

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

C.P. (IB) - 4108/MB/2019

Under Section 7 of the I&B Code, 2016

*In the matter of*

Reliance AIF Management Company  
Limited

Reliance Centre, 7<sup>th</sup> Floor, South Wing,  
Off. Western Express Highway,  
Santacruz (E), Mumbai- 400055

....Petitioner No. 1

And

Reliance Nippon Life Asset Management  
Limited – PMS Division

Reliance Centre, 7<sup>th</sup> Floor, South Wing,  
Off. Western Express Highway,  
Santacruz (E), Mumbai- 400055

.... Petitioner No. 2

vs.

Bharucha & Motivala Infrastructure  
Private Limited

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

.... Corporate Debtor

Order Pronounced on: 06.05.2021

Coram: Hon'ble Suchitra Kanuparthi, Member(Judicial)  
Hon'ble Chandra Bhan Singh, Member(Technical)

For the Petitioner: Adv. Viraj Parikh, Adv. Amit Agrawal, Adv. Radhika  
Yadav, Adv. Saurabh Pandya, i/b REG Street Law  
Advisors

For the Corporate Debtor: Sr. Adv. Gaurav Joshi, Adv. Shyam Kapadia a/w

Adv. Shashwat Rai, i/b Keystone Partners

*Per: Chandra Bhan Singh, Member (Technical)*

ORDER

1. Reliance AIF Management Company Limited (hereinafter called as 'Petitioner No. 1') and Reliance Nippon Life Asset Management Limited (hereinafter called as 'Petitioner No. 2') have sought the Corporate Insolvency Resolution Process of Bharucha & Motivala Infrastructure Private Limited (hereinafter called as 'Corporate Debtor') on the ground, that the Corporate Debtor committed default to the extent of Rs. 37.51 Crores as provided under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called as the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Contentions of the Petitioner:

2. The Counsel for the Petitioners submits that Reliance Capital AIF Trust (through its trustee and AMC) is a SEBI registered Alternate Investment Fund (AIF). Petitioner No. 1, Reliance AIF Management Company Limited, is the investment manager of Reliance Capital AIF Trust. Reliance Capital AIF Trust provides various differentiated investment opportunities through unique offering to make investments in various different schemes across asset classes. For portfolio management, Petitioner No. 2, Reliance Nippon Life Asset Management Limited (formerly known as Reliance Capital Asset Management Limited) – PMS Division, is the portfolio manager for portfolio management of clients which is a SEBI registered Asset Management Company (AMC). The Corporate Debtor, Bharucha & Motivala Infrastructure Private Limited, is a part of the PRA group of companies. Its sister concerns, Lake District Realty Private Limited (hereinafter called as 'LDR'/ 'Issuer Company') and Pune Kondhwa Realty Private Limited (hereinafter called as 'PKR') are engaged in a real estate project over 61,900 sq. ft. of a land in Village of Yeolewadi, Taluka Haveli, District Pune.

3. LDR through Board Resolution dated 15.09.2016 proposed to issue secured, unrated, redeemable, Non-Convertible Debentures (NCDs) of nominal value of Rs. 20,000/- each aggregating to Rs. 40,00,00,000/- on a private placement basis, issued in two series, in tranches, pursuant to the Debenture Trust Deed dated 06<sup>th</sup> October, 2016, out of which 14625 non-convertible debentures amounting to nominal value of Rs. 29,25,00,000/- are currently held by the Petitioners herein who are debenture holders. Trust Capital Services Private Limited then transferred 1000 number of Non-Convertible Debentures issued by the Issuer Company amounting to Rs. 2,00,00,000 to the Petitioner No. 2.

4. The Series I debentures were redeemable in 10 equal quarterly installments commencing from 30 June 2018 till 30 Sep 2020 whereas Series II debentures were redeemable in 14 equal quarterly installments commencing from 30 June 2018 till 30 Sep 2020. Reliance Capital AIF Trust, under its two separate schemes namely Reliance Yield Maximiser Alternative Investment Fund- Scheme II and Reliance Yield Maximiser Alternative Investment Fund- Scheme III, subscribed to the Non-Convertible Debentures which were offered and issued by LDR.

5. The Counsel for the Petitioners then submits that in respect of the Non-Convertible Debentures issued by LDR, Vistra ITCL (India) Limited (formerly known as IL & FS Trust Company Limited) was appointed as the Debenture Trustee by LDR through a Debenture Trust Deed dated 06.10.2016. Under the Debenture Trust Deed, the Issuer Company had created (i) by way of a registered English Mortgage, first ranking sole and exclusive charge and mortgage on the freehold rights title, and interest in the mortgage properties as marked in Schedule A of the Indenture of Mortgage entered into between the Debenture Trustee, Issuer Company, Corporate Debtor, PRA Realty (India) Private Limited, Promoters and PKR, and (ii) first ranking sole and exclusive charge and mortgage on the receivables of the Issuer Company.

