IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKT BENCH,

KOLKATA

C.P (IB) No.1610/KB/2018

In the matter of

An application 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.

And

In the matter of:

Betoking Limited, A Company incorporated under the laws of Cyprus, having its registered office at 12 Esperidon Street, 4th Floor,1087, Nicosia, Cyprus.

… Financial Creditor

Versus

In the matter of:

Eden Real Estates Private Limited, CIN U45200WB2006PTC111702, having its registered office at 9B, DR. Martin Luther King Sarani, 3rd Floor, West Wing, Kolkata-700016.

…Corporate Debtor

Date of hearing : 22/03/2022

Order Pronounced on : 16/06/2022

Coram:
Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Rakesh Tiku,Sr. Adv.] For the Financial Creditor
2. Mr. Naveen Goel, Adv.]
3. Mr. Rishi Bhatnagar, Adv.]
4. Mr. Nikunj Berlia, Adv.]
5. Ms. Anshu Jain, Adv.]
6. Mr.Mohan Khullar, Adv.]

1. Mr. Jishnu Saha, Sr. Adv.] For the Corporate Debtor
2. Mr. Jishnu Chowdhury, Adv.]
3. Mr. Soumabho Ghose, Adv.]
4. Mr. Ishaan Saha, Adv.]
5. Ms. Riti Basu, Adv.]
6. Mr. Chandrani Das, Adv.]

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition 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 has been filed by **Betoking Limited,** a company incorporated under the laws of Cyprus , having its registered office at 12 Esperidon Street, 4th Floor,1087, Nicosia, Cyprus, through Mr. Surendra Sethi, Authorised Signatory, vide Board Resolution dated 17/09/2018 (Annexure-B), (hereinafter referred to as the Financial Creditor) for seeking initiation of Corporate Insolvency Resolution Process in respect of **Eden Real Estates Private Limited, CIN** U45200WB2006PTC111702, having its registered office at 9B, DR. Martin Luther King Sarani, 3rd Floor, West Wing, Kolkata-700016 (hereinafter referred to as the Corporate Debtor).

3. The Financial Creditor has submitted that the Financial Creditor had subscribed to 29,76,005, 11% Compulsorily Fully Convertible Debenture of Rs.100 each issued by the Corporate Debtor at par and sum of Rs.29,76,00,500/- was paid by the Financial Creditor to the Corporate Debtor. It is submitted that 29,76,005 Compulsorily Fully Convertible Debenture (CFCD) were issued by the Corporate Debtor to the Financial Creditor and on the same, an interest component of 11% was payable to the Financial Creditor. The Financial Creditor has annexed with the petition , copies of the CFCD collectively marked as Annexure F-1. It is submitted that the said CFDS and the interest due thereon constituted a financial debt and the Financial Creditor became a Financial Creditor thereof. As per the terms of the issue of CFCD, interest @ 11% was payable to the Financial Creditor on 31st March of each Financial Year by the Corporate Debtor. The Corporate Debtor has paid interest to the Financial Creditor prior to the Financial Year 2012-2013. The total interest for the period Financial Years 2013-14 till 2017-18 amounts to Rs.16,36,80,275/- which amount has been withheld by the Corporate Debtor and an amount of Rs.4,79,19,812/- has been paid as TDS. It is submitted that a total amount of Rs.11,57,60,463/- is, therefore, due and payable by the Corporate Debtor as on 1st April, 2018 to the Financial Creditor, which has not been paid by the Corporate Debtor to the Financial Creditor.

Copies of the TDS Certificates showing proof of deduction of TDS and deposit thereof on account of the interest are collectively marked as Annexure-F-2. It is submitted that the Financial Creditor sent a letter through its advocate on 5th September, 2018 demanding the repayment of a sum of Rs.11,57,60,463/- from the Corporate Debtor within 10 days from receipt thereof but the Corporate Debtor has not paid any amount to the Financial Creditor till date. The copy of demand letter dated 5th September, 2018 is annexed as Annexure- F-3. It is submitted that the Corporate Debtor on the contrary vide its advocate's letter dated 13th September, 2018, in reply to the letter dated 5th September, 2018 issued by the Financial Creditor, has made various false and misconceived allegations upon the Financial Creditor. The Financial Creditor denied and disputed the contents of the letter dated 13th September, 2018 issued by the Corporate Debtor, stating that they are baseless and afterthought to deny payment of the Financial Creditor. The Reply dated 13th September 2018 to the letter of demand dated 5th September, 2018 is annexed as Annexure- F-4. It is submitted that the Corporate Debtor has committed a default under the IBC Code, 2016.

4. The Financial Creditor further submits that a sum of Rs.11,57,60,463/- is the amount of interest due on the CFCDs for the period 01.04.2013 to 31.03.2018. It is submitted that as per the terms of issued of CFCDs, interest @ 11% was payable on the 31st March of the each year but no interest has been paid since 31.03.2012 and date of default in respect of the CFCDs are as follows:-

    a. 31.03.2012, 31.03.2013, 31.03.2014, 31.03.2015, 31.03.2016, 31.03.2017 & 31.03.2018 when the interest has become due and payable by the corporate debtor to the financial creditor in respect of the CFCDs;
    b. On 05.09.2018 when the Financial Creditor demanded the repayment of interest in respect of the CFCDs and the corporate debtor has failed to repay the same. The details of the computation of amount of default has been annexed as Annexure-G.

5. The Financial Creditor has annexed the Certificate from the Bank of the from the bank of the Financial Creditor evidencing that no payment has been received from the Financial Creditor has been annexed as Annexure-H.

6. It is submitted that in view of the default committed by the Corporate Debtor in

payment of the interest as aforesaid, the Financial Creditor has filed the present petition.

7. On being served with the notice of the Court, the Corporate Debtor has filed its reply affidavit.

8. The Corporate Debtor in its reply affidavit filed through Indranil Bhowmick, the authorized signatory of the Corporate Debtor, has submitted that the application filed by the Financial Creditor is mala fide and misconceived because the Financial Creditor has deliberately suppressed and misrepresented the facts and circumstances deserves to be dismissed.

9. It is submitted that that the Financial Creditor has suppressed the fact that it is a sister concern of Trafalgar Investment (Mauritius) Ltd. The nexus between the Financial Creditor and the Trafalgar Investment Ltd. will be evident from the last balance sheet of the two companies. The relevant extracts whereof are annexed to the reply affidavit as Annexure-A. It is further submitted that it will be clear from the balance sheet of the Financial Creditor for the year ended 31st March, 2013 that Trafalgar Investment (Maruritius) Limited is a related party and it has been admitted in the said balance sheet that Financial Creditor is controlled by Trafalgar Overseas Limited, a company incorporated in Gibraltor which owns 100% of the Company's issued share capital. It is submitted that the balance sheet of the Financial Creditor for year ending 31st March,2014 states that on 17th April, 2013, the shares of the company were transferred from Trafalgar Overseas Investments Limited (Gibraltar) to Middleton Holdings Limited, registered in Gibraltar. It is further submitted that the balance sheet of the Trafalgar Investment (Mauritius) Limited for the year 31st March, 2017 similarly disclosed that the Financial Creditor is related company. The said balance sheet further disclosed that the holding company of Trafalgar Investment (Mauritius) Limited is Middleton Holdings Limited, having its registered office at 57/63, Line Wall Road,Gibraltar. This clearly establishes that Middleton Holdings Limited is the holding company of Betoking Limited as well as Trafalgar Investment (Mauritius) Limited. There is further disclosure in the balance sheet of Betoking Ltd. as on 31.03.2014, of the fact that the Eden Real Estates Private Limited is a subsidiary. On 16th November, 2007 Betoking Limited and Trafalgar Investment(Mauritius) Limited entered into an agreement with one Eden Realty Ventures Private Limited (previously) known as Laxmi Realtors Private Limited)

and others with the object of investing in Eden Real Estates Private Limited, a special purpose vehicle incorporated to develop lands by the said Eden Realty Ventures Private Limited at Mahestala, Budge Budge.A copy of the said agreement entitled shareholders' agreement is annexed as Annexure-B.

10. As will appear from the said shareholders' agreement, the same essentially provided for acquisition of majority shares in Eden Real Estates Private Limited by Betoking Limited and Trafalgar Investment (Mauritius) Limited and the control of the Board of the said company by them. This will appear from the clause of the said agreement which provided for acquisition of 66.67% shares in Eden Real Estates Private Limited by Betoking Limited and Trafalgar Investment (Mauritius) Limited and by the clauses therein providing for their equal representation in the Board of the company, and through the casting vote of the Chairman, being one of the nominee Directors of Betoking Limited and Trafalgar Investment (Mauritius) Limited in its Board.

11. It is submitted that pursuant to and in terms of the shareholders' argument, Betoking and Trafalgar Investment (Mauritius) Limited came to acquire 66.67% shares in Eden Real Estates Private Limited and thereafter went on to acquire further shares in the company, by virtue whereof, they presently own 72% of the total paid up shares of Eden Real Estates Private Limited. In the circumstances, as the majority shareholders of the company and as the persons in control of its Board of Directors, Betoking Limited and Trafalgar Investment (Mauritius) Limited were as such at all material times in absolute control of the company and its affairs.

12. Strangely, despite being the majority shareholders of Eden Real Estates Private Limited and despite being in control of its Board, Betoking Limited and Trafalgar Investment (Mauritius) Limited proceeded to serve a notice on Eden Real Estates Private Limited on 5th September, 2018 under Section 7 of the Insolvency and Bankruptcy Code, 2016, and thereafter on the same date proceeded to cause the resignation of their directors from the Board of the company. While a copy of the said notice served by Betaking Limited on 5th September, 2018 is annexed and marked "C", a copy of the notice served by Trafalgar Investment (Mauritius)Limited on the same date is annexed as Annexure-D, to the reply affidavit.

13. In view of the fact that Betoking Limited and Trafalgar Investment(Mauritius) Limited are related parties, who with a common object entered into the shareholders' agreement, and who are jointly 72% majority shareholders of the company currently, it is evident that the instant application has been filed by the majority shareholders of the company to seek the company's dissolution. This despite the fact that, at all material times, they were in complete control of the company and its affairs, which they surprisingly choose to relinquish by causing the resignation of their directors from the Board on 5th September, 2018.

14. It is submitted that in this context, it is relevant to note that as the majority shareholders of the company and the persons in control of its Board and its affairs, Betoking Limited and Trafalgar Investment (Mauritius) Limited have at all material times controlled all financial decisions of the company, have negotiated with the company's bankers on its behalf, have entered into agreements with the company's bankers as a part of the Board of the Company and have made diverse representations with regard to the company's Mahestala Project to the intending buyers of flats and spaces. In this context, it may be noted that the nominee directors of Betoking Limited and Trafalgar Investment (Mauritius) Limited in the Board of the company were the following:

i) David Cohen
ii) Sushovit Dutt Majumdar

Specimen copies of the documents evidencing their active participation in the affairs of the company, including the company's financial affairs and board minutes are annexed collectively as Annexure-E. Documents evidencing the fact that Betoking Limited and Trafalgar Investment (Mauritius) Limited also sought to sell the flats and spaces in the Mahestala Project of the company by advertising their participation in the same are annexed as Annexure-F.

15. It is submitted that as it will appear from the shareholders' agreement, that Betoking Limited and Trafalgar Investment (Mauritius) Limited initially agreed to invest a sum of US$ 153824.91 equivalent to Rs.66,67,000 in Eden Real Estates Private Limited against allotment 0f 66.67% shares in the company. This will be evident from annual return of the company for the year 2007-08, the relevant extract whereof annexed and marked as Annexure-G.

