IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V

CP(IB) 787 MB 2021

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

Nippon Life India AIF Management Limited and Another

4th Floor, Tower A, Peninsula Business Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400013.

... Financial Creditor

V/s.

Lake District Really Private Limited

Bungalow No. 10, Staveley Road, Near Joes Mess, Pune – 411001.

... Corporate Debtor

Order delivered on :- 02.11.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances:

For the Financial Creditor	: Adv. Viraj Parikh a/w Adv. Amit Agrawal, Adv. Saurabh Pandya
For the Corporate Debtor	: Adv. Shashant Rai

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. This Company petition is filed by Nippon Life India AIF Management Limited and Another (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Lake District Really Private Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called "**Code**") on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 37,51,64,939/- as on 14.05.2019.

The submissions by the Financial Creditor: -

2. The Petitioners have filed the present Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") seeking commencement of the corporate insolvency resolution process ("CIRP") against the Corporate Debtor for default in payment of financial debt of Rs. 78,19,90,685 ("Debt") due and payable under 14,625 non-convertible debentures ("NCDs") issued by the Corporate Debtor pursuant to a Debenture Trust Deed dated 6th October 2016 ("DTD"). The Petitioners hold 100% of the NCDs issued by the Corporate Debtor.

3. The Corporate Debtor proposed to issue the NCDs of nominal value of Rs. 20,000 each on a private placement basis, in 2 (two) series, in tranches, pursuant to the DTD. The Petitioners are undisputedly the holders of 100% of the

NCDs issued by the Corporate Debtor. Petitioner No. 1 holds 13625 NCDs and Petitioner No. 2 holds 1000 NCDs.

4. The key terms of the DTD are as follows:

   i. In the first tranche, a sum of Rs. 10 crores was to be disbursed against issuance of 5000 NCDs.

   ii. In subsequent tranches, upon satisfaction of various conditions precedent and subsequent, further monies upto a further sum of Rs. 25 crores were to be disbursed.

   iii. Interest was payable @ 16% p.a. compounding annually upto 30th June 2018 and @18% p.a. compounding annually thereafter on a quarterly basis starting from 31st December 2016.

   iv. Principal amount for Series I NCDs was to be repaid in 10 instalments starting from 30th June 2018 and for Series II NCDs was to be repaid in 14 instalments starting from 30th September 2018.

   v. The NCD holders were ensured return of 21.67%. Therefore, any difference between the ensured return and interest paid was to be paid in the form of redemption premium.

   vi. The failure to pay any amounts due under the NCDs was an event of default.

   vii. The inability to continue with the real estate project for any reason whatsoever is also an event of default.

5. A sum of Rs. 29,25,00,000/- was disbursed to LDR against the NCDs. The dates of disbursement are between 14th October 2016 and 30th November 2017 (Petition, Vol. I, Part IV (1), Pg. 16). The receipt of monies under the NCDs is not disputed by the Corporate Debtor in its Reply to the Petition.

6. The Petitioners addressed a Notice dated 06.04.2018 to the Corporate Debtor noting that there had been various breaches by the Corporate Debtor which constituted an 'Event of Default' under the DTD including (i) stoppage of the Project and commitment of default in relation to the servicing of the principle and interest under the NCDs, (ii) failure to provide adequate security cover and (iii) failure to provide additional security and called upon the Corporate Debtor to cure these breaches.

7. The obligation to commence repayment of principal payments under the Series I NCDs started on 30th June 2018 and under the Series II NCDs started on 30th September 2018. The Corporate Debtor defaulted on these obligations. Therefore, the Corporate Debtor committed default as contemplated under the Code. The Petitioners addressed a fresh notice dated 2nd January 2019 to the Corporate Debtor to forthwith pay all outstanding dues.

8. The Debenture Trustee issued a notice dated 21.02.2019 pointing out the various breaches of the Corporate Debtor, which were 'Events of Default' and called upon the Corporate Debtor to immediately pay the entire outstanding amounts under the NCDs on or before 5th March 2019.

9. The Petitioner also invoked guarantees provided as security against the NCDs and in this regard, the CIRP of the corporate guarantor viz. Bharucha and Motivala Infrastructure Private Limited ("BMIPL") has already been admitted into CIRP by this Hon'ble Tribunal by way of its Order dated 6th May 2021.

