

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB)/421(MB)/2023

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

Silver Bank Limited

[Identification no.: C110365]

...Financial Creditor/Applicant

Versus

B L A Power Private Limited

[CIN:U40102MH2006PTC165430]

...Corporate Debtor/Respondent

Order Pronounced on 06.02.2024

Coram:

Hon'ble Member (Judicial) : Justice V. G. Bisht (Retd.)
Hon'ble Member (Technical) : Sh. Prabhat Kumar

Appearances:

For the Financial Creditor : Mr. Karl Shroff, Advocate.
For the Corporate Debtor : Mr. Pulkit Sharma,
Advocate.

ORDER

Per: Prabhat Kumar

This Company Petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **Silver Bank Limited** ("**hereinafter referred to as the Financial Creditor/Applicant**"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **B L A Power Private Limited** ("**hereinafter referred to as the Corporate Debtor/Respondent**").

Brief Facts:

1. The Applicant, formerly known as BanyanTree Bank Limited, was incorporated on 11.06.2012 having Identification no. C110365, and its registered office being at 4th floor, HSBC Centre, Cybercity, Ebene, Mauritius.
2. The Respondent was incorporated on 08.11.2006 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is U40102MH2006PTC165430. Its registered office is at 84, Maker Chambers III, Nariman Point, Mumbai - 400021. Therefore, this Bench has jurisdiction to entertain and decide the Petition.
3. The Authorised share capital of the Corporate Debtor is Rs.145,00,00,000/- (Rupees One Hundred and Forty Five Crores Only) and Paid up capital is Rs. 141,14,74,960/- (Rupees One Hundred and Forty One Crores Fourteen Lakhs Seventy four Thousand Nine Hundred and Sixty only).
4. In and around 2013, the Corporate Debtor was desirous of raising monies for the purpose of capital expenditure and working capital requirements in relation to the Phase II of its 45*2 MW Thermal Power Plant located at Gadarwara, Madhya Pradesh. Accordingly, on being approached by the promoters of Corporate

Debtor i.e. (i) B LA Power Holding Private Limited and (ii) Mr. Anup Agarwalla (hereinafter collectively referred to as "Promoters of Corporate Debtor"), the Financial Creditor agreed to invest in the project.

5. The parties agreed that the Financial Creditor shall invest in the Corporate Debtor by subscribing to the securities of the Corporate Debtor. Pursuant to this, the Financial Creditor, Promoters of Corporate Debtor and Corporate Debtor executed and entered into a Subscription Agreement dated 17th June 2013 ("Subscription Agreement") and a Shareholders' Agreement dated 17th June 2013 ("SHA"). Vide the Subscription Agreement and SHA, the Financial Creditors subscribed to
 - i. 51,87,500 (Fifty One Lakhs Eighty Seven Thousand Five Hundred) Compulsorily Convertible Debentures ("CCD"); and
 - ii. 100 (Hundred) Equity Shares ("Shares") of the Corporate Debtor (Hereinafter collectively referred as "Investor Securities").
6. Consequently, in and around July 2013, the Financial Creditor disbursed a total amount of INR 7,26,26,400/- (Indian Rupees Seven Crores Twenty Six Lakhs Twenty Six Thousand Four Hundred Only) to the Corporate Debtor for the aforesaid securities.
7. The said CCDs of the Corporate Debtor were issued at a price of INR 14/- (Indian Rupees Fourteen Only) each having 12% p.a. interest payable each quarter and the Shares of the Corporate Debtor were issued at a price of INR 14/- (Indian Rupees Fourteen Only) each. Out of the total amount, the amount disbursed by Financial Creditor for CCDs amounts to INR 7,26,25,000/- (Indian Rupees Seven Crores Twenty Six Lakhs Twenty Five Thousand Only).

8. On 17th June 2013, the Promoters of Corporate Debtor, BLA Industries Private Limited ("BLA Industries") and the Financial Creditor entered into an Option Deed ("Option Agreement"). This Option Agreement was entered into between the parties to service the debt i.e. the CCDs issued by the Corporate Debtor. As per the Option Agreement, the Promoters of Corporate Debtor and BLA Industries were collectively defined as "Call Option Holders". Under this Option Agreement, it was agreed between the parties that the Financial Creditor shall have a right for put option /sell of the 51,87,500 CCDs ("Option Securities") held by them and the same shall be purchased by the Call Option Holders as per Schedule 4 of the Option Agreement ("Put Option"). The Schedule 4 was divided into 12 Put Option rights along with the period and percentage of the CCDs on which the Financial Creditor could exercise its Put Option.
9. Thereafter, vide an amendment agreement dated 24th December 2015 ("First Amendment Agreement"), the parties amended and replaced Schedule 4 of the Option Agreement. By the said amendment, it was recorded that the Financial Creditor has already exercised 3 Put Options which were honoured by the Call Option Holders and thus, amended the remaining Put Options under Schedule 4 of the Option Agreement. Subsequently, the parties again amended the Option Agreement vide an amendment agreement dated 14 September 2016 ("Second Amendment Agreement"). Under this agreement it was stated that the Financial Creditor had already exercised 4 Put Options and the same were honoured by the Call Option Holders. By this amendment, the remaining Put Options under Schedule 4 of the Option Agreement were amended and the parties agreed that the Put Option will be exercised at the end of every month. It was further agreed that the interest and redemption premium will also

