IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT- V, MUMBAI BENCH

IA No. 1827 of 2022

IA No. 1896 of 2022

In

C.P. No. 1221/MB/I&B/2021

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

ICICI Prudential Real Estate AIF-I,

A scheme of ICICI Prudential Real Estate AIF Acting through its Investment Manager ICICI Prudential Assest Management Company Limited,

2nd Floor, Block B-2, Nirlon Knowledge Park, Western Express Highway, Goregaon (East), Mumbai - 400063.

....Petitioner/ Financial Creditor

Vs

Gagan I-Land Township Private Limited,

Wellesley Court, CTS No.15B M.G. Road Pune 411001.

.... Corporate Debtor

Date of Conclusion of argument: 14.07.2022

Date of Pronouncement: 27.07.2022

Coram:
Hon'ble Shri. H.V. Subba Rao, Member (Judicial)
Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances *(Via Videoconferencing)*:
For the Petitioner : Mr. Rohan Rajadhaksha, Mr. Ryan Dsouza, Mr. Karl T Tamboly, Mr. Nirav Shah, Mr. Zaid Mansuri Advocate i/b DSK Legal

For the Respondent: Mr. Dev Upadhyay, Mr. Amir Arshiwala, Advocate.

ORDER

1. The Petitioners viz. 'ICICI Prudential Real Estate AIF - I' (hereinafter as **Petitioner**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Petitioner" by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'Gagan – I Land Township Pvt. Ltd.' (hereinafter as '**Corporate Debtor**'). This Petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Present Petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 140,5590,642/-.

3. The Petitioner is established as an irrevocable, determinate Trust under the Trust Act, 1882 vide Indenture of Trust dated May 30, 2014 and the Corporate Debtor is a private limited company incorporated under the

provisions of the Companies Act, 1956. The Corporate Debtor is engaged in the business of real estate development.

4. The brief facts of the Petition are as follows:

(i) The captioned Company Petition has been filed by the Financial Creditor, acting through its investment manager ICICI Prudential Asset Management Company Limited ("**Investment Manager**") under Section 7 of the Insolvency & Bankruptcy Code, 2016 ("**IBC**"). The Investment Manager is empowered to file the captioned Company Petition on behalf of the Financial Creditor under clause 4.2.28 (a) of the Investment Management Agreement dated July 31, 2014 (***Ex. B of the Petition)***. The default committed by the Corporate Debtor is in respect of meeting its obligations of payment of interest and redemption of the debentures subscribed to by the Financial Creditor under the Debenture Subscription Agreement dated August 28, 2017 read along with the Addendum dated August 31, 2017 (collectively "**DSA**"). The amount claimed in default in the captioned Company Petition as on October 31, 2021 is Rs. 140,55,90,642.

(ii) Pursuant to the DSA, the Financial Creditor subscribed to 77,200 secured, unrated, unlisted, non-convertible debentures ("**Debentures**") having face value of Rs. 10,000 each aggregating to Rs. 77,20,00,000 (Rupees Seventy-Seven Crores Twenty Lacs Only) ("**Subscription Amount**"). The Debenture Subscription Agreement was executed between the Corporate Debtor, M/s Gagan Ace Developers, Mr. Vishal Agarwal (**'Promoter 1'**), Mr. Sushil Agarwal (**'Promoter 2'**), Mr. Alnesh Somji (**'Promoter 3'**), Mr. Hanif Somji (**'Promoter 4'**) and the Petitioner. The Promoter 1, Promoter 2, Promoter 3 and Promoter 4 are hereinafter collectively referred to as "**Promoters**". A copy of the

Debenture Subscription Agreement is annexed to the Petition. The DSA was amended by an Addendum dated August 31, 2017 (**"Addendum to DSA"**). A copy of the Addendum to DSA is annexed to the petition. The Debenture Subscription Agreement and the Addendum to the DSA are hereinafter collectively referred to as the **"DSA"**.

(iii) In the requisite Form-1, under the head "Amount in Default" the amount claimed to be in default is Rs. 140,55,90,642/- which was due and payable by the Corporate Debtor to the Petitioner, as per the terms of Debenture Subscription Agreement (hereinafter DSA). The date of first default is stated to be 30.09.2019, as per part IV of the Petition.

