

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. 5**

CP No. 4469/IBC/MB/2019

Under Section 9 of the I&B Code,
2016

In the matter of

**IDBI Trusteeship Services
Limited**

Asian Building, Ground Floor, 17 R.
Kamani Marg, Ballard Estate,
Mumbai – 400 001

... Petitioner

Vs.

Ornate Spaces Private Limited

774, Ornate Galaxy, Tilak Road,
Parsi Colony, Dadar (east), Mumbai
– 400 014

... Corporate Debtor

Heard on: 10.02.2020

Pronounced on: 29.06.2020

Coram: Hon'ble Suchitra Kanuparthi, Member (J)

Hon'ble Chandra Bhan Singh, Member (T)

For the Petitioner : Adv. Parag Kabadi, Adv. Taruna Nagpal, Adv.
Sachin Shankar, Adv. Ryan D'Souza, i/b
DSK Legal

For the Corporate Debtor : Adv. Harshad Rajeshirke

Per: Suchitra Kanuparthi, Member (J)

ORDER

1. The Petitioner/Applicant viz. 'IDBI Trusteeship Services Limited' (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" on 11.12.2019 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) against 'Ornate Spaces Private Limited' (hereinafter as '**Corporate Debtor**').
2. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt granted is stated to be Rs. 245,00,00,000/-, and

the amount claimed to be in default is Rs. 194,36,71,151/- as on 05.10.2019. The date of default is stated to be 31.12.2018.

BRIEF HISTORY OF THE CASE

3. The Petitioner is acting for and on behalf of the debenture holder being Piramal Capital and Housing Finance Ltd. (**Piramal Finance**).
4. The Corporate Debtor holds development rights in respect of all that piece and parcel of land admeasuring 6,629.18 sq.mtrs, bearing Plot no.H-27, H-28, H-29, H-30 and H-31(part), CTS No.1(part), 2A(part),3(part) and 6(part) of village Oshiwara, Taluka Andheri, Mumbai, suburban district.
5. The Corporate Debtor created a English Mortgage under a Debenture Trust Deed dated 29.06.2016 (**Debenture Trust Deed**) in favour of the Petitioner to secure the due repayment of principal amount of non-convertible debentures aggregating to Rs. 245,00,00,000/- of Corporate Debtor along with all outstanding amounts on the terms and conditions contained therein. Out of the said 24,500 NCD's, Corporate Debtor only issue 23,923 NCD's and the same were subscribed by Piramal Enterprises Limited. Corporate Debtor redeemed 1,990 NCDs on 02.02.2018 and presently the balance 21,943 NCDs are held by Piramal Finance. The Debenture Trust Deed has been duly registered with the sub Registrar of Assurances. The Debenture Trust Deed was amended by the Deed of Amendment dated 15.11.2016.
6. Corporate Debtor failed, neglected and defaulted to fulfil its payment obligations towards the debenture holders in accordance with the Debenture Trust Deed and also failed to pay the interest due on 31.12.2018. Since this constituted an event of default under clause 24.6 of the Debenture Trust Deed, the Petitioner became entitled to declare all the outstanding NCDs and the accrued interest thereon to be immediately due. Upon such declaration the same shall become due and payable forthwith. The Petitioner, therefore, by its letter dated 04.01.2019 addressed, inter alia to Corporate Debtor and the Guarantors declared an event of default under the said Debenture Trust Deed and called upon them to repay the entire outstanding amount aggregating to Rs. 171,23,54,552/- together with further interest and default interest till the date of the payment.
7. Corporate Debtor by its letter dated 16.01.2019 responded to the Petitioner's said letter dated 04.01.2019 admitting it's liability to pay and the default committed under the Debenture Trust Deed. By the said

letter, Corporate Debtor assured to comply with its obligations contained in the Debenture Trust Deed.

