

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**BENGALURU BENCH**  
**(Exercising powers of Adjudicating Authority under**  
**The Insolvency and Bankruptcy Code, 2016)**  
***(Through virtual/physical mode)***

**CP (IB) No.115/BB/2022**  
U/s. 7 of the IBC, 2016  
R/w Rule 4 of the IBC (AAA) Rules, 2016

**IN THE MATTER OF:**

**Vistra ITCL (India) Limited,**  
The IL&FS Financial Centre,  
Plot C-22, g Block, 7<sup>th</sup> Floor  
Bandra Kurla Complex, Bandra (East)  
Mumbai - 400 051.

... Financial Creditor/Petitioner

**VERSUS**

**Excel Dwellings India Private Limited,**  
Registered office at:  
Survey no.95/5, Mottanahalli Village,  
Gudigattanahalli Village, SarjapuraHobli,  
Anekal Taluk Bangalore KA 562 125.

No.44, 12<sup>th</sup> Main,,  
17<sup>th</sup> Cross 6<sup>th</sup> Sector  
Behind BDA Complex,  
HSR Layout  
Bangalore- 560 102.

... Respondent/Corporate Debtor

**Order delivered on: 13<sup>th</sup> March, 2024**

**Coram:** Hon'ble Mr. K. Biswal, Member (Judicial)  
Hon'ble Mr. Manoj Kumar Dubey, Member (Technical)

**PRESENT:**

For the Petitioner : Ms. Anuparna Bordoloi., Adv  
For the Respondent : Shri Srikant V. Kumbar., Adv

**ORDER****Per: Manoj Kumar Dubey, Member (Technical)**

1. The present petition is filed on 29.06.2021, by Vistra ITCL (India) Limited (hereinafter referred as 'Financial Creditor/Petitioner'), under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 4 of the I&B (Application to Adjudicating Authority) Rules 2016, *inter alia*, seeking to initiate Corporate Insolvency Resolution Process in respect of M/s Excel Dwellings India Private Limited (hereinafter referred as 'Corporate Debtor/Respondent') for a total outstanding default amount of Rs. 87,97,46,671/- (Rupees Eighty-Seven crores Ninety-Seven Lakhs Forty-Six Thousand Six Hundred and Seventy-One Only) as on 31.05.2021, as per Part IV of Form No. 1. The Date of default has been mentioned as 16.04.2021. The working as been given as under:

	Principal overdue	31,75,00,000
Add:	Interest over-due/Redemption Premium Payable	35,52,59,045
Add:	PM Fee overdue (Including GST)	6,60,11,516
	Dues excluding default interest	73,87,70,561
Add:	Default interest	14,09,76,110
	<b>Total dues</b>	<b>87,97,46,671</b>

2. The facts of the case are discussed below:

a. It is submitted that the corporate debtor viz M/s Excel Dwellings India Private Limited and M/s Excel Dwellings Oxigen Private Limited and the Financial Creditor viz Vistra ITCL (India) Limited (the Debenture Trustee, representing all the Debenture Holders), have executed the Debenture Trust Deed dated 05.07.2016 amended vide the Deed of Amendment dated 24.11.2016 and the Deed of Amendment dated 14.10.2020 *inter alia* by and between Excel Dwellings India Private Limited, Excel Dwellings Oxigen Private Limited, Promoters, Pebble Creek Landowners and Vistra ITCL (India) Limited. Debentures valued at an amount of Rs. 400,000,000/- was issued by the Corporate debtors vide the aforementioned transaction documents.