16. It is submitted that the shareholder's agreement further contemplated that Betoking Limited and Trafalgar Investment (Mauritius) Limited would bring in further funds into the company through the device compulsorily fully convertible debentures (CECDs) of Rs.25,53,16,856/- Accordingly, Betoking Limited subscribed to CFCDs dated 30the April, 2007and 14" August,2007of the value of Rs.25,53,16,856/-which were fully convertible on the expiration of ten years. The said CFCDs matured on 29 April, 2017 and 13th August, 2017. Although upon their maturity Betoking Limited was obliged to convert the said CFCDs into equity, they failed to do so despite the fact that at the time Betoking Limited and Trafalgar Investment (Mauritius} Limited were not only the majority shareholders of the company but were also in complete control of its Board. Subsequently, Betoking Limited had invested a sum of Rs. 4,22,83,700/- against which CFCDs were issued on 23" April, 2009 which are fully convertible on the expiration of 10 years on 22" April,2019.

17. This apart, upon realizing the need for further capital infusion into the company in the year 2016, Trafalgar Investment (Mauritius) Limited invested a further sum of Rs. 83,29,961 against allotment of further shares in the company to it. Trafalgar Investment (Mauritius) Limited also invested Rs. 13,91,70,040/- towards subscription of CFCDs fully convertible on the expiry of 5 to 8 years. At the time a corresponding investment of Rs.2 crore was also made by the other shareholders of the company against allotment of further shares and subscription of CFCDs. It is by consequence of such agreements that the shareholding of Betoking Limited and Trafalgar Investment (Mauritius) Limited in Eden Estates Private Limited stood increased from 66.67% to 72%.

18. It is submitted that without proceeding to convert its CEFDs into equity, despite being obliged to do so, taking advantage of their majority holding and control of its Board, on 7th July,2016 Betoking, Limited caused a letter to be written by the company to the Reserve Bank of India seeking extension of time for converting its CFCDs into equity. In response to the company's said letter dated 7 July,2016, by a letter dated 15" March,2017 the Reserve Bank of India called upon the company to take necessary steps for the purpose of such extension in the manner contemplated under the Companies Act, 2013. While a copy of the letter written by the company to the Reserve Bank of India is annexed hereto and marked 'H', a copy of the Reserve Bank of lndia's reply to the same dated 15

March,201 7is annexed and marked as Annexure-I.

19. It is submitted that although in the circumstances, Betoking Limited and Trafalgar Investment (Mauritius) Limited ought to have caused the company to take steps to obtain requisite extension of time for converting the CFCDs into equity in the manner contemplated by the Companies Act, 2013, they did not take any step in this regard. In the circumstances, the obligation of Betoking Limited to convert the CFCDs which matured on 29 April, 2017 and 13 August, 2017 respectively into equity remained unperformed. It is, however, evident that Betoking Limited and Trafalgar Investment (Mauritius) Limited did not take any steps for converting the said CFCDs into equity of the aggregate value of Rs.25,53,16,856 with a mala fide intent and object of seeking to realize interest on the same, even without being entitled to such interest.

20. As stated hereinabove, the purchase of Mahestala land where the company's project is currently under execution, was negotiated by Laxmi Realtors Private Limited, it later came to be known as Eden Realty Private Limited. It is at that stage that Eden Realty Ventures Private Limited entered into a negotiation with Betoking Limited and Trafalgar Investment (Mauritius) Limited for funding the acquisition of the said Mahestala lands and the development of the said lands by construction of a multi-storied building and spaces thereon. It is upon Betoking Limited and Trafalgar Investment (Mauritius) Limited agreeing to fund and execute the whole project that Eden Real Estates Private Limited was incorporated in terms of the shareholders' agreement, with the shareholding of Betoking Limited and Trafalgar Investment (Mauritius) Limited at 66.67% and the shareholding of the other shareholders, being the shareholders of Eden Realty Ventures Private Limited at 26.33%. As will appear from the financial records of the company, against the initial total investment of Rs. 66,67,000/- made by Trafalgar Investment (Mauritius) Limited and Betoking Limited for acquisition of 66.67% shares in the company and allotment of 25,52,644 no of CFCDs of Rs. 100 each, the total investment of the other shareholders was only Rs.33,32,710/-. This in itself is clear manifestation of the fact that the project was at all material times a project of Betoking Limited and Trafalgar Investment (Mauritius) Limited and that the other shareholders of the company were essentially acting under their instructions and at their instance in the project. It is, however, on the promises and representations made by Betoking Limited and Trafalgar Investment (Mauritius) Limited to the other shareholder of the company, Eden

Infra projects Pvt. Ltd. that they proceeded to invest a further sum ofRs.2 crores in the company in or around FY 2016-17 to 2018-19 against issue of further 1,21,323 no. of equity shares of Rs. 1 O each with premium of Rs. 9 per share along with allotment of 17,69,486 no of CFCDs of Rs. 10/- each in the company to. them. Such investment as made by the other shareholders of the company on the clear promises and representation of Betoking Limited and Trafalgar Investment (Mauritius) Limited that they would ensure due completion of the project, the handing over of flats and other spaces in the multistoried buildings and/or construction at the Mahestala land to the allottees of such flats and spaces and would also ensure repayment of loans and advance received from banks and financial institutions for the same.

21. It is submitted that at the time of investing in the Eden Real Estates Private Limited and consequently in its Mahestala project, both Betoking Limited and Trafalgar Investment (Mauritius) Limited were fully aware of the fact that any return of their investment must await the completion of the project and the generation of revenue from the sale of flats and other spaces thereat. Despite being fully aware of such facts, Betoking Limited and Trafalgar Investment (Mauritius) Limited, however, provided· for payment of interest by the company on the CFCDs subscribed by them, even though they were well and fully aware of the fact that there could be no question of payment of interest against the said CFCDs. In this context it may be relevant to note that apart from the funds infused by the promoters of the company including both Betoking Limited and Trafalgar Investment (Mauritius) Limited, the company also borrowed substantially for the project from banks. In the year 2011-2012 the company obtained a term loan of Rs.25 Cr from the HDFC, under and in terms of a sanction letter dated 14 March, 2011, a copy where of is annexed as Annexure "J".

22. It is submitted that as it will appear from the said sanction letter dated 14th March, 2011, which was signed on behalf of the company pursuant to Board resolution in which the nominee directors of Betoking Limited and Trafalgar Investment (Mauritius) Limited duly participated, the same prohibited the payment of any interest on subsidiary loans which included the CFCDs. As Betoking Limited and Trafalgar Investment (Mauritius) Limited were, however, insistent on payment of interest on CFCDs, to get around such provision in the loan agreement of HDFC Bank Limited, in or around 22" March,2012, hence it

was decided in the board meeting held on 22 nd March~ 2012 that the company should approach HDFC Bank for permission to pay the interest to Betoking Limited and Trafalgar Investment (Mauritius) Limited. However the HDFC Bank did not give such permission hence it was decided that the entire loan amount of the HDFC Bank should be prepaid to enable the company to pay interest to Betoking and Trafalgar Investment (Mauritius) Limited. Copy of the Board resolution dated 22nd March, 2012 is annexed as Annexure-K.

23. It is submitted that although as the primary investors in the company and the persons in actual control of the Mahestala Project, Betoking Limited and Trafalgar Investment (Mauritius) Limited ought to have waited for returns on their investment till the completion of the Mahestala Project, they wrongfully and unlawfully chose to provide for interest on CFCDs by virtue of their majority shareholdings and by exercising control over the Board of the company, Betoking Limited and Trafalgar Investment (Mauritius) Limited despite being fully aware that such investments would earn returns only on the completion of the project. All interest payments caused to be made by the company on the CFCDs subscribed by Betoking Limited and Trafalgar Investment (Mauritius) Limited were as such caused to be made by them in exercise of their control over the company and its Board to wrongly repatriate profits to themselves even without profit being earned.

24. It is submitted that upon resolving to pay back the loans of HDFC Bank Limited, in an attempt to circumvent the prohibition on the payment of interest on any subsidiary loan contained in the sanction letter dated 14th March, 2011, the company under the stewardship of Betoking and Trafalgar Investments obtained a term loan of Rs.29 Crores from Bank of Baroda. A copy of the said sanction letter dated 07th March, 2014 is annexed as Annexure- L.

25. It is submitted that as would appear from the said sanction letter dated 07th March, 2014 executed in favour of the company, even though the same did not contain any express provision on payment of interest on subsidiary loans, the Bank of Baroda required all realization of moneys made by the company against the booking of any flat or space in its Mahestala Project to be deposited in Escrow account maintained with the bank, contrary to the terms of such sanction, by wrongfully exercising their majority control in the company Betoking Limited and Trafalgar Investment (Mauritius) Limited, however, started clandestinely

depositing moneys realized against the booking of flats and spaces at Mahestala Project into a separate bank account maintained with the Bank from which they started paying themselves interest on the CFCDs. Upon discovering such fact the Bank of Baroda, however, threatened to foreclose the loan given to the company, whereupon the Board of the company, acting under the control of Betoking Limited and Trafalgar Investment (Mauritius) Limited once again decided to repay the loan obtained from the Bank of Baroda and to shift the loan account of the company to the Life Insurance Corporation Housing Finance Limited (LICHFL). Relevant Board resolution in connection with the loan obtained from Life Insurance Corporation Housing Finance Limited is annexed as Annexure "M". The transfer of the loans of the Bank of Baroda to the Life Insurance Corporation Housing Finance Limited was made on 5 March, 2018, when admittedly the Board of the company was still under the control of Betoking Limited and Trafalgar Investment (Mauritius) Limited. Although Betoking Limited and Trafalgar Investment (Mauritius) Limited proceeded to cause a resolution to be passed for transfer of the loans from Bank of Baroda to the LICHFL in the expectation that the loan agreement would permit them to appropriate interest against CFCDs from out of the booking amounts for the flats and spaces at Mahestala Project, the loan agreement which ultimately came to be executed between the company and LICHFL on 29.03.2018 provided for a similar restriction. A copy of the said sanction letter dated 05.03.2018 and loan agreement dated 29.03.2018 executed by and between the company and LICHEL are annexed as Annexure N collectively.

26. It is submitted that by virtue of each of the aforementioned agreements entered into by the company, while under the control of Betoking Limited and Trafalgar Investment (Mauritius) Limited, with the HDFC Bank Limited, thereafter with the Bank of Baroda and finally with the LICHFL that no interest could be paid on the subsidiary loans including interest on the CFCDs subscribed by Betoking Limited and thereafter also by Trafalgar Investment (Mauritius) Limited. Betoking Limited and Trafalgar Investment (Mauritius) Limited, as the majority shareholders of the company were at all material times well and fully aware of the prohibitions imposed by the loan agreements entered into with HDFC Bank Limited, Bank of Baroda and LICHFL on payment of interest on the CFCDs. In this context it may be relevant to note that being well and fully aware of the fact that further bank loans would. have to be obtained by the company for its project and that the loan agreements with the banks would

prohibit the payment of interest on subsidiary borrowings including on the CFCDs, as early as on 3" April, 2008 the Board of the company resolved that "dues to debenture holders would be subsidiary to dues to banks/institutions lending funds to the company by way of term loans, which was expected to happen shortly." In contemplation of such position even the shareholders' agreements provided that in the event interest on the CFCDs could not be paid, the same would continue to accrue and would be paid when such payment would be possible without any further accretion of interest thereon. A copy of the board resolution dated 3 April, 2008 is annexed hereto and marked "O".

