

National Company Law Appellate Tribunal, New Delhi

COMPANY APPEAL (AT) No. 39 of 2020

(Arising out of Order dated 17th December, 2019 passed by National Company Law Tribunal, Bengaluru Bench, in Company Petition No.- 73/BB/2019)

IN THE MATTER OF:

**Akhil R Kothakota
65/66 Classic Orchards, Phase 2
Behind Meenakshi Temple
Bannerghatta Road
Bengaluru 560 076.**

**2. Madadi Rinda
Villascapes Villa,
No 33, Gandipet,
Opposite Lane Villa Greens,
Hyderabad - 500075**

.....Appellants

Versus

**M/s. Tierra Farm Assets Company Pvt. Limited
Technopolis, Seventh Floor, A-Wing
No 325/1, 14th Main, 5th Cross
RMV Extension, Sadashiv Nagar
Bengaluru - 560**

....Respondent

**Appellants: Mr. Aditya Verma and Mr. Priyamvada Mishra,
Advocates.
Respondent: None.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. This Appeal is preferred by the Petitioners against the Order dated 17.12.2019 passed by the National Company Law Tribunal, (Bengaluru Bench, NCLT) in (CP/73/BB/2019). By the Impugned Order, NCLT, while disposing of the Petition has observed as follows;

“5. The facts as narrated above disclose that it is not case of even the Petitioners that the Company has resorted to misappropriation/fraud in order to deny the claim of the Petitioners. The financial status of the Company discloses that the Company is suffering substantial losses leading to severe financial distress

making it unable to pay its stake holders. Since the issue is not exclusively confined to the Petitioners, as several similarly situated stake holders, as per the list enclosed to the Petition, the efforts being by the Company like to explore the possibility of settlement, refer the matter to Arbitration, selling properties of the Companies, are appropriate/plausible steps to be pursued so as to find solution to the entire issue.

6. The basic facts as contended by the Petitioners, prima facie, are not in dispute. While deciding an Application/Petition filed U/s 71(10) Companies Act, 2013 R/w 73 of NCLT Rules, 2016, the Tribunal has to consider financial status of Company, the interest of all stake holders etc., before ordering to repay the outstanding standing exclusively in respect of Petitioners. We are convinced with the reasons furnished by the Company for its failure to redeem debentures, pay interest of NCDs in question. Therefore, it would be just and proper to grant six months' time tentatively to the Company to explore all possibilities of settlement of the claims of the Petitioners alongwith all similarly situated claimants.

7. In the result, by exercising powers conferred on this Tribunal, U/s. 71(10) of the Companies Act, 2013 R/w Rule 73 of the NCLT, Rule 2016, the Company Petition bearing C.P. No. 73/BB/2019 is hereby disposed of with the following directions:

(1) The Respondent Company is hereby granted six months' time, provisionally from today, so as to explore all possibilities of settlement of claims of Petitioners alongwith other similarly situated claimants.

(2) No order as to costs."

2. Succinctly put, the facts in brief, are that M/s. Tierra Farm Assets Company Pvt. Ltd. (hereinafter referred to as the 'Respondent Company'), incorporated on 13.03.2012, issued certain secured 'Non-Convertible Debentures'. On 17.12.2015 a Debenture Trust Deed was executed between the 'Respondent Company' and Vistra ITCL (India) Limited, which is the Debenture Trustee to issue debentures against certain properties listed in Schedule II of the Deed. On 21.03.2017, an Allotment Letter was issued to the first Appellant for 75 secured 'Non-Convertible Debentures' for a

purchase amount of Rs. 15,00,000/- and on 30.03.2017, another Allotment Letter was issued for 150 secured 'Non-Convertible Debentures' for a purchase amount of Rs. 30,00,000/-. The second Appellant was issued an Allotment Letter dated 30.03.2017 for 75 secured 'Non-Convertible Debentures' for an amount of Rs. 15,00,000/-. It is the case of the Appellants that the 'Respondent Company' was due to pay quarterly interest amount but no such interest payments have been made subsequent to 01.01.2018 and that the Company made only the following interest payments to the petitioners which was detailed before NCLT as follows;

