

Through Videoconference

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. - I**

*** *** ***

C.P. No. 138/MB/2020

An Application under Section 71(10) of the Companies Act, 2013
(Under Rule 73, Part VIII of the National Company Law Tribunal Rules, 2016)

IDBI TRUSTEESHIP SERVICES LIMITED

having its registered office at
Asian Building, Ground Floor,
17, R. Kamani Marg, Ballard Estate,
Mumbai – 400 001.

... ***Petitioner***

versus

RELIANCE HOME FINANCE LIMITED

having its registered office at
Reliance Centre, 6th Floor, South Wing,
Off Western Express Highway, Santacruz (East),
Mumbai – 400 055.

... ***Respondent***

Date of Order: 21.06.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

For the Petitioner: Mr. Prateek Seksaria, Advocate with Mr. Ameya Gokhale, Mr. Vaibhav Singh and Ms. Pragya Sharma, Advocates i/b Shardul Amarchand Mangaldas & Co.

For the Respondent: Mr. Venkatesh Dhond, Learned Senior Counsel with Mr. Sarosh Bharucha, Mr. Tushad Kakalia, Ms. Raghavi Sharma and D. J. Kakalia i/b Mulla and Mulla and CBC.

Per: Janab Mohammed Ajmal, Member (Judicial)

ORDER

The Debenture Trustee seeks direction under Section 71(10) of the Companies Act, 2013 (the Act) for redemption of the debentures issued by the Respondent.

2. The facts pleaded in the Company Petition may be stated as follows.
 - (a) The Petitioner, a public limited Company, is the Debenture Trustee registered under the Securities and Exchange Board of India (SEBI) (Debenture Trustee) Regulations, 1993.
 - (b) The Board of Directors (BoD) of the Respondent on 10.11.2016 authorised issuance of secured non-convertible debentures (NCDs) at face value of INR 1000/- each aggregating to INR 3,00,000 Lakhs and unsecured NCDs at face value of INR 1000/- each aggregating to INR 50,000 Lakhs.
 - (c) The Petitioner by Debenture Trustee Agreement dated 10.11.2016 consented to act as the Debenture Trustee to the aforesaid Debentures. After the Respondent issued the prospectus as required under the Act and the Regulations, the Petitioner entered into a Debenture Trust Deed (DTD) with the former on 02.01.2017.
 - (d) The Respondent then on 03.01.2017 issued two series of Unsecured NCDs at face value of INR 1000/- each, with coupon interest at the rate of 9.25% (for NCD Series I- INE217K08271) and 9.40% (for NCD Series II - INE217K08269) payable annually to the respective debenture holders. The maturity / redemption date was 03.01.2032.
 - (e) The Respondent enjoyed credit rating of “AA+” on the date of issue of the NCDs. The credit rating however had a downslide from ‘C’ as on 26.04.2019 to ‘D’ as on 12.09.2019. The fall in the credit rating within

such a brief period alarmed the Debenture Trustee (i.e. Petitioner) who was obliged to act to safeguard the rights and interest of the debenture holders.

- (f) Meanwhile the Respondent on 27.04.2019 informed the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE) that it had delayed the repayment of principal aggregating to INR 542,00,00,000/- in respect of the loan due to various Banks. The Respondent however assured that it would regularise the said payment shortly. The Respondent's admission of default in respect of the repayment of the material debts constituted an 'event of default' in terms of clauses 5.2 (g) and (i) of the DTD.
- (g) The Respondent on 29.06.2019 informed the BSE & NSE further that due to the ongoing liquidity crunch, the maturity of certain (other) debentures worth INR 400,00,00,000/- has been extended till 31.10.2019 with the consent of the debenture trustees and the debenture holders concerned. The said communication and admission of default also constituted 'event of default' under the DTD.
- (h) Considering the large scale financial debacle *inter alia* in the affairs of the Respondent, the Reserve Bank of India (RBI) issued circular dated 07.06.2019, devising a framework for Resolution of Stressed Assets. In pursuance thereof the lenders of the Respondent entered into an Inter-Creditor Agreement (ICA) to arrive at a Resolution Plan. Neither the Petitioner nor any of the debenture holders to the extant issue had anything to do with the ICA nor had they agreed to the proposition.
- (i) On 15.07.2019, the Petitioner called upon the Respondent to provide information *inter alia* of any debenture redemption reserve, the list of receivables for securing the NCDs and regarding the future course of action in making the payment to the debenture holders. The Petitioner by letter dated 07.08.2019, indicated several breaches of the terms of the DTD and called upon the Respondent to remedy the same.

