

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP (IB) - 1267/I&B/MB/2019
Under Section 7 of the I&B Code, 2016

In the matter of

Bennett Property Holdings Company Limited
5th Floor, Times Tower, Kamala
Mills Compound, SB Marg,
Lower Parel (West), Mumbai- 400 013

....Petitioner

Vs.

Brick Eagle Affordable Housing Advisory LLP
Unit No: B-12-13, Second Floor,
Art Guild House, Phoenix Market City,
LBS Marg, Kurla West, Mumbai - 400 070

....Corporate Debtor

Order delivered on: 10.01.2020

Coram:

Hon'ble Shri Bhaskara Pantula Mohan, Member (J)
Hon'ble Shri Shyam Babu Gautam, Member (T)

For the Petitioner: Aarohee Gursale, Advocate i/b Dhaval Vussonji &
Associates

For the Corporate Debtor: Ashish Pyasi a/w Angshuman Chaliha,
Advocates i/b Universal Legal

Per: Shri Shyam Babu Gautam, Member

ORDER

1. This is an application filed under Section 7 of the Insolvency and Bankruptcy (I&B) Code, 2016 by Bennett Property Holdings Company Limited (hereinafter called the 'petitioner') seeking the Corporate Insolvency Resolution Process of Brick Eagle Affordable Housing Advisory LLP (hereinafter called the 'Corporate Debtor') on the ground that the Corporate Debtor committed default in repayment of the dues to the petitioner.
2. The petitioner being a finance company incorporated on 18/12/2010 bearing Company Identification Number

U70102MH2010PLC211087 has filed this petition through its authorised person named Ms. Pooja Gaonkar, Head, Legal & Company Secretary, against the Corporate Debtor who is a Limited Liability Partnership incorporated on 12/06/2013 and bearing identification number: AAB-5796.

3. The counsel appearing on behalf of the petitioner submitted that a total amount of Rs. 20,00,00,000/- (Rupees Twenty Crores) was disbursed by them in favour of one company named Playtor Lifespaces Private Limited the Corporate Debtor on 30/03/2015 under Debenture Subscription Agreement dated 27/03/2015 whereunder the petitioner had subscribed to 2000 secured, unrated, unlisted, non-convertible debentures to the Corporate Debtor having face value of Rs. 1,00,000/- aggregating to a sum of Rs. 20,00,00,000/-.
4. The tenure mentioned under this Debenture Subscription agreement was for 42 months from the closing date i.e. 30/03/2015. This tenure was to expire on 29/09/2018. The company was obligated to repay the subscription amount of Rs. 20,00,00,000/- after a moratorium period of 8 quarters. The repayment of the subscription amount was to be made in 6 quarterly instalments as set out in clause VII of Annexure 3 of the said agreement.
5. Also, under clause VI of the Annexure 3 of the Debenture Subscription Agreement, the debentures carried an interest at the rate of 12% p.a. payable annually. The petitioner was also entitled to redemption premium as well as the debentures carried additional interest as penal interest at the rate of 1% p.m. over and above the interest in the event the Company failed to repay the amounts under the said agreement, as and when due.
6. The counsel for the petitioner also submitted that the payment of all amounts due under the Debenture Subscription agreement entered into both the parties was secured by the company by way of, *inter alia*, Deed of Corporate Guarantee dated 27/03/2015 executed by the Corporate Debtor and one Playtor Childspaces Private Limited.
7. The petitioner further mentioned that in view of the defaults committed by the company, the petitioner by its notice dated

28/06/2018 accelerated the redemption under clause 18.2.1 of the Debenture Subscription Agreement and by a notice dated 29/06/2018 invoked the securities namely, the Corporate Guarantee executed by the Corporate Debtor and called upon the Guarantors to make payments of the sums of more particularly mentioned in the notices dated 28/06/2018 and 29/06/2018 which according to the petitioner were duly served on the Corporate Debtor. But despite several reminders, the Corporate Debtor failed and neglected to comply with aforesaid notices and make the payments.