- b. Further, the Guarantors have executed irrevocable and unconditional Personal Guarantee dated 05.07.2016 and Deed of Amendment to Deed of Irrevocable and Unconditional Personal Guarantee dated 24.11.2016 with the Financial Creditors viz Vistra ITCL (India) Limited in favour of the Financial Creditor. However, the Corporate Debtors failed to adhere to the agreed Business Plan in relation to the Project Oxigen Phase II and Phase III and there have been defaults in the servicing of other financial obligations undertaken by Guarantors in the Transaction Documents which have materially and adversely affected the interest of the Petitioner. Further, there has also been repetitive instances of causing/permitting damage to be caused to the Mortgage Properties by failing to control acts of vandalism by the contractor, namely Mr. Hari Arunagiri on 24.10.2020 and the same was brought to the notice of the corporate debtor vide letter dated 26.10.2020. Moreover, the instance of vandalism and property damage was not rectified despite the notice and the said action constituted as an 'Event of Default' under various provisions of the Transaction Documents and under Clause 12.2 (a), (e) and (l) of the Debenture Trust Deed in particular as the events that had occurred resulted in Material Adverse Effect thus leading to an Event of Default.
- c. The Corporate Debtor was issued notice dated 07.01.2021 for the said Event of Default to rectify/remedy the 'event of default' forthwith and within not later than 14 days from the date of receipt of the notice. Thereafter, a Demand Certificate dated 14.04.2021 was issued to the Guarantors viz. Mr. Sivaram Krishna Reddy Allu, Mr. Vivekananda R and Mr. Mohammed Meraj under clause 3 of the Deed of Irrevocable and Unconditional Personal Guarantee dated 05.07.2016 and Deed of Amendment to Deed of Irrevocable and Unconditional Personal Guarantee dated 24.11.2016 for the payment of the outstanding principal amount under the Transaction Documents, and the same has not been complied with till date.
- d. Due to failure to rectify/remedy the default within the stipulated period in the notice, the additional cure period and till date, all debentures become due for redemption as on 16.04.2021 and all debenture

outstanding were immediately payable and due as notified under legal notice dated 16.04.2021. The same has not been complied with till date and the Corporate Debtor remains in default.

- e. Subsequently, vide reply dated 17.05.2021 to notice dated 14.04.2021, Mr. Mohammed Meraj has admitted liability only to the extent of Rs. 27.36 crores out of the principal outstanding Rs. 31.75 Crores. However, the total outstanding amounts inclusive of all associated interest payments/Redemption premium payments, which are due and payable under the Transaction Documents totals to a sum of Rs. 87,9746,671/- (*Rupees Eighty-seven crores ninety-seven lakhs forty-six thousand six hundred and seventy-one only*).
  - f. Accordingly, in view of the non-rectification of event of default by the corporate debtor and non-payment of principal outstanding amount along with all interest, payment/redemption premium payments which are due and payable under the transaction documents, the financial creditor upon the approved instructions by the Anchor Investor viz Walton Street India has preferred the present application.
3. The Learned Counsel for the Respondent filed his objection vide diary no 1486 dated 15.03.2023 inter alia contending the following:
- a. It is submitted that the respondent entered into an agreement for issue of 190 secured debentures for the face value of Rs. 19,00,00,000 for developing the land under the name Pebble Creek, to the land measuring approximately 18 acres and 33 guntas in survey no.123, 124,128 and 144/2 respectively. Further, the respondent intends to acquire additional land measuring 11 acres 02 guntas forming part of survey no 92/5 and 92/8 respectively. Subsequently, the debenture trust deed is amended and additional 210 secured debentures were issued for nominal amount of Rs. 21,00,00,000/-. As the redemption period was mentioned in the debenture trust deed in view of getting additional debenture, the deed was modified, similarly, the time for redemption as modified accordingly the debenture trust deed amended for the terms and conditions on 14.10.2020 where the redemption period was extended by 64 months and the final redemption date shall be 31.03.2022.

- b. Further, it is submitted that the debenture trustee sent a notice to the respondent for intimating the vandalism of the property by Mr. Hari Arunagiri. It is submitted that the petitioner has erroneously contended that the respondent did not take any further initiative for rectifying vandalism to the property due to business contingencies.
- c. The Respondent received the notice dated 16.04.2021 from the Financial Creditor, and reply was sent to this notice on 17.05.2021 which is self-explanatory. Further, on 31.05.2021, the Financial creditor submitted the record of default claiming the amount of Rs. 87,97,46,617/- for the value of redemption of debentures. It is further submitted that, on 23.07.2021, after obtaining information from National E-Governance Services Limited the respondent has provided a proposal to the anchor investor and marked copy of the proposal to the petitioner creditor the measures which will be taken to solve the problem.
- d. Moreover, on 17.06.2022, there was third amendment to the debenture trust deed where the clause 2 (tenure) of schedule 7 (Terms and Conditions of issue of Debentures), clause 3 (interest rates) of Schedule 7 (Terms and Conditions of issue of Debentures) and Clause 6 (Redemption) of Schedule 7 (Terms and Conditions of Issue of Debentures) was amended and the amendment debenture trust deed executed on 17.06.2022 which will come into effect from 31.03.2022. As per the third amended debenture trust deed agreement, the debenture redemption period will be on 31.03.2024, and redemption premium is payable only after post payment of principal amount and the debentures redeemed on or before maturity date 31.03.2024, all cash flows collected from the project receivables would be utilised in priority towards principal repayment, post which surplus shall be utilised for redemption premium.
- e. Further, as per the Third Amendment, the financial creditor from 31.12.2016 to 06.03.2023 has already paid amount of Rs. 31,54,05,000/- towards the principal amount and there is principal amount of Rs. 8,45,95,000/- pending. As per the said amended terms and conditions the respondent is liable to pay the said pending amount and if there is any excess cashflow from the project, then the amount