6. Further, the Indenture of Mortgage dated 06.10.2016 was executed

between the Issuer Company, Mortgagor, Corporate Debtor and PRA Realty (India) Private Limited, the Promoters and the Debenture Trustee by which Mortgagor mortgaged and created charge over certain parts of the Project along with the development rights of the Mortgagor on the Project and all benefits and advantages arising out of the development of the Project. A Deed of Pledge, dated 06.10.2016, was also entered into between the Promoters, Issuer Company and the Debenture Trustee by which the Promoters of Issuer Company pledged 100% of the shares of the Corporate Debtor collectively held by the Promoters.

7. The Counsel for the Petitioners further submits that to secure the repayment of the Non-Convertible Debentures, the Corporate Debtor and PRA Realty (India) Private Limited issued a common Deed of Irrevocable and Unconditional Corporate Guarantee dated 06.10.2016. Also, the Corporate was the co-obligor as per the Debenture Trust Deed entered into with the Debenture Trustee. Furthermore, the Promoters of LDR namely, Mr. Rustom Bharucha and Mr. Zubin Bharucha issued a Deed of Irrevocable and Unconditional Personal Guarantee dated 06.10.2016.

8. In due course, the Issuer Company had repaid a total sum of Rs. 6,99,50,684 to Reliance Capital AIF Trust through Petitioner No. 1 and to Petitioner No. 2 till 30.09.2019. The default in repayment of the remaining sum took place on behalf of the Issuer Company. Hence, on 06.04.2018, the Petitioner Nos. 1 and 2 wrote to the Issuer Company, its Promoters, Corporate Debtor and PRS Realty (India) Private Limited listing the material breaches of the various documents, which remain unsecured, and requested them to remedy the breaches immediately. The default on interest took place from quarter ending December, 2018 and continues till date. Further, default on principal took place from quarter ending June, 2018 and continues till date.

9. Thereafter, Petitioner Nos. 1 and 2 issued an event of default notice dated 02.01.2019 to the Issuer Company, its Promoters, the Corporate Debtor and PRA Realty (India) Private Limited. The same notice was issued

by the Debenture Trustee on 21.02.2019. Owing to the persistent default of the Issuer Company, Debenture Trustee issued two separate notices dated 14.05.2019 to the Promoters and Corporate Debtor with copy to PRA Realty (India) Private Limited, recording the default in making repayments of the Non-Convertible Debentures and enclosing a demand certificate pursuant to Claus 4 of the Corporate Guarantee calling upon it to pay the said amount of Rs. 37,51,64,939/-. To repay the monies relating to debentures, various cheques were also issued which have been dishonored. Despite issuance of notice to LDR, Corporate Debtor, PRA Realty (India) Private Limited and Promoters, the due payments have not yet been made. Hence, the present Petition has been filed by Petitioners against the Corporate Debtor.

Contentions of the Corporate Debtor:

10. The Counsel for the Corporate Debtor submits that the present Petition is not maintainable and ought to be dismissed. The Petitioners (Debenture Holders) are seeking to invoke the provisions of the Debenture Trust Deed dated 06.10.2016 against the Corporate Debtor, wherein the Petitioners are not parties to the said Trust Deed, instead Vistra ITCL (India) Limited (Debenture Trustee) had entered the said Trust Deed with Issuer Company. The said Trust Deed provided that the Debenture Trustee with a right to initiate action against Issuer Company or the Corporate Debtor. However, the Debenture Trustee has not even been made a party to the present Petition despite it being a necessary party. The present Petition ought to be dismissed on this ground alone.

11. The Counsel for the Corporate Debtor further submits that the Petitioners have failed to disclose the following important and material facts:

- a. PKR is the owner of a property situated in Village of Yeolewadi, Taluka Haveli, District Pune. Then, PKR entered into a Joint Development Agreement with the Issuer Company wherein PKR and Issuer Company agreed to jointly develop the said

property. The Issuer Company was also entitled to the exclusive development rights to develop and construct on the said property. PKR also executed a Power of Attorney in favor of the Issuer Company pertaining to the development of the said property.