(iv) The Corporate Debtor is the owner of land comprising of sub Plot Nos. 262/B admeasuring 3381.118 square meters and 262/C admeasuring 1207.552 square meters, collectively admeasuring 4588.67 square meters out of final plot no. 262 situated in Sangamwadi Town Planning Scheme III, Village Ghorpadi, Taluka Haveli, Pune (**"Property"**) and was to develop a commercial real estate project on the Property.

(v) The Petitioner is currently holding 76,589 Debentures (**"Outstanding Debentures"**) issued by the Corporate Debtor.

(vi) In addition to the aforesaid, the following documents were executed between the parties:

- Debenture Trust Deed dated August 29, 2017
- Supplemental Deed to the Debenture Trust Deed dated September 15, 2017
- Personal Guarantee of the Promoters dated August 28, 2017.

- Pledge of shares of the Corporate Debtor pursuant to the Share Pledge Agreement dated August 28, 2017 and March 16, 2018 executed by the Promoters in favour of the Debenture Trustee.
- Copy of Debenture Subscription Agreement
- Copies of Debenture Certificates issued by the Corporate Debtor to the Petitioner
- Certified copies of the bank statement of the Petitioner showing disbursement by the Petitioner and interim payments by the Corporate Debtor.

(vii) Relying on the representations made by the Corporate Debtor and its Promoters, the Petitioner disbursed the Subscription Amount to the Corporate Debtor in the following manner:

Disbursement Date	**Amount (INR)**
September 01, 2017	67,20,00,000/-
March 20, 2018	10,00,00,000/-

(viii) Pursuant to the DSA, the Corporate Debtor issued the Debenture to the Petitioner. A copy of the MGT-7 (Annual Return) of the Corporate Debtor filed with the Ministry of Corporate Affairs containing to the list of Debenture holders for the financial year ended March 31, 2020, is enclosed to the Petition.

(ix) The obligations of the Corporate Debtor under the DSA were *inter alia* secured by:

a. A personal guarantee furnished by the Promoters of the Corporate Debtor.
b. A pledge over shares of the Corporate Debtor.
c. Mortgage created under Debenture Trust Deed dated August 29, 2017.

d. Additional security created under Supplemental Deed to the Debenture Trust Deed dated September 15, 2017.

(x) As per clause 2.1 of the DSA, the Corporate Debtor was liable to pay interest at the rate of 15% per annum compounded quarterly and payable on the outstanding Subscription Amount. As per clause 2.2 and clause 2.3 of the DSA, the interest payments were to commence on March 31, 2018 and payable on a quarterly basis on the last day of every quarter. Further, in accordance with clause 10.1.3 of the DSA, the Debentures were to be redeemed in such manner so as to achieve a Guaranteed IRR (as defined under the DSA) of 19.5% on the Subscription Amount.

(xi) The Debentures were to be redeemed by the Corporate Debtor on the following dates

Repayment Date	**Repayment Instalment**
August 31, 2020 being the last day of the period of 36 months from the First Tranche Closing Date	1/3rd of the Subscription Amount along with such additional amounts so as to ensure the Subscriber receives the Guaranteed IRR (as defined under the DSA) on such amount
November 30, 2020 being the last day of the period of 39 months from the First Tranche Closing Date	~Same as above~
February 28, 2021 being the last day of the period of 42 months from the First Tranche Closing Date	~Same as above~

(xii) The Subscription Amount was disbursed to the Corporate Debtor in 2 tranches. The First Tranche Closing Date was September 1, 2017 on which date, the Financial Creditor disbursed an amount of Rs. 67.2 Crore. The next disbursement of Rs. 10 Crore was on March 20, 2018.

(xiii) The Corporate Debtor failed to make the interest payment for the quarters ending September 2019 and December 2019. Owing to the aforesaid failure, a notice dated February 3, 2020 (**"Notice 1"**), was issued by ICICI Prudential Asset Management Company Limited (in its capacity as the investment manager of the Petitioner and Portfolio Manager of other subscribers of the debentures issued by the Corporate Debtor pursuant to the DSA) *inter alia* to the Petitioner calling upon the Corporate Debtor to make the payment of the outstanding interest as detailed in the Notice 1 within 30 days of receipt of Notice 1. A copy of the Notice is annexed to the Petition.

(xiv) As stated in Part IV of the Petition, the Corporate Debtor paid sum of Rs. 7,94,228/- on April 03, 2021, towards interest for the quarter ending September 2019. The Corporate Debtor thus failed in meeting its payment obligation in accordance with the Notice 1.