will be utilised for the redemption premium. It is submitted that the respondent company is solvent as per the third amendment agreement dated 17.06.2022, the claim of the financial creditor is not valid as the debenture redemption period has been extended up to 31.03.2024, thus, the present petition becomes infructuous, as it is a premature claim.

4. Heard Learned Counsel for the parties and perused the records.
5. On 31.01.2024 Tribunal directed both the parties to file written submissions within two weeks however, the same has not been filed till date.
6. The present petition is filed on 29.06.2021 by M/s Vistra ITCL (India) Limited against M/s Excel Dwellings India Private Limited for an amount of Rs. 87,97,46,671/- as on 31.05.2021, as mentioned in Form No.1.
7. It is seen that the respondent and the financial creditor have executed Debenture Trust deed dated 05.07.2016 and amended it vide Deed of Amendment dated 24.11.2016; and further amended vide Deed of Amendment dated 14.10.2020. Debentures valued at an amount of Rs. 400,000,000/- was issued by the corporate debtor. It is submitted by the petitioner that failure on the part of the respondent to control the act of vandalism by the contractor causing damage to the mortgaged property even after the same was brought to the notice of the respondent has constituted an *Event of Default*. Due to failure on the part of the respondent to rectify the default within the stipulated time, all debentures became due for redemption as on 16.04.2021.
8. However, the respondent have denied that they did not take any action for rectifying the vandalism to the property. Another contention raised by the respondent is that as per the third amended debenture trust deed agreement which was executed on 17.06.2022, the debenture redemption period was extended upto 31.03.2024; and redemption premium was payable only after payment of principal amount. Hence, the claim of the petitioner is a premature claim.
9. It is seen that the Petitioner has attached the Copy of Debenture Trust Deed dated 05.07.2016 wherein it is stated that "*The redemption of the Debenture shall arise on the Principal Payment Dates till the Final Redemption Date or such other earlier dates as provided herein as set out in Schedule 6*".

Further, this Deed dated 05.07.2016 was amended vide Deed of Amendment dated 24.11.2016 wherein the Schedule 6 of deed dated 05.07.2016 is replaced in its entirety by the contents of Annex 8 (Pg 159 of petition) of Amendment deed dated 24.11.2016. Further 2<sup>nd</sup> Deed of Amendment dated 14.10.2020 was entered into between the parties amending the terms of the Debenture Trust Deed dated 05.07.2016 and Deed of Amendment Debenture trust deed dated 24.11.2016 wherein the Redemption period as stated in the deed dated 24.11.2016 is replaced as follows” *“The redemption period for the repayment of NCDs is extended by period of 28 months from 24 months to 64 months i.s till 31<sup>st</sup> March 2022. The final NCDs redemption date shall be 31<sup>st</sup> March 2022”*. Moreover, on perusal of the Third Deed of Amendment dated 17.06.2022, which is produced by the respondent, it was observed that the redemption period has been amended again, and the maturity date for the Debenture is extended to 31.03.2024. The relevant para of the Third Amendment is as follows:

*“2. This Agreement Deed and the provisions as set out herein shall be deemed to be effective from 31.03.2022.*

*The Debentures shall have a tenure commencing from their respective dates of allotment and shall mature on March 31,2024.*

**Unquote**

*The existing Clause 3 (Interest Rate) of Schedule 7 (Terms and Conditions of issue of Debentures) of DTD shall be replaced as following:*

*Quote*

***Interest rate:*** *from the period starting from 1<sup>st</sup> April 2018 till Final Redemption Date, any additional cashflows/surplus from the Projects to be paid as Redemption Premium as and when available post repayment of Principal amount.*

- *The redemption premium is due and payable only on the maturity date i.e., March 31, 2024. In case the entire outstanding principal amount is paid before the Maturity Date, the Redemption Premium can be paid thereafter subject to availability of surplus cashflows from the project. The Redemption Premium shall be such amount that yields an Internal Rate of Return (IRR) OF 24.6% on the Subscription Amount of the NCDs by taking into account all the*