be paid monthly by the Corporate Debtor. The revised schedule of Put Option, interest and redemption premium was annexed to the amendment agreement dated 14 September 2016.

10. Post amending Schedule 4 of the Option Agreement under the Second Amendment Agreement, the Corporate Debtor/Promoters of the Corporate Debtor fulfilled first 3 Put Options on 30 November 2016, 31 December 2016 and 31 January 2017. Thereafter, the Financial Creditor issued put intimation notices and put exercise notices as per Clause 5 of the Option Agreement and Second Amendment Agreement from February 2017 to February 2020. As per Clause 5 of the Option Agreement, it was Call Option Holders' obligation, to purchase the Option Securities or cause Corporate Debtor to buy back the Option Securities. However, despite multiple requests and reminders, the Call Option Holders defaulted in purchasing and/or causing Corporate Debtor to buy back the Option Securities.
11. Vide email dated 16th November 2017, the Financial Creditor requested Mr. Anup Agarwal i.e. one of the Promoters of the Corporate Debtor to clear the outstanding dues pending since February 2017 amounting to sum of INR 1,68,40,127 (Indian Rupees One Crore Sixty Eight Lakhs Forty Thousand One Hundred and Twenty Seven only). However, the Corporate Debtor/Call Option Holders failed to make any payments.
12. As the Corporate Debtor/Call Option Holders failed to pay the outstanding amount, there was a default of INR 5,10,03,569 (Indian Rupees Five Crores Ten Lakhs Three Thousand Five Hundred and Sixty Nine Only) ("Put Option Amount") towards the Put Option and redemption premium from February 2017 till February 2020.
13. Further, as per the revised schedule of the Second Amendment Agreement, the Corporate Debtor was obligated to make

- monthly payment towards the interest amount on CCDs to the Financial Creditor. Accordingly, Financial Creditor raised invoices upon the Corporate Debtor for the interest amounts due and payable.
14. As per Clause 6 of the Schedule 3 of the Subscription Agreement, it was the obligation of the Corporate Debtor to pay interest on the CCDs. However, on issuance of the Interest invoices and despite multiple reminders, the Corporate Debtor defaulted in making the aforementioned payments towards interest as per terms of the Second Amendment Agreement.
 15. The Corporate Debtor had informed the Financial Creditor that as the operations of the Corporate Debtor were furloughed due to on-going litigation, the Corporate Debtor and/or Promoters of Corporate Debtor could not fulfil the exercise options of the Financial Creditor or make payments with respect to the interest and premium.
 16. In and around August 2019, the operations of the Corporate Debtor resumed and the Financial Creditor received part payments amounting to Rs. 21,73,348/- towards Interest Invoices till 26 March 2020 which were set off against the invoices of February 2017 to June 2017. However, the Corporate Debtor failed to make any payment/ repayments against the remaining outstanding Interest Invoices. Therefore, there was a default of INR 89,97,257 (Indian Rupees Eighty Nine Lakhs Ninety Seven Thousand Two Hundred and Fifty Seven Only) ("Interest Amount") towards interest from July 2017 till February 2020.
 17. In the Annual Returns of the Corporate Debtor for the Financial Year 2018-19, 2019-20, 2020 - 21 and 2021 - 22 the Corporate Debtor has falsely recorded that there were no notices from the Financial Creditor to exercise the options. However, as a matter

of fact, the Financial Creditor has issued notices and Interest invoices till February 2020 and the same not been recorded in the Annual Returns of the Corporate Debtor.