8. The outstanding amount as per the petitioner is Rs. 41,25,10,306/- as on 25/03/2019 along with further interest, redemption premium and penal interest payable until payment and/or realization thereof. The date of default as mentioned by the petitioner is 31/03/2018.
9. The counsel for the petitioner also submitted that by and under a Debenture Trust Deed dated 21/03/2015 IL&FS Trust Company Limited was appointed as the Debenture Trust of the debentures subscribed to by the petitioner.
10. The petitioner has annexed the following documents in support of the contentions made:
 - i. Copy of Board Resolution
 - ii. Copy of the Account Statement of the Financial Creditor held with HDFC Bank
 - iii. Copy of the Debenture Subscription Agreement
 - iv. Copy of Debenture Trust Deed
 - v. Copy of Corporate Guarantee
 - vi. Copy of notice issued to Playtor Lifespaces Private Limited and the Corporate Debtor
 - vii. Copy of the Notice issued to the Corporate Debtor
 - viii. Copy of the RPAD acknowledgment receipts
 - ix. Copy of the e-mail correspondence
 - x. Copies of the account statement of the Financial Creditor held with its Bank
 - xi. Copy of the Particulars of Claim
 - xii. Copy of the Master data of the Financial Creditor and Corporate Debtor

11. On the contrary, the counsel for the Corporate Debtor has denied all the statements, contentions and allegations made by the petitioner in toto stating that this petition deserves to be dismissed on the ground that it is entirely misconceived in fact, bad in law and not maintainable under Section 7 of the Code.
12. Further, the counsel for the Corporate Debtor submitted that he is falsely implicated by the petitioner and is not entitled to pay the claimed amounts to be in default as per the Debenture Subscription Agreement dated 27/03/2015 and the amount disbursed was towards investment and not loan.
13. The Corporate Debtor further replied that the petitioner mentioned about an amount of Rs.20,00,00,000/- which was sanctioned through the Debenture Subscription Agreement out of which Rs.14,26,06,537/- has already been paid but the total amount claimed to be in default is Rs. 41,25,10,306/- which is arbitrary.
14. The counsel for the Corporate Debtor further contended that the petition is not maintainable pursuant to the execution of the Debenture Trust Deed dated 26/03/2015 and the Deed of Guarantee dated 27/03/2015 wherein IL&FS was solely authorised to invoke corporate guarantee, whereas the present petition is filed by the petitioner for which there is no privity of contract between the petitioner and the Corporate Debtor and in absence of it, the contract cannot be enforced by any third party.
15. The Corporate Debtor also mentioned that the petitioner has transferred some of the debentures illegally and now in order to bypass those debenture holders, this petition has been preferred by the Subscriber without taking consent from such debenture holders. The possibility cannot be denied that if such resolution is put to vote before such debenture holders, they would not support initiation of Corporate Insolvency Resolution Process against them. Again, the Board Resolution passed by the petitioner does not in any manner mention that the Corporate Insolvency Resolution Process can be initiated against the Corporate Debtor which is mandatory. To this contention the petitioner replied that these contentions raised are merely baseless and frivolous technical objections and has miserably failed to defend the present petition.

16. The next contention of the Corporate Debtor is that the Stamp Duty is not duly paid on the Deed of Guarantee and hence, the same cannot be relied upon. Also, the Corporate Debtor mentioned that the Deed of Guarantee was not executed in Maharashtra and should have been stamped within three months after it has been first received in this State. In support of this contention, the Corporate Debtor has relied on the recent judgment of the Hon'ble Supreme Court of India in the matter of **Garware Walls Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.** wherein the Court reversed the judgment of the Bombay High Court and reiterated the principles laid down by it in the matter of **SMS Tea v. Chandmari Tea Estate** and held that an arbitration clause as an instrument, which is not stamped as per law, cannot be given effect if and until the instrument is duly stamped i.e. full stamp duty in respect of such instrument as provided by law has been paid. If an unstamped instrument is brought before a person authorised to receive evidence or holding a public office, such person is required to impound the instrument. The Corporate Debtor contended that the said instrument referred to in this petition are to be impounded under the Maharashtra Stamp Act, 1958.
17. The Corporate Debtor further submitted that there is no default as the Petition clearly states that principal moratorium period is of 8 quarters which is still available as even the redemption of debentures provides for redemption up to 30/09/2018, however the tenure period was expiring on 29/09/2018 and the company was obligated to repay after the principal moratorium period of 8 quarters which is still available.
18. The Corporate Debtor further stated that the Debenture Subscription Agreement as well as the petition clearly provides for the applicability of Internal Rate of Return ("IRR"), a metric system used in capital budgeting to estimate the profitability of potential investments. The Corporate Debtor stated further that there is no financial debt as the DSA, clause 18.4 provides that in the event of default committed by the Company, the petitioner be entitled to an amount equivalent to the subscription amount along with 33% IRR i.e. returns on investments thereon. The DSA entrails investment in