(xv) The Investment Manager (on behalf of the Financial Creditor and certain other debenture holders) issued a default notice dated July 20, 2021 and notified the Corporate Debtor and Personal Guarantors to make payment of an aggregate amount of Rs. 167,03,19,104 (as there were multiple subscribers under the DSA, the amount includes the amounts subscribed to by the Financial Creditor as well as the other subscribers thereunder) in terms of the DSA. The Corporate Debtor did not respond to the aforesaid notice.

(xvi) However, the Corporate Debtor addressed a letter dated September 09, 2021 under which it expressly admitted its liability under the DSA and further admitted to a default in respect of the interest payable for the quarters ending September 2019 and December 2019 amounting to Rs. 7,29,18,444 and further on account of the pandemic sought:

- Capitalisation of outstanding amount of quarterly interest;
- Restructuring of outstanding liability;
- Total waiver on penal interest; and
- Reduction in interest rate to 8%.

(xvii) By a letter dated September 9, 2021, the Corporate Debtor itself has admitted that he has failed to pay Interest for the quarters ending September 2019 and December 2019 thus acknowledging that it has defaulted in servicing its obligations under the DSA. Under the said letter, the Corporate Debtor requested the Petitioner to restructure the debt, capitalise and reduce the interest rate and to waive penal IRR on account of the pandemic. A copy of the letter dated September 9, 2021 is annexed to the Petition.

(xviii) Accordingly, the Petitioner by a letter dated October 01, 2021 responded to the Corporate Debtor and rejected the request of the Corporate Debtor. It may be noted that the Corporate Debtor has failed to meet its payment obligations by making payment of entire Interest since quarter ending September 2019. A copy of the letter dated October 01, 2021 is annexed to the Petition.

(xix) The Debenture Trustee issued a letter dated 14.09.2021 on the Personal Guarantor for invoking the Personal Guarantee dated 28.08.2017. A copy of the letter dated September 14, 2021 is annexed to the Petition.

(xx) As on October 31, 2021, an amount of Rs.140,55,90,642/- (Rupees One Hundred Forty Crores Fifty-Five Lacs Ninety Thousand Six Hundred and Forty-Two Only) is due and payable to the Petitioner in accordance with the DSA.

(xxi) The Corporate Debtor is unable to repay the amounts "due" and "payable". Hence the Application u/s 7 is filed before this Tribunal.

5. The Corporate Debtor orally argued the case and raised the following objections:

(i) The Company Petition has been filed by the Debenture Trustee and rely on clause 35.1 of the debenture trust deed dated August 29, 2017 ("DTD") the debenture trustee viz. Vistra ITCL (India) Limited appointed under the DTD was not authorised to file the present Company Petition as there was no consent from the majority debenture holders under the DTD.

(ii) The default in redemption of debentures is hit by Section 10A of the IBC. The default to be asserted under the DSA, if any, can only relate to a default in redemption of the Debentures as provided for in clause 6. The default can occur only in redemption of the Debentures and further that a default in payment of interest is not considered a default under the terms of the DSA.

Findings:

6. Before coming into the legal aspects in deciding the above company Petition, it is important to mention here that the Corporate Debtor did not choose to file any reply even after taking number of adjournments. On the other hand, the counsel appearing for the Corporate Debtor, on 5th May 2022, mentioned before this Bench as if the Corporate Debtor is admitting the liability which was recorded in the daily order dated 5th

May 2022. Thereafter, the matter was reserved for orders. Since the order could not be passed by this Bench due to demitting office by one of the Member, the matter was reopened and relisted for *de novo* arguments. At this stage, the Corporate Debtor filed separate application bearing IA 1827 of 2022 as an afterthought to recall the order dated 04.05.2022 under which the Corporate Debtor's right to file reply was forfeited and also the order dated 05.05.2022 in which the submission of the Counsel appearing for the Corporate Debtor to that effect the Corporate Debtor is admitting the claim was recorded. The above I.A is also disposed of through this common order.