“(4) In line with its obligations under the debentures, the Company made the following interest payments to the Petitioners:

- a. Debenture Holder No.1: Interest payments of Indian Rupees Four Lakhs Seventy Thousand (INR 4,77,000/-) on 30.06.2017, Indian Rupees Two Lakhs Seven Thousand (INR 2,07,000/-) on 04.10.2017 and Indian Rupees Two Lakhs Seven Thousand (INR 2,07,000/-) on 01.01.2018.*
- b. Debenture Holder No. 2: Interest payments of Indian Rupees One Lakh Twenty-Eight Thousand Nine Hundred and Twenty Five (INR 1,28,925/-) on 04.10.2017 and Indian Rupees Sixty Two Thousand One Hundred (INR 62,100/-) on 01.01.2018.*

(5) As per the terms of the debentures, the Company was supposed to make interest payments to the Petitioners in March 2018, June 2018, September 2018 and December 2018 (as of the date of filing). However, the Company failed and neglected to make such payments. Upon the failure of the Company to make the interest payments on schedule, the Petitioners started addressing correspondence to their Broker, the Debenture Holders Representative, the Debenture Trustee and the Company. The Petitioners have been diligently following up with the Company and the various other entities involved in the issue of the debentures. Right from the time, the interest payments were defaulted on, the Petitioners have addressed correspondence calling upon the Company,

the Debenture Trustee and the Debenture Holders Representative to comply with the terms of the Debenture Trust Deed. The Petitioners have also been consistent in their demand for redemption of the debentures as stipulated under the terms of the Debenture Trust Deed.

(6) As of the date of filing of this Application, the following amounts are due and payable. These amounts include the default interest payable, as well as the prepayment penalty (which is triggered if the early redemption is on account of the Company's default):

a) Debenture Holder No. 1:

a. Principal amount of Indian Rupees Forty Five Lakhs (INR 45,00,000/-).

b. Interest of Indian Rupees Eight Lakhs Twenty Eight Thousand (INR 8,28,000/-) [payments due on 31.03.2018, 30.06.2018, 30.09.2018 and 31.12.2018]

c. Default interest (as per clause 5.5 of the Debenture Trust Deed) as of January 2019:

i. On the sum of Indian Rupees Two Lakh Seven Thousand (INR 2,07,000/-) due on 01.03.2018; Indian Rupees Twelve Thousand Four Hundred and Twenty (INR 12,420/-) (months 1-3) + Indian Rupees Twenty Four Thousand Eight Hundred and Forty (INR 24,840/-) (months 4-6) + Indian Rupees Forty Nine Thousand Six Hundred and Eighty (INR 49,680/-) (months 7-10).

ii. On the sum of Indian Rupees Two Lakhs Seven Thousand (INR 2,07,000/-) due on 01.06.2018: Indian Rupees Twelve Thousand Four Hundred and Twenty (INR 12,420/-) (months 1-3) + Indian Rupees Twenty Four Thousand Eight Hundred and Forty (INR 24,840/-) (months 4-6) + Indian Rupees Twelve Thousand Four Hundred and Twenty (INR 12,420/-) (months 7).

iii. On the sum of Indian Rupees Two Lakhs Seven Thousand (INR 2,07,000/-) due on 01.09.2018: Indian Rupees Twelve Thousand Four Hundred and Twenty (INR 12,420/-) (months 1-3) + Indian Rupees Eight Thousand Two Hundred and Eighty (8,280/-) (month 4).

iv. On the sum of Indian Rupees Two Lakhs Seven Thousand (INR 2,07,000/-)

due on 01.12.2018: Indian Rupees Four Thousand One Hundred and Forty (INR 4,140/-) (month 1).