<u>The submissions by the Corporate Debtor: -</u>

10. At the outset, the Corporate Debtor submits that the above Petition is not maintainable and ought to be dismissed. The Debenture Holders had filed a petition before this Hon'ble Tribunal under Section 7 of the Code for initiating CIRP against Bharucha & Motivala Infrastructure Private Limited (an obligor/ guarantor of the Corporate Debtor) on account of occurrence of default in payments of the amounts sought to be claimed in the present Petition. By an Order dated 6 May 2021, this Hon'ble Tribunal was pleased to admit the said Petition. The Debenture Holders have filed their claim with the Insolvency Resolution Professional appointed pursuant to the said Order dates 6 May 2021 and is part of the Committee of Creditors therein. It is settled law that where a 'Financial Creditor', seeks initiation of 'Corporate Insolvency Resolution Process' against the 'principal borrower' or one or the other 'corporate guarantors' in respect of a claim, it cannot file second application for the same set of claims against the other 'Corporate Debtor', be it the principal borrower or one or other Corporate Guarantor. Hence, it is manifestly clear that seeking of triggering of 'Corporate Insolvency Resolution Process' by the Debenture Holder against the principal borrower, the

Corporate Debtor and the corporate guarantors, Bharucha and Motivala for same set of claims is impermissible.

11. Furthermore, the Debenture Holders have also approached this Hon'ble Tribunal with unclean hands and have suppressed material facts and documents from this Hon'ble Tribunal while filing the present Petition. The Debenture Holders have failed to disclose that there was default on the part of the Debenture Holders in disbursing monies to the Corporate Debtor as per the said Debenture Trust Deed. The Debenture Holders are now seeking to take advantage of their own wrong.

12. The Debenture Holders have further failed to disclose that the Corporate Debtor was forced to stop construction on the project due to force majeure condition which resulted in non-generation of revenue for the Corporate Debtor. The Debenture Holders were aware at all relevant times that the Corporate Debtor was facing a force majeure condition. Further, the Debenture Holders were also aware that the Corporate Debtor was in and continues to be in talks with third-party Developers for the assignment of development rights of the construction in the project under taken by the Corporate Debtor and that the Corporate Debtor as well as the said third party Developers had assured the Debenture Holders that the payments to the Debenture Holders would be made from the deposits to be received by the Corporate Debtor from such assignment. The Debenture Holders are, in fact, a part of the said negotiations with the said third party developers and have indicated their assent with the terms of the agreement that was proposed to be executed

between the Corporate Debtor and the said third party developers. The Debenture Holders have deliberately failed to mention that they are part of back-channel talks and negotiations to resolve the disputes that have arisen inter alia between them and the Corporate Debtor, which are currently ongoing and ought to be given a chance to reach fruition.

13. Pertinently, the Debenture Holders are not parties to the said Trust Deed and Vistra TTCL (India) Limited (formerly IL. & FS Trust Company Limited) ("Debenture Trustee") had entered into the said Trust Deed with the Corporate Debtor. The said Debenture Trust Deed provided the Debenture Trustee with a right to initiate action against the Corporate Debtor or the Corporate Debtor. In this regard, an English mortgage ("Mortgage Deed") has also been created to secure the dues of the Corporate Debtor to the Debenture Holders. Clause 5 of the Mortgage Deed recognises the power of the Debenture Trustee to enforce the mortgage on occurrence of any Event of Default, including through sale without intervention of any court (as contemplated under Section 69 of the Transfer of Property Act, 1882 ("TOPA")). Clause 8 of the said Mortgage Deed contains the Debenture Trustee's covenant to make reconveyance of the mortgaged property to the Corporate Debtor only on proof of payment of the NCDs, thus, the mortgage is certainly an English mortgage within the meaning of Section 58(e) of the TOPA. In fact, even the aforesaid Debenture Trust Deed confirms the existence of an English mortgage in favour of the Debenture Trustee, in its Recitals 14-15 and Clauses 9.1-9.3.

Pertinently, the value of the mortgaged assets is much more than the alleged debt claimed by the Debenture Holders.

14. It is submitted that where an English mortgage exists in favour of any creditor in the absence of enforcement of the said mortgage and thereafter finding a shortfall post-enforcement, it cannot be said that any default whatsoever has occurred at all, within the meaning of the Code. In the event that the outstanding amount is presently to be treated already as an amount in 'default' under the Code, without first requiring the mortgagee to enforce the English mortgage, it will result in a manifestly unfair case of the creditor having its cake and eating it too. In the present case, the Debenture Trustee has secured 'title' to the mortgaged property by way of English mortgage, by way of security; it has also not called on the Corporate Debtor to redeem the mortgage, nor has it offered to reconvey the property to the Corporate Debtor.

