

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CP (IB) -3164/I&BP/MB/2018

Under Section 7 of the I&B Code, 2016

In the matter of

Indiabulls Housing Finance Limited,
M-62 & 63, First Floor, Connaught Place,
New Delhi-110001

.... Petitioner

Vs.

Hanumesh Realtors Private Limited
Raaj Chambers, S. K. M. Fabrics, Andheri
Premises, Plot No. 115, 115/IT-03, R K
Paramhans Marg, Andheri (East),
Mumbai-400069

.... Respondent

Order delivered on: 06.12.2018

Coram:

Hon'ble Bhaskara Pantula Mohan, Member (J)
Hon'ble V. Nallasenapathy, Member (T)

For the Petitioner: Mr. Gaurav Joshi, Senior Advocate, Adv. Chirag Kamdar,
Adv. Nanki Grewal, Adv. Paridhi Saraf, Adv. Henna Goradia i/b M/s. Wadia
Ghandy & Co.

For the Respondent: Adv. Amir Arsiwala, Adv. Pulkit Sukhramani, Adv. Nikhil
Kapoor i/b The Law Point.

Per: Bhaskara Pantula Mohan, Member (J)

ORDER

1. Indiabulls Housing Finance Limited (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process of Hanumesh Realtors Private Limited (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default on 24.10.2017 to the extent of Rs. 92,64,45,369/- along with pending TDS for an amount of Rs.9,04,999/-, 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 Petition states that the Petitioner sanctioned a loan in favour of the Corporate Debtor for Rs. 60,00,00,000/- on 30.09.2013 vide a Loan Agreement dated 30.09.2013 and an Addendum Agreement dated 1.10.2013. The said Loan Agreement carries an interest of 18.10% p.a. repayable within 60 months from the date of disbursement. The Corporate Debtor was irregular in making repayments and committed a breach in making payment towards the EMI with respect to the aforesaid Loan facility. No EMI with respect to the said Loan was paid after 31.03.2016.
3. The said loan was secured by registered mortgage over residential premises, garage and a store room in the building known as "Palais Royal" situated at plot no. 5B and 6 at Shree Ram Premises, Worli Estate, Lower Parel, Mumbai owned by the Corporate Debtor. A loan agreement dated 30.09.2013 was executed between the Petitioner and the Corporate Debtor. Subsequently, on 1.10.2013, an Addendum Agreement was executed between the parties to make Mr. Vikas Kasliwal as a guarantor for securing the loan. On 17.10.2013, a Share Pledge Agreement was entered into between Mr. Vikas Kasliwal and others and the Petitioner. The Corporate Debtor was made a Confirming Party to this Share Pledge Agreement. The Pledgors (Vikas Kasliwal and others) had pledged 10,000 shares of the Corporate Debtor in favour of the Petitioner in order to secure the aforesaid Loan amount. On 03.03.2015, the Corporate Debtor, M/s. Yashaswini Leisure Private Ltd. and M/s. Mandakini Hospitality Private Ltd pledged a total of 17,700 debentures (out of which 6000 debentures were pledged by the Corporate Debtor) of M/s. Shree Ram Urban Infrastructure Ltd (hereinafter referred to as "SRUIL") in favour of the Petitioner.
4. The Petitioner has enclosed the CIBIL Report which shows that the Corporate Debtor owes Rs. 55,00,00,000/- to the Petitioner.
5. On 30.09.2017, the Petitioner declared the loan account of the Corporate Debtor as a Non-Performing Asset (NPA) in accordance with the prudential guidelines issued on Asset Classification by the Reserve Bank of India.
6. On 24.10.2017, the Petitioner issued a Loan Recall notice to the Corporate Debtor and called upon them to pay the entire outstanding sum of Rs. 79,87,36,518/- towards the principal debt, arrears and interest till 17.10.2017 along with future interest @ 18.10% p.a w.e.f. 18.10.2017 alongwith pending TDS for an amount of Rs. 98,98,329/- till actual date of

payment within 3 days from the date of receipt of this notice, failing which the Petitioner would take remedy under civil as well as criminal law to recover the loan amount.