18. Meanwhile, the Financial Creditor went into conservatorship in and around April 2020, under the Mauritian Law. After the Financial Creditor was out of the conservatorship, the name of bank was changed from Banyan Tree Bank Limited to Silver Bank Limited.
19. On 27th September 2022, the Financial Creditor issued an intimation notice for non-payment of Put Option Amount ("Intimation Notice for CCDs") as per Clause 12.1 of the SHA, thereby calling upon Call Option Holders to cure the following default:
 - i. by purchasing 22,84,972 (Twenty-Two Lakhs Eighty-Four Thousand Nine Hundred and Seventy-Two only) CCDs as per the put option intimation, and put option exercise notices or cause the Corporate Debtor to buyback the same; and
 - ii. by depositing total sum of Rs. 3,19,89,572 (Rupees Three Crores Nineteen Lakhs Eighty-Nine Thousand Five Hundred and Seventy-Two only) as the principal amount and Rs. 1,90,13,997 (Rupees One Crore Ninety Lakhs Thirteen Thousand Nine Hundred and Ninety-Seven only) as the redemption premium in the designated bank account of Financial Creditor within a period of 3 months from receipt of the Intimation Notice for CCDs, as stipulated under Clause 12 of the SHA.
20. Further, as per Clause 6.4 of Schedule 3 of the Subscription Agreement, in the scenario the Corporate Debtor failed to pay interest on the CCDs as per Clause 6.1, 6.2 and 6.3 of Schedule 3, a default interest of 3% p.a. shall accrue on the face value of the CCDs and the same was payable immediately by Corporate

Debtor to Financial Creditor. As the Corporate Debtor had failed to pay the interest on the CCDs post March 2020, the Financial Creditor issued a separate intimation notice for non-payment Interest Amount dated 27th September 2022 ("Intimation Notice for Interest"). In the said Intimation Notice for Interest, the Financial Creditor called upon the Corporate Debtor to cure the default by:

- i. depositing the total sum of Rs. 1,01,81,713 (Rupees One Crore One Lakh Eighty-One Thousand Seven Hundred and Thirteen only) as the interest on the CCDs and;
- ii. Rs. 75,84,191 (Rupees Seventy-Five Lakhs Eighty-Four Thousand One Hundred and Ninety-One Only) as default interest; in the designated bank account of the Financial Creditor as mentioned in the Interest Invoices, within a period of 1 month from the receipt of the Intimation Notice for Interest, as stipulated under Clause 12 of SHA.

21. However, the Corporate Debtor has failed to make any payments or address any reply/response to the Financial Creditor. On failure by the Corporate Debtor and/or Call Option Holders to make any payments as called upon by the Financial Creditor under the Intimation Notices, the Corporate Debtor failed to cure the default within the stipulated period, thus, triggering an Event of Default under Clause 1 of the Annexure VI of the SHA.
22. The Financial Creditor on exercising its rights under Clause 4.1 (a) of the Option Agreement issued a Demand Notice dated 30 December 2022 ("Demand Notice") for the exercising its Put Option right with respect to all the Option Securities.
23. In the said Demand Notice, the Financial Creditor called upon:
 - i. the Call Option Holders to purchase 32,74,232 (Thirty- Two Lakhs Seventy-Four Thousand Two Hundred and Thirty-Two

- only) CCDs or cause the Corporate Debtor to buyback the same;
- ii. the Call Option Holders or the Corporate Debtor to deposit total sum of INR 4,58,22,952 (Rupees Four Crores Fifty Eight Lakhs Twenty-Two Thousand Nine Hundred and Fifty-Two only) as the principal amount and INR 3,07,53,202 (Rupees Three Crore Seven Lakhs Fifty Three Thousand Two Hundred and Two only) as the redemption premium in the designated bank account of Financial Creditor as mentioned in the put exercise notices; and
- iii. the Corporate Debtor to deposit the total sum of INR 1,01,81,713 (Indian Rupees One Crore One Lakh Eighty- One Thousand Seven Hundred and Thirteen only) as the interest on the CCDs and INR 81,75,821 (Indian Rupees Eighty One Lakhs Seventy Five Thousand Eight Hundred and Twenty One Only) as default interest, in the designated bank account of Financial Creditor as mentioned in the invoices, within a period of 7 days from the receipt of the Demand Notice.
24. In light of the aforesaid, as the Corporate Debtor has failed to make payments within 7 days, the total amount claimed by the Financial Creditor to be in default is Rs.9,54,87,554/- as on 28th March 2023. The date of default is submitted to be 06.01.2023.

