Issuer the Debenture Trustee (acting on the instructions of the Majority Debenture Holders) shall have the right to cause the Security Providers to sell in whole or in part or in whatsoever manner determined at the sole discretion of the Debenture Trustee the Mortgaged Properties at the price deemed appropriate by the Debenture Trustee (acting on the instructions of the Majority Debenture Holders). Provided that within the time period as specified in the aforesaid notice by the Debenture Trustee the Security Providers shall have the right to redeem the Debentures in full by making an irrevocable and unconditional full and final repayment of all the Secured Obligations”.

21. Further Events of Defaults stipulate at Clause 17 of Debenture of Trustee Deed that the Security under the transaction document become enforceable by the Debenture Trustee upon occurrence of the Events of Defaults and also envisages a situation, wherein the promoter buyouts the unsold mortgage unit from the Issuer at a price that the Issuer reduced the debenture, at a price which enables Debenture Holder to receive outstanding an amount from principal and from the debenture.
22. The Events of Defaults as Clause 17.2.1 and also empowers the Debenture Trustee to appoint the personal or receiver to take control of the Mortgage Properties.
23. Therefore, in terms of the Debenture Trustee cum Mortgage Deed, it is clear that the title of the Mortgaged Properties is

transferred to the Debenture Trustee absolutely and upon the satisfaction of the secured obligations the Debenture Trustee shall reconvey that the property to the Corporate Debtor the clause of reconveyance is contemplated at Clause 22 as follows;

22 Reconveyance/ Redemption

22.1 *Upon the satisfaction in full of the Secured Obligations to the satisfaction of each of the Secured Parties the Debenture Trustee shall immediately from the date of the written request and without recourse and cost and without any representation or warranty of any kind by or on behalf of the Secured Parties, unconditionally release reconvey re-grant and reassign unto the Issuer such of the Mortgage Property from the Security created hereunder as have not therefore been sold or otherwise foreclosed applied or released pursuant to this Deed, provided that such reconveyance, reassignment or release of the Security created under this Deed shall not thereby affect or cause the reassignment retransfer or release of any property or assets secured under any other mortgage or charge which ranks paripassu in point of security or otherwise. In this regard the Debenture Trustee agrees and undertakes to execute all such deeds and documents that may be required for the purposes of the aforementioned release reconveyance and reassignment onto the Issuer of the Mortgaged Property at the cast of the Issuer.*

22.2 *The re-conveyance and reassignment on the performance as stated hereinabove of the conveyance and other deeds, documents and writings in case of the Mortgage Property in exercise of the power of the sale herein contained or transfer of mortgage or other assurance required to be created by the Debenture Trustee acting for the benefit of the Debenture Holders shall if executed by any of the duly and validly authorized*

officers of the Debenture Trustee be deemed as good and effectual as if the same had been executed by the Debenture Trustee acting for the benefit of the Debenture Holders.

24. Further upon perusal of the Debenture Trustee Deed cum Indenture of Mortgage dated 10.01.2018, it is clear that the Events of Defaults envisage the realization of Security upon happening Events of Defaults as a mechanism defined under the agreement in the particular manner, wherein he has power to sale the property, upon to receiver and make application to the court permanent receiver under Clause 32. It also envisages a provision at Clause 35.5, wherein it is agreed between the parties that the Debenture Holder and Debenture Trustee can take properties without intervention of court.
25. It is relevant to refer to section 58(e) of the Transfer of Properties Act 1882, which defines in English Mortgage.

“Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.”

26. Therefore, in terms of the English Mortgage, the Mortgagor has a recourse to repay the mortgaged debt and has the right to seek reconveyance of the properties to the mortgagor upon complete satisfaction of Debt.

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27. The Petitioner has absolute rights in the mortgaged property and cannot initiate any action under section 7 upon non-payment of dues under the Debenture Trust Deed, the petitioner has agreed to recourse and sell the mortgaged assets and recover the money due.
28. In view of the given factual matrix, this Bench conclude upon non-payment dues under the Debenture Trust Deed, there is no default and the Petitioner has agreed to recourse as envisaged under registered Debenture Trust Deed cum Mortgage and hence, petition is dismissed.
29. The Registry is hereby directed to communicate this order to both the parties immediately.

Sd/-
RAJESH SHARMA
Member (Technical)

07.10.2021

Sd/-
SUCHITRA KANUPARTHI
Member (Judicial)