8. As Corporate Debtor and the Guarantors failed and neglected to comply with the requisitions made in the aforesaid letter dated 04.01.2019, the Petitioner by its advocate's letter 25.02.2019 called upon the Guarantors to jointly and/or severally pay to the Petitioner or to the Petitioner's advocate a sum aggregating to Rs. 173,58,10,707/- within 7 days from the date of receipt of the said notice. A copy of the said letter was endorsed to Corporate Debtor. The Guarantors have neither replied to the said letter nor paid the said amount.
9. Subsequent to the aforesaid correspondence, on 29.03.2019, Corporate Debtor paid the interest which was due and payable for the NCDs for the quarter ended 31.12.2018 without paying the default interest. On 24.06.2019 again the Corporate Debtor paid the interest which was due and payable for the NCDs for the quarter ended 31.03.2019 again without paying the default interest. Corporate Debtor has failed and neglected to pay interest due and payable for the quarters ended on 05.07.2019 and 05.10.2019 on the NCDs for the aforesaid quarters.
10. As on 5.10.2019, the total amount claimed in default was Rs 194,36,71,151/- was due and payable.
11. The Petitioner has filed Commercial Suit (L) no. 968 of 2019 in the Hon'ble Bombay High Court, inter-alia, seeking a direction against Corporate Debtor and the Guarantors to jointly and severally pay to the Petitioners an aggregate sum of Rs. 214,63,07,617/- with further interest and further default interest and fixation of a decree of foreclosure of the Mortgaged Property and sale of the Mortgaged Property and sale of the Hypothecated Properties and the Pledged Shares and payment of the net sale-proceeds thereof, after deducting the costs, charges and expenses of such sale, in the event Corporate Debtor and the Guarantors fail to pay to the Financial Creditor the detrital amounts.
12. By an ad-interim order dated 23.09.2019 passed by an Hon'ble Bombay High Court, Corporate Debtor and the Guarantors, their officers, agents, employees and servants and/or any person/entity claiming through and/or under them were restrained from in any manner selling, transferring, alienating, disposing of, encumbering, mortgaging, hypothecating, creating a charge, parting with possession, including any third party and/or creating parting with possession, including any third party and/ or creating any their party rights, title or interest or in any

manner whatsoever or license in respect of the Mortgaged Property, the Hypothecated Property and the Pledged Shares.

13. The following documents were executed by the Corporate Debtor in pursuance of and subject to the Debenture Trust Deed:
- i. Deed of Hypothecation – Debenture dated 29.06.2016.
 - ii. Power of Attorney dated 29.06.2016 for appointing the Petitioner as Corporate Debtor's true and lawful attorney to do or cause to be done various acts, deeds, matters or things mentioned therein, subject to the terms of the Deed of Hypothecation.
 - iii. Demand Promissory Note dated 29.06.2016 in favour of the Petitioner promising to pay a sum up to Rs. 245,00,00,000/-.
 - iv. An unconditional and irrevocable personal guarantee dated 29.06.2016 was executed by Mr. Vijay Sopan Machindar and Mrs. Komal Vijay Machindar in favour of the Petitioner guaranteeing payment of Rs. 245,00,00,000/- as well as the interest thereon.
 - v. Share Pledge Agreement dated 29.06.2016 executed by the Guarantors.
 - vi. Power of Attorney dated 29.06.2016 by which the Guarantors authorized the Petitioner as a Debenture Trustee to accomplish the purpose of the Share Pledge Agreement.

REPLY OF THE CORPORATE DEBTOR

14. The Corporate Debtor filed two replies on 16.01.2020 and 06.02.2020 to the petition denying the liability and raising the following contentions:
- i. The Petitioner is not the Financial creditor and that no monies have been lent or advanced by the Petitioner and hence the Petition is liable to be dismissed.
 - ii. The Petition is not maintainable since it has been filed in breach of Debenture Trust Deed dated 29.06.2016, which is very basis on which the Petitioner claims to be acting. The Debenture Trust Deed expressly provides that before initiating any action or exercising any right or performing any duty under the said Deed, the Debenture Trustee shall seek written instructions from the Debenture Holders and only upon receipt of the same shall the Debenture trustee exercise any rights. No such written instructions have been produced or filed. It would therefore appear that no such written instructions have been obtained till date.