27. It is submitted that in view of the express provisions in the shareholders' agreement and the resolution passed by the company in its Board meeting held on 3rd April, 2008, each sanction of each loan obtained by the company from the banks mentioned hereinabove had to be approved by its Board of Directors.

28. The aforementioned facts have been clearly suppressed by Betoking Limited in the instant application. This clearly evidences its agreement not to receive any interest on the CRCDs till the repayment of all the bank loans. The instant application has as such been filed contrary to such agreements of Betoking Limited and Trafalgar Investment (Mauritius) Limited and upon suppression of material facts.

29. Notwithstanding the clear provision in the shareholders' agreement, the resolution taken by the company in its Board meeting held on 3" April, 2008 and the further resolutions passed by its Board at the time of sanctioning of each loan from the banks mentioned hereinabove, Betoking Limited and· Trafalgar Investment (Mauritius) Limited, however, by exercising their wrongful control over the Board and by taking advantage of their majority shareholding in the same caused payment of interest to be made on the CFCDs to the extent of Rs.22,97,68,833. The total interest that Betoking Limited and Trafalgar Investment (Mauritius) Limited have caused to be paid on the CFCDs between the financial years 2013-14 to 2014-15 is Rs.22,97,68,833/- including payment of TDS u/s 195 of the Income Tax Act,1961. A chart containing the details of payment of such interest is annexed and marked "P" to the reply affidavit. It will be evident from such chart that such payments of interest have been caused to be made by Betoking Limited and Trafalgar Investment (Mauritius) Limited to themselves, notwithstanding the clear bar in the loan agreements. The payment

of such interest and the claim for further interest on the CFCDs, notwithstanding the clear agreement of Betoking Limited acting through the Board of the company with the Banks and lastly with the LICHFL represent the clear violation of such contracts with the Banks and the LICHFL. As such, apart from the fact that its present claim on account of nonpayment of interest on the CFCDs is clearly wrongful and illegal, the same is also contrary to the agreements on. the part of Betaking Limited that payment of such interest would be subservient to the loans obtained from banks and financial institutions and also to the quistclose truth came to operation in this regard.

30. It is submitted that the TDS payments on which Betoking Limited has relied on in an attempt to establish its entitlement to its claim made in the instant application have been caused to be made by Betoking Limited and Trafalgar Investment (Mauritius) Limited by exercising their wrongful control over the company, such payments have been caused to be made in violation of the provisions of the loan agreements entered into by the company with its banks. In any event, such payments were required to be made as part of the company on its statutory application under the Income Tax Act which requires the tax to be deducted at source on interest payment it accrue, even if such payments are not made.

31. As stated hereinabove, Betaking Limited and Trafalgar Investment(Mauritius) Ltd were the primary investors in the Mahestala Project of the company and had essentially represented, inter alia, to the allottees of flats and other spaces in the said project, which is still under consideration, that they would ensure the due financing of the project, due completion of the same and due delivery of flats and spaces to the allottees thereof, most of whom had paid substantial sums to company. Betoking Limited and Trafalgar Investment (Mauritius) Limited had as such made clear representation to the investing public who invested in the company's Mahestala Project, of their continued involvement with the project and their continued obligation to ensure the completion of the project and to ensure delivery of flats and spaces thereunder to the prospective purchasers thereof. In this context it may be noted that a total of 38 towers were to be constructed in the project out of which 34 towers have been completed and more than 1600 flats/spaces have been delivered and registered in favour of the allottees thereof. The balance four towers with 480 flats are still under construction. Out of the same, bookings have been received by the company for 115 flats/spaces.

Substantial advances have also been received from such bookings. The attempt on the part of Betoking Limited to now have the company declared insolvent is as such an attempt to interfere with the rights of the said 115 allottees, who have already booked flats and have paid substantial advances against the same and an attempt to prevent the company from completing the project that it had undertaken, which was the primary purpose of induction of Betoking Limited and Trafalgar Investment (Mauritius) Limited into the project and the primary purpose of their investment in the same. A schedule containing the details of 115 allottees of flats/spaces in the said four towers under construction, whose rights are sought to be affected by Betoking Limited through the device of the instant application is annexed as Annexure "Q".

32. It is submitted that the instant case is probably the first instance of the absolute majority shareholders of a company in control of its Board of Directors and 'complete control over the management of the company attempting to have the company declared insolvent. The instant application has been filed by Betoking Limited with the full knowledge of the fact that its claim for interest on the CFCDs is contrary to its agreement, not to receive interest on the CFCDs so long as the bank's/institutional loans remain unpaid. Such agreements with the banks/institutions were entered into with the object of ensuring the due completion of the project and due payment to the bank/institution of their debts in preference over any other debt or financial liability of the company. The instant application is as such also a mala fide attempt on the part of the Betoking Limited to prevent the due repayment of the Bank loans obtained by the company.

33. It is submitted that the aforementioned facts and circumstances leave no room for doubt that Betoking Limited has not only suppressed the material and relevant facts but has also proceeded to deliberately misrepresent facts with the object of misleading this Tribunal. Betoking Limited has deliberately suppressed the fact that it had agreed not to receive interest on the CFCDs till such time as all loans obtained by the company from banks or financial institutions are duly repaid. It has suppressed the fact that it had made diverse representations to the prospective allottees of flats/spaces in the Mahestala Project of the company that it would ensure due completion of the project and due delivery of allotted /booked flat/spaces to them. It has suppressed the fact that it had as such agreed not to dissociate itself from the project or to act against the interest of the company which would in any manner put the project in jeopardy. Betoking Limited has

further suppressed the fact that it had, through its shareholding in the company and its representation in its Board made similar representations to the' banks and finally to the (LICHFL).

34. It is submitted that a promoter of a company and its majority shareholders are precluded by the scheme of Insolvency and Bankruptcy Code, 2016 from maintaining application for dissolution of the company under Section 7 thereof. The Scheme of the Code suggests that such application can only be made under Section 10 of the Code. As such, apart from being wrongful, mala fide and harassive, the instant application is also clearly misconceived. As such, the same deserves to be and should be dismissed with costs.

35. It is submitted that it is evident from the petition that the instant application is completely purposeless and that its only purpose is to vex and harass the company, its other promoters and shareholders and consequently to vex, harass and put in jeopardy the interest of various persons who have invested in flats/ spaces in the project of the company at Mahestala. As stated hereinabove, the remaining assets of the company are four towers under construction, i.e. Mahestala Project. No value can be realized from such project unless construction is completed. It is, however, peculiar that Betoking Limited, being a shareholder of the company is seeking to prevent the completion of the same. Betoking Limited and Trafalgar Investment (Mauritius) Limited would be entitled to realize returns on their investments only after completion of the remaining four towers and realizing the value thereof, repaying the bank loans and thereafter distributing the profits. It is, however, surprising that Betoking Limited and Trafalgar Investment (Mauritius) Limited are now deliberately seeking to stop the completion of the project and consequently to stop the only source of revenue of the company. As this cannot be the object of the Insolvency and Bankruptcy Code, 2016, the instant application deserves to be dismissed as deliberately vexatious act done by the promoters of the company against itself, with exemplary costs.

36. It is submitted that as has been stated hereinabove, on the date of service of the notice under Section 7 of the Insolvency and Bankruptcy Code, 2016, Betoking Limited and Trafalgar Investment (Mauritius) Limited both caused their directors of the company to resign from the same. Such resignation of the directors of Betoking Limited and Trafalgar Investment (Mauritius) Limited is clearly wrongful and an attempt to create an artificial deadlock in the affairs of the company.

37. It is submitted that in such circumstances, the other promoters and shareholders including Eden Infra Projects Pvt. Ltd. which holds 26% of the equity share capital of the company have been forced to file an application before this Tribunal, inter alia, under the provisions of Sections 241 and 242 of the Companies Act, 2013 seeking essential reliefs, and an order has also been made on 29th November, 2018 in the said application being C.P.No.1565/KB/2018. Subsequently thereto, Trafalgar Investment (Mauritius) Limited and Betoking Limited preferred an appeal against the order dated 29th November 2018 before the Hon'ble Appellate Tribunal being Company Appeal (AT) No. 15 of 2019. The Hon'ble Appellate Tribunal was pleased to dismiss the same by an order dated 29 January, 2019. A copy of the order dated 29 November, 2018 and 29 January, 2019 passed by this Tribunal and the Hon'ble Appellate Tribunal are annexed annexure R collectively.

38. It is submitted that Betoking Limited and Trafalgar Investment (Mauritius) Limited, as the entities in control of the Board of the company could not have caused resignation of their directors from the Board with the object of filing the instant application. Such resignation of the directors of Betoking Limited and Trafalgar Investment (Mauritius) Limited from the Board of the company is per se wrongful and illegal and must defeat the instant action which is founded on the basis thereof. In this context it may be noted that Betoking Limited and Trafalgar Investment (Mauritius) Limited, as majority shareholders of the company, who under the shareholders' agreement were in control of the Board of the company, cannot now seek to take advantage of the purported wrongs committed by the Board controlled by their own nominees to maintain the instant application. This is clearly in violation of the doctrine of nullus commodumcaperepotest de injuria sua propria, which prevents any person from taking advantage of his own wrong. It is also relevant to note in this regard that the directors who have fiduciary duty to the company and cannot act in breach thereof. For the aforementioned reasons it is denied that there is any debt due and owing by the company to Betoking Limited on account of interest on the CFCDs or otherwise as alleged or at all. There can consequently be no question of Betoking Limited being entitled to maintain the instant application or of seeking the admission of the same before this Tribunal.

39. It is lastly submitted that CECDs are hybrid instruments which cannot have any assured return as per RBI master circular on FDI vide no. 15/2014-15 dated

1st July 2014, a copy of which is annexed hereto and marked "S". As such, investments in CFCDs by Betoking and Trafalgar Investments do not constitute a financial debts as defined in the insolvency and Bankruptcy Code, 2016 as they are not monies disbursed to the companies in consideration for the time value of money. It is therefore stated and respectfully submitted that the instant application is not maintainable under section 7 of the Insolvency and Bankruptcy Code, 2016. The issue of maintainability of the instant application under section 7 of the Insolvency and Bankruptcy Code, 2016 is a question of law.

It is also relevant to note in this regard that Eden Infra projects Private Limited which holds 26% of the equity share capital of the company had also invested in CFCDs in 2016, however, it has not insisted on payment of interest on such CFCD's , in deference to the prohibitions imposed by the loan agreements entered into by the company with HDFC Bank Limited, Bank of Baroda and on payment of interest on the CFCDs.

Such facts clearly reveal the mala fide intent of Betoking and Trafalgar Investments in wrongfully insisting on the premature payment of interest on CFGDs to them prior to the completion of the Maheshtala project, in violation of the said loan agreements. For the reasons mentioned above, it is stated and respectfully submitted that the application deserves to be ·and should be dismissed with costs.