real estate, with implementation of the petitioner specified and approved business plan for timelines, construction cost.

19. The counsel for the petitioner submitted his rejoinder wherein strong opposition has been made for taking the reply of the Corporate Debtor on record as there was a huge delay on the part of the Corporate Debtor in filing reply and this Bench had already warned them to file as soon as possible. But this Bench has been fair enough and allowed the Corporate Debtor to present his case. The following order is hereby passed:

FINDINGS

20. We have heard both the parties at length, taken all their submissions into account and perused the documents and evidences placed on record by them. It has become crystal clear that an amount of Rs. 20,00,00,000/- was disbursed by the petitioner in favour of the Corporate Debtor. Therefore, it can be safely concluded that both the parties shared a relationship of creditor and debtor. As on 25/03/2019, the total outstanding amount due and payable was Rs.41,25,10,306/- inclusive of the principle amount, interest, redemption premium and penal interest.
21. After careful reading of all the documents placed on record and after hearing both the parties at length, we are of the view that there is a default on the part of the Corporate Debtor in making the payment towards the liability to the Petitioner. Despite repeated requests and reminders in the form of notices, the Corporate Debtor failed to repay the dues.
22. The main contention raised by the Corporate Debtor is that the said Debenture Agreement is merely an investment and does not amount to Loan. But here on this aspect, we would like to rely on the order of the Hon'ble National Company Law Appellate Tribunal in the matter of **Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd. (Company Appeal (AT)(Insolvency) No. 44 of 2017)** decided on 11.08.2017 wherein it was held that in view of Section 5(8)(c) of the Code, a 'debenture' comes within the meaning of 'financial debt'. Thus, is expressly

covered under Section 5(8) of the IBC, 2016 as well as Section 2(30) of the Companies Act, 2013.

23. Therefore, the contention made by the Corporate Debtor that they are not bound to repay the amount because it was the Debenture Subscription Agreement that was entered into both the parties which cannot be called to be a loan but is merely an investment, does not stand.

Also, reliance can to be placed on the judgment of the Hon'ble Supreme Court of India in **M/s Innovative Industries Limited vs. ICICI Bank and another** wherein it was held as follows:-

“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 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.”

24. Therefore, it is very clear that the Debenture Subscription Agreement is as good as a Loan Agreement and hence in the present matter, the Corporate Debtor is bound to pay the dues to the petitioner and cannot run away from his liability. Secondly, the documents submitted by the petitioner are enough to establish the debt as well as the default on the part of the Corporate Debtor.
25. Also, regarding the contention of the Corporate Debtor about computation of the amount not being correct, it is observed by this Bench that correct interpretation of the Debenture Subscription Agreement has not been made by the Corporate Debtor and that they had subscribed to 2000 secured, unlisted, unrated and non-convertible debentures having face value of Rs.1,00,000/- aggregating to Rs.20,00,00,000/-The amount due under the agreement were secured by the Corporate Debtor by way of Deed of Guarantee which is also admitted by them. The amount of

Rs.41,25,10,306/- which is claimed to be in default by the petitioner includes the outstanding principle amount, interest as per IRR and penal interest as per the particulars of claim which is annexed as Annexure K of the copy of petition.