- iii. The Petitioner has also filed Commercial Suit (L) No. 968 of 2019 in the Hon'ble Bombay High Court. A perusal of the same would show that an identical issue has been raised in the said Suit.
- iv. A perusal of the Debenture Trust Deed dated 29.06.2016 would show that the second and third tranches of the loan/disbursements were towards project related expenses. The project as planned under the said Deed is still under progress and the Corporate Debtor has been duly following up and complying with the same.
- v. Subsequent to the Debenture Trust Deed, the Corporate Debtor has entered into a Loan Agreement cum Mortgage deed dated 25.01.2019 with PNB Housing Finance Limited. A Pari Passu Agreement dated 31.01.2018 was also executed between PNB Housing Finance Limited, Piramal Finance Limited, Piramal Housing Finance Limited, Petitioner and the Corporate Debtor. However, despite the express knowledge of the Petitioner, these material and relevant agreements and facts have not been disclosed or produced with the Petition.
- vi. Under the Loan Agreement cum Mortgage Deed dated 25.01.2018 it is expressly agreed that PNB Housing Finance Limited would make payments of the earlier existing loans subject to the terms mentioned therein.
- vii. The Petitioner is entitled to the benefit of the Notification dated 27.02.2019 it may be noted that the said Notification only permits the Debenture Trustee to file on behalf of the Petitioner. However, the present application has been filed by the Debenture Trustee not itself but through a purported Power of Attorney Holder. It is submitted that the right to file being a specific right granted by statute cannot be delegated and must be filed by the Debenture trustee itself.

REJOINDER BY THE PETITIONER

15. The Petitioner filed a rejoinder on 21.01.2020 dealing with the contentions raised by the Corporate Debtor:
 - i. The Petitioner reiterated that corporate Debtor has not disputed the fact that it has defaulted repayment of financial debt or that financial debt was availed by them and now is due and payable, on this ground alone, the petition may be admitted.

- ii. The petitioner state that the reply of the Corporate Debtor is based on purported slowdown of real estate and various permissions granted is absolutely irrelevant to admission of the Petition.
- iii. The Petitioner denies that the Petition has been filed in breach of the Debenture Trust Deed. The Petitioner has received written instructions from Piramal Capital and housing Finance Limited, the sole debenture holder to file the present petition. The said provision in the Debenture Trust Deed is for the sole benefit of the debenture holder and not the Corporate Debtor. Therefore, the lack of instructions, if any, has no bearing on the rights and obligations of the Corporate Debtor under the Debenture Trust Deed and cannot be a ground for contesting the maintainability of the captioned Petition.
- iv. The filing of the Suit before the Hon'ble Bombay High Court does and cannot operate as a bar to the present Petition. The present Petition is independently filed under the insolvency and Bankruptcy Code, 2016 and cannot be obfuscated in such manner.
- v. The permissions obtained by the Corporate Debtor are immaterial and cannot be used as a defence to the breach committed by the Corporate Debtor in repaying the financial debt.
- vi. The Petitioner denies that they suppressed any documents and/or agreements. The Petitioner has duly brought on record all the documents and material which are necessary for the adjudication of the present Petition.
- vii. The Petitioner denies that the Petition is not maintainable. The Petitioner say that by a Notification dated 27.02.2019 issued by the Central Government, trustees have been authorized to file application seeking the initiation of Corporate Insolvency Resolution Process against Corporate Debtor on behalf of the Petitioner. Therefore, the present Petition is maintainable in law and fact.

FINDINGS:**QUESTIONS OF LAW:**

1. Whether there was novation of Contract?
2. Whether this Petition under Section 7 of the Code is barred by law in view of the pending civil suit for recoveries of the amount dues before the Hon'ble Bombay High Court?
3. Whether technicalities make a material change in summary proceedings under IBC?

