

Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT No.- I

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C.P. (IB) No. 980/MB/2020

BIPIN VAZIRANI,
7, Sumit Apartments,
31 A, Carmichael Road,
Mumbai - 400 026.

... Petitioner/Financial Creditor

Versus

Pebble Bay Developers Private Limited,
at Raheja Chambers,
Linking Road & Main Avenue, Santacruz West,
Mumbai – 400 054

... Respondent/Corporate Debtor

Date of Order: 06.04.2021

CORAM:

Hon'ble Janab Mohammed Ajmal, Member (Judicial)

Hon'ble Shri V. Nallasenapathy, Member (Technical)

Appearance:

For the Petitioner(s): Mr Darshit Dave with Mr Ativ Patel, Advocates i/b
AVP Partners

For the Respondent(s): Mr Karl Tamboly with Mr Areez Gazdar & Ms
Juhi Bahirwani, Advocates i/b Veritas Legal

Per: Janab Mohammed Ajmal, Member (Judicial)

ORDER

This Company Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) seeks initiation of Corporate Insolvency Resolution Process (CIRP) against the Respondent Corporate Debtor alleging default in making payment of a financial debt to the tune of ₹. 7,23,98,459/- (Rupees Seven Crores Twenty Three Lakhs Ninety Eight Thousand Four Hundred Fifty Nine Only).

2. Previously this Petitioner had filed a Petition under Section 7 against the Corporate Debtor in C.P. (IB) No. 3876 of 2018 in this Tribunal claiming default in payment of a sum of ₹. 6,23,98,459.20. The parties entered into a settlement and executed consent terms on 28/02/2019. In view of the Consent Terms, this Tribunal on 04/03/2019 dismissed the said Petition as withdrawn with liberty to file fresh petition in case of breach of the consent terms.
3. The consent terms *inter alia* stipulated the following.

“4. The Corporate Debtor hereby agrees and undertakes that the said amount shall be paid by the Corporate Debtor to the Financial Creditor vide post dated cheques ("PDC") on the due dates mentioned hereunder:

<i>DATE</i>	<i>CHEQUE No</i>	<i>Drawn on</i>	<i>AMOUNT</i>
<i>31-07-2019</i>	<i>001180</i>	<i>HDFC BANK LTD</i>	<i>Rs. 40,00,000/-</i>
<i>31-08-2019</i>	<i>001181</i>	<i>HDFC BANK LTD</i>	<i>Rs. 40,00,000/-</i>
<i>30-09-2019</i>	<i>001182</i>	<i>HDFC BANK LTD</i>	<i>Rs. 40,00,000/-</i>
<i>31-10-2019</i>	<i>001183</i>	<i>HDFC BANK LTD</i>	<i>Rs. 60,00,000/-</i>
<i>30-11-2019</i>	<i>001184</i>	<i>HDFC BANK LTD</i>	<i>Rs. 60,00,000/-</i>
<i>31-12-2019</i>	<i>001185</i>	<i>HDFC BANK LTD</i>	<i>Rs. 80,00,000/-</i>
<i>31-01-2020</i>	<i>001186</i>	<i>HDFC BANK LTD</i>	<i>Rs. 80,00,000/-</i>
<i>31-01-2020</i>	<i>001187</i>	<i>HDFC BANK LTD</i>	<i>Rs. 1,24,35,680/-</i>

A copy of the aforesaid PDCs, duly signed and handed over to the Financial Creditor, have been annexed hereto and marked Exhibit -

[A]. Such PDCs shall be handed over by the Corporate Debtor to the Financial Creditor, upon execution of these Consent Terms.

5. It is hereby agreed by and between the Parties that the aforementioned PDCs shall be presented for payment by the Financial Creditor, only after giving 5 days advance notice in writing to the Corporate Debtor of his intention to do so. After obtaining the express written consent of the Corporate Debtor, the Financial Creditor may proceed to deposit the PDCs with the bank. The Corporate Debtor hereby agrees to provide its written consent within 3 days of receipt of such notice from the Financial Creditor.

6. The Financial Creditor shall give notice to the Corporate Debtor of depositing the PDCs, as stipulated in clause 5 herein above, by way of addressing an email to the Corporate Debtor on the following 3 (Three) email addresses - (i) deepak@theadvantageraheja.com; and (ii) aditya@theadvantageraheja.com; and (iii) shiv@theadvantageraheja.com

7. Similarly, the Corporate Debtor shall give written consent to the Financial Creditor, as stipulated in clause 5 herein above, by way of addressing an email to the Financial Creditor on the following email address - bipin@sovship.net.