- b. The Issuer Company was desirous of raising money for the development of the said property and hence, the Issuer Company intended to issue, by way of private placement, debentures to the Debenture Holders. Pursuant to the same, the Issuer Company entered into a Debenture Trust Deed whereby the NCDs upto an aggregate amount of Rs. 40 Crores were to be issued to the Debenture Holders on a private placement basis. The said Debenture Trust Deed provided that an amount of Rs. 35 Crores was to be utilized for meeting the expenses of the project as per the Business Plan. The Debenture Trust Deed further set out the disbursement of amounts where *inter alia* an amount upto Rs. 60 lakhs was to be disbursed to the Issuer Company for payments to be made to PRA Realty Private Limited and towards the Project Management Fees. The said fees was to be discharged per month upto a period of nine months commencing from November, 2016. Simultaneously, the Petitioners insisted on the execution of the following documents on 06.10.2016 as security for the said NCDs: i) Corporate Guarantee by the Corporate Debtor and PRA Realty Private limited in favor of the Debenture Trustee; ii) An Indenture of the Mortgage between the Issuer Company, PKR, Corporate Debtor, PRA, the Promoters and Debenture Trustee; and iii) A Deed of Pledge between the Promoters, the Issuer Company and the Debenture Trustee.
- c. As stated above regarding the disbursement of Project Management Fees, accordingly, for the months of October, 2016 to December, 2016, an aggregate amount of Rs.

94,27,000/- was disbursed to the Issuer Company. However, the Petitioners refused to release the fees for the month of January, 2017 on the pretext that no work being carried out on the said property. Thereafter, for the same issue, the Issuer Company addressed an email dated 17.01.2017 to the Petitioners stating that it was unfair of the Petitioners to stop the disbursement of the said fees at that critical stage as the Issuer Company was fully reliant on the said fees to support its team, pay salary and also to meet its expenses. The Issuer Company also pointed out that it had over 220 clients that were waiting for the development of the said property. In these circumstances, a request was made to the Petitioners by the Issuer Company to release the said fees urgently. The Issuer Company also informed the Petitioners that it would start the work on priority once the drawings, plans and designs were in place. This email was followed by other mails dated 21.01.2017 25.01.2017 and 05.02.2017 raising the similar concerns. The fees amounts were somehow disbursed in February, 2017 and March, 2017 with enormous difficulty and delay.

- d. In the month of April, 2017, the Petitioners once again defaulted in disbursing the fees. In the circumstances, the Issuer Company by its emails dated 14.04.2017, 03.05.2017 and 08.05.2017 requested for the payment of the fees along with other payments towards construction and Fire NOC as it was getting difficult to follow up on the '*issues that were committed & documented*' and that the same was actually slowing down the progress of the project and delaying the start of construction. The Issuer Company also called upon the petitioners to make a commitment as to whether they were willing to support the project or not. Thereafter, the Petitioners belatedly released the said fees. During this time, as RERA had come into force, the Issuer Company had to comply with

various provisions of RERA. So, the Petitioners insisted that a new Escrow Account be opened for deposit of amount received from the flat purchasers in accordance of RERA.

- e. The setting up of the said Escrow Account by the Petitioners took nine months to be operational due to which the Issuer Company could not collect monies from the flat purchasers during the said period. The said delay by the Petitioners led to huge financial difficulties for the Issuer Company. As the Issuer Company could not collect any monies from the flat purchasers in the said Escrow Account, the servicing of the interest of the said NCDs was delayed by the Issuer Company.
- f. While the project was still ongoing, the Hon'ble National Green Tribunal (NGT) passed an Order dated 19.05.2015 restraining construction within 30 meters (100 ft.) of the base of hills. As the Issuer Company already had plans that were issued by the Pune Municipal Corporation, the said Order did not affect the project of the Issuer Company and the Issuer Company continued construction activities on the said project. However, sometimes around November, 2017, the State of Maharashtra through the Urban Development Department issued a Notification to give effect to the directions contained in the said Order dated 19.05.2015 of the NGT whereby all the construction activities which were within 100 ft. of the base of a hill were restrained. Accordingly, the Issuer Company had to stop construction activities.
- g. The Issuer Company, verbally as well as through an email dated 16.02.2018, informed the Petitioners about the stoppage of the construction activities and that it had to demolish the plinth which was already constructed in view of the said notification. The Issuer Company further informed the Petitioners that the Issuer Company was trying to complete a deal with a third party developer being, Provident Housing Limited, a wholly owned

subsidiary of Puravankara Limited. In the due course, the Issuer Company also informed the Petitioners that it was negotiating with Provident Housing Limited who would take over the project and the Issuer Company would exit the project. During this time, a Memorandum of Understanding was also entered between the Issuer Company and Provident incorporating broad terms of agreement therein. The Petitioners were always informed of the said negotiations; even they were a part of the said negotiations.