Submissions of the Respondent-

25. The learned counsel for the Respondent has contested the Application on the following grounds:
- i. The Applicant is neither a "Financial Creditor" nor the transaction is a "Financial Debt"
- ii. The Applicant is not a Financial Creditor
- iii. The transaction is not a "Financial Debt"

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- iv. As per notification dated 7th November 2017 issued by RBI, the transaction of CCDs is covered under the investment activities under the FEMA Regulations and Reserve Bank of India (“RBI”) and guidelines on Foreign Direct Investment (“FDI”) in India as the Company has been filing Form FC-GPR as per the requirements of the RBI Master Circular on FDI.
- v. From the Certificate No. 006 GPR issued to the Applicant for allotment of CCDs, it is obvious that the nature and intention of CCDs is investment by the Applicant with no obligation on the part of the Respondent to repay the same. Additionally, such investment being under the FDI and having covered by the RBI Guidelines under FEMA have to be given the same treatment as given to such CCDs under the said Guidelines i.e. “equity”. The alignment of the contractual terms of investment by the Applicant and the Company with the RBI Guidelines and FEMA clearly reflect the intention of the parties as to treat the investment by the Applicant as equity and not as debt.
26. The Respondent further submits that CCD are not repayable and have to be compulsorily converted as per the agreed terms and conditions between the Applicant and the Respondent. Also, the CCDs are to be treated as equity and not debt under the law.
27. Moreover Redemption, if any, had to be done only by the Call Option Holders, there is no mechanism of the Company repaying those Debentures. The Respondent is not a party to this Option Deed.
28. The Respondent has relied upon the Judgement in the case of *Narendra Kumar Maheshwari v/s Union of India (1990 Supp SCC 440)* wherein the Supreme Court observed that in the various guidelines, compulsorily convertible debentures are regarded as 'equity' and not as a loan or debt. The Respondent

has further relied upon the Judgement in the case of *Sahara India Real Estate Corporation Limited v/s SEBI and Anuj Jain vs. Axis Bank Limited and Ors* ((2020) 8 Supreme Court Cases 401: 2020 SCC OnLine SC 237) ("Anuj Jain"); NCLAT Judgment given in the case of *IFCI Limited vs Sutanu Sinha* (Company Appeal (AT) (CH) (Ins) No. 108 of 2023). This judgment has been upheld by the Hon'ble Supreme Court vide a three Judge Bench Judgement in the matter of *IFCI Limited Vs Sutanu Sinha*.

29. Further, the respondent contends that the Applicant while filing the present Application has failed to consider the proposition upheld in the recent judgment in the case of *Vidarbha Industries Power Limited vs. Axis Bank Limited [Civil Appeal no. 4633 of 2021]*, wherein Hon'ble Supreme Court has considered "*the viability and overall financial health of the Corporate Debtor as not extraneous matters*". In this regard what emerges is that apart from the financial health of the corporate debtor, there are other factors that need to be taken to consideration such as the viability of the business and the ability of the Corporate Debtor to undertake the same. In view of the aforesaid and without prejudice to the contentions of the Respondent as to the nature of the transaction being in the nature of equity and not debt, the Applicant in the present Application has failed to bring out any case and/or reasoning justifying the initiation of CIRP against the Corporate Debtor on the other hand the Respondent has demonstrated that it is viable and its management capable to manage the affairs of the Company and sail it through the challenging times.

30. In the case of *EPC Construction India Limited through its Liquidator vs M/s Matrix Fertiliser and Chemicals Limited*, CP (IB) No. 156/KB/2022, the National Company Law Tribunal Division Bench rejected the section 7 Company Application filed by the Petitioner on the grounds that if payment against CRPS is not due, no liability can be said to arise. Further, Section 3 (12) of the IBC defines "default" a "non- payment of debt when whole or any part of instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be." Hence, the necessary corollary would be that unless CRPS is payable, non-payment against CRPS cannot be termed as default and it is settled law that existence of a debt and default is sine qua non to maintain an application under IBC, 2016.
31. Also, in the case of *HDFC Ventures Trustee Company Limited v/s Kakade Estate Developers Private Limited* CP (IB) No. 747MB-IV/2022 Bench- IV of this Tribunal has clearly rejected contention of the Applicant that CCPS are financial debt qua the Corporate Debtor. In that case, after examining the legal and factual aspect of the matter it was concluded that "*In view of the foregoing discussion, we feel that the amount paid by the Applicant to the Corporate Debtor towards subscription of the Corporate debtor's CCPS are in the nature of financial debt qua Promoters only and the obligation of the Corporate Debtor was solely and only based upon the guarantee arrangements agreed to by the Corporate Debtor under the Consent Award where the Corporate Debtor along with its promoters agreed to, jointly and severally, pay the agreed amount. This guarantee obligation was taken as debt in terms of clause (i) of Section 5(8) of the Code which includes 'the amount of any liability in respect of any of the*

guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause' and it was concluded that the payment of money by the Applicant to the Corporate Debtor towards subscription was a Financial Debt qua the promoters only and the liability of the Corporate Debtor in respect of such debt was based on guarantee obligation of the Corporate Debtor under the Consent Award as per the clause (i) of Section 5(8) of the Code."