16. a) On going through the submissions made by the Learned Counsel for both the sides and on perusing the documents produced on record, we necessarily need to consider the rights of the Petitioner to recover the amount due under the Debenture Trust Deeds and the events of defaults as contemplated there under. The Debenture Trust Deed executed by and between the Corporate Debtor and the Petitioner entailed the powers/duties conferred upon the Debenture Trustee to represent the Debenture Holder as a security trustee and represent the Debenture Holder of the events of default due to non-payment of money as contemplated under Clause 24.6. The Corporate Debtor failed and neglected to repay the monies/interest due under the Debenture Trust Deed on 31st December, 2018. Since this default constituted a default under clause 24.6 of the debenture trust deed, the Petitioner was entitled to declare the outstanding on NCD due and payable along with interest. The Financial Creditor called upon the Corporate Debtor to pay the entire outstanding amount of Rs. 1,71,23,54,552/- (One Hundred and Seventy One Crores, Twenty Three Lakhs, Fifty Four Thousands, Five Hundred and Fifty Two only) together with further interest, vide letter dated 4th January, 2019.

b) The rights of the Petitioner cannot be linked to execution of the Pari Passu Agreement dated 31.01.2018 which was also executed between PNB Housing Finance Limited, Piramal Finance Limited, Piramal Housing Finance Limited, Petitioner and the Corporate Debtor. The said agreement confirms the original Debenture Trust Deed and stipulates certain events of payment by PNB Housing finance Limited. The payments which ought to be made in accordance to the Pari Passu Agreement were not adhered to and were defaulted to. The relevant recital of the Pari Passu Agreement is extracted below:

"The lenders desire to enter into this agreement in order to share the security on first pari-passu basis without any preference or priority of the said loans availed by the borrower from the Lenders under their respective loan agreements including sharing of proceeds on enforcing of security in the manner hereinafter appearing".

Upon strict interpretation of the Pari-passu Agreement, it is evident that this agreement is a mere arrangement to share security on pari-passu basis and does not in any way substitute or Novate the original loan Agreements.

c) Clause 3.4 of the Pari-Passu Agreement, further substantiates the rights of the Lenders under their original Agreement as follows:

"Notwithstanding anything herein contained concerning the rights of individual lenders, the lenders agree that no lender taking any proceedings against the borrower shall seek to retain for itself an advantage over the others lenders as a result of that action, but at all times maintain pari-passu proportion with respect to the common security and amounts due to each of them from the borrower".

Therefore this bench concludes that statutory rights of enforcement of contract cannot be taken away by any contractual arrangement.

17. However, PNB having filed the Intervention Application MA 247 of 2020 and later chose to withdraw the said Application.
18. a) The Corporate Debtor's objection that the petitioner is not a financial creditor and that the petitioner sought to rely on the notification of Central Government which came into effect on 27/02/2019. The Corporate Debtor stated that this petition was filed on the basis of purported power of attorney of Debenture holder and no specific instructions were notified by the debenture holders.

The notification of Ministry of Corporate Affairs is extracted below:

MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 27th February, 2019
S.O. 1091(E). —In exercise of the powers conferred by sub-section (1) of section 7 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies following persons who may file an application for initiating corporate insolvency resolution process against a Corporate Debtor before the Adjudicating Authority, on behalf of the financial creditor: –
(i) a guardian;
(ii) an executor or administrator of an estate of a financial creditor;
(iii) a trustee (including a debenture trustee); and
(v) a person duly authorised by the Board of Directors of a Company.
[F. No. 30/25/2018-Insolvency Section]
GYANESHWAR KUMAR SINGH, Jt. Secy.