7. On 16.12.2017, the Petitioner sent a SARFAESI notice under Section 13(2) of SARFAESI Act, 2002 to the Corporate Debtor, Mr. Vikas Kasliwal and other pledgors of shares and debentures claiming a sum of Rs. 82,64,47,484/- as on 12.12.2017 along with future interest @ 18.10% p,a with effect from 13.12.2017 plus pending TDS of an amount of Rs. 9,04,999/-.
8. On 14.02.2018, the Advocates of the Corporate Debtor replied to the Petitioner's SARFAESI notice raising *inter alia* the following contentions:
 - a) Their client, Mr. Vikas Kasliwal had requested the management of the Petitioner for settlement of the loan account of the Corporate Debtor as several investors were interested in investing in the "Palais Royale" project undertaken by SRUIL. Further, no action under SARFAESI would be maintainable as the Hon'ble Supreme Court has time and again held that no proceedings would be maintainable under the SARFAESI Act, 2002 if the borrower is willing to settle the outstanding dues.
 - b) That the Petitioner had advanced loans to the Corporate Debtor and its sister concerns at various instances and these were shown as housing loans. When the Corporate Debtor and its sister concerns got embroiled in various legal disputes, further loans were disbursed by the Petitioner in instalments so that the Corporate Debtor and its group companies could pay/ repay the interest on the original loan and the loans accounts to the group companies would remain evergreen. The relationship between the Corporate Debtor and the Petitioner was more than that of a Lender and Borrower.
9. The Petitioner has annexed the Statement of Account of the Corporate Debtor from the period 30.09.2013 to 17.07.2018.
10. The Corporate Debtor had requested time to file reply on 09.10.2018 as well as on 05.11.2018 and thereafter one week time was granted by this Bench to file the same. However, the Corporate Debtor did not file any reply till 13.11.2018 (last date of hearing).
11. On 13.11.2018, the Corporate Debtor raised the following oral arguments:

- a) The Amount of debt shown in the CIBIL Report is Rs, 55,00,00,000/- while the amount of debt due as mentioned in Form-I of the Petition is Rs. 92,64,45,369/-. Therefore, the amount claimed to be in default is incorrect.
- b) The Petitioner is not in a position to return the debentures of SRUIL pledged under the Debenture Pledge Agreement dated 03.03.2015 as SRUIL is now under liquidation. The Corporate Debtor relied on the decision in *Lallan Prasad v. Rahmat Ali and Anr.*, (1967) 2 SCR 233 to conclude that a Financial Creditor is not entitled to sue for repayment of any debt due in light of the fact that the Petitioner is not in a position to return the debentures of SRUIL to the pledgor of those debentures on account of the fact that SRUIL is in liquidation.
12. The key arguments raised in the written submissions filed by the Corporate Debtor are as follows:
- (a) That the Petitioner is not a "financial creditor" of the Corporate Debtor herein as no financial debt is owed by it to the former. The funds were routed through it and another company known as SRUIL back to the Petitioner itself and therefore the same cannot be considered as disbursements against the time value of money. The Petitioner further cited the following judgments in support of its argument that a debt has to be disbursed against the time value of money.
- i. Nikhil Mehta and Sons v. AMR Infrastructure [Company Appeal (AT) (Insolvency) No. 7 of 2017]
 - ii. Mack Soft Tech Pvt. Ltd. V. Quinn Logistics India Ltd. [Company Appeal (AT) (Insolvency) No. 143 of 2017]
 - iii. IL&FS Financial Services Ltd. V. La-Fin Financial Services Pvt. Ltd. [TCP No. 919/I&BC/NCLT/MB/MAH/2017]

However, the definition of financial debt in Section 5(8)(a) provides for an inclusive definition of financial debt to include money borrowed against the payment of interest. There is clearly a loan given of Rs. 60,00,00,000/- on 30.09.2013 vide a Loan Agreement dated 30.09.2013 and an Addendum Agreement dated 1.10.2013. The said Loan Agreement carries an interest of 18.10% p.a. Therefore it is a financial debt and the Petitioner is a Financial Creditor.