Thus, the facts of the above case are total and substantially different from the present case and the findings thereof reinforces the legal position that transaction not contemplating repayment of investment are not the financial debt qua the Company.

32. The Respondent has further contended that Interest in itself is not a Financial Debt and application for recovery of interest under Section 7 under the Insolvency and Bankruptcy Code, 2016 ("IBC") cannot be filed. Additionally, the Applicant has filed its Section 7 Application basing its claim and alleging default on account of Put Option, Redemption Premium, payment of interest and Default Interest. Default on account of Put Option and redemption cannot be imputed on the Respondent as the Respondent is not a party to such agreement. Also, the claim or payment of interest raised vide notices from 16th March 2017 till March 2020 are clearly barred by limitation for the purpose of Section 7 of the Code.
33. Further, Demands/Claim for the period between 25th March 2020 and 24th March 2021 are perpetually out of the ambit of the Code on account of the statutory prohibition under section 10A of the Code. As per the provisions of Section 10A of the Code no application under Section 7 of the Code can

ever be filed for and in respect of any demand or claim arising on or after 25th March 2020 till 24th March 2021.

34. It may be seen from the Application of the Applicant that the Applicant has alleged default to the extent of Rs.89,97,257 from July 2017 till February 2020. Thereafter, the Applicant has alleged and claimed an amount of Rs. 1,01,81,713/- towards interest as on September 2022. The increase in the amount claimed as in the alleged default on account of interest is Rs. 11,84,455.48. If seen in the light of the break-up of the dues as provided by the Applicant, it is clear that the said amount of Rs. 11,84,455.48 pertains to the period from March 2020 to June 2021 and includes the alleged default of Rs. 11,32,722.60 which pertain to the period from March 2020 till March 2021, which needs to be excluded on account of statutory prohibition under Section 10A of the Code, for the purpose of Section 7 of the Code. Thus, the net amount alleged to be in default on account of interest is much less than the threshold limit of Rs 1 Crore as per Section 4 of IBC. Additionally, the alleged amount claimed to be in default also includes claim towards 'default interest'. It is settled position of law that any interest on interest is in the nature of penalty and opposed to public policy and thus not allowed under the law. Therefore, the same cannot be the basis for determination of default for the purpose of an application under section 7 of the Code. In view of the above, the respondent has contended that the alleged amount claimed on account of interest being below the threshold limit of Rs. 1 Crore as per Section 4 of IBC, no application can be maintained by the Applicant under Section 7 of the Code.

Findings-

35. Heard learned counsel and perused the material available on record.
36. It is not in dispute that Principal Component of the debt arises from Compulsory Convertible Debentures and accrued interest thereon. The CCDs have no obligation attached to it as regards repayment of debenture money by the issuer of such debentures. Accordingly, such debentures cannot partake the character of debt qua Corporate Debtor. This fact is also clear from the pleadings in part IV whereby it has been acknowledged that the Promoters of Corporate Debtor and BLA Industries only had an obligation under the Call option vested in the Applicant. As regards causing the Corporate Debtor to buy back the aforesaid debentures, we are of the considered view that it is also not the obligation of the Corporate Debtor and causative action is to be taken by the call option obligors.
37. We notice that the Petitioner has alleged default of Rupees more than 1 Crore in payment of accrued interest. During the course of hearing held on 15.01.2024, Counsel for the Corporate Debtor brought cheques for the payment of the interest due on the CCD; however, the Counsel for the Financial Creditor refused to take those cheques contending that they don't have any instructions to do so. This act of the Corporate Debtor demonstrates bona-fide on its part to settle and pay the amount of debt if any due to the Petitioner. However, the conduct of the Petitioner in refusing to accept these cheques towards payment of accrued interest, which can only be at best construed as debt in the present case, indicates that the present petition has been filed not for the resolution of the Corporate Debtor but has been filed with the sole objective of recovery of redemption amount of CCD as well.

38. It is trite law that no petition is maintainable for recovery of debt under the code hence this petition is not maintainable.
39. The Petition bearing CP (IB) 421/MB/2023 filed by **Silver Bank Limited** [Identification no.: C110365], the Financial Creditor, under section 7 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **B L A Power Private Limited** [CIN: CIN:U40102MH2006PTC165430], the Corporate Debtor, is disposed as **dismissed**.
40. Ordered accordingly.

Sd/-
Prabhat Kumar
Member (Technical)
/MK/

Sd/-
Justice V. G. Bisht (Retd.)
Member (Judicial)