- b) Further we need to look at Section 7 of I & B Code, which empowers the Financial Creditor to initiate CIRP against the Corporate Debtor, Sec 7 is extracted below:

"A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor,

as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred."

c) Upon conjoint reading of Sec7 and the recent notification of Central Government, we are of the opinion that rights of parties to seek CIRP by financial Creditor or Operational creditor cannot be subjected to technicalities and formalities. The Petitioner being Debenture Trustee has sought to file this petition with a power of attorney to enforce the rights of debenture holder under the Debenture Trust Deed. The Debenture Trustee is not a financial creditor and is acting on trust/security Trustee for the Debenture holder having requisite authorisation under the Debenture Trust Deed and power of attorney as well.

d) The notification only clarifies that Debenture Trustee can file a petition under sec.7 and the defect pointed out by the Corporate Debtor and since the default took place in December19/January2019, the petitioner cannot take advantage of the subsequent notification is absolutely untenable. The procedural formality regarding obtaining written consent from the Debenture holders does not take away the statutory rights of seeking initiation of CIRP under the I & B Code 2016. The Corporate Debtor has not challenged nor disputed the execution of Debenture Trust Deeds and rights of Debenture holders under such Debentures issued by them.

19. The objection of the corporate Debtor that filing of suit, bars the rights of the Petitioner to initiate CIRP proceedings is also untenable and it is settled position of law that the petitioner can initiate CIRP under the I & B Code and also file a suit for recovery of outstanding sum. The Hon'ble NCLAT in "*Karan Goel Vs. M/s Pashupati Jewellers [Comp. App. (AT) (Ins) No. 1021/2019]*" dated 01.10.2019 at para 7 held that,

"Merely because a suit has been filed by the Appellant and is pending, cannot be a ground to reject the application under Section 7of the I &B Code. "

20. The Adjudicating Authority in summary proceedings under I & B Code is not bound by civil procedure code and technicalities prescribed therein and thus a petition under sec7 by the financial creditor can be admitted if there is a debt and default. In the instant case, the bench is of the opinion that the petitioner has sought to enforce the rights of the Debenture holder under the Debenture Trust deed dated 29th June,

2016, the Corporate Debtor has defaulted in payment of the said sum due there under. Hence the objection about material defects is untenable.

21. In "Innoventive Industries Ltd. Vs. ICICI Bank and Anr. – (2018) 1 SCC 407", the Hon'ble Supreme Court observed: -

"28 When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the Corporate Debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the Corporate Debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the Corporate Debtor."

22. In view of the above decision of Supreme Court, while admitting the petition under Sec.7, the only aspect relevant is that there is a debt and default and in the instant case, we find an express provision and obligation of repayment under the Debenture Trust Deed and further that the Corporate Debtor defaulted in paying monies under the Debenture trust deed and also under the Pari Passu agreement executed by the parties to facilitate and secure payment of monies due to the Petitioner. The primary agreement of loan namely the Debenture Trust Deed executed by parties under which the Debentures were issued to the Debenture Holders was sought to be confirmed by execution of Pari Passu Agreement and therefore it can be said that two distinct Agreement ensures to the benefit of petitioner's right of receiving payments and non-payment of monies by the Corporate Debtor or PNB demonstrates a clear liability and default, thus an action to initiate CIRP can be triggered.

23. The Corporate Debtor filed MA 225 of 2019 seeking dismissal of CP no.4469 of 2019, reiterating identical issues raised in the reply to the petition. Therefore the issues raised in the MA are subsumed in the reply and has been dealt with in the detailed finding, as such no separate order is required to be passed, the MA is disposed off accordingly.
24. Considering the above facts, we come to conclusion that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor. The two essential requirements, i.e. existence of 'debt' and 'default', for admission of a petition under section 7 of the I&B Code, have been met in this case.
25. Further that, we have also perused the Form – 2 i.e. written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Petitioner and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, Mr. Jayesh Sanghrajka, having registration No. IBBI/IPA-001/IP-P00216/2017-18/10416, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
26. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
27. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.

28. That the Interim Resolution Professional shall perform the duties as assigned under **Section 18** and **Section 15** of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
29. The Petition is hereby "**Admitted**". The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
30. Ordered Accordingly.

SD/-
Chandra Bhan Singh
Member (Technical)

SD/-
Suchitra Kanuparthi
Member (Judicial)