- (b) That the project ran into legal difficulties on account of a PIL initiated by NGO called "Janhit Manch" and the same is pending before the Supreme Court. As a result, SRUIL was unable to obtain the Occupation Certificate for the building. However, these proceedings are not relevant for admission of a Section 7 petition wherein debt and default is established.
- (c) The MOU dated 24.09.2015 was entered into between SRUIL and Adhita Realty Pvt. Ltd. (a company run by Mr. Avinash Bhosale who was a close associate of the Petitioner.) and it was agreed that as compensation for services rendered, Mr. Bhosale would receive flats from SRUIL at a very reasonable price etc.

This Bench has given serious consideration to this argument but the MOU dated 24.09.2015 and it was not mentioned there about the loan advanced by to the Corporate Debtor. In fact, it was an agreement between the builder and the purchasers and hence the contention of the Corporate Debtor that the loans would be paid only when the conditions of MOU were satisfied does not have legs to stand.

- (d) The Corporate Debtor further submits that it was agreed between all the parties that the Petitioner will provide loans to various companies for the express purpose of funnelling the funds back to itself via SRUIL- solely for the purpose of maintaining the account of SRUIL regular and evergreen .The structure adopted by the Petitioner to evergreen the accounts of SRUIL is in contravention of banking/ financial/ accounting norms for financial institutions. such structuring of transactions seems to be an attempt to take advantage of cheaper refinancing available for housing loan and seems to be akin to a fraud on the entire banking system etc. This Bench is not in a position to support the above view. Strictly going by the record, what is required to be seen and understood is what is required to be adjudicated. What falls beyond the purview of the record and the law under the Code is not a matter of concern for this Bench.
- (e) That the Petitioner is already in possession of the debentures of SRUIL which have been pledged with it by the Corporate Debtor. Therefore, the Petitioner may seek to enforce its rights over the said debentures and redeem the monies through sale thereof. This Bench feels that it is the prerogative of the Financial Creditor to exercise his options and therefore the Corporate Debtor has no role

to suggest any methodology to be adopted by the Financial Creditor.

- (f) That the Petitioner has failed to mention the date of occurrence of default as required in Form I Part IV of the Petition and that this default constitutes a material defect which has to be remedied. It is to be noted that the Loan Recall notice was addressed to the Corporate Debtor and the Date of Default on 24.10.2017 and the Petition has clarified in its oral submissions that 24.10.2017 itself is the Date of Default.
- (g) It was further submitted that the Corporate Debtor is not liable to repay the amount since the same has not become due and payable as the MOU entered with Adhita Realty Pvt. Ltd. has not been complied with and hence there is no question of default as there is no amount "due" and "payable" as defined u/s 3(12) of the Code and therefore the Petition filed u/s 7 is not maintainable. The abovesaid contention is bereft of any merit and it is clear on record that the Financial Creditor had advanced monies and the Corporate Debtor is liable to pay. Beyond that there is nothing to see as far as a petition under Section 7 of this Code is concerned.
- (h) In addition to what is stated above, several other arguments were raised by the Corporate Debtor in its written submissions which this bench feels are of no relevance.