- (j) The Petitioner then obtained the consent of more than 75% in value of the unsecured NCD holders as required under the DTD for accelerating redemption of the unsecured NCDs. The Petitioner on 17.12.2019 by letter informed the Respondent of various acts of default and called upon to make the payment of the principal and the interest aggregating to INR 471,28,77,146/- due in respect of the unsecured NCDs. The Respondent however failed to make any payment. Such failure also constituted an 'event of default' under clauses 5.2 (a) & (b) of the DTD.
- (k) Even otherwise the Respondent was liable to pay the interest to the tune of INR 40,58,16,292/- in respect of the NCDs on 03.01.2020 and had failed to honour the same. Such default also constituted an 'event of default' under DTD.
- (l) The Petitioner unsuccessfully put the Respondent on notice dated 04.01.2020 to make the payment of all monies in respect of the unsecured NCDs aggregating to INR 476,29,09,292/- with interest at the rate of 2% p.a. till the date of realisation.
3. The Petitioner accordingly came up with the present Petition *inter alia* with the following prayers [interim prayers are omitted]:
1. *That this Hon'ble Tribunal order and declare that the Respondent is liable and obligated to redeem the Unsecured NCDs and make the payment of principal amount, interests and all monies due and payable amounting to INR 476,29,09,292/- (Indian Rupees Four Hundred Seventy Six Crores Twenty Nine Lakhs Nine Thousand Two Hundred Ninety Two only) being the undisputed outstanding amount due and payable in respect of the Unsecured NCDs;*
 2. *That this Hon'ble Tribunal order and declare that any action taken or resolution passed by the Respondent in order to subvert the rights of the Applicant and the Unsecured NCD holders and to evade*

Respondent obligations of redemption of the Unsecured NCDs and payment of the principal amount along with interest and all monies due thereon is illegal non-binding, invalid and non-est;

3. *That the Respondent above named be directed to make repayment of the debentures pertaining to Unsecured NCDs along with interest and all monies due thereon; aggregating to INR 476,29,09,292 Indian Rupees Four Hundred Seventy Six Crores Twenty Nine Lakhs Nine Thousand Two Hundred Ninety Two only) in accordance with the terms and conditions of the Debenture Trust Deed;*
 4. *That in respect of NCD Series – I the Respondent above named be directed to make payment of interest at the rate of 11.25% on the sum of INR 273,15,77,750/- (Indian Rupees Two Hundred Seventy Three Crores Fifteen Lakhs Seventy Seven Thousand Seven Hundred Fifty only) from 4 January, 2020 until payment and / or realization thereof;*
 5. *That in respect of NCD Series – II, the Respondent above named be directed to make payment of interest at the rate of 11.40% on the sum of INR 203,13,31,542/- (Indian Rupees Two Hundred Three Crores Thirteen Lakhs Thirty One Thousand Five Hundred Forty Two only) from the date of this Application until payment and / or realization thereof.*
4. The Respondent did not file a reply to the Petition. The defence plea, in objection to the Petition, culled from the written submission filed by the Respondent may be stated as follows.
- (a) The power under Section 71(10) of the Act is discretionary and could not be automatic solely on the basis of default in honouring the NCDs as contended by the Petitioner. The use of word ‘may’ in Section 71(10) of the Act is a clear indication that the Tribunal has to exercise its discretionary jurisdiction while granting the reliefs thereunder. The

jurisdiction therefore could not be mandatory. The use of word 'shall' in sub-section 11 in contradistinction to the word 'may' in sub-section 10 clearly indicates that the jurisdiction under sub-section 10 cannot be mandatory.

