IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III
(IB) – 495(ND)/2023

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. CATALYST TRUSTEESHIP LIMITED

…… Applicant/ Financial Creditor

VERSUS

M/s. BCC INFRASTRUCTURES PRIVATE LIMITED

…… Respondent/ Corporate Debtor

Order Pronounced On: 17.01.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For Applicant : Mr. Ajay Bhargava, Ms. Wamika Trehan, Mr. Siddhant Kumar, Advs.

For Respondent : Mr. Vijay Kaundal, Ms. Sapna Jha, Mr. Nitin Kant Sharma, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1) This Application has been filed by M/s. Catalyst Trusteeship Limited, the Applicant before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate

Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s. BCC Infrastructures Private Limited, the Respondent on the ground that the Corporate Debtor has defaulted/failed to clear the principal amount, interest, default interest, redemption premium, etc. amounting to a sum of Rs. 746,82,04,199/- (Rupees Seven Hundred Forty Six Crore Eighty Two Lakh Four Thousand One Hundred and Ninety Nine Only). The date of default in the present matter is 01.06.2023, i.e., upon expiry of seven days provided in the recall notice dated 24.05.2023.

2) <u>Submissions of the Applicant/Financial Creditor:</u>

i. It is the case of the Applicant that the Corporate Debtor has issued 17.25% secured, redeemable non-convertible debentures with the face value of Rs. 10,00,000/- (Rupees Ten Lakh Only) for an aggregate amount of Rs. 420,00,00,000/- (Rupees Four Hundred and Twenty Crore Only) ("Debentures") in terms of the Debenture Trust Deed executed between the Corporate Debtor and the Financial Creditor.

ii. The Debt Amount was agreed to be disbursed by the Debenture Holder to the Corporate Debtor by contributing to the subscription amount of the Debentures in one or more tranches. Accordingly, a total amount of Rs. 420 Crore was disbursed by the Debenture Holder in favour of the Corporate Debtor on different dates. For better understanding, a table is reproduced below:

S. No.	**Date**	**Amount Disbursed (in Rs.)**
1.	22.11.2019	380,00,00,000/-
2.	16.04.2020	20,00,00,000/-
3.	27.10.2020	20,00,00,000/-
Total Amount Disbursed		**420,00,00,000/-**

iii. It was agreed between the parties that the proceeds of the Debt Amount will be utilized towards expenses in connection with development, construction and completion of a residential project named "Bharat City" on a parcel of land admeasuring approx. 57.484 Acre situated at Tila More, Indraprastha Yojana, Ghaziabad, Uttar Pradesh ("Project") and towards repayment of existing dues of the Corporate Debtor. The Debenture Trust Deed provided that the financial assistance availed by the Corporate Debtor shall carry an interest rate of 17.25% per annum which shall be payable in the manner specified therein.

iv. In terms of the Debenture Trust Deed, the Tenure of the Debentures shall not exceed 60 months from the Series I Date of Allotment. Further, as per Clause 1.1 (x)(a) of the Debenture Trust Deed "Series I Date of Allotment" means the date of the resolution of the Board of the Issuer, allotting the Series I Debentures. Therefore, the Series I Date of Allotment is 22.11.2019.

v. In terms of the Debenture Trust Deed and the disclosure documents, Series I, Series II and Series III Debentures became redeemable in 12 equal quarterly instalments starting from the last day of the 27th month from the Series I Date of Allotment (22.11.2022). Therefore, Series I, Series II and Series III Debentures became redeemable starting from 21 February 2022.

vi. It is submitted by the Applicant that the Corporate Debtor has defaulted in respect of its obligation to redeem the Debentures starting from 21.02.2022. Further, the Corporate Debtor has made certain part payments towards interest, but it has failed to pay the redemption amount in respect of the Debentures.

vii. In terms of the Debenture Trust Deed, the redemption of Debentures on the redemption dates would occur by payment of the principal amount of the Debentures to the Debenture holders. Accordingly, on each redemption date upon payment of the principal amount of the Debentures, the face value of the Debentures shall stand reduced proportionately to that extent.

viii. The Financial Creditor was constrained to issue a recall notice dated 24.05.2023 to the Corporate Debtor, calling upon the Corporate Debtor to immediately (and not later than 7 days) repay all amounts due and payable in terms of the Debenture Trust Deed amounting to Rs. 742,07,63,480/- (Rupees Seven Hundred Forty Two Crore Seven Lakh Sixty Three Thousand Four Hundred and Eighty Only).

ix. The Applicant in order to substantiate its case has relied upon the financial statements for the financial year ending 31.03.2022 of the Corporate Debtor.