7. Similarly, the Corporate Debtor filed another application IA 1896 of 2022 raising maintainability of the Company Petition as an afterthought which was also disposed of through this common order.
8. Let us deal with the oral objections raised by the Corporate Debtor in opposing the above company petition:
    a. The first contention of the Corporate Debtor is that the Petitioner is not a Financial Creditor. It is the contention of the Corporate Debtor that the Company Petition has been filed by the Debenture Trustee and it seeks to rely on clause 35.1 of the debenture trust deed dated August 29, 2017 ("**DTD**") to argue that the debenture trustee viz. Vistra ITCL (India) Limited appointed under the DTD was not authorised to file the present Company Petition as there was no consent from the majority debenture holders under the DTD. The argument is wholly incorrect for the following reasons:

        (i) Firstly, the captioned Company Petition is filed on behalf of the debenture holder viz. the Financial Creditor (ICICI Prudential Real Estate AIF - I) acting through the Investment Manager. The debenture trustee appointed under the DTD is Vistra ITCL (India) Limited. On a perusal of the captioned Company Petition, it is clear that the debenture trustee is not the financial creditor who has presented the captioned Company Petition.

(ii) Secondly, the captioned Company Petition is filed upon the Corporate Debtor defaulting under the terms of the debenture subscription agreement dated August 28, 2017 read with Addendum dated August 31, 2017 (collectively "**DSA"**). The Financial Creditor is a party to the DSA and the same is clear from a perusal of the DSA. The Corporate Debtor admittedly failed in payment of its interest obligations under the DSA for the quarters ending on September 2019 and December 2019. This is an admitted position in the letter dated September 9, 2021 issued by the Corporate Debtor which was subsequently confirmed by the Corporate Debtor's counsel during the hearing of the captioned Company Petition, which was duly recorded by this Tribunal in its order dated May 5, 2022.

(iii) Thirdly, in any event, the Financial Creditor is subscriber of approximately 80% of the debentures issued under the DSA (77,200 out of 97,200) and therefore the question of consent of majority debenture holders not being there does not arise. The default committed by the Corporate Debtor is in respect of meeting its obligations of payment of interest in relation to the debentures subscribed to by the Financial Creditor under the DSA.

(iv) Fourthly, the Financial Creditor, i.e., ICICI Prudential Real Estate AIF-I is a scheme of ICICI Prudential Real Estate AIF, which has been registered as a Category-II Alternative Investment Fund under the provisions of the Securities and Exchange Board of India (Alternate Investment Funds) Regulations, 2012. IDBI Trusteeship Services Limited (**"Trustee"**) is the sole trustee appointed in respect of ICICI Prudential Real Estate AIF. The Investment Manager is appointed under an Investment Management Agreement July 31, 2014, executed between the Trustee and the Investment Manager to, *inter-alia*, act

for and behalf of the Financial Creditor. The Investment Manager is empowered to file the captioned Company Petition on behalf of the Financial Creditor under **clause 4.2.28 (a) of the Investment Management Agreement** dated July 31, 2014. The said clause is reproduced as below:

POWERS AND AUTHORITIES OF THE INVESTMENT MANAGER:

"to institute, conduct, compromise, compound, or abandon any legal proceedings for or on behalf of or in the name of the AIF - I and/or the Trustee, and to defend, compound or otherwise deal with any such proceedings against the AIF-I or Trustee or its officers concerning the affairs of the AIF - I, and also to compound and allow time for payment or satisfaction of any equity due and of any claims or demands by or against the AIF - I and to refer any differences to arbitration and observe and perform any awards thereof;"

In view of the above, it is abundantly clear that the Financial Creditor was sufficiently authorised to present the captioned Company Petition through the Investment Manager and therefore this argument of the Corporate Debtor ought to be rejected.

b. Another objection taken by the Corporate Debtor is that the default in redemption of Debentures is hit by Section 10A of the IBC. The Corporate Debtor has sought to argue that the default to be asserted under the DSA, if any, can only relate to a default in redemption of the Debentures as provided for in clause 6 of the DSA. The Corporate Debtor then seeks to rely upon Article 10 of the DSA to argue that a purported default can occur only in redemption of the Debentures and further that a default in payment of interest is not considered a default under the terms of the

DSA. This argument is wholly incorrect and unsustainable for the following reasons:

(i) A perusal of the DSA, in particular clause 2, it is abundantly clear that the Corporate Debtor was liable to pay interest at the rate of 15% per annum compounded quarterly and the same was payable on the outstanding Subscription Amount.

(ii) As per clause 2.2 and clause 2.3 of the DSA, the interest payments were to commence on March 31, 2018 and payable on a quarterly basis on the last day of every quarter.