- h. Later, by an Order dated 16.04.2018, the Hon'ble Supreme Court directed the Municipal Authorities to consider the applications for sanction of plans notwithstanding certain directions contained in the said Order by the NGT. The same was informed to the Petitioners by the Issuer Company vide its email dated 18.04.2018. However, by an Order dated 26.04.2018, the Hon'ble High Court once again restricted all development/ construction with 100 ft. of the base of a hill and this was intimated by the Issuer Company to the Petitioners vide an email dated 15.08.2018. By the same email, the Issuer Company also informed that the project would be delayed with regard to the timelines of the project due to these *force majeure* circumstances. But, the Issuer Company was hopeful of the deal with Provident so it entered into a Supplementary Memorandum of Understanding with the Provident incorporating changes of plans and updated about it to the Petitioners as well. By the same email dated 15.08.2018, the Issuer Company shared with the Petitioners a draft Joint Development Agreement to be executed between the Provident, PKR and the Issuer Company.
- i. Thereafter, by a further email dated 27.09.2018, the Issuer Company informed the Petitioners that most of the buildings in the approved plan of the project as passed in the year 2016

could not be constructed due to the said Order passed by the Hon'ble Bombay High Court. It was also informed by the Issuer Company that the master layout of the project had to be altered to ensure that the buildings which had been previously sanctioned were moved away from the buffer zone so that the same could be re-approved. The Issuer Company also attached the tentative master layout for the urgent approval of the Petitioners in the same email. The Petitioners, through their reply email dated 27.09.2018, stated that they were in agreement with the change in the layout plan so as to enable repayment to them.

- j. During all this time, the Issuer Company was negotiating with Provident to finalize a business plan. While the negotiations were going on, the Petitioners issued an Event of Default Notice on 2<sup>nd</sup> January 2019, to the Issuer Company, its Promoters, PRA and the Corporate Debtor calling upon to repay the debenture outstandings of Rs. 32,15,34,305/- payable as on 31.12.2018. The said notice was issued on the basis that the project activities had stopped even after knowing the above mentioned facts and *force majeure* situation. Subsequently, another Event of Default Notice dated 21.02.2019 was issued to the Issuer Company, its Promoters, PRA and the Corporate Debtor. In pursuant to it, the Issuer Company transferred a sum of Rs. 80,32,506/- on 14.03.2019 to the Petitioners.
- k. Thereafter, the Debenture Trustee issued a Demand Certificate dated 14.05.2019 under the said Debenture Trust Deed to the Corporate Debtor invoking the said Guarantee Agreement dated 06.10.2016 and calling upon the Corporate Debtor to pay an amount of Rs. 37,51,64,939/- to the Petitioners. While the Petitioners were issuing the Demand Certificates, they were also in continuous negotiations with the Issuer Company and Provident as also attending meetings and conference calls with

Provident. The Issuer Company, by its email dated 18.06.2019, informed the Petitioners that an initial Joint Development Agreement had been signed by the Issuer Company and the Provident and neither of them were in a position to back out of the deal. In pursuance of the same, by an appeal dated 24.06.2019, modified plans were submitted by the Issuer Company to the Urban Development Department of the State of Maharashtra and the said appeal is pending.

- I. In November 2019, the Issuer Company, the Petitioners and Provident had a meeting in Bangalore to discuss the pending issues. At this time, the representatives of the Petitioners had assured the issuer Company that they would co-operate with the Issuer Company and Provident to see through this deal. However, the Petitioners proceeded to file the present Petition.

12. The Counsel for the Corporate Debtor submits that the said NCDs are not due and payable as on date. As per the said Debenture Trust Deed, the tenure of the said NCDs end only on 30.09.2020 and 30.09.2021 and these are redeemable not later than the above mentioned dates. Thus, the said NCDs are not to be paid as on date in view of the above fact and the Petitioners can initiate any action either through the Debenture Trustee and/ or themselves only after 30.09.2021 when the said NCDs become due and payable. It is submitted that the Petitioners are seeking to invoke the guarantee against the Corporate Debtor under the said Guarantee Agreement dated 06.10.2016 which was pertinently entered between the Corporate Debtor and the Debenture Trustee whereas the Petitioners were not parties to the said Agreement. The Petitioners cannot seek to invoke an Agreement which it was not even party to. Even the Demand Certificate under the said Guarantee Agreement was issued by the Debenture Trustee and not by the Petitioners. In view of the same, the Petitioners do not have any locus to file the present Petition and hence, it is not maintainable.