8. It is hereby agreed by and between the parties that in the event the Corporate Debtor fails to make payments in the manner / within the time period stipulated in Clause [4] hereinabove, or fails to provide its written consent in the manner stipulated in Clause [5] hereinabove, then the Corporate Debtor shall be entitled to a grace period of 3 (three) months ("grace period") from the date of such PDC.

9. The Corporate Debtor hereby agrees and undertakes that in the event the Corporate Debtor is unable to honour any PDC during the statutory validity period of such PDC (i.e. a period of 3 (three) months from the date of such PDC), the Corporate Debtor shall issue a fresh cheque / PDC, as may be mutually agreed between the Parties, for such outstanding amount within a period of 10 (Ten) days from the date of such expiry.

10. Notwithstanding what has been stated herein above, the Corporate Debtor hereby agrees and undertakes to make payment of the said Amount, being Rs. 5,24,35,680/- (Rupees Five Crore Twenty Four Lakh Thirty Five Thousand Six Hundred and Eighty Only) to the Financial Creditor, in any event, on or before 31st March 2020. In the event the Corporate Debtor fails to make payment of the said Amount on or before 31st March 2020, the Corporate Debtor shall be held to be in breach of these Consent Terms and the Financial Creditor shall be at liberty to initiate any legal proceedings as it deems fit and necessary against the Corporate Debtor.” (Emphasis supplied)

4. The Petition in Form – 1 filed on 30.09.2020 indicated that the Corporate Debtor defaulted in payment of ₹. 7,23,98,459/-. The date of default being 31/07/2019.
5. The Counsel for the Corporate Debtor submits that as per the consent terms, the payment had to be made on or before 31/03/2020 as referred to in Para 10 thereof. Since the date of default is on 31/03/2020, they are entitled for protection under Section 10A of the Code inserted by way of Amendment w.e.f., 05.06.2020. The Petition would thus be not maintainable.
6. Section 10A of the Code reads thus:

“[10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.”
7. Counsel for the Petitioner submits that the first instalment as per the Consent Terms, was due on 31/07/2019. The Corporate Debtor issued the cheque in terms of the Consent Terms. However, vide Email dated 26/07/2019 it

requested the Petitioner (Financial Creditor) not to deposit the cheque as it had not been able to arrange funds. Thus, it has to be held that the default occurred on 31/07/2019.

8. The Petitioner on 28/08/2019, intimated to the Corporate Debtor that the second instalment was due and payable on 31/08/2019. The Corporate Debtor by E-mail dated 30/08/2019 once again requested the Petitioner not to deposit the second instalment cheque, as they were unable to arrange funds. Further the Corporate Debtor requested three months grace period as provided under Clause 8 of the Consent Terms.
9. It is accordingly submitted that the Corporate Debtor with malicious intention of not making the payments, sought excuses. The Petitioner requested the Corporate Debtor to replace the cheques for the month of July and August 2019 with fresh cheques and to adhere to the original repayment schedule as per the Consent Terms.
10. The Petitioner informed the Corporate Debtor that the third instalment was due and payable on 30/09/2019. The Corporate Debtor by an E-mail dated 27/09/2019 again requested the Petitioner not to deposit the Cheque dated 30/09/2019 till further instructions. The Petitioner once again requested the Corporate Debtor to replace the cheques for the month of July and August 2019 at the earliest, else it would be constrained to deposit those Cheques before they expired.
11. The Petitioner *vide* E-mail dated 15/10/2019 requested the Corporate Debtor to take back the three cheques of July, August and September 2019 and to issue replacement cheques. Accordingly, the Corporate Debtor took back those cheques and replaced them with three cheques dated 17/10/2019, in favour of the Petitioner.

12. It is submitted that the Petitioner *vide* email dated 14/01/2020 informed the Corporate Debtor that the validity of the cheques issued on 17/10/2019 towards the instalment of July, August and September 2019 were due to expire, and therefore the Petitioner was depositing those cheques on 15/01/2020 for realisation.
13. Whenever the Petitioner sought the concurrence of the Corporate Debtor for depositing the cheques in the bank for collection, the Corporate Debtor repeatedly stated that they were not in a position to arrange the funds and requested not to deposit those cheques. It also issued fresh cheques in lieu of the old cheques. Thus, the Petitioner despite receiving cheques from the Corporate Debtor, could never deposit any of them. The cheques could not be deposited because of the request made by the Corporate Debtor in terms of the Consent Terms. It is submitted that 31/07/2019 being the due date of the first instalment need to be taken as date of default on failure of the Corporate Debtor to make the payment there against.
14. The Counsel for the Corporate Debtor submits that due to the sudden outbreak of Covid-19 Pandemic, the Central and the State Governments took consequential measures by imposing lockdown all over the country to arrest its spread. Such inevitable action had an adverse impact on all aspects of human life including trade and commerce. Thus, with a view to minimise the impact of the Pandemic on the Corporate entities and to save them from being pushed into insolvency, the amendment on 05/06/2020, was brought about¹.