13. The Petitioner in its written submissions responded to the above arguments of the Corporate Debtor as follows:

- a) Once debt due is established under Section 7 of the Code then any defence which challenges the exact amount in default is irrelevant and extraneous. In this regard, para 30 of the decision of the Hon'ble Supreme Court in *Innoventive Industries Ltd v. ICICI Bank and Ors.*, AIR 2017 SC 4084 was relied upon by the Petitioner, which is reproduced as follows:

"On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e payable unless interdicted by some law or has not yet become

due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise"

The Petitioner further relied on the decision of the Hon'ble NCLAT in the case of *Mr. Ajay Agarwal v. Central Bank of India and the State Bank of India, Company Appeal (AT) (Insolvency) No. 180 of 2017*. In this case, the Appellant raised a dispute as to mismatch of debt amount due but did not dispute that some debt is due and is payable to the Financial Creditor and that it has defaulted in making such payment. Hence the appeal was dismissed.

The Petitioner further submits that the Corporate Debtor has incorrectly read the CIBIL Report. The Loan sanctioned amount is shown as Rs. 60,00,00,000/-. The outstanding amount is shown as 55,00,00,000/- as this amount is outstanding towards the Principal amount only and is not inclusive of any interest. The outstanding amount of Rs. 92,64,45,369/- is the amount outstanding as on 17th August, 2018 and hence there is no inconsistency or incorrect computation in the default amount.

14. The Petitioner clarified that SRUIL is not in liquidation. A winding up petition was admitted against SRUIL and a provisional liquidator has been appointed by the Hon'ble Bombay High Court. The Petitioner argued that admission of a winding up petition does not lead to culmination of liquidation proceedings and only after final orders of liquidation are passed that a Company can said to be in liquidation. They relied on the decision of Hon'ble Calcutta High Court in *Raghunath Exports Ltd.*, CAL HC [2008] 83 SCL 68 (Cal)

"In the practice that we follow in this Court, there is room for a conditional Order of admission to be passed. Though the adjudication of indebtedness and the quantum thereof is tentative at the admission stage, it is mere firm and less tentative as to the indebtedness and quantum of debt than what a prima facie view would connote. In principle there is no bar to the company demonstrating at the final stage that the prima facie view earlier taken ought to be varied on the strength of further material that the company may produce. The company is afforded a chance on the post-advertisement stage to use a second affidavit to the same petition for winding up. However,

inasmuch as there is only an Order of admission which is passed at the first stage, the exercise of discretion as to whether the company should be wound up notwithstanding its palpable indebtedness, is left for the second stage.”

15. The Petitioner argued that it will be in a position to return the pledged debentures upon repayment of the debt by the Corporate Debtor. Just because of the fact that there is a winding up petition admitted against the Petitioner, that does not extinguish the debentures of SRUIL. Further, Clause 16.2 of the Debenture Pledge Agreement states as follows:

Without limiting Clause 16.1, neither the liability of any pledgor(s) nor the Confirming Party nor the validity or enforceability of this Agreement shall be prejudiced, affected or discharged by:

(f) The insolvency or liquidation or any incapacity, disability or limitation or any change in the constitution or status of any of the Pledgor(s) or the Confirming Party, as the case may be other than to the extent required by law;”

The Petitioner contended that in light of the clear contractual stipulation as set in the Debenture Pledge Agreement, the admission of liquidation proceedings against SRUIL can have no bearing whatsoever on the Corporate Debtor’s liability.

16. Findings:

Looking at the case, the contentions raised by both the parties, this Bench is of a clear view that the “debt” and “default” are clearly established. The petition deserves to be admitted on all counts.

17. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in repaying the loan availed and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:

(I) (a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any

judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

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

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

(IV) That the order of moratorium shall have effect from 06.12.2018 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.

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

(VI) That this Bench hereby appoints Mr. Ravi Prakash Ganti, Flat No. 2, Ashiana CHS, Plot no 60-A, Sector 21, Kharghar, Navi Mumbai – 410210. Maharashtra Email:-gantirp@gmail.com, having Registration No. IBBI/IPA-002/IP-N00102/2017-18/10245 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

10. Accordingly, this Petition is admitted.

11. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional within seven days from the date order is made available.

Sd/-

V. Nallasenapathy
Member (T)

Sd/-

Bhaskara Pantula Mohan
Member (J)