Rejoinder filed by the Petitioners:

13. The Counsel for the Petitioners submits that the present Petition is maintainable as the Corporate Debtor did not deny the execution of the Irrevocable and Unconditional Deed of Guarantee dated 06.10.2016. Also, the Corporate Debtor has not denied that the said Deed of Guarantee had been invoked in accordance with the terms and conditions stipulated therein. The Corporate Debtor did not even deny the amount in default. The Corporate Debtor itself admitted that there was a delay by the Issuer Company in servicing the interest of the said debentures by the Issuer Company for which the Corporate Debtor is a Corporate Guarantor and therefore, the Corporate Debtor is liable for the financial debt owed to the Petitioners.

14. The Counsel for the Petitioners submits that the Debenture Trustee had been appointed by the Issuer Company only for the benefit of the Petitioners in order to secure the payment and other obligations of the Issuer Company. The Debenture Trust Deed itself records that the Debenture Trustee had been appointed only to facilitate the process of issuance of debentures and it cannot be stated that the Petitioners who are Debenture Holders can only initiate proceedings through the Debenture Trustee. The Petitioners being the Financial Creditors of the Issuer Company are entitled to file the preset Petition against the Corporate Debtor which is also the Corporate Guarantor for the amount loaned by way of subscription of NCDs.

15. It is further submitted that the Petitioner Companies had made timely payments towards the issuance of the NCDs and the same has not ever been disputed by the Corporate Debtor and/ or the Issuer Company. With respect to the allegation of delay in disbursement of the PM fees by the Petitioners, it is submitted that the disbursement of the PM fees was subject to Clause 8.8.6 of the Debenture Trust Deed as per which the payment of the PM fees was subject to actual cost incurred in the Project so it is denied that the said PM fees were not contingent on any work being

carried out on the said property.

16. It is further submitted that there was no *force majeure* condition affecting the Project and in any case, the same was not a ground for delaying payment of monies towards the debentures to the Petitioners as per the Debenture Trust Deed. The Issuer Company itself made a part payment of Rs. 80,32,506/- towards the debentures and therefore, admitting its liability to the Petitioners. Neither the Debenture Trust Deed nor the Deed of Corporate Guarantee provide for extension of time in case of a *force majeure* condition. Also, the NGT Order dated 19.05.2015 was much prior to the Debenture Trust Deed dated 06.10.2016 so there was no impossibility in completing the Project. As per the Debenture trust Deed, in case there was any Order issued by any Court of competent jurisdiction affecting the Project, then the same would constitute an Event of Default under the Debenture Trust Deed and result in the redemption of the NCDs. Moreover, if there was any inability to proceed with the Project then the same would also constitute an Event of Default which is given under Clause 17 of the Debenture Trust Deed. This Clause 17 clearly envisages the fact in which if there is any legal restrain put in place by a court of competent jurisdiction then the same leads to the impairing of the Project. Now at this stage, when monies are to be paid to the Petitioners, the Corporate Debtor cannot make a plea that the Project suffered from *force majeure* and resultantly, the payments to the Petitioners have been delayed.

17. The Counsel for the Petitioners submits that the allegation by the Corporate Debtor that the present proceedings are premature as the Debenture Trust Deed provided the final settlement date for the redemption of the said NCDs to be 30.09.2021 is wrong. It is submitted that the Debenture Trust Deed provided for payment of principal and interest commencing June, 2018 and there was a default with respect to the same on the part of the Issuer Company and the Corporate Debtor. Clause 8.9 of the Debenture Trust Deed provided for the "Premature Redemption" of the debentures on Event of Default and in such scenario, the Petitioners were

entitled to recover the money paid towards the NCDs. In the present case, the Event of Default occurred prior to the issuance of the Event of Default notice and the Petitioners had served the Event of Default notice on the Corporate Debtor and the Issuer Company only on 02.01.2019 and therefore, the Petitioners were entitled to redeem the NCDs as per the terms of Clause 8.9 of the Debenture Trust Deed. The Debenture Trust Deed also provided the consequences of Event of Default under Clause 18 and provided that in case there was any Event of Default in the view of the Petitioners then in such a scenario, the Corporate Debtor and the Issuer Company were forthwith liable to pay the amounts towards outstanding NCDs, including accrued interest, outstanding principal amount and default interest.

18. It is submitted that the Petitioners had at no point of time had by their conduct, impliedly waived off the breaches that were committed by the Issuer Company. As per Clause 34 of the Debenture Trust Deed, no waiver could be valid and/ or binding unless it was made in writing and was duly executed by duly authorized representatives of the parties. It is then submitted that no such waiver was given in writing by the Debenture Trustee on behalf of the Petitioners and therefore, there could not be any waiver of the breaches that were committed by the Issuer Company.