40. The Financial Creditor has filed **rejoinder affidavit** through its authorized signatory stating that the Corporate Debtor and his purported authorized signatory are put to strict proof regarding the contents of this paragraph. It is stated that there have been no valid Board meetings of the respondent company since July, 2018. The purported resolution on which the signatory of the present reply, Mr. Indranil Bhowmick, is only a generic resolution and is specifically authorize him to reply to the present insolvency petition, which is a serious matter and cannot be subsumed under the previous resolution. It would be improper and strange for a person, whose designation is not even specified to represent the Company in such an important matter, more so when the shareholders holding 74% of the voting equity have not approved any resolution authorizing him to file this reply and the Company is being attempted to be hijacked by a 26% shareholder. The entire reply, being unauthorized, is liable to be ignored. It is submitted that Mr. Bhowmick has no authority to receive notices of this matter or

to reply on behalf of the Company.

41. It is submitted that the present Corporate Debtor, Betoking Limited is a bona fide Financial Creditor with respect to the Corporate Debtor within the meaning of the term as ascribed under the Insolvency and Bankruptcy Code, 2016. No material facts have been concealed and there has been no attempt to mislead this Court. The matter is simple and straightforward. Financial dues of the petitioner have not been paid. This has been admitted not only in the annual financial statements of the Company, but also in reply to the legal notice and in the present reply.

42. It is submitted that any relationship between Trafalgar Investment (Mauritius) Limited and Betoking Limited is of no consequence to the present petition and the respondent is only trying to divert the attention of this Court. The only issue before this Tribunal is whether or not financial dues of the petitioner have been paid and admittedly, the respondent company has not paid the interest due on the debentures. Nothing further is required to be established. A corporate entity can be a related party to a shareholder and yet be a financial creditor within the meaning of the Section 4(7) of the Insolvency and Bankruptcy Code. The terms of the SHA are irrelevant for this purpose.

43. It is submitted that only the shareholding percentage are admitted. Mr. Indrajit De is controlling the company in spite of having only 26% shareholding. This is evident from the fact that the present reply is being filed under his instruction only, as the remaining 74% shareholdings have never authorized this reply. It is reasserted that the Corporate Debtor, Betoking Limited is not a shareholder, but only a CFCD holder and is not a participant in any form or manner of the day to day affairs and the management & control of the Corporate Debtor.

44. It is submitted that sending of the legal notice dated 5th September, 2018 is admitted. The alleged resignations of the directors of the respondent is a matter for the directors and has nothing to do with the petitioner as the Financial Creditor is not a shareholder, but only a CFCD holder and is neither aware of nor a participant in any form or manner of the day to day affairs and the management & Control of the Corporate Debtor.

45. It is submitted that the Corporate Debtor is not a shareholder, but is only a

CFCD holder and is neither aware of nor a participant in any form or manner of the day to day affairs and the management & control of the Corporate Debtor. Therefore, any details pertaining to the same and denied for want of knowledge. As per Clause 7.2. " Constitution of Board", specifically 7.2.2. the same has been reproduced below:

> " 7.2.2. For so long as the Investor is a shareholder, Investor shall have the right to nominate, remove and replace in office three (3) Directors. Investor Directors shall not be liable to retire to retire by rotation".

46. It is submitted that the Financial Creditor is not a Shareholder, but a CFCD holder and therefore, the allegations/ averments made in the present, preceding and subsequent paragraphs wrongly stating the status of the Corporate Debtor are wrong and denied. It is specifically submitted that Corporate Debtor has never had any person as director on board of the Corporate Debtor. The contents of document annexed and marked as "F" in the reply of the Corporate Debtor are wrong and denied. The Corporate Debtor is put to strict proof with regards the veracity of the contents. It is denied that the said directors were in control of the Company and the financial decisions were taken by them. In any case, the directors of a company are district from the shareholders and any alleged consent of a nominee director cannot be treated as a consent or permission from the shareholder.

47. It is submitted that the Financial Creditor did not invest in any shares whatsoever of the Corporate Debtor is falsely stated, whereas, the Corporate Debtor was issued 29,76,005 CECDs and a sum of Rs. 29,76,000.500 was paid to the Corporate Debtor. That Betoking Limited and Trafalgar Investment (Mauritius) Limited are two separate legal entities. They are also two individual and separate parties to the SHA dated 16.11.2007. The Corporate Debtor is not a shareholder, but is only a CFCD holder and is neither aware of nor a participant in any form or manner of the day affairs and the management & control of the Corporate Debtor. In any case, even a shareholder could be a corporate debtor and there is no bar under the Code on the Corporate Debtor, who may also be a shareholder from maintaining a petition under section 7 of the Code.

48. It is submitted by the Financial Creditor that the imputations made by the Corporate Debtor are wrong and denied. In any case, the alleged non-conversion cannot and should not in any way prejudice the debt owned with respect to the

preceding years, which forms the basis of this present petition.

49. It is submitted that the fact of sending a letter to RBI for extension of maturity date of CFCDs and RBI's reply is irrelevant for the purposes of the present proceedings. The contents of this paragraph cannot prejudice the debt owed with respect to the preceding years, which forms the basis of this present petition.

50. It is submitted that it is most humbly submitted that, assuming but not admitting, the alleged non-conversion cannot and should not in any way prejudice the debt owed with respect to the preceding years, which forms the basis of this present petition. The alleged reasons for non-conversion are wholly irrelevant and the interest on the CFCDs is admittedly due and has also been acknowledged in the financial statements of the Corporate Debtor.

51. It is submitted that the execution of the SHA is not denied and the detailed examination of the same is not required for the present petition. It is denied that Eden Infra Projects Pvt. Ltd. invested further amounts on the basis of the representations of Betoking and Trafalgar. It is Eden Infra Projects Pvt. Ltd., through Indrajit De that is in control of the Corporate Debtor and all decisions are being taken by him. The Corporate Debtor is not a shareholder, but is only a CFCD holder and is neither aware of nor a participant in any form or manner of the day to day affairs and the management & control of the Corporate Debtor. It is pertinent to note Clause 7.5. "Managing Director", specifically 7.5.1 and the same has been reproduced below:

> "… The Company shall have managing director who, for so long as Laxmi is a Shareholder, shall be a nominee of Laxmi…"

It is submitted that the SHA reflects the above and the same finds no mention in the reply filed by the Corporate Debtor.

52. It is submitted that there was no question of Betoking and Trafalgar being aware that they would have to wait for the completion of the project before any return on their investment. The terms of the issuance of the CFCDs as evidenced in the SHA are clear and binding and the Corporate Debtor cannot try any escape from payment of interests on the ground that it had no money to pay or that there was some off-the-record understanding that the interest was payable only after the project was completed. This is totally incorrect. The Corporate Debtor had also been deducting withholding tax on the interest payments due and depositing that

with the Income Tax Department as can be seen from the TDS certificates filed by the Corporate Debtor. Any alleged borrowings by the Corporate Debtor from other banks were its own doing and can in no way subjugate the rights of the Corporate Debtor. The fact and details of term loan as purported to have taken is denied for want of knowledge.

53. It is submitted that the Financial Creditor is not a shareholder, but is only a CFCD holder and is neither aware of nor a participant in any form or manner of the day to day affairs and the management & control of the Corporate Debtor. The fact of loan, its terms and any correspondence between HDFC and the Corporate Debtor are denied for want of knowledge. It is most humbly submitted that no impediment can be created to repayment of legality owed debt on account of agreements to which the Corporate Debtor is not a party, in any form or manner. It is also pertinent to not that the SHA pre-dates the purported loan agreement and gains precedence over any other purported agreement. Whether or not the alleged loan agreements had approval of the nominee directors of Trafalgar is also not relevant as the Corporate Debtor never agreed or consented to such deferred, or non-payment of interest and any alleged agreement to the contrary by the Corporate Debtor or its directors is of no consequence and is not binding on the Corporate Debtor.

54. It is submitted that the Financial Creditor is not a shareholder, but is only a CFCD holder. Payment of interest on the CFCDs was provided for in the SHA which was negotiated prior to Trafalgar was even holding any shares in the Corporate Debtor. Interest payment, or the liability to pay interest had nothing to do with profits and it was nowhere provided in the SHA or any other document, that interest would be paid only from the profits. If a company is unable to pay interest, it is liable to be wound up. Demands for payment of CFCD interest were made as per SHA as well as the terms of issue of the CFCDs and payment ought to have been made and no question exists regarding waiting for years on end, when the same was not contemplated.

55. It is further submitted that the factum of loan and its terms are denied for want of knowledge. Assuming but not admitting the factum of loan and its terms, the same is an agreement between the Corporate Debtor and HDFC and the same cannot be used to prejudicially affect the legal rights of the Financial Creditor who is not a party to such purported agreement in any form or manner and has never

consented for the interest payment to be deferred. Any decision of the directors of a company qua a loan agreement, cannot affect the contractual rights of the Corporate Debtor.

56. It is submitted that the Financial Creditor has not played any role with respect to purported loan by Bank of Baroda, its terms and acts or omissions done in pursuance thereof. The factum of loan and its terms are denied for want of knowledge. It is most humbly submitted that no impediment can be created to repayment of legally owed debt on account of agreements to which the Financial Creditor is not a party in any form or manner. It is also pertinent to note the SHA pre-dates the purported loan agreement and gains precedence over any other purported agreement. The Corporate Debtor has, for almost a decade, illegally denied the payment of dues to the Financial Creditor. The factum, the signing and terms of the purported loan agreement with LICHFL are denied for want of knowledge and in any case, the same cannot be a legitimate excuse for the non payment of the admitted interest dues to the Financial Creditor and hence the present petition deserves to be allowed.

57. It is submitted that the factum of loan obtained from LICHFL and its terms are denied for want of knowledge. It is further submitted that Financial Creditor has not played any role with respect to purported loan by LICHFL, its terms and acts or omissions done in pursuance thereof and has never consented to the same. It is also pertinent to note the SHA pre-dates the purported loan agreement and gains precedence over any other purported agreement. It is pertinent to note that the language of Clause 5.2 of the SHA rather contemplates immediate payment of interest on CFCDs or at most within one year. The Financial Creditor is deliberately misquoting this clause which permitted deferment only by a year and not perpetually. It is wrong to suggest that a purported internal decision, taken without the express consent of the Financial Creditor, which prejudices the interests of the (Financial Creditor). The alleged concurrence of the Board of the Corporate Debtor to subordinate the interest of the debenture holders, without express consent of the debenture holders is meaningless and of no legal effect. Without prejudice to the above, it is submitted that firstly, any decision by the nominee directors cannot be said to be a decision approved by the shareholder. Trafalgar's nominee directors are distinct from the shareholders and even extending this argument, any decision of Trafalgar (while nothing that in the present case, here was no such consent or decision by Trafalgar) cannot be

binding on the Financial Creditor as the two are separate and distinct legal entities having their own juridical identities.

58. **During the Course of arguments**, the Ld. Counsel for the Financial Creditor submitted that Betoking Limited (Financial Creditor) an entity registered in Cyprus, was issued 29,76,005 Compulsorily Fully Convertible Debentures (CFCDs) for a total sum of Rs. 29.76 crores in Eden Real Estates Pvt. Ltd- Corporate Debtor (EREPL) between 23 March 2007 and 24 Feb 2009. As per the terms of issue of the CFCDs, interest @11% was payable on 31 March of each year. Interest was paid till 31.3.2012 but not after that. CFCDs were to convert to equity shares 10 years after allotment. EREPL had applied to RBI for extension of time to convert CFCDs into shares. Rs.11,57,60,463 is the amount of interest due on the CFCDs until 31.03.2018. However, tax at source was deducted on interest accrued, and paid by the Financial Creditor in each financial year (Annexure F2 pages 34-59 of Betoking's Section 7 Application).