26. The next contention by the counsel for the Corporate Debtor is that the petition is not maintainable because the Debenture Trust Deed dated 26/03/2015 and the Deed of Guarantee dated 27/03/2015 authorises IL&FS to invoke corporate guarantee, whereas the present petition is filed by the petitioner for which there is no privity of contract and in absence of it, the contract cannot be enforced by any third party. This contention does not stand because clause 18.2.1. of the Debenture Subscription Agreement clearly entitles the petitioner to exercise rights upon the occurrence of an event of default, being, *inter alia*, accelerating the redemption of the debentures, enforcing the security documents.
27. Further to the contention of the Corporate Debtor that this petition has been preferred by the Subscriber without taking consent from such debenture holders and that the Board Resolution passed by the petitioner does not in any manner mention that the Corporate Insolvency Resolution Process can be initiated against the Corporate Debtor which is a mandatory condition. But after reading the Board Resolution annexed by the petitioner at Annexure A of the copy of petition, it is observed that it does contain and clearly mentions to institute an insolvency petition and therefore, there is no scope for any ambiguity in relation thereto.
28. The next contention raised by the counsel appearing on behalf of the Corporate Debtor that the Stamp Duty is not duly paid on the Deed of Guarantee and hence, the same cannot be relied upon and also that the Deed of Guarantee was not executed in Maharashtra and should have been stamped within three months after it has been first received in this State for which the Corporate Debtor relied upon the recent judgment of the Hon'ble Supreme Court of India in the matter of **Garware Walls Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.** was relied, wherein the Court reversed the judgment of the Bombay High Court and reiterated the principles laid down by it in the matter of **SMS Tea v. Chandmari Tea Estate** and held that "an arbitration clause is an instrument, which is not

stamped as per law, cannot be given effect if and until the instrument is duly stamped i.e. full stamp duty in respect of such instrument as provided by law has been paid. If an unstamped instrument is brought before a person authorised to receive evidence or holding a public office, such person is required to impound the instrument.” Here, in this present matter, it is pertinent to note that the Deed of Guarantee was executed at New Delhi and sufficient stamp duty of Rs.400/- has been paid on it as is also reflected on the said document. Also, the Deed of Guarantee is silent on whom the obligation lies to pay the stamp duty. Therefore, according to Section 29 of The Indian Stamp Act, 1899 wherein it is mentioned that it is for the one executing the instrument to pay the stamp duty, and here, in this matter, it was the Corporate Debtor who was to pay the Stamp Duty because he had executed the said Deed of Guarantee which is in question before this Bench. Moreover, the judgment of the Hon’ble Supreme Court cannot be relied upon here in this present matter because the order was passed in arbitration proceeding and not while considering petition under IBC, 2016. It is also observed that the Corporate Debtor on one hand relies on the said Deed of Guarantee and on the other hand denies its evidentiary value and therefore, this contention raised has no credibility and therefore cannot be relied upon.

29. The Corporate Debtor further submitted that there is no default as the Petition clearly states that principal moratorium period is of 8 quarters which is still available as even the redemption of debentures provides for redemption up to 30/09/2018, however the tenure period was expiring on 29/09/2018 and the company was obligated to repay after the principal moratorium period of 8 quarters which is still available. But after going through the documents it is observed that the date 30/09/2018 was the date of redemption for the repayment of the last 20% of the principle amount and not the date of which the Corporate Debtor could repay the entire amounts due under the Debenture Subscription Agreement and therefore, there was no moratorium time available to repay the debt as the entire moratorium period got expired on 31/03/2017.
30. Therefore, all the contentions of the Corporate Debtor do not stand because of the abovementioned reasons and due to the existence of

debt and default being made on the part of the Corporate Debtor in making the payment to the petitioner. The amount in default is well above the minimum required amount of Rs.1 Lakh. Thus, it is to be noted that this petition fulfils all the requisite conditions to admit a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 and therefore, the petition deserves to be admitted.

31. 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. In the light of above facts and circumstances, the existence of debt and default is reasonably established by the Financial Creditor as a major constituent for admission of a petition under section 7 of the I&B Code. 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 10.01.2020 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. Sunil Kumar Bansal, having office at Flat No: 1101, 11th Floor, Akruiti Atria, Block B, Saiwadi, Off N. S. Phadke Marg, Andheri (East), Mumbai 400 069 and having Registration No. IBBI/IPA-001/IP-P01232/2018-19/11928 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

32. Accordingly, this Petition is admitted.

33. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-

Shyam Babu Gautam
Member (Technical)

Sd/-

Bhaskara Pantula Mohan
Member (Judicial)

/SNEHA/