(iii) A bare reading of Article 17.1.2 of the DSA makes it abundantly clear that any default in payment obligations (including payment of Interest) under the terms of the DSA qualifies as an event of default under the DSA.

EVENT OF DEFAULT:

"Failure / breach / default by the Company to meet its payment obligations (including principal amount, Interest or Penal IRR) when they become due in respect of the Debentures or to redeem the Debentures as provided in this Agreement or under any of the Transaction Documents;"

(iv) Article 17.2 of the DSA enlists the various consequences that may follow upon commission of default by the Corporate Debtor. These include an acceleration of all payment obligations under the DSA (*Article 17.2.1.1 of the DSA*) and further permit the Financial Creditor to exercise any rights available to it under the documents executed in relation to the Debentures, including enforcement of its security interest created under various

security documents and further to exercise all rights available to it under law (*Article 17.2.1.6 of the DSA*).

(v) Therefore, it is clear that any default in payment of interest in relation to the Debentures qualifies as an express event of default under the terms of the DSA and in particular Article 17.1.2 of the DSA.

(vi) The Corporate Debtor admittedly failed to in payment of its interest obligations under the DSA for the quarters ending on September 2019 and December 2019. The said interest admittedly amounts to Rs. 7,29,18,444 to all debenture holders under the DSA (which included an aggregate amount of Rs. 5,79,13,874 of interest payable by the Corporate Debtor to the Financial Creditor). This is an admitted position in the letter dated September 9, 2021 (in paragraph 3) issued by the Corporate Debtor, which was subsequently confirmed by the Corporate Debtor's counsel during the hearing of the captioned Company Petition, which was duly recorded by this Tribunal in its order dated May 5, 2022.

(vii) It is submitted that:

(a) Admittedly, the default in payment of interest as aforesaid occurred on September 30, 2019 and December 31, 2019 viz. the last day of the quarters.

(b) Any default in payment of interest is an express event of default under the terms of the DSA.

(c) The period covered under section 10A of the IBC is March 25, 2020 to March 25, 2021. Clearly the default committed by the Corporate Debtor does not fall within the period prescribed under section 10A of the IBC. In the instant case the default was committed by the Corporate Debtor in September

2019, i.e., prior to the outbreak of the COVID - 19 pandemic. Therefore, it cannot be considered as a default during COVID period.

9. On hearing the counsel for the Petitioner and upon going through Form-1 filed by the Petitioner and the related materials, this Bench is of the view that the Corporate Debtor has committed default in repayment of a financial debt. The above CP being filed on 11.11.2021 is within 3 years from the date of default. Thus the CP satisfies all the legal requirements for admission.

10. **IA 1827 of 2022:**

The above application was filed on 08.07.2022 after reopening the matter for fresh arguments since the order could not be passed by the earlier Bench due to demitting the office by the Judicial Member. The present Bench who had heard the arguments afresh on 14.07.2022 made it very clear to the Counsel appearing for the Corporate Debtor that they will dismiss the above Application No. IA 1827 of 2022 since this Bench had heard the submissions of the counsel appearing for the Corporate Debtor and also permitted him to file written submissions confirming to legal aspects. Therefore, the question of passing any separate order in the above Application does not arise.

Accordingly, the above IA stands **disposed of** with the above observations. Despite granting the liberty the corporate debtor did not choose to file any written submissions.

11. **IA 1896 of 2022**

This is an Application filed by the Corporate Debtor for the maintainability of the above Company Petition. This Bench had Reserved the main Company Petition for orders on 14.07.2022 wherein, the contentions of the IA are already dealt by the Bench in the CP itself. Thus, This IA is filed belatedly and stands **infructuous and disposed of.**

12. Accordingly, the above Company Petition is admitted by passing the following:

ORDER

a. The above Company Petition No. (IB) 1221 (MB)/2021 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Gagan I-Land Township Private Limited.

b. This Bench hereby appoints **Mr. Manish Motilal Jaju,** Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00034/2016-17/10087 residing at D 502 Neelkanth Business Park Vidyavihar, Mumbai, Maharashtra - 400086, Email ID- mmjaju5@gmail.com as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Petitioner shall deposit an amount of Rs.10 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by COC.

d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any

property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

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

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

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

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

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

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

k. **Accordingly, this Petition is admitted**.

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

Sd/-	Sd/-
Anuradha Sanjay Bhatia	**H.V Subba Rao**
Member (Technical)	**Member (Judicial)**