59. It is submitted that CFCDs fall within meaning of "debt" (Section 3(11)) and "financial debt" (Section 5(8) sub-clauses (a), (c) and (f)). Default has occurred for interest due for that financial year on 31 March of each year since 2013. The CFCDs shown in the Balance Sheet of the Corporate Debtor, alongwith interest due, as "Unsecured Loan" (Annex. G page 388 of CD's Affidavit in Reply). Even Shareholders Agreement dated 16.11.2007, Clause 5.2, provides for payment of interest till CFCDs are converted into shares. The claim of the Financial Creditor is well within limitation as the CFCDs have still to be converted and the total interest for the period Financial Years 2013-14, 2014-15, 2015-16,2016-17 and 2017-18 is still due. Interest payment could be deferred for at most 1 year. (Annexure B page 140 of CD's Affidavit in Reply).

60. It is submitted that Section 18 of Limitation Act - "Effect of acknowledgment in writing" is applicable to proceedings under Section 7, IBC. Entries in the Balance Sheet qua the Financial Creditor establishes their acknowledgement of liability in the present case. Also, the Corporate Debtor in its Affidavit in Reply filed again acknowledges this and averments and/or omission therein are specifically covered under Explanation (a) of Section 18.

61. It is submitted that although no notice was required, Financial Creditor issued notice dated 5.09.2018 demanding payment (Annexure F3 page 60-61of

Betoking's Section 7 Application). Corporate Debtor sent reply dated 13.09.2018 (Annexure F4 page 62-66of Betoking's Section 7 Application)wherein it admitted issuance of CFCDs but took the strange plea that "interest was not interest" and was to be only paid out of cash flows. The Corporate Debtor, after receipt of notice dated 5.09.2018, merely as a counterblast and to create the semblance of a dispute, filed company petition CP/1565/KB/2018 seeking to get de facto control of the company while owning around 26% equity. Alleged disputes amongst shareholders of EREPL have nothing to do with the default committed in repayment of financial debt under IBC.

62. That even if claims are disputed, this factor does not affect the admissibility of on an application under Section 7, IBC. (Decision: M/s Innovative Industries Ltd. v. ICICI Bank & Anr. S. No. 13). In its reply, Corporate Debtor admits issuance of CFCDs, admits payment of interest till 2013, admits that TDS has been deducted on interest due event thereafter, but interest has not been paid as there was no cash flow and takes the following defences (case citations with relevant para/pages given after this table):

S. No.	**Defence by Corporate Debtor**	**Petitioner's Response**
1.	Petitioner is majority shareholder/related to shareholder and cannot file petition	Petitioner is not a shareholder. Even shareholder, who is a corporate creditor can maintain petition under section 7 • CIT v. Spencer & Co. Ltd. (S.No.2) • India Power v. Meenakshi Energy (S.No.5) • Shailesh Sangani v. Joel C. (S.No.6)
2.	CFCDs not converted into shares in 10 years	Application was made to RBI for extension of time. Till such time CFCDs converted to shares, obligation to pay interest remains. Default has occurred for interest due even during the 10 years.
3.	Trafalgar Directors participated in management of EREPL.Board resolutions of 2008 show that interest was not to be paid on CFCDs	Betoking is not concerned with internal management of EREPL. Board resolution of 2008 does not say that interest on CFCDs is not to be paid. Interest on CFCDs was paid after 2008. Betoking not bound by Board resolutions of EREPL board. Default in payment of interest has admittedly occurred.
4.	LIC Master prohibits payment of interest on CFCDs and Trafalgar nominee Directors participated in Board meeting approving LIC loan.	Betoking never agreed to waive/defer payment of interest or subordinate it to LIC loan. Directors'action cannot bind Betoking. Subsequent contract with third party cannot amend terms of CFCDs without Betoking's express consent.

5.	RBI Master circular of 2014 prohibits assured returns.	RBI directions are relevant for the purpose of FEMA (which relates to foreign exchange regulations), it cannot change nature of CFCDs, which are clearly debt, to equity. CFCDs, if held by resident Indians, would not be within RBI circular and would be debt. Instrument cannot change from debt to equity based on residential status of holder of instrument. Non-obstante clause in Section 238of IBC in any case overrides any other law. Debentures are clearly loans. Conversion to shares is merely a means of repayment of the loan. • CIT v. Spencer & Co. Ltd. (S.No.2) • Southern Technologies v. JCIT (S.No.3) • Zaheer Mauritius v. DIT (S.No.4) • Shailesh Sangani v. Joel C. (S.No.6) • Neelkanth Township v. Urban Infra (S.No.7) • M/s Brahma Centre v. ITO (S.No.8) • Ganesh Benzoplast v. CIT (S.No.9) • CIT v. Secure Meters (S.No.10)
6.	Loss of investment, etc. of the General Public	Neither the inherent purpose of IBC, 2016 nor, specifically, of an application under section 7. Rather it seeks to save the company and it assets etc. (Interests). • Duncans v. A.J. Agrochem(S.No.1) • Innoventive v. ICICI (S.No.13).

63. During the course of arguments, the Ld. Counsel for the Corporate Debtor submitted that the Financial Creditor's claim on account of unpaid interest against 29,76,005 CFCDs in the Corporate Debtor company issued to the Financial Creditor is not maintainable as it is settled law that the share subscription money does not constitute a financial debt as defined in section 5 (8) of the Insolvency and Bankruptcy Code, 2016. The Ld. Counsel for the Corporate Debtor has referred to and relied upon decision in the case of **ACBC Enterprises –Vs Affinity Beauty Private Limited [(IB)-352(PB)/2017}.**

64. Ld. Counsel further submitted that the present application is fraudulent and has been filed with malicious intent by the controlling entity of the Corporate Debtor. It is submitted that the Financial Creditor through its sister concern holds 72% of the total issued and paid up share capital of the Corporate Debtor and were all along in management and control of the Corporate Debtor. The Corporate Debtor has embarked on a real Estate Project at Mahestala. As the

persons in management and control of the Corporate Debtor at all material times, it is the representatives of the Financial Creditor, who took all management and control commercial decision of the Corporate Debtor and even advertised their involvement of the development project undertaken through Corporate Debtor. Numerous promises and representations have been made by them to the prospective buyers of flats and commercial spaces at the said project, which the Financial Creditor is now attempting to breach by filing the present application.

65. The Financial Creditor is as such a related party of the Corporate Debtor as defined in Section 5(24) of the Code, and by reason thereof as well cannot maintain the instant application.

66. It is submitted that the Financial Creditor caused CFCDs worth Rs. 25,53,16,856/- to be issued to it by the Corporate Debtor on 30th April, 2007 and 14th August, 2007. The maturity dates of such CFCDs were 29th April, 2017 and 14th August, 2017. The FC also caused the Corporate Debtor to issue further CFCDs worth Rs. 4,22,83,700/- to it on 234 April, 2009 with a maturity date of 22nd April, 2019. Although obliged to compulsorily convert the CFCDs at the end of their term, the FC has deliberately not done so. While on the one hand failing to do so, the Financial Creditor has claimed interest on the CFCDs up to 2018. It may be noted in this regard that the Financial Creditor had written to the Reserve Bank of India on 7h July, 2016 seeking an extension of time for conversion of CFCDs into equity shares of the Corporate Debtor. Such request was however refused.

67. The Corporate Debtor had obtained a term loan of Rs.25 crores from the HDFC Bank on 14h March, 2011. As per the sanction letter dated 14th March, 2011 signed by the Corporate Debtor under the stewardship of the Financial Creditor and/or TIML, payment of interest on subsidiary loan including CFCDs was prohibited. The Financial Creditor and/or TIML however caused the Corporate Debtor to act in violation of the prohibition in the sanction letter dated 14h March, 2011 by providing for payment of interest on CFCDs to the FC and TIML. To avoid the prohibition on payment of interest on CFCDs in the sanction letter dated 14h March, 2011, the Financial Creditor and TIML caused the loan account of the Corporate Debtor to be transferred from one bank to another. The loan agreement between the Corporate Debtor and Life Insurance Corporation Housing Finance

Limited that was executed on 9th March, 3 2018, however, provided for a similar restriction on payment of interest on CFCDs.

68. It is submitted that on 3rd April, 2018, the Board of the Corporate Debtor, then under the control of the Financial Creditor and TIML passed a resolution that "dues to debenture holder would be subsidiary to dues to banks/financial institutions". Notwithstanding the restrictions in the loan document and the board resolution of the Corporate Debtor , the Financial Creditor and TIML caused interest on CFCDs amounting to Rs.22,97,68,833/- to be paid to them for the financial years 2013-14 and 2014-15.

69. A CFCD is an equity instrument and cannot be considered a loan. Reference is made to the decision in **IDBI Trusteeship Services Limited -Vs- Hubtown Limited (2015(4) ADR 290}; Sahara India Real Estate Corporation Ltd. & Ors. -Vs.- Securities and Exchange Board of India and Another [2013 (1) SCC l].**

70. The Financial Creditor relied on Section 71(4) of the Companies Act, 2013 to contend that the redemption of CFCDs and conversion into equity shares of the Corporate Debtor was to be subject to payment of interest. Such contention is bereft of any basis in law and is contrary to the shareholders' agreement dated 11th November, 2007. Section 71(8) of the Companies Act, 2013 clearly provides that a company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue. The shareholders' agreement dated 16th November, 2007, the resolution dated 3rd April 2018 passed by the Board of the Corporate Debtor then controlled by the Financial Creditor and TIML as well as the loan agreements executed by the Corporate Debtor all clearly provide that no interest will be payable on the CFCDs until the completion of the project and the payment of interest on CFCDs is made subordinate to the bank's dues.

71. The Financial Creditor's nominees resigned from the Board of the Corporate Debtor on 5th September, 2018. On the same date the Financial Creditor served a notice on the Corporate Debtor under Section 7 of the Code. The Financial Creditor as such clearly attempted to take advantage of its own wrong, which cannot be allowed.

72. The Financial Creditor (FC) claims only the interest payable on Compulsorily Fully Convertible Debentures (CFCDs) issued to it (Part-IV, para 2). The debenture certificates (Petition pages 28 to 33) which were issued on 5th July, 2007, 14 August, 2007 and 23rd April, 2009 have a tenure of ten years. The tenure of each of these debenture certificates is as such admittedly over. Each of the debentures has accordingly matured and has become compulsorily fully convertible. The Financial Creditor, which was at the material point in time in management of the CD company did not, however, take any step in this regard. This notwithstanding the fact that an application made by the FC to the Reserve Bank of India for extension of time to convert the debentures into equity was not accepted (Reply page 401).

73. It is now settled law that CFCD is an equity instrument and cannot be considered a loan. **IDBI Trusteeship Services Limited --Vs- Hubtown Limited [2017 (1) 8CC 568]; Sahara India Real Estate Corporation Limited & Ors. Vs- Securities and Exchange Board of India and Anr. [2013(1) SCC 1].**

74. It is submitted that a claim only on account of interest can in any event not represent a financial debt under Section 5(8) of the IBC. It may be noted in this regard that "financial debt" means debt along with interest. As such, interest by itself, without a demand for the principal, cannot constitute a financial debt. It may be noted in this regard that even according to the Financial Creditor, the debt itself has not become due and has consequently not been claimed. A claim confined only to interest as such cannot form the subject matter of a petition under Section 7 of the Code.