- (b) Sub-section 8 thereof provides that the payment of interest or the redemption of the debentures has to be made in terms of the issue. Therefore without considering the terms of the debenture issue, the discretion under sub-section 10 cannot be appropriately used. Sub-section 10 enjoins the Tribunal to order the payment of the principal as well as interest, upon a solitary instance of default, even of payment of interest. Therefore, it is incumbent on the Tribunal to exercise the discretion judiciously and to decide when and how the power needs to be exercised.
- (c) Reference is also made to Rule 73 of the National Company Law Tribunal Rules, 2016 (the Rules) that the Tribunal before making an order under Section 71 of the Act shall give reasonable opportunity of being heard to the Company and any other person interested in the matter. The Rule therefore indicates that the Tribunal may conclude the factum of default but still exercise its discretion in not passing an order for redemption. Sub-rule 4 provides that the order needs to be made taking into consideration the interest of the Company, the debenture holders, the depositors or in the public interest. While passing an order, the Tribunal should also consider the financial condition of the Company.
- (d) It is further submitted that an order in favour of the Petitioner would not be in the interest of the Respondent or its body of creditors and even in the interest of the debenture holders whom the Petitioner represents. The principal outstanding against the unsecured NCDs represent only 4% of the total principal debt burden of the Respondent. The lenders of the Respondent have, under the RBI circular dated 07.06.2019, entered into

an ICA *inter alia* for the debt resolution of the Respondent. Therefore, an order in terms of the relief sought would cause serious prejudice to the Respondent and the ICA lenders who so far have refrained from enforcing their security. An order as sought would rather derail the Resolution Process and would adversely affect the potential resolution of the Respondent.

- (e) The redemption date of the principal amount is more than 11 years away (i.e. 03.01.2032). Therefore, the proposed resolution of the Respondent could possibly take care of the payments. Their redemption is claimed on the basis of right of acceleration provided under the DTD. Event of default under clause 5.2 (g), (i) & (o) as alleged are erroneous and doesn't constitute the 'event of default'. Therefore, the event of default has not been established and an order under Section 71(10) of the Act could not be passed. The Petition is otherwise not maintainable and is liable to be rejected.

5. We have heard the learned counsel appearing for both the sides. It is submitted on behalf of the Petitioner that once the Tribunal is satisfied that there has been a default as contemplated under Section 71(10) of the Act, it would be obligatory on the part of the Tribunal to pass an order thereunder. In this connection reliance is placed on *Akhil R. Kothakota and another v. M/s Tierra Farm Assets Company Pvt. Ltd. (Company Appeal (AT) No. 39 of 2020 decided on 09.11.2020)* and *Indrajit Saroj & Ors. v. Prism Industrial Complex Limited Company & Ors (CP No. 201/ALD/2017, NCLT, Allahabad Bench decided on 18.05.2018)*
6. There is no quarrel that the Petitioner represented 1348 number of debenture holders in respect of the following unsecured NCDs issued by the Respondent.

Sr. No.	ISIN	Principal Redemption Date	Coupon Interest Rate (%) (payable annually)
1.	INE217K08271 ("NCD Series - I")	3 January 2032	9.25
2.	INE217K08269 ("NCD Series -II")	3 January 2032	9.40

7. The Petitioner acts to protect the rights and interest of the debenture holders in terms of the DTD dated 02.01.2017. The DTD mandated that the Respondent shall pay the principal amount of the unsecured NCDs with accrued interest to the debenture holders. Event of default in respect of the unsecured NCDs is stipulated under clause 5 of the DTD. The relevant clauses *inter alia* read as follows:

“3 Unsecured NCDs

3.1 Amount of Unsecured NCDs, Purpose and Covenant to Pay Principal and Interest

...

3.1.3 The Company covenants with the Debenture Trustee that the Company shall pay to the Un-Secured NCD Holders the principal amount of the Un-Secured NCDs along with any accrued interest, on the Redemption Date(s) mentioned in the Financial Covenants and Conditions.

3.1.4 The Company covenants with the Debenture Trustee that the Company shall also pay interest and any other Amounts Outstanding on the Un-Secured NCDs at the rate stipulated along with all other monies in accordance with the provisions set out in the Financial Covenants and Conditions.

...

3.1.9 In case of any default in payment of the Amounts Outstanding of the due date (as applicable), the Company shall pay a default interest rate as mentioned under clause 20.2 hereto.