Reply filed by the Corporate Debtor to the Rejoinder:

19. The Counsel for the Corporate Debtor submits that even after filing the present Petition, the parties have had various meetings and telephone conferences to resolve issues arising in the present Petition. During these meetings, the Issuer Company and Provident reassured the Petitioners that the Joint Development Agreement between the Issuer Company and Provident has been initialed and is awaiting sanction of plans from the concerned authorities. The Issuer Company has on several occasions indicated to the Petitioners that the issues arising in the present Petition would be resolved if the said transactions between the Issuer Company and

Provident is successfully completed. In the last 12 months, the Petitioners had requested further comfort from the Provident regarding the transaction with the Issuer Company. The Issuer Company had accordingly arranged such meetings/ calls where Provident had reassured the Petitioners that Provident will continue the transaction with the Issuer Company and that Provident was only waiting for the buildings plans to be sanctioned by the authorities. Even the building plans are ready, and the Issuer Company is now awaiting the layout sanction approval from the Pune Municipal Corporation in order to be able to submit the final building plans for approval.

20. The Issuer Company had also offered various options for settlement of the issues in the present Petition, one of them about a private investor who is desirous of investing monies in the Issuer Company which would assist in getting the Petitioners out of the current transaction. The Petitioners had initially rejected the proposals. Subsequently, the Issuer Company and Petitioners have had further discussions pursuant to which the Petitioners have requested for a meeting with the private investor. The Issuer Company had arranged for a meeting in March, 2020. However, the meeting could not happen due to Covid-19. Subsequently, another private investor has expressed its willingness and the Issuer Company is in talks with the said private investor to invest in the Issuer Company. The Issuer Company is willing to setup a meeting with the Petitioners once the ongoing Covid-19 situation in Maharashtra is under control.

Findings:

21. The Counsel for the Petitioners submits that Reliance Capital AIF Trust (through its trustee and AMC) is a SEBI registered Alternate Investment Fund (AIF). Petitioner No. 1, Reliance AIF Management Company Limited, is the investment manager of Reliance Capital AIF Trust. Petitioner No. 2, i.e., Reliance Nippon Life Asset Management Limited is a SEBI registered Asset Management Company. The Corporate Debtor,

Bharucha & Motivala Infrastructure Private Limited is a part of PRA group of Companies. Its sister concerns, Lake District Realty Private Limited (LDR) and Pune Kondhwa Realty Private Limited (PKR) are engaged in the real estate project. The Debenture Trust Deed is executed between LDR and the Debenture Trustee. The Deed is for the issuance of 20,000 secured, unrated, redeemable, non-convertible debentures (NCDs) of Rs.20,000 each on a private placement basis issued in series in tranches pursuant to the Debenture Trust Deed of 06.10.2016. The Petitioners are debenture holders where the Petitioner No. 1 holds 13,625 NCDs and applicant No. 2 holds 1,000 NCDs.

22. The Bench also notes that the total sum of Rs.29.25 Crores was disbursed to LDR by the NCD holders. In return an interest payment of about Rs.6.99 Crores was made by LDR. The Bench further notes that LDR defaulted in its obligation to make repayment of the principal amount 30.06.2018. A demand certificate was issued under the guarantee for a sum of about Rs. 37.51 Crores to the Corporate Debtor on 14.05.2019. The Financial Creditor mentions that in accordance with the terms and conditions of the Deed of Guarantee, the Corporate Debtor was to pay the outstanding amount by 01<sup>st</sup> June 2019 and thereby triggering the default.

23. The Corporate Debtor is a party to the Debenture Trust Deed in its capacity as a security provider/ co-obligor and surety to that. Along with the Issuer Company, i.e., LDR, the Corporate Debtor is jointly and severally liable to repay all outstanding amounts under the NCDs. Under the terms of the Debenture Trust Deed, the Corporate Debtor agreed to make payments to the debenture holders by way of issue of an unconditional, irrevocable Corporate Guarantee. The Bench notes that as per Clause 2 of the Corporate Guarantee dated 06.10.2016, the Corporate Debtor is not only liable as a surety but also as a primary obligor. As per Clause 2 of the Deed of Guarantee, the obligation on part of the Corporate Debtor is unconditional and irrevocable. Further, the Corporate Debtor is liable as if it is the Principal Debtor under the Debenture Trust Deed as per Clause 16 of

the Deed of Guarantee. Also, as per Clause 20 of the Deed of Guarantee, the Corporate Debtor is liable to pay, irrespective of any dispute between LDR, the Corporate Debtor and the Debenture Holders.