d. Prepayment Penalty (as per clause 5.9): 3% of Indian Rupees Forty Five Lakhs (INR 45,00,000) + Indian Rupees One Lakhs Thirty Five Thousand (INR 1,35,000)

Total due as of date: Indian Rupees Fifty-Six Lakhs Twenty-Four Thousand Four Hundred and Sixty (INR 56,24,460/-)

b) Debenture Holder No. 2:

a. Principal amount of Indian Rupees Fifteen Lakhs (INR 15,00,000/-)

b. Interest of Indian Rupees Two Lakhs Seventy-Six Thousand (INR 2,76,000/-) [payments due on 31.03.2018, 30.06.2018, 30.09.2018 and 31.12.2018]

c. Default interest (as per clause 5.5 of the Debenture Trust Deed) as of January 2019:

i. On the sum of Indian Rupees Sixty-Nine thousand (INR 69,000/-) due on 01.03.2018: Indian Rupees Four Thousand One Hundred and Forty (INR 4,140/-) (months 1-3) + Indian Rupees Eight Thousand Two Hundred and Eighty (INR 8,280/-) (months 4-6) + Indian Rupees Sixteen Thousand Five Hundred and Sixty (INR 16,560) (months 7-10).

ii. On the sum of Indian Rupees Sixty-Nine Thousand (INR 69,000/-) due on 01.06.2018: Indian Rupees Four Thousand One Hundred and Forty (INR 4,140/-) (months 1-3) + Indian Rupees Eight Thousand Two Hundred and Eighty (INR 8,280/-) (months 4-6) + Indian Rupees Four Thousand One Hundred and Forty (INR 4,140/-) (month 7).

iii. On the sum of Indian Rupees Sixty-Nine Thousand (INR 69,000/-) due on 01.09.2018: Indian Rupees Four Thousand One Hundred and Forty (INR 4,140/-) (months 1-3) + Indian Rupees Two Thousand Seven Hundred and Sixty (INR 2,760/-) (month 4).

iv. On the sum of Indian Rupees Sixty Nine Thousand (INR 69,000/-) due on 01.12.2018: Indian Rupees One Thousand Three Hundred and Eighty (INR 1,380/-) (month 1).

v. Prepayment penalty (as per clause 5.9 of the Debenture Trust Deed): 3% of Indian Rupees Fifteen Lakhs (INR 15,00,000/-) + Indian rupees Forty-Five Thousand (INR 45,000/-)

Total due as of date: Indian Rupees Eighteen Lakhs Seventy Four Thousand Eight Hundred and Twenty (INR 18,74,820/-)."

3. The Appellants stated that despite being in default neither the Debenture Holders Representative nor the Debenture Trustee have responded to the Petitioners' specific request for redemption of the debentures. Despite repeated correspondence between 19.04.2018 to 04.09.2018, vide various e-mails, the Debenture Holder Representative or the Debenture Trustee did not respond to the issue of non-payment of quarterly interest. On 05.09.2018, the Appellants sent an e-mail invoking this right under clauses 5 and 12 of the Debenture Trust Deed and finally on 31.10.2018, a legal notice was also issued for which there was no response. Thereafter, on 09.11.2019 the said Company Petition was filed before NCLT seeking the following directions;

"(a) That the Company abovenamed be directed to make repayment of the aforesaid Deposit(s)/Debenture(s) along with interest due thereon in accordance with the Terms and Conditions of the Deposit/Debenture i.e., Indian Rupees Fifty-Six Lakhs Twenty-Four Thousand Four Hundred and Sixty (INR 56,24,460/-) to Debenture Holder no.1 and Indian Rupees Eighteen Lakhs Seventy Four Thousand Eight Hundred and Twenty (INR 18,74,820/-) to Debenture Holder No. 2;

(b) Pending the hearing of this application, the Company be enjoined from dealing with the

Mortgaged Properties as specified in the Debenture Trust Deed 17.12.2015;