75. It is stated that the application is fraudulent and has been filed with malicious intent by the controlling entity of the Corporate Debtor . It may be noted in this regard that the FC through its sister concern holds 72% of the total issued and paid up share capital of the Corporate Debtor and was at all material times, in management and control of the Corporate Debtor.

76. Although the Financial Creditor has attempted to identify itself as an independent entity, it is evident from the financial reports and statements of the FC that the CD is a subsidiary of the Financial Creditor (Reply pages 39, 65). The financial statement submits that the FC Company is controlled by Trafalgar Overseas Limited, which owns 100% of the Financial Creditor's issued share capital (Reply page 44).

77. It is settled law that the affairs of a company include the affairs of its subsidiary and that a wholly owned subsidiary and holding company have to be treated as a single entity.

a. New Horizons Limited & Ors. -Vs- Union of India & Ors. (1995) 1 SCC 478 (Paras 24, 26,27 to 37)
b. Bajrang Prasad Jalan & Ors. - Vs - Mahabir Prasad Jalan & Ors. AIR 1999 Cal 156 (Para 22 onwards)

78. The financial records of Trafalgar Investment Mauritius Limited also acknowledged that the Corporate Debtor Company is a subsidiary and shows the Financial Creditor to be a related party (pages 111- 114).

79. It is submitted that both the Financial Creditor and the said Trafalgar Investment Mauritius Limited agreed to become the shareholders of the Corporate Debtor Company vide a shareholder agreement dated November 16. 2007 (Reply page 116). The same clearly recognizes that the Corporate Debtor Company has been incorporated for the purpose of executing a Housing Project at Mahestala (Reply page 117). The shareholder agreement further provides for capitalization, management, operation and control of the company (Reply page 120). Moneys were brought in by the Financial Creditor and Trafalgar Investment Mauritius Limited through CFCDs (Reply page 121). The Financial Creditor and Trafalgar Investment Mauritius Limited are described in the shareholders' agreement as investors and were given the right to control the Corporate Debtor Company, inter alia, by appointing Directors (Reply page 123). The purpose of funding is provided in Clause 3 of the agreement (Reply page 131). **Clause 5.1.3 of the agreement provides that if by the end of the term, the investors have not exercised conversion right, the investor's CFCDs shall compulsorily stand converted into underlying shares. Clause 5.3.4 acknowledges that upon conversion of the investors CFCDs and/or underlying shares, the total shareholding of the Financial Creditor and Trafalgar Investment Mauritius Limited would be 94%. Clauses 6 and 7 of the agreement provide for governance of the company by the Financial Creditor and Trafalgar Investment Mauritius Limited (Reply page 141).**

80. It is submitted that at the time of filing of the petition the FC through its sister concern Trafalgar Investment Mauritius Limited held and still holds 72% of the total issued and paid up share capital of the Corporate Debtor . The Directors

appointed by the FC and the said Trafalgar Investment Mauritius Limited were at all material times also in management and control of the Corporate Debtor. The directors of the Financial Creditor and Trafalgar Investment Mauritius Limited, however, all of a sudden resigned from the Board of the Corporate Debtor on 5th September, 2018 obviously to facilitate the filing of the instant application. **This in itself clearly demonstrates that the instant application is fraudulent and merits an enquiry under Section 65 of the IBC. Reference in this regard may be made to *Embassy Properties - 2019 SCC online SC 1942* (paras 51, 52).**

81. It is submitted that a promoter of a company and its majority shareholders are precluded by the scheme of the Code from maintaining an application for dissolution of the company under Section 7 of the Code. The scheme of the Code suggests that such application can only be made under Section 10 of the Code. As such, apart from being wrongful, mala fide and harassive, the instant application is also clearly misconceived. In the circumstances, It is submitted by the Corporate Debtor that the company petition deserves to be dismissed with exemplary cost.

82. Clause 5.2 of the agreement provides that in the event the company is unable to pay any interest accrued on the investors CFCDs in any given year, such unpaid interest shall be paid in the succeeding years together with interest accrued on investors CFCDs during that year. The agreement as such recognized that non-payment of interest on CDCFs will not constitute an event of default.

83. It is submitted that on 3rd April, 2018 the Board of the Corporate Debtor, then under the control of the Financial Creditor and Trafalgar Investment Mauritius Limited passed a resolution that dues to debenture holder would be subsidiary to dues to banks/financial institutions. Notwithstanding the restrictions in the loan document and the Board resolution of the Corporate Debtor, the Financial Creditor and Trafalgar Investment Mauritius Limited caused interest on CFCDs amounting to Rs.22,97,68,833/- to be paid to them as dividend for the financial years 2013-14 and 2014-15.

84. It is submitted that even if there was any right to claim interest, such right has been waived. It is now settled law that a debt may not be due if it is not payable on law or on fact. Consequently, there can be no question of a default in respect of such debt**. Innoventive Industries Limited --Vs- ICICI Bank and**

another reported in (2018) I SCC 407. In the circumstances, the company petition deserves to be dismissed with exemplary costs.

85. **We are astonished to know the pe**culiar facts of this case which called upon this Adjudicating Authority to dig a little deeper and explore whether this is a fit case in which the corporate veil should be pierced to know the real truth.

86. The facts stated by the Corporate Debtor which are not the bald allegations only but are based on valid agreement between the Financial Creditor and the Trafalgar Investment Mauritius Limited, on the one hand and the Corporate Debtor on the other. It would be seen that vide a Shareholder's Agreement dated November 16, 2017, the Financial Creditor herein and Trafalgar Investment Mauritius Limited had agreed to become the shareholders of the Corporate Debtor, which clearly recognizes that the Corporate Debtor herein had been incorporated for the purpose of executing a housing project at Maheshtala. It would be further seen that monies were to be brought in by the Financial Creditor and Trafalgar Investment Mauritius Limited through CFCD. These two entities were described in the shareholder agreements as "Investors" and were given the right to control the Corporate Debtor Company by appointing there own Directors. It is also mentioned in Clause 5.1.3 of the Agreement that *"if by the end of the term the investors have not exercised conversion right, the investor's CFCDs shall compulsorily stand converted into underlying shares"*. It is further mentioned in Clause 5.3.4. that *"upon conversion of the investors CFCDs and/or underlying shares, the total shareholding of the Financial Creditor and Trafalgar Investment Mauritius Limited would be 94%"*. Clauses 6 and 7 of the Agreement "*provide for governance of the company by these two entities".*

87. It is further interesting to note that even at the time of filing of the petition, the Financial Creditor through its sister concern Trafalgar Investment Mauritius Limited held and still holds 72% of the total issued and paid up share capital of the Corporate Debtor. Even the Directors appointed by the Financial Creditor and the Trafalgar Investment Mauritius Limited were at all material times in the management and control of the Corporate Debtor. It is submitted by the Corporate Debtor that the Directors of the Financial Creditor and Trafalgar Investment Mauritius Limited, resigned from the Board of the Corporate Debtor, all of a sudden on 5th September, 2018, obviously to facilitate the filing of the present

application, which would clearly demonstrate that all is not fair and above board at their end.

88. With this backdrop, we would certainly like to see whether the Financial Creditor is really entitled and eligible to move the present petition under section 7 of the Code against the Corporate Debtor. Prima facie it appears to us that all is not well and the Financial Creditor and its sister concern even though claimed to be separate entities but were in actual control of management of the Corporate Debtor. They cannot be allowed to have the cake and eat it too.

89. Under the IBC, a promoter of a company or its majority Shareholders cannot file an application under Section 7 of the Code against the Company and if they wish to dissolve their company they can initiate proceedings under Section 10 of the Code as corporate applicant in the event of a default. Any other application by the promoters or majority Shareholders against the corporate person, to which they belong, shall be a mala fide and harassive action which can be prevented or stalled by this Adjudicating Authority on an application being moved by the minority Shareholders.

90. Coming back to the facts of the case in hand, the Financial Creditor has sought to maintain an application under section 7 of the Code for payment of arrears of interest, against the Corporate Debtor. The Agreement dated 5th September, 2018, Clause 5.2 "Provides that in the event the Company is unable to pay any interest accrued on the investors, CFCDs in any given year, such unpaid interest shall be paid in the succeeding years together with interest accrued on investors CFCDs during that year".

91. A Company or a group of Companies, who are in control of a subsidiary exercising control by way of being majority Shareholders thereof, cannot be allowed to file an application against the said company thereby oppressing minority Shareholders, just for the sake of their own material benefits. In the present case, the Financial Creditor and Trafalgar Investment Mauritius Limited who are investors in the Corporate Debtor holding Compulsorily Fully Convertible Debenture interest bearing 'CFCD', @ 11% p.a. cannot be allowed to violate or ignore the terms of the mutual agreement. These debenture certificate were issued on 5th July, 2007, 14th August, 2007 and 23rd April, 2019 and had a tenure of 10 years and accordingly matured and became Compulsorily Fully Convertible. The

Financial Creditor which was at all material times in management of the Corporate Debtor Company did not take any step to convert the CFCDs into equity shareholding and instead, wrote to the Reserve Bank of India for extension of time to convert the debentures into equity and that request too was not accepted by the Reserve Bank of India. It is strange that a majority shareholder is trying to exploit the minority shareholders by squeezing the blood out of 26% minority shareholders, who are helpless spectators and cannot do anything because the management of the Corporate Debtor has always been in the hands of the Financial Creditor. These minority shareholders hardly have any say before the 74% majority shareholders.

92. It is further incomprehensible that in spite of the resolution passed on 3rd April, 2018, by the Board of the Corporate Debtor, that the dues to the debenture holder would be subsidiary to dues to banks and financial institutions, notwithstanding the restrictions imposed in the loan document and the Board Resolution of the Corporate Debtor, the Financial Creditor and Trafalgar Investment Mauritius Limited caused interest on the CFCDs amounting to Rs.22,97,68,833/- to be paid to them as dividend for the Financial Years 2013-2014 and 2014-2015.

93. Before taking a decision whether this Adjudicating Authority is empowered to do and in what circumstances this Adjudicating Authority or for that matter a Court, must trace out the real person or persons behind a Financial Creditor, who is working from behind the corporate veil and when that corporate veil should be pierced or lifted to expose the real corporate person or natural person controlling or managing the affairs of the Company, and is the beneficial owner of the company's undertaking, and who is exploiting or taking undue advantage of its resources to the detriment of the revenues, the minority shareholders or the public at large. It is also duty bound to decide the issue whether in the given circumstances, it is entitled to maintain a petition under section 7 of the Code against the Corporate Debtor.

94. It would be worthwhile to refer to and discuss a few of the Judgments on the issue passed by the Apex Court and other higher courts. In the case of **State of *U.P. and Others Vs. Renusagar Power Co. and Others (1988) 4 SCC 59***, the Hon'ble Supreme Court observed as under:-

"52. Chandrachud, C.J. relied on aforesaid observations and referred

to Pennington's Company Law, 4th edn. pages 50-51, where it was stated that there were only two cases where the court had disregarded the separate legal entity of a company and that was done because the company was formed or used to facilitate the evasion of legal obligations.

53. The learned editor of Pennington's Company Law, 5th edn., at page 49. has recognised that this principle has been relaxed in subsequent cases. He states that the principle of company's separate legal entity has on the whole been fully applied by the courts since Salomon case'º. Corporate veil has been lifted where the principal question before the court was one of company law, and in some situations where the corporate personality of the company involved was really of secondary importance and the application of the old principle has worked hardship and injustice. In England, there have been only a few cases where the court had disregarded the company's corporate entity and paid attention to where the real control and beneficial ownership of the company's undertaking lay. When it had done this, the court had relied either on a principle of public policy, or on the principle that devices used to perpetrate frauds or evade obligations will be treated as nullities, or on a presumption of agency or trusteeship which at first sight Salomon case" seems to prohibit. Again at page 36 Of the same book, the learned author notes a few cases where the courts have disregarded separate legal entity of a company and investigated the personal qualities of the shareholders or the persons in control of it because there were overriding public interests to be served by doing so.