5 EVENTS OF DEFAULT AND REMEDIES:

5.1 Upon the occurrence of any of the events specified in Clause 5.2 below (each, an “Event of Default”), the Debenture Trustee may, in its discretion, which has not been waived in writing by the Debenture Trustee (acting on the Approved Instructions), the Debenture Trustee may or acting on the Approved Instructions shall, after notice to the Company but without intervention of any court or without assigning any reason, declare the principal amount of the Un-Secured NCDs, all interest and all other monies to be due and payable forthwith, and the Debenture Trustee shall have the following rights namely;-

5.2 The occurrence of any one of the following events shall constitute an Event of Default by the Company:

a. Default is committed in payment of the principal amount of the Un-Secured NCDs on the due date(s) and such default continues for a period of 30 (thirty) working days;

b. Default is committed in the payment of any interest on the Un-Secured NCDs on the due date(s) and such default continues for a period of 30 (thirty) working days;

c. Default is committed in payment of any other Amounts Outstanding and such default continues for a period of 30 (thirty) days;

...

g. If the Company is unable to pay its material debts (in the reasonable opinion of the Debenture Trustee) or proceedings for taking it into liquidation, whether voluntarily or compulsorily, may be or have been commenced or any resolution voluntary winding-up is passed or a competent Court admits any petition for winding-up which is not stayed or vacated;

...

i. The Company is unable to or has admitted in writing its inability to pay its material debts as and when the same are due or it is certified by an accountant appointed by the Debenture Trustee that based on the examination of the financial condition of the Company

by reason of the Company's liquidity position, insufficiency of cash flows, or otherwise, it is unlikely that the Company would be in a position to pay its obligations in connection with the NCDs;

...

o. The Company enters into amalgamation, reorganization or reconstruction without the prior consent of the Debenture Trustee in writing as per requirements of Applicable Laws;

5.3 In any Event of Default or any event which, after the notice or lapse of any time, or both would constitute an Event of Default has happened, the Debenture Trustee at its discretion may, or if so requested in writing by the holders of not less than three-fourth in value of the principal amount of the Un-Secured NCDs then outstanding, or if so directed by a special resolution of the Un-Secured NCD Holders shall (subject to being indemnified and/or secured by the Un-Secured NCD Holders to its satisfaction) give notice to the Company specifying that the Amounts Outstanding in whole but not are and have become due and repayable at the early redemption amount on such date as may be specified in such notice. It is clarified that this right provided to the Debenture Trustee is in addition to the rights provided under 5.1 above”.

8. It is not in dispute that the Respondent by letter dated 27.04.2019 informed the BSE & NSE that the repayment of principal to various banks have been delayed due to the ongoing securitization and monetization proposals considered by the financial institutions. It is also not in dispute that by letter dated 29.06.2019, the Respondent informed the BSE & NSE that due to severe liquidity crisis in the housing sector, the maturity of certain debentures has been extended till 31.10.2019.
9. The letters dated 27.04.2019 and 29.06.2019 clearly indicate that the Respondent has been unable to pay its material debts. It is also not in dispute that the lenders, owing to the inability of the Respondent to service its debts,

have come together to endeavour a debt Resolution Process for the Respondent. The conduct of the Respondent in not being able to service its debts clearly constitutes an event of default in terms of clause 5.2 (g) & (i) of the DTD. Further the interest in respect of unsecured NCDs was due on 03.01.2020. The payment was not made until 09.01.2020 (date of filing of the Petition).

10. The Respondent's inability to pay the material debts is independent of other conditions / circumstances specified in clause 5.2 (g) & (i) of the DTD. Therefore, the default in servicing the other material debts and the failure of the Respondent to pay the interest due on the extant unsecured NCDs clearly constitutes events of default as agreed to between the parties under the DTD.
11. Therefore, we have no hesitation in holding that the Respondent committed default in respect of the payment of interest on the debentures in terms of Section 71(10) of the Act.
12. It goes without saying that the redemption of the debentures and the payment of interest has to be in accordance with the terms and conditions of the issue. The same is specified in sub-section 8 of Section 71 of the Act. As already indicated the Respondent defaulted in making the payment of interest as required under the terms and conditions of their issue. Therefore the Petitioner / debenture trustee was entitled to move the present forum in sub-section 10. Therefore, we have no hesitation in holding that the Respondent committed default in respect of the payment of interest on the debentures in terms of