15. As stated, under the Debenture Trust Deed, a committed sum upto Rs. 60 lakhs per 6% month towards the said PM fees had to be disbursed for a period of nine months commencing from November, 2016. Accordingly, for the months of November, 2016 and December, 2016, an aggregate amount of Rs. 94,27,000/- was in fact disbursed to the Corporate Debtor. However, the Debenture Holders refused to release the said PM fees for the month of January, 2017 on the pretext that no work was carried out on the said property. This despite the fact that the said PM fees was not contingent on any work being carried out on the said property.

16. In the circumstances, the disbursement of the said amounts were made in February, 2017 and March, 2017, with enormous difficulty and delay. This had an adverse impact on the project.

17. While the project was still ongoing, the Hon'ble National Green Tribunal passed an Order dated 19th May, 2015 ("said Order") inter alia, restraining construction within 30 meters (100 ft) of the base of hills. As the Corporate Debtor already had plans that were issued by the Pune Municipal Corporation, the said Order did not affect the project of the Corporate Debtor and the Corporate Debtor continued construction activities on the said project. However, sometime around November, 2017, the State of Maharashtra through the Urban Development Department issued a Notification ("Maharashtra Government Notification") to give effect to the directions contained in the said Order dated 19th May, 2015 whereby all construction activities which were within 100 feet of the base of a hill were restrained. Accordingly, the Corporate Debtor had to stop construction activities. The Corporate Debtor at this point of time, verbally informed the representatives of the Debenture Holders about the stoppage of construction activities and further informed the Debenture Holders that in view of the Maharashtra Government Notification, the Corporate Debtor had to demolish the plinth that had already been constructed.

18. It is submitted that as stated the Debenture Holders have approached this Hon'ble Tribunal with unclean hands while suppressing material facts and documents from this

Hon'ble Tribunal while filing the present Petition. The Debenture Holders have also failed to disclose to this Hon'ble Tribunal that they had defaulted in disbursement of funds as contemplated under the said Debenture Trust Deed. Even after defaulting in discharging their responsibility under the said Debenture Trust Deed, the Debenture Holders are seeking to rely on the provisions of the Debenture Trust Deed which suit their requirement. It is humbly submitted that the Debenture Holders cannot now seek to take advantage of their own wrong and claim benefits from the same.

19. It is submitted that a bare perusal of the records will reflect that the Debenture Holders at all relevant times were aware about the difficulties the project was facing due to passing of the said Orders by the NGT and the Hon'ble Bombay High Court. The Debenture Holders had by their conduct, impliedly waived off the alleged breaches that were committed by the Corporate Debtor. Thus, Notices dated 2nd January, 2019 and 21" February, 2019 were non-est in view of the subsequent conduct of the Debenture Holders.

Findings:-

20. We have heard Counsel for the parties and gone through the records.

21. During the course of arguments, the Counsel for the Petitioner has argued that in this case the existence of financial debt and its default by the Corporate Debtor has been proved on record. Since the Corporate Debtor has failed to pay the outstanding financial debt despite notice

dated 14.05.2019, the present Petition is liable to be admitted.

22. On the other hand, the Counsel for the Corporate Debtor has argued that the present Petition is not maintainable as a Petition u/s 7 has already been admitted against the Corporate Guarantor which is pending, and a Resolution Plan has already been submitted in the said proceedings which are likely to be finalized. Therefore, the outcome of the said CIRP should be awaited and till then the present Petition may be kept in abeyance.

23. The Counsel for the Corporate Debtor has further argued that the Financial Creditor did not disburse the entire payment which was agreed with the result that the project undertaken by the Corporate Debtor halted for shortage of funds resulting in losses to the Corporate Debtor. Therefore, the Financial Creditor cannot be allowed to take advantage of his own wrongs.

24. The Counsel for the Corporate Debtor has further argued that the financial debt in question is fully secured by way of English mortgage of a property of the Corporate Debtor which is valued more than the outstanding debt. Therefore, the Corporate Debtor should not be pushed into insolvency. In support of his contentions, the Counsel for the Corporate Debtor has relied upon the law laid down in ***Vidharbha Industries vs. Axis Bank 2022 (8) Supreme Court Cases 352*** whereby it has been held that when the admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the

awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority have to exercise its discretion u/s 7 (5)(a) to keep the admission of the Application of the Financial Creditor in abeyance unless there is good reason not to do so.