54. Indubitably, in this case there was no question of evasion of taxes but the manner of treatment of the power plant of Renusagar as the power plant of Hindalco and the government taking full advantage of the same in the case of power cuts and denial of supply of 100 per cent power to Hindalco, in our opinion, underlines the facts and, as such, imply acceptance and waiver of the position that Renusagar was a power plant owned by Hindalco. Shri Trivedi naturally relied on several decisions which we shall briefly note in aid of the submission that Renusagar's power plant could not be' treated as Hindalco's power plant. He referred us to the well known case of Aron Salomon v. A. Salomon & Co. Ltd.'° (at pp. 27, 30-31, 43; 56) to emphasise the distinction between the shareholders and the company. This point of view was emphasised by this Court also by Chandrachud, C.J. in Western Coalfields Ltd. case' relying on Rustom Cavasjee Cooyer v. Union of India", where this Court held that a company registered under the Companies Act was a legal person, separate and distinct from its individual members. Property of the company was not the property of the shareholders. These propositions, in our opinion, do not have any application to the facts of the instant case. Shri Trivedi also drew our attention to the Bank voor Handel en Schee pvaart N.V.V. Slat Jorcl", where in the context of the international law property belonging to or held on behalf of a Hungarian national came up for consideration and the distinction between a share holder and a company was emphasised and highlighted.

55. In Kodak Ltd. v. Clark' , the Court of Appeal in England while dealing with an English company carrying on business in the U. K.

owned 95 per cent of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors etc., of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholders. It was held that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax. Renusagar was not the alter ego of Hindalco, it was submitted. On the other hand these English cases often pierced the veil to serve the real aim of the parties and for public purposes. See in this connection the observations of the Court of Appeal in DHN Food Distributors Ltd.. V. London Borough of Tower Hamlets. It is not necessary to take into account the facts of that case. We may, however, note that in that case the corporate veil was lifted to confer benefit upon a group of companies under the provisions of the Land Compensation Act, 1961 of England. Lord Denning at page 467 of the report has made certain interesting observations which are worth repeating in the context of the instant case. The Master of the Rolls said at page 467 as follows:

Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of General accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book in company law says : 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth & Co. (Wakefield) L,td. v. Caddies. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one, so that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realise that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly.

56. Word Justice Goft proceeded with caution and observed as follows at pages 468 and 469 of the report :

Secondly, on the footing that that is not in itself sufficient, still, in my judgment, this is a case in which one is entitled to look at the realities

of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned ; further, they had no separate business operations whatsoever ; thirdly, in my judgment, the nature of the question involved is highly relevant, namely whether the owners of this business have been disturbed in their possession and enjoyment of it. I find support for this view in a number of cases, from which I would make a few brief citations, first from Harold Holdsworth & Co. (Wakefiled) Ltd. v. Caddies where Lord Reid said : (AII 737-38) PP.737.38)

It was argued that the subsidiary companies were separate legal entities, each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

Mv Lords, in my judgment, this is too technical an argument. This is an agreement in re mercatoria, and it must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Mfg. Co. and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective.

That particular passage, is l think, especially cogent having regard to the fact that counsel for the local authority was constrained to admit that in this case, if they had thought out it soon enough, DHN could, as it were, by moving the pieces on their chess board, have put themselves in a position in which the question would have been wholly unarguable.

I also refer to Scottish Co-operative Wholesale Society y Ltd. v. Meyer'. That was a case tinder Section 210 of the Companies Act, 1948 and Viscount Simonds said : (All ER p. 71)

I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. He said :

In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view.

My third citation is from the judgment of Danckwerts, L . J. in Merchandise Transport Ltd. v. British Transport Commission where he said that the cases — (All ER P. 518)

show that where the character of a company. or the nature of the persons who control it. is a relevant feature, thc court will go

behind the mere s t a t u s of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who d i r e c t and control the activities of a company which is incapable of doing anything without human assistance.

The third ground, which I place last because it is longest, but perhaps ought to come first, is that in my judgment, in truth, DHN were the equitable owners of the property. In order to resolve this matter, it will be necessary fr›r me to refer in some detail to the facts

95. On the question of corporate veil, the Hon'ble Supreme Court in the matter of ***Delhi Development Authority Vs. Skipper Construction Co.(P) Ltd. (1996) 4 SCC 622, the Hon'ble Supreme Court held in paras 24,25,26, 27 and 28,*** *which are as under:-*

" 24. *In Salomon v. Salomon & Co. Ltd.* the House of Lords had observed,*

'The company is at law a different person altogether from the subscribers…., and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act."

Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct". [Gower: *Modem Company Law* – 4th Edn. (1979) at p. 137.] Pennington *(Company Law* – 5th Edn. 1985 at p. 53) also states that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. A Professor of Law, S. Ottolenghi in his article *"From peeping behind the Corporate Veil, to ignoring it completely"* says

"the concept of 'piercing the veil' in the United States is much more developed than in the UK. The motto, which was laid down by Sanborn,and cited since then as the law, is that 'when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons'. The same can be seen in various European jurisdictions."

[(1990) 53 *Modern Law Review* 338]

Indeed, as far back as 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article *"Piercing the veil of corporate entity"* [published in (1912) XII *Columbia Law Review* 496] and summarised their central holding in the following words:

"The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can "The various classes of cases

where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this: When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."

25. In Palmer's *Company Law,* this topic is discussed in Part II of Vol. I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:

"The courts have further shown themselves willing to 'lifting the veil' where the device of incorporation is used for some illegal or improper purpose.... Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere sham' and made an order for specific performance against both the vendor and the company."

Similar views have been expressed by all the commentators on the *Company* Law which we do not think necessary to refer to.

26. The law as stated by Palmer and Gower has been approved by this Court in *TELCO* v. *State of Bihar.* The following passage from the decision is apposite:

"a.. Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented,or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation."

27. In *DHN Food Distributors Ltd.* v. *London Borough of Tower Hamlets* the court of appeal dealt with a group of companies. Lord Denning quoted with approval the statement in *Gower's company Law* that

"there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group".

The learned Master of Rolls observed that "this group is virtually the same as a partnership in which all the three companies are partners". He called it a case of "three in one" — and, alternatively, as "one in three".

28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at

the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created severall corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant 5ingh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family *and* that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.

96. The Hon'ble Supreme Court in another matter in the case of ***Subhra Mukherje and Another Vs. Bharat Coking Coal Ltd. and Others*** **(2000) 3 SCC 312**, Paras 11 & 12,which are as under:-

"11. *Mr. Srivastava submitted that undue emphasis was given to the fact that the Directors of the Company were brothers and the appellants are their wives. He argued that the Company is a separate legal entity which is independent of its Directors and shareholders and repeatedly referred to the oft-quoted decision in Saloriioii v. Salomon. The principle laid down in.Saloriiau case more than a century ago in 1 897 by the House of Lords that the company is at l aw a different person altogether from the subscribers who have limited liabil ity, is the foundation of joint stock company and a basic incidence of incorporation both under English law and Indian law. Lifting the veil of incorporation under statutes and decisions of the courts is an equally settled position of law. This is more readily done under American law. To look at the realities of the situation and to know the real state of affairs behind the facade of the principle of the corporate personality, the courts have pierced the veil of incorporation. Where a transaction of sale of its immovable property by a company in favour of the wives of the Directors is alleged to be sham and collusive, as in the instant case, the court will be justified in piercing the veil of incorporation to ascertain the true nature of the transaction as to who were the real parties to the sale and whether it was genuine and bona fide or whether it was between the husbands and the wives behind the facade of separate entity of the company. That is what was done by the High Court in this case.*

12. There can be no dispute that a person who attacks a transaction as sham bogus and fictitious must prove the same. But a plain reading of Question l discloses that it is in two parts; the first part says, "whether the transaction in question is a bona fide and genuine one" which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge if by proving that it is a sham and fictitious transaction. When the circumstances of the case and the intrinsic evidence record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the court to find out whether the respondent has led anyevidence to show that the transaction is sham, bogus or fictitious."

97. Similarly in the case of ***State of Rajasthan and others Vs. Gotan Lime Stone Khanij Udyog Private Limited (2016) 4 SCC 469 SCC ,Hon'ble Supreme Court in Paras 26 and 27 held as under:-***

> " 26. In *DDA* v. *Skipper Construction Co. (P)* Ltd.*[0], it was observed: (SCC pp. 637-38, paras 24-25)
>
> *" Lifting the corporate veil*
>
> *24.* In *Salomon* v. *Salomon & Co. Ltd.*[19], the House of Lords had observed,
>
> > *''the company is at law a different person altogether from the subscriber….. and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers and the same hands received the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act'.*
>
> Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is *' when the corporate personality is being blatantly used as a cloak for fraud or improper conduct'.* [Gower: *Modern Company Law* – 4th Edn. (1979) at p. 137.] Pennington *Compan y* Lair—5th Edn. 1985 at p. 53) also states that *'where the protection of public interests is of paramount impo rtance or where the compan y has been formed to evade obligations imposed by the law' ,* the court will disregard the *corporate veil. A Professor of Law, S. Ottolenghi in his article 'From Peeping Behind the Corporate Veil, to Ignoring it Completely'says*
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> *"the concept of "piercing the veil" in the United States is much more developed than in the UK. The motto, which was laid down by Sanborn,*
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'The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been brieny reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this: When the conception of corporate entity is employed to defraud creditorsto evade an existing obligation to circum vent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.'

25. In Palmer's Compan y Low, this topic is discussed in Part II of Vol. I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception.It runs:

'The courts have further shown themselves willing to "lifting the veil" where the device of incorporation is used for some illegal or improper purpose... . Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere "sham" and made an order for specific performance against both the vendor and the company.'

Similar views have been expressed by all the commentators on the *Company Law* which we do not think it necessary to refer."

27. It is thus clear that the doctrine of lifting the veil can be invoked if the public interest so requires or if there is allegation of violation of law by using the device of a corporate entity. In the present case, the corporate entity has been used to conceal the real transaction of ransfer of mining lease to a third party for consideration without statutory consent by terming it as two separate transactions—the first of transforming a partnership into a company and the second of sale of entire shareholding to another company. The real transaction is sale of mining lease which is not legally permitted. Thus, the doctrine of lifting the veil has to be applied to give effect to law which is sought to be circumvented.

98. The Hon'ble Supreme Court in the case of ***Ois Advanced Technology Pvt. Ltd. vs. State NCT of Delhi, (2020) SCC Online Del 338, in Paras 25 and 26 held as under:-***

" 25. It is pertinent to note, even otherwise, in a case, if any person incorporated a company and purchased or transferred all properties in the name said company and thereafter leaves the country. However, while staying in abroad, he can operate the company through authorised representatives and enjoy the

proceeds of same. In that eventuality, when 100% shares of the company are with an accused, proceedings under Section 82 & 83 Cr. P.C. can be initiated and executed and in my considered opinion, the property of such company can be attached. The proposition of law as argued by learned senior counsel appearing on behalf of the petitioner is applicable only in cases, where there are different shareholders and company is doing business, but in the present case 90% shares belongs to accused Sanjay Bhandari and 10% to his wife. Thus, it is a private limited company, being run by the same family only but without conducting any business, transactions, only owning properties in the name of the company. Without any business but having property, in that situation, the Trial Court has rightly lifted the corporate veil of the company and accordingly, the applications moved by the petitioner have been dismissed.