¹ 1. Inserted by the *Insolvency and Bankruptcy Code (Second Amendment) Act, 2020* dated 05.06.2020 w.e.f 05.06.2020.

2. Further extended for 3 months from 25.09.2020 *vide* Notification No. S.O. 3265(E) dated 24.09.2020 issued by MCA.

Further extended for 3 months from 25.12.2020 *vide* Notification No. S.O. 4638(E) dated 22.12.2020 issued by MCA.

15. In view of the above amendment and the consequential notifications issued by the Ministry of Corporate Affairs, a Petition *inter alia* under section 7 of the Code cannot be filed for the default occurring between 25/03/2020 and 24/03/2021. The Counsel for the Corporate Debtor submits that, the Consent Terms clearly mention that the Corporate Debtor is required to make payment of the sum agreed on or before 31/03/2020. The consent terms clearly demonstrate that the amount due under the consent terms were payable by 31/03/2020 as per clause 10 thereof. Thus, the default has taken place only on 31/03/2020 and hence Petitioner could not have initiated CIRP against the Corporate Debtor.
16. The Counsel for the Corporate Debtor relied on the judgment of the Hon'ble NCLAT in the case of Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Ltd (Company Appeal (AT) (Insolvency) No. 701 of 2020) to buttress his point that in case of default occurring between 25/03/2020 and 24/03/2021, no petition would lie.
17. On hearing the Counsel on either side and upon perusal of the pleadings, following are the observations of this Bench.
 - a) The Corporate Debtor had issued 8 (eight) PDCs to the Petitioner dated 31/07/2019, 31/08/2019, 30/09/2019, 31/10/2019, 30/11/2019, 31/12/2019, 31/01/2020 and 31/01/2020. However, the Petitioner on the request of the Corporate Debtor, had not deposited those cheques for encashment and also has taken replacement cheques on many occasions. Even the replacement cheques were not deposited for realisation.
 - b) Since the replacement cheques were issued by the Corporate Debtor and were accepted by the Petitioner, the contention of the latter that default had taken place on 31/07/2019 does not hold water. In the clause 4 of the Consent Terms it was clearly stated as "*The Corporate Debtor hereby agrees and undertakes that the*

said amount shall be paid by the Corporate Debtor to the Financial Creditor vide postdated cheques ("PDC") on the due dates mentioned hereunder". When the Corporate Debtor issued fresh cheques and they were accepted, the due date also got extended. Besides by its conduct the Petitioner accepted the extension of the due dates. The contention of the Petitioner that the fresh cheques would not extend the date of default would not be helpful.

- c) Even the para 10 of the Consent Terms provides that *"Notwithstanding what has been stated herein above, the Corporate Debtor hereby agrees and undertakes to make payment of the said Amount, being Rs. 5,24,35,680/- (Rupees Five Crore Twenty Four Lakh Thirty Five Thousand Six Hundred and Eighty Only) to the Financial Creditor, in any event, on or before 31st March 2020. In the event the Corporate Debtor fails to make payment of the said amount on or before 31st March 2020, the Corporate Debtor shall be held to be in breach of these Consent Terms and the Financial Creditor shall be at liberty to initiate any legal proceedings as it deems fit and necessary against the Corporate Debtor."* The above stipulation makes it abundantly clear that the payment had to be made on or before on 31/03/2020. (*Emphasis supplied*)
- d) Since it has been categorically covenanted that the payment had to be made on or before 31/03/2020, on failure to do so it would then be held to be in default. The date of default thus has to be construed only as 31/03/2020 and not otherwise. The contention of the Petitioner that the default has occurred on 31/07/2019 cannot be accepted.
- e) Section 3(12) of the Code defines *"default" as non-payment of debt when whole or any part or instalment of the amount of debt*

has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be.”

- f) In view of Section 10A of the Code, no Petition can be filed for the default occurring on or after 25/03/2020. The default in the instant case having occurred after 25/03/2020, this Petition presently would not be maintainable. Hence ordered.

ORDER

The Company Petition be and the same is dismissed on contest. The dismissal however shall not be an impediment for the Petitioner to initiate any proceeding including one under the Code against the Corporate Debtor in accordance with law. No costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Janab Mohammed Ajmal
Member (Judicial)