25. We have weighed the contentions raised by the Counsel for the parties and have also gone through the records.

26. So far as the point raised with regard to permissibility of simultaneous CIRP proceedings against the Principal Debtor and the Corporate Guarantor is concerned, in this regard reference can be made to the law laid down in State ***Bank of India vs. Athena Energy 2020 SCC Online NCLAT 774*** whereby it was held that the simultaneous initiation of CIRP against the Principal borrower and its Corporate Guarantors is permissible. Therefore, it cannot be said that the present Petition is not maintainable simply because CIRP has already been initiated against the Corporate Guarantor of the Corporate Debtor.

27. It has also been argued on behalf of the Corporate Debtor that since the Petitioner failed to disburse the project management fee, no amount is payable to the Petitioner. In this regard, it has been pointed out by the Counsel for the Petitioner that as per clause 8.6 of DTD (Debenture Trust Deed), the payment/reimbursement was to be made on actual cost/expense incurred for the project from the project escrow account and undisputedly, the project remained stand still from January, 2017 till May, 2017. Therefore, there was no question of any payment of the

project management fee. Apart from this, the Corporate Debtor continued to receive disbursement from the debenture holders even after May, 2017 and also continued to make interest payments to the debenture holders even during the period from January, 2017 to May, 2017. Therefore, this contention raised on behalf of the Corporate Debtor is wholly fallacious.

28. It has also been argued on behalf of the Corporate Debtor that the present Petition is wrongly filed by the Petitioner/debenture holders who have no right to file the same as under the terms and conditions of the DTD, only the debenture trustees could have filed the Petition in the event of any default by the Corporate Debtor. However, in this regard, a reference can be made to the law laid down in ***Zubin Barucha vs. Reliance AIF Management Company Limited 2023 IBC law in 235 NCLAT***, whereby it has been held that the debenture holders who have subscribed to the NCDs for the benefit of issuer company have the right to receive payment after issue of the demand certificate by the debenture trustee and the Guarantor have jointly and severally undertaking to make such payments to the debenture holders are Financial Creditors. In view of the law laid down in the cited case, it cannot be said that the Petitioner is not entitled to maintain the present Petition.

29. So far as the law laid down in Vidharbha Industries Limited vs. Axis Bank (supra) is concerned, in our considered view, the same cannot be applied to the fact and circumstance to the present case. In the cited case, it was observed that the award/decree in favour of the Corporate Debtor should

have been taken into account while considering the admission of Petition u/s 7 of the Code, 2016. However, in this instant case, there is no such award/decree in favour of the Corporate Debtor. It has simply been argued that since an English mortgage in respect of the valuable property of the Corporate Debtor has been created in favour of the Petitioner which is valued more than the outstanding debt claimed, the present Petition cannot be admitted. Even this contention does not seem to be tenable considering the fact that there is no evidence on record with regard to the valuation of the mortgaged property. Therefore, on this ground the Petition cannot be dismissed. Besides, in the written submissions, the Corporate Debtor has pointed out that it was contemplating a deal with a third-party developer i.e. Provident Housing Limited to take over the project of the Corporate Debtor. This by itself shows that the Corporate Debtor is not able to sustain itself financially to continue the project and this further strengthens the view that resolution of the Corporate Debtor is necessary.

30. No other points have been raised. Even otherwise the Financial Creditor has been able to establish the existence of financial debt and its default committed by the Corporate Debtor and, therefore, in our considered view, the Petition u/s 7 of the Code, 2016 deserves to be admitted. It is ordered in the following terms:

ORDER

a. **The above Company Petition No. (IB) -787 (MB)/2021 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Lake District Really Private Limited.**

b. This Bench hereby appoints Mr. Kedar Mulye, Registration No: IBBI/IPA-001/IP-P-01365/2018-19/12282 as the Interim Resolution Professional email :- kmulye@hotmail.com and address at 1301 Chaitanya Residency Jay Prakash Nagar Road, No. 2, Goregaon East, Mumbai - 400063, to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of Rs. 3 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA	**KULDIP KUMAR KAREER**
Member (Technical)	**Member (Judicial)**