3) **Submissions of the Respondent/Corporate Debtor:**

i. The Respondent/Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant and stated that the Series I Date of Allotment is wrongly mentioned as 22.11.2022 while it is 22.11.2019.

ii. It is the case of the Corporate Debtor that the Debenture Holders, Real Estate Credit Opportunities Fund managed by M/s. Edelweiss Alternative Asset Advisors Limited approached the Corporate Debtor through the Financial Creditor being the Debenture Trustee offering to extend facilities to the Corporate Debtor to enable the Corporate Debtor to carry out the development of the project.

iii. The Corporate Debtor was constrained to avail of the facility offered by the Debenture Holders. The Corporate Debtor was allowed to utilise the facilities offered by way of issuance of Non-Convertible Debentures towards all project-related expenses and repayment of existing dues.

iv. The Corporate Debtor has contended that on account of force majeure condition he has been forced to delay the liability as per the Debenture Trust Deed to repay the money due. The Corporate Debtor mentions that it could not proceed with the construction work on account of certain Government Orders and also because of Orders of the National Green Tribunal (NGT).

v. The Corporate Debtor denied and disputed the amount in default of Rs. 746,82,04,199/- as claimed by the Financial Creditor. The amount claimed by the Financial Creditor is a grossly inflated amount which cannot survive the test of genuineness. The Corporate Debtor is ready and willing to honour its obligations towards the Financial Creditor as soon as the development of the project normalises, and the Corporate Debtor is able to generate revenue from the project. Further, the Financial Creditor cannot be permitted to drive a good project into insolvency based on its whims and fancies.

4) **Analysis and Findings:**

i. We have heard the Ld. Counsels appearing for both parties and also perused the records.

ii. Admittedly, the Corporate Debtor (Issuer) has issued 17.25% secured, redeemable non-convertible debentures with the face value of Rs. 10,00,000/- (Rupees Ten Lakh Only) for an aggregate amount of Rs. 420,00,00,000/- (Rupees Four Hundred and Twenty Crore Only) Debentures to the Financial Creditor (Debenture Trustee).

iii. In the light of the various clauses of the "Debenture Trust Deed", we find that an 'Event of Default' notice was first sent by the Financial Creditor (Debenture Trustee) on 24.05.2023 (recall notice). It is clear that in accordance with clauses of the Debenture Trust Deed dated 16.11.2019, the Corporate Debtor (Issuer) has to pay to the Financial Creditor (Debenture Trustee), the amount stated in the recall notice dated 24.05.2023, once an Event of Default has been declared under the Debenture Trust Deed dated 16.11.2019 and under the Debenture Trustee Agreement dated 14.11.2019.

iv. The above default and its consequences clearly provide that non-payment of interest towards outstanding redeemable non-convertible debentures is an 'event of default' and the Debenture Trust Deed recognizes that in case there is an 'event of default', the Financial Creditor (Debenture Trustee) is entitled to recover the money paid towards the redeemable non-convertible debentures. Therefore, an 'event of default' has occurred in terms of the Debenture Trust Deed when accrued interest was not paid when it became due and payable and therefore the Corporate Debtor was entitled to redeem the redeemable non-convertible debentures.

v. For better understanding of the present case, the relevant portion of the recall notice dated 24.05.2023 is reproduced below:

"5. As you, the Issuer, have committed defaults in payment of interest and other monies in terms of the Debenture Trust Deed and also in observance and performance of the other conditions of the Debenture