26. In the case of *Balwant Rai fiialu)a* (supra), the Constitution Bench of the Hon'ble Supreme Court held that the doctrine of piercing the corporate veil of a company allowed the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham, deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The present case falls under the same circumstances, thus, I find no illegality and perversity in the order passed by the court below".

99. We have also considered the various reported and unreported judgments cited by the Financial Creditor including the following judgments:

i. Duncans Industries Ltd. V. A.J.Agrochem
(Civil Appeal No. 5120 of 2019) (217 Comp Cas 320 (SC)

ii. Commissioner of Wealth Tax v. Spencer & Co. Ltd.
(AIR 1973 SC 2376) (1973 88 ITR 429 SC) (1973) 4 SC 204;

iii. M/s Southern Technologies Ltd. v. Joint Commissioner of Income Tax, Coimbatore,
(Civil Appeal No. 1337 of 2003) (2010) 320 ITR 577)

iv. Zaheer Mauritius V. Director of Income Tax (International Taxation)-II
(Decided on 30.07.2014) (Delhi High Court)
(W.P.C.) 1648 of 2013)

v. India Power Corporation Ltd. v. Meenakshi Energy Ltd. & Ors.
(Company Appeal (AT) (Insolvency) No. 1220 of 2019)

vi. Shailesh Sangani v. Joel Cardoso & Anr.
(Company Appeal (AT) (Insolvency) No. 616 of 2018)

vii. Neelkanth Township and Construction Pvt.Ltd. v. Urban Infrastructure Trustees Ltd.
(Company Appeal (AT) (Insolvency) No. 44 of 2017)

viii. M/s Brahma Center Development v. Income Tax Officer
(ITA No. 373/ DEL/2016)

ix. Ganesh Benzoplast Ltd. v. Assistant Commissioner of Income Tax
(2007) 111 TTJ Mum 385)

x. Commissioner of Income Tax, Udaipur, Rajasthan v. M/s Secure Meters Ltd.
(Special Leave to Appeal/Petition (Civil) No. 10548 of 2009)

xi. Asset Reconstruction Company (India) Limited V. Bishal Jaiswal & Anr.
(Civil Appeal No. 323 of 2021) (2021 (5) SCALE 711)

xii. Dena Bank (now Bank of Baroda) v. C. Shivakumar Reddy & Anr.
(Civil Appeal No. 1650 of 2020) (2021 (9) SCALE 145)

xiii. M/s Innoventive Industries Ltd. v. ICICI Bank & Anr.
(Civil Appeal No. 8337-8338 of 2017) (2018) 1 SCC 407)

100. After going through the facts and circumstances of this case, and the orders of the Hon'ble Supreme Court, and Hno'ble NCLAT we can easily hold that all the facts of the judgments relied upon by the Financial Creditor are quite distinguishable. We do not think any of these judgments would help the Financial Creditor in the peculiar facts of this case.

101. Keeping in mind the various circumstances as discussed in the aforementioned citations, we are of the considered view that it is imperative to pierce the corporate veil in the present case as well, so as to reach the real group of persons or corporate persons who have been managing and controlling the affairs of the Corporate Debtor at their convenience and investing money in the shape of CFCD but controlling

its affairs and fulfilling their aims while at the same time securing their investment by charging interest at the rate of 11 per cent per annum and when it comes to converting their CFCDs in equity investment/shares as had been agreed by them by way of the agreements mentioned above, then postponing the same even in violation of their terms. The financial creditors have been performing dual role in the management of the company and their main aim is to secure their own interest unmindful to the interest of the other creditor of the corporate debtor, including the banks, or even to the minority shareholders. They have also turned their back to the investors in the projects initiated by them or at their behest and have left them in the lurch. This Adjudicating Authority, however, would not be permitting such an illegality and therefore hold that the real persons behind managing the affairs of the Corporate debtor herein were the financial creditor herein, i.e. Betoking Ltd., and Trafalgar Investment (Maruritius) Limited.

102. It is further submitted that the balance sheet of the Trafalgar Investment (Mauritius) Limited for the year 31st March, 2017 similarly disclosed that the Financial Creditor is related company. The said balance sheet further disclosed that the holding company of Trafalgar Investment (Mauritius) Limited is Middleton Holdings Limited, having its registered office at 57/63, Line Wall Road, Gibraltar. This clearly establishes that Middleton Holdings Limited is the holding company of Betoking Limited as well as Trafalgar Investment (Mauritius) Limited. There is further disclosure in the balance sheet of Betoking Ltd. as on 31.03.2014, of the fact that the Eden Real Estates Private Limited is a subsidiary. On 16th November, 2007 Betoking Limited and Trafalgar Investment (Mauritius) Limited entered into an agreement with one Eden Realty Ventures Private Limited (previously) known as Laxmi Realtors Private Limited) and others with the object of investing in Eden Real Estates Private Limited, a special purpose vehicle incorporated to develop lands by the said Eden Realty Ventures Private

Limited at Mahestala, Budge Budge. A copy of the said agreement entitled shareholders' agreement is annexed as Annexure-B.

103. Since the majority shareholders of the company and the persons in control of its Board and its affairs, Betoking Limited and Trafalgar Investment (Mauritius) Limited have at all material times controlled all financial decisions of the company, have negotiated with the company's bankers on its behalf, have entered into agreements with the company's bankers as a part of the Board of the Company and have made diverse representations with regard to the company's Mahestala Project to the intending buyers of flats and spaces, they cannot say that they are only debenture-holders entitled to interest on their investment only.

104. As already discussed above, it would appear from the sanction letter dated 07th March, 2014 executed in favour of the company, even though the same did not contain any express provision on payment of interest on subsidiary loans, the Bank of Baroda had required all realization of moneys made by the company against the booking of any flat or space in its Mahestala Project to be deposited in Escrow account maintained with the bank, contrary to the terms of such sanction, by wrongfully exercising their majority control in the company Betoking Limited and Trafalgar Investment (Mauritius) Limited, however, started clandestinely depositing moneys realized against the booking of flats and spaces at Mahestala Project into a separate bank account maintained with the Bank from which they started paying themselves interest on the CFCDs. Upon discovering such fact the Bank of Baroda, however, threatened to foreclose the loan given to the company, whereupon the Board of the company, acting under the control of Betoking Limited and Trafalgar Investment (Mauritius) Limited once again decided to repay the loan obtained from the Bank of Baroda and to shift the loan account of the company to the Life Insurance Corporation Housing Finance Limited (LICHFL). Relevant Board resolution in connection with the loan obtained from Life Insurance Corporation Housing Finance Limited is

annexed as Annexure "M". The transfer of the loans of the Bank of Baroda to the Life Insurance Corporation Housing Finance Limited was made on 5 March, 2018, when admittedly the Board of the company was still under the control of Betoking Limited and Trafalgar Investment (Mauritius) Limited. Although Betoking Limited and Trafalgar Investment (Mauritius) Limited proceeded to cause a resolution to be passed for transfer of the loans from Bank of Baroda to the LICHFL in the expectation that the loan agreement would permit them to appropriate interest against CFCDs from out of the booking amounts for the flats and spaces at Mahestala Project, the loan agreement which ultimately came to be executed between the company and LICHFL on 29.03.2018 provided for a similar restriction. A copy of the said sanction letter dated 05.03.2018 and loan agreement dated 29.03.2018 executed by and between the company and LICHEL are annexed as Annexure N collectively.

105. It is clear from the above discussions that by virtue of each of the aforementioned agreements entered into by the company, while under the control of Betoking Limited and Trafalgar Investment (Mauritius) Limited, with the HDFC Bank Limited, thereafter with the Bank of Baroda and finally with the LICHFL that no interest could be paid on the subsidiary loans including interest on the CFCDs subscribed by Betoking Limited and thereafter also by Trafalgar Investment (Mauritius) Limited. Betoking Limited and Trafalgar Investment (Mauritius) Limited, as the majority shareholders of the company were at all material times well and fully aware of the prohibitions imposed by the loan agreements entered into with HDFC Bank Limited, Bank of Baroda and LICHFL on payment of interest on the CFCDs. In spite of the fact that further bank loans would have to be obtained by the company for its project and that the loan agreements with the banks would prohibit the payment of interest on subsidiary borrowings including on the CFCDs, as early as on 3" April, 2008 the Board of the company resolved that "dues to debenture holders would be subsidiary to dues to banks/institutions lending funds to the company by way of term loans, which was expected to happen shortly." In contemplation of such position even the shareholders' agreements provided

that in the event interest on the CFCDs could not be paid, the same would continue to accrue and would be paid when such payment would be possible without any further accretion of interest thereon. A copy of the board resolution dated 3 April, 2008 is annexed hereto and marked "O". What is surprising is that the financial creditors and always put their interest over the interest of the company while taking decisions even when being in the majority. It would be like working against the business interest and goodwill of the CD-company slowly leading it to liquidation.

106. We, must therefore mention without any hesitation that the financial creditors had hidden vested interests in the Corporate Debtor and by taking decision against the interest of the company, including demanding the payment of interest on their CFCDs, and on non payment thereof seeking orders of Corporate Insolvency Resolution Process against the Corporate Debtor would be the worst example of betrayal by the majority shareholders with the minority shareholders, which in the circumstances placed before us cannot be allowed.

107. We, thus hold that the real brains working in the Corporate Debtor and taking all material decisions at all relevant times, were **Trafalgar Investment (Maruritius) Limited** is a related party and it has been admitted in the said balance sheet that Financial Creditor is controlled **by Trafalgar Overseas Limited, a company incorporated in Gibraltor** which owns 100% of the Company's issued share capital. It is submitted that the balance sheet of the Financial Creditor for year ending 31st March, 2014 states that on 17th April, 2013**, the shares of the company were transferred from Trafalgar Overseas Investments Limited (Gibraltar) to Middleton Holdings Limited, registered in Gibraltar.** It is further submitted that the balance sheet of the Trafalgar Investment (Mauritius) Limited for the year 31st March, 2017 similarly disclosed that the Financial Creditor is related company. **The said balance sheet further disclosed that the holding company of Trafalgar Investment (Mauritius) Limited is Middleton Holdings Limited, having its registered office at 57/63, Line Wall Road,Gibraltar. This clearly**

establishes that Middleton Holdings Limited is the holding company of Betoking Limited as well as Trafalgar Investment (Mauritius) Limited. There is further disclosure in the balance sheet of Betoking Ltd. as on 31.03.2014, of the fact that the Eden Real Estates Private Limited is a subsidiary.

108. On giving careful thought to the aforesaid facts, pleadings and other documents placed on record by the parties, we do not think that the financial creditors are eligible or entitled to claim the interest outstanding on their CFCDs particularly in the light of the provisions of the agreements between the parties, terms of which have not been adhered to by the financial creditors, particularly in the light of the facts the CFCDs have not been converted on their maturity and interest is being claimed in spite of the fact that the corporate debtor has been availing loans from the various financial institutions.

109. We, therefore, are satisfied that this petition has no merit and is liable to be dismissed. We, therefore, order accordingly.

110. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 16th day of June , 2022

PJ.