24. The Bench notes that the Debenture Trustee is duly registered with the RoC and certification of charge has been annexed in the Petition. A Bank statement reflecting disbursement of monies has also been annexed in the Petition. We note that Corporate Debtor has not denied the execution of the trust deed or the deed of guarantee. It is also not disputed by the Corporate Debtor regarding the monies disbursed and the quantum of debt due and computation of interest.

25. The Corporate Debtor had raised basically four defenses. The defenses raised by the Corporate Debtor, the response of the Petitioner on the same and findings of the Bench are as under:-

25.1. The Bench notes that the Corporate Debtor had contended that the Petitioners are only holders of the NCDs and are not parties to the debenture trust deed and therefore the debenture holders do not have any locus to file the present Petition as only debenture trustee can file the present Petition. The Bench finds this argument taken by the Corporate Debtor to be untenable as it is a fact that the Debenture Trustee is for the convenience of the Debenture Holders and their benefit. It is for this reason that the Debenture Trustee is only an agent of the Debenture Holders. The presence of a Trustee in no way limits or erases any right of the debenture holders under any circumstances. In this regard, the Petitioners mention Clause 18.1 of the Debenture Trust Deed which mentions as under:-

*"Without prejudice to the rights and remedies of Debenture Holders under Applicable Law, upon occurrence of any of the Event of Default which has not been cured within the Cure Period, the Debenture Trustee shall if so directed by the Majority*

*Debenture Holders, be entitled to exercise any of the following rights."*

The Financial Creditor has brought to the attention of the Bench an analogous case *Bennet Property Holdings Company Limited v. Brick Eagle Affordable Housing* where NCLT upheld the locus of the debenture holder to file an Application under Section 7 of the Code. The relevant paragraphs of the said Judgment are reproduced below:

*"14. The counsel for the Corporate Debtor further contended that the petition is not maintainable pursuant to the execution of the Debenture Trust Deed dated 26/03/2015 and the Deed of Guarantee dated 27/03/2015 wherein IL&FS was solely authorised to invoke corporate guarantee, whereas the present petition is filed by the petitioner for which there is no privity of contract between the petitioner and the Corporate Debtor and in absence of it, the contract cannot be enforced by any third party.*

*26. The next contention by the counsel for the Corporate Debtor is that the petition is not maintainable because the Debenture Trust Deed dated 26/03/2015 and the Deed of Guarantee dated 27/03/2015 authorises IL&FS to invoke corporate guarantee, whereas the present petition is filed by the petitioner for which there is no privity of contract and in absence of it, the contract cannot be enforced by any third party. This contention does not stand because clause 18.2.1 of the Debenture Subscription Agreement clearly entitles the petitioner to exercise rights upon the occurrence of an event of default, being, inter alia, accelerating the redemption of the debentures, enforcing the security documents."*

Therefore, the ground taken by the Corporate Debtor that only the

debenture trustee can file the Petition under the Debenture Trust Deed is not tenable.

25.2. 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 monies 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 dated 19.05.2015 of the Hon'ble National Green Tribunal (NGT). The Bench notes that taking shelter under the Orders of 19.05.2015 is improper on part of the Corporate Debtor as this Order was in existence at the time of execution of the Debenture Trust Deed dated 06.10.2016. Therefore, the Corporate Debtor was while executing the Debenture Trust Deed and Guarantee was fully aware of the implication of the said Order and therefore, cannot rely on a pre-existing limitation as a *force majeure* condition. In addition, the Corporate Debtor had no right to raise any dispute as its obligation towards honoring the payment obligation was "unconditional". The Bench notes that not to proceed with the construction work for any reason whatsoever it may be, triggers the Petitioner's right to invoke Guarantee as per the Deed of Guarantee. In this regard, Para 17.1.32 of the Deed of Guarantee is reproduced below:

*"17.1.32 Inability to proceed with the Project due to termination of any material contract or for any other reason."*

The Bench is also of the view that *force majeure* is not an inherent right available with 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 being there as a part of the contract.

25.3. The Corporate Debtor also mentions that the Petitioners had breached the Debenture Trust Deed by refusing to disburse the Project

Management Fees (PM) and, therefore, since the Petitioner has breached the terms of Debenture Trust Deed, the Corporate Debtor is not liable to pay. The Petitioners in response mention that there was no obligation on its part to make payments towards Project Management Fees (PM) as, under the Debenture Trust Deed, PM fees was only payable if the actual expenses were being incurred. Petitioners mention that it is undisputed between January 2017 to May 2017, the project had come to a complete halt, therefore, to spend Rs.40 lakh a month to manage a project where no construction was going on is untenable. In this regard, the Bench would like to refer to Clause 8.8 of the Debenture Trust Deed which is as under:-

*"8.8 Mandatory Prepayment*

...