(c) Pending the hearing of this application, a direction to the Company/Security Providers to deposit the amount of Indian Rupees Seventy Four Lakhs Ninety-Nine Thousand Two Hundred and Eighty (INR 74,99,280/-) with this Hon'ble Tribunal;

(d) Pending the hearing of this application, a direction to the Company/Security Providers to deposit the receivables as defined in the Debenture Trust Deed dated 17.12.2015 with this Hon'ble Tribunal;

(e) Pending the hearing of this application, a direction to the Debenture Trustee to enter into/take possession of the Mortgaged Properties as specified in the Debenture Trust Deed dated 17.12.2015; and

(f) Such further orders be passed as this Hon'ble Tribunal deems fit in the facts and circumstances of this case.

(Emphasis Supplied)

4. Learned Counsel appearing for the Appellant vehemently contended that NCLT has not given any specific direction of repayment and has only disposed of the Petition with the direction to the 'Respondent Company' to 'explore all possibilities of settlement' without giving any timeline for repayment; that Section 71(10) of the Companies Act 2013 specifically empowers the Tribunal to '*direct, by Order, the Company to redeem the debentures forthwith on payable of principal and interest due thereon*' when a Company has failed to pay interest on debentures when it is due. The Learned Counsel further contended that no particulars were pleaded or provided by the 'Respondent Company' regarding any efforts made towards settlement either by way of Arbitration or sale of properties and that the case of the 'Respondent Company' has been considered by NCLT as the gospel truth, without any binding dictum, in the absence of which, the Appellants and the individual Debenture Holders would suffer.

5. The main issue which arises for consideration is whether the provisions under Section 71(10) of the Companies Act 2013 was adhered to by NCLT while disposing of the Petition.

6. It is the main contention of the Learned Counsel appearing for the Appellant that NCLT did not specifically address to 'the prayer for repayment' but rather gave a direction to explore all possibilities of settlements of claims of Petitioners and granted six months' time, which is ultra vires to Section 71(8) and Section 71(10) of the Companies Act, 2013.

7. Despite service of notice, there was no representation from the 'Respondent Company'. Notice was issued on 12.02.2020 to the 'Respondent Company' by Speed Post by this Tribunal and thereafter the matter was posted on 25.02.2020 and on 19.03.2020. Subsequently, the matter was adjourned to 13.10.2020 when the Counsel for the Appellant filed 'Affidavit of Service' to establish that the 'Respondent Company' was also served through e-mail. The matter was adjourned to 02.11.2020 for final Hearing but none appeared for the 'Respondent Company'.

8. Learned Counsel relied on the Judgement of the Hon'ble Supreme Court in ***Dhampur Sugar Mills Ltd. V/s. State of U.P. & Ors. 2007/8 SCC 338*** in which it is observed that the "power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case" binds the Tribunal to give effect to the right of the Appellants under Section 71(10) read with Section 71(8). He also placed reliance on the Judgement of the Hon'ble Apex Court in ***Manohar Lal (D) by Lrs. V/s. Ugrasen (D) by Lrs. & Ors. 2011/SCC 557*** in which it was held 'the Court

cannot grant a relief which has not been specifically prayed for by the Parties’.

9. For better understanding of the case Section 71(8), 71(9), 71(10), 71(11) and 71(12) of The Companies Act, 2013 are reproduced as hereunder:-

“71(8) A company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue.

71(9) Where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal and the Tribunal may, after hearing the company and any other person interested in the matter, by order, impose such restrictions on the incurring of any further liabilities by the company as the Tribunal may consider necessary in the interests of the debenture-holders.

71(10) Where a company fails to redeem the debentures on the date of their maturity or fails to pay interest on the debentures when it is due, the Tribunal may, on the application of any or all of the debenture-holders, or debenture trustee and, after hearing the parties concerned, direct, by order, the company to redeem the debentures forthwith on payment of principal and interest due thereon.