*cashflows arising to the subscriber on account of this NCDs as mentioned in below table:*

<b>Particulars</b>	<b>IRR (%)</b>
<i>Gross Transaction IRR</i>	24.6%
<i>Gross Investor IRR</i>	20.15%

- *Any surplus cashflows available from the Project and other security collaterals post repayment of entire Principal Amount, shall be utilized for payment of Redemption Premium on the NCDs per the agreed IRR by Debenture Holders as per the transaction by the Anchor Investor.*

**Unquote**

*The existing Clause 6 (Redemption) of Schedule 7 (Terms and Conditions of issue of Debentures) of DTD shall be replaced as following:*

**Quote**

*The Debentures shall be redeemed on or before the Maturity Date (i.e. March 31, 2024). All cash flows collected from the project receivables would be utilized in priority towards principal repayment, post which surplus shall be utilized for Redemption Premium”.*

10. It is noticed from the facts of the case that the date of default mentioned in Form No.1 of 16.04.2021 is on the basis of issuing a Legal Notice by the Financial Creditor to the Corporate Debtor on this date. A perusal of this Legal Notice, which is at page no.213 Annexure-N of the CP, showed that this was with reference to the previous notice dated 07.01.2021 issued by the Petitioner calling upon the CD to rectify/remedy the “event of default” within fourteen days. The Notice dated 07.01.2021 reveals that the event of default mentioned therein was in relation to the vandalism and damage of the mortgaged property by the contractor for which the CD was asked to rectify and repair the damages within fourteen days. This was with reference to the Clause 12.2 of the Debenture Trust Deed paras (e) and (l). Therefore, this notice dated 16.04.2021 was in relation to the damage

caused to the mortgaged property due to the acts of vandalism by the contractor only, and was not related to any financial default. In the objections filed on 15.03.2023, the CD has rejected the allegation that it did not take any action to prevent/rectify the damage and vandalism to the mortgaged property. In the reply of the CD dated 17.05.2021 it was stated that due to these disturbances, the site was kept closed since January, 2021, for a substantial period of time. The Petitioner has chosen not to respond to this reply by the CD by filing any rejoinder to the same.

11. In the reply submitted on 15.03.2023, the Respondents have submitted a letter dated 23.07.2021 addressed to the Anchor Investor and the Deed of third Amendment dated 17.06.2022 to the main Debenture Trust Deed dated 05.07.2016. In accordance with the third Amendment to the said Debenture Trust Deed, the maturity date for the Debentures was stated to be 31.03.2024, thus extending the date of maturity. It is further noticed from the third Amendment that there was no reference to the issue regarding the vandalism of the mortgaged property by the contractor on the basis of which the original event of default/date of default for filing of this petition was decided by the Financial Creditor.
12. It is pertinent to mentioned here that for initiation of the proceedings under Section 7 of the IBC, there has to be a 'debt' and a 'default'. *The Hon'ble Apex Court in the case of **Innoventive Industries Limited v. ICICI Bank (2018) 1 SCC 407**, has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC . Under the ambit of Section 7 of the Code, the Adjudicating Authority is to only determine whether a 'default' has occurred and whether the 'debt', which may still be disputed, was due and remained unpaid. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete....."*
13. In this case since the maturity date of the Debenture itself is extended up to 31.03.2024, therefore it cannot be treated to be payable as on the date referred to above, which has been decided as 'date of default' by the Petitioner for filing of this C.P. Moreover, under Section 3(12) of the IBC a "default" means non-payment of debt when whole or any part or instalment of

*the amount of debt has become due and payable and is not <sup>1</sup>[paid] by the debtor or the corporate debtor, as the case may be;*

14. In this case the 'date of default' has been selected by the Petitioner not on the basis of non-payment of debt or its instalment, but on account of vandalism and damage to the mortgaged property made by the contractor. On the other hand, when the date of the maturity of Debenture itself has been extended up to 31.03.2024, it cannot be held that a default has occurred in terms of provisions of Section 3(12) of the IBC and therefore there will not be any applicability of provision of Section 7 as the 'debt' was neither due nor any default had occurred.
15. Hence instant petition bearing CP (IB) No. 115 of 2022 stands **dismissed** as the same is not maintainable.

-Sd-

**(MANOJ KUMAR DUBEY)**  
**MEMBER (TECHNICAL)**

-Sd-

**(K BISWAL)**  
**MEMBER (JUDICIAL)**