*8.8.6 It is further clarified that the surplus in the Project Escrow Account to be utilized by the Company in accordance with Clause 8.8.2 shall be released in the following manner:*

....

*(iii) For payments to be made to PRA Realty/ Company towards Project Management Fees which shall not exceed Rs. 60,00,000/- per month inclusive of service tax and or any other government taxes/ charges ("PM Fees"), **the payment/ reimbursement will be made on actual cost/ expense incurred for the Project** from the Project Escrow Account on instructions of the Trustee, acting upon instructions from the Debenture Holders.*

...

*(emphasis supplied)"*

Therefore, it is clear to the Bench that payment of PM fees to the Issuer Company was subject to actual cost or expenses incurred. Therefore, since no actual work was carried out it was correct not to pay payment towards the PM fees from the Project's Escrow Account. The Bench also

would like to mention that in the present Petition the Corporate Debtor is a Guarantor in unconditional and irrevocable Deed of Guarantee and, therefore, as long as the Deed of Guarantee is in accordance with procedure prescribed, no dispute can be raised by the Corporate Debtor.

25.4. The Corporate Debtor has also taken a view that the NCDs are not due and payable. He mentions that as per the Debenture Trust Deed the tenure of the NCDs ends only on 30.09.2020 and 30.09.2021 respectively and that the NCDs can be redeemable only after these dates. In this regard, the Bench notes that vide Para 18 of the Debenture Trust Deed provides for 'Event of Default' and consequences falling out of an 'Event of Default'. The relevant portion of Para 18 is as under:-

**“18 CONSEQUENCES OF AN EVENT OF DEFAULT**

*18.1 Without prejudice to the rights and remedies of the Debenture Holders under Applicable Law, upon occurrence of any of the Event of Default which has not been cured within the Cure Period, the Debenture Trustee shall if so directed by the Majority Debenture Holders, be entitled to exercise any of the following rights:*

*(a) call upon the Company to forthwith redeem and/or the other Security Providers to forthwith purchase all the outstanding NCDs and in such a case the Company will be liable to redeem and/or the other Security Providers will be, jointly and severally, liable to purchase and pay the Debenture Holders the following amounts:*

*(i) The accrued and unpaid Interest;*

*(ii) The outstanding principal amount of the NCDs along with the Redemption Premium;*

*(iii) Default interest at the rate of 2% (two percent) per month (compounded on monthly basis), on the entire Debenture Outstandings (“Default Interest”) from the date of occurrence on the Event of Default till the time such payment is actually made to the satisfaction of the Trustee (acting on the instructions of the Majority Debenture Holders), which will be in addition to the Interest payable on the amounts determined as per Clause 18.1 (a) (i) and (ii) above which will also continue to accrue on the amounts determined as per Clauses 18.1(a) (i) and (ii) above. It is hereby clarified that the Default Interest shall not be taken into account to arrive at the Redemption Premium.*

*(the aggregate of the amounts payable to the Debenture Holder in terms of Clause 18.1 (a) (i) to (iii) above are referred to as “the Default Amounts”)*

*(b) It is clarified that the Debenture Outstandings including the Default Amounts will become due and payable to the Debenture Holders immediately upon occurrence of an Event of Default.*

**(emphasis supplied)**

26. The above default and its consequences clearly provide that non-payment of interest towards outstanding NCDs is an ‘event of default’ and the Debenture Trust Deed recognizes that in case there is an ‘event of default’, the Petitioners/ Debenture Holders are entitled to recover the money paid towards the NCDs. Therefore, the Bench notes that in this case an ‘event of default’ has occurred in terms of Clause 8.8 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 NCDs.

27. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Petitioner as a major constituent for admission of a Petition under Section 7 of the Code. Therefore, the Petition under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-(I), namely:

(I) (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);

(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.

(II) 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.

(III) 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.

(IV) 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.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of the Code.

(VI) That this Bench hereby appoints, Mr. Kedar Parshuram Mulye, having office at 1301, Chaitanya Residency, Jay Prakash Nagar, Road No. 2, Goregaon East, Mumbai, Maharashtra- 400063; having Registration No. IBBI/IPA-001/IP/P-01365/2018-19/12282 as an Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

28. This Bench "**admits**" the Company Petition 4108 of 2019 filed under Section initiating CIRP against the Corporate Debtor. The commencement of the CIRP shall be effective from the date of the Order.

29. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-  
Chandra Bhan Singh  
Member (Technical)

Sd/-  
Suchitra Kanuparthi  
Member (Judicial)