Trust Deed as aforesaid, we, acting as the trustee for the Debenture Holders have become entitled to call for redemption of the Debentures and payment of interest and all other amounts due in respect thereof. Accordingly, we hereby declare that the entire amount in respect of the Debentures has become due and payable by you, the Issuer, to the Debenture Holders immediately, Accordingly, we the Debenture Trustee hereby declare that the entire amount in respect of the Debentures has become due and payable by you, the issuer to the Debenture Holders immediately. Accordingly, the amounts of the Debentures together with interest, default interest, redemption premium etc. aggregating to Rs. 742,07,63,480/- (Rupees Seven Hundred Forty-Two Crore Seven Lakhs Sixty-Three Thousand Four Hundred and Eighty only) as on 21st May, 2023 have become due and payable by you immediately together with coupons and other dues etc. w.e.f. 22nd May, 2023 till its full payment, the particulars of which are given in Annexure hereto."

vi. We note that the Corporate Debtor has not denied the execution of the Debenture Trust Deed and the Debenture Trustee Agreement. It is also not disputed by the Corporate Debtor regarding the monies disbursed and the quantum of debt due and computation of interest and the recall notice dated 24.05.2023.

vii. The Hon'ble NCLAT in the matter of **Budhpur Buildcon Pvt. Ltd. Vs Abhay Narayan Manudhane,** CA (AT) (Ins) No. 589 of 2021 wherein the Hon'ble NCLAT held that the subscription towards debentures carry a 'time value for money' and therefore such amounts are 'Financial Debts'.

viii. In view of the above-cited judgement, we are of the considered view that the Applicant is a Financial Creditor holding Financial Debt which is in default of payment by the Corporate Debtor. Therefore, we are satisfied that there exists debt and default and the same is corroborated by the averments made within the application.

ix. For better appreciation Section 5(8) of the IBC, 2016 is reproduced below for ready reference:

"5. Definitions.-In this Part, unless the context otherwise requires,—

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

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(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;"

x. Therefore, in accordance with Section 5(8)(c), the Corporate Debtor (Issuer) is liable to pay the amount claimed as Financial Debt on account of the "Debenture Trust Deed" to the Financial Creditor (Debenture Trustee). Therefore, we come to the conclusion that M/s. BCC Infrastructures Private Limited is the Corporate Debtor with regard to the Section 7 application filed by the M/s. Catalyst Trusteeship Limited.

xi. We are of the considered view that force majeure is not an inherent right available to any party. It can be only applicable if a clause to that effect is agreed between the parties and incorporated into the contract. A force majeure clause cannot be unilateral and retrospectively claimed even if not there as a part of the contract.

xii. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Applicant as a major constituent for admission of the Application under Section 7 of the Code. Therefore, the Application under sub-section (2) of Section 7 is taken as Complete.

5) In light of the above facts and circumstances, it is ordered as follows: -

i. The Application bearing **IB-495(ND)/2023** filed by the Applicant/(FC), under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent/(CD) is **admitted.**

ii. We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flow from the provisions of Section 14(1)(a), (b), (c) and (d) of the Code. Thus, the following prohibitions are imposed:

"(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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(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.

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]"

iii. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and

Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the Corporate Debtor in terms of Section 14(3)(b) of the Code.

iv. The Applicant/(FC) has proposed the name of Mr. Harish Taneja as the Interim Resolution Professional ("IRP") having address: 236-L, Model Town, Near Mukhija Hospital, Sonipat, Haryana-131001. His Email id is harishtaneja78@gmail.com. His registration number is IBBI/IPA-002/IP-N00088/2017-18/10229. The Applicant filed a copy of the Consent Issued by Mr. Harish Taneja in Form 2, Written Communication by proposed IRP, as per the requirement of Rule 9(l) of the Adjudicating Authority Rules along with the Certificate of Registration and Authorization for Assignment in Form B.

Accordingly, Mr. Harish Taneja is appointed as IRP.

v. In pursuance of Section 13(2) of the Code, we direct the IRP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

vi. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.

vii. The IRP is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.

viii. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

ix. The Financial Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakh Only) with the IRP to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by IRP and shall be paid back to the Financial Creditor.

x. In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today.

xi. The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.

xii. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India ("IBBI") for their record.

xiii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

Sd/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)