71(11) If any default is made in complying with the order of the Tribunal under this section, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than two lakh rupees but which may extend to five lakh rupees, or with both.

71 (12) A contract with the company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.”

10. It is significant to mention that Section 71(11) of the Companies Act, 2013 speaks of ‘Penalty for Default’. Section 71(12) provides ‘a contract with

a Company to take up & pay for any debentures of the Company may be enforced by a decree of 'Specific Performance'. As a matter of fact, Section 73 of the NCLT Rules, 2016 relates to 'Applications' under Section 71(9), 71(10), 73(4) and Section 74(2) & Section 76(2) of the Companies Act, 2013. It is relevant to mention that the relief for 'Specific Performance' is allowed as a 'rule' when there is no other relief which would meet the circumstances of the given case. In **Mamta Kothari V/s. Bharat Hydro Power Corporation Ltd. (2015) 129 SCL**, Section 117(4) of the 1956 Companies Act (equivalent to Section 71 of the Companies Act, 2016) has been discussed at length by CLB, Kolkata. Apart from holding that the Application was not barred by limitation, the Respondent Company was directed for redemption of the debentures covered by the Applications by Payment of the Principal amount and interest due thereon as per the terms and conditions of the issue of such debentures.

11. On a pointed query from the Bench, Learned Counsel appearing for the Appellant submitted that though the Impugned Order is dated 17.12.2019 and six months' time granted by the Tribunal had lapsed, till date, the 'Respondent Company' did not take any pro-active steps to initiate or explore any kind of possibility of Settlement.

12. A perusal of the Reply filed by the 'Respondent Company' in the Company Petition before the Tribunal shows that there is a clear admission by the 'Respondent Company' in paras 12 to 18 that there is a default of payment of interest on the 'Non-Convertible Debentures' and that they proposed to settle the dues and that the matter was under due process. It is relevant to mention that in para 17 of their Reply, the 'Respondent

Company' had averred that there is an Arbitration proposal pending between the Parties, but the material on record does not evidence any such initiation of 'Arbitration proceedings'.

13. A perusal of the record shows that the Tribunal had taken into consideration the 'Financial Status of the Company', the interest of all 'Stake Holders' and has given a direction for settlement. However, the fact remains that the 'Respondent Company' did not make any effort to settle the matter nor was there any representation on their behalf before this Tribunal, despite service of notice. Section 71(10) provides a clear mechanism for issue and repayment of debentures, including the enforcement of repayment obligations. Section 71(10) provides that the Tribunal may hear the Parties concerned and direct, by Order, the Company to redeem the debentures forthwith on payment of principal and interest due thereon. We find force in the contention of the Learned Counsel appearing for the Appellant that Section 71(10) does not empower the Tribunal to ascertain the financial condition of the default Party or grant any other relief than the relief provided for under the said Section. It is also seen that there is no Arbitration clause in the Debenture Trust Deed and on a query from the Bench, Learned Counsel replied that 'no consent' was given by the Appellants for initiation of any 'Arbitration proceedings' and that till date it is a 'non-starter'.

14. Having regard to the Prayer of the Appellant, the provisions of Section 71(8) read with Section 71(10) of the Companies Act 2013 and also the fact that no concerted efforts have been made by the 'Respondent Company' to explore the possibilities of settlement and also the fact that the

time of six months' granted by the National Company Law Tribunal has lapsed, though this Tribunal is of the considered view that Section 71(10) of the Companies Act 2013, ought to have been strictly adhered to, keeping in view the facts and circumstances of the attendant case on hand, this Appeal is disposed of with a specific direction to the 'Respondent Company' to repay the amounts 'due and payable' to the Appellants herein within a period of two months from today, failing which it is open to the Appellants to take steps as deemed fit, in accordance with Law. No costs. IA No. 706/2020 (for stay) is closed.

[Justice Venugopal M.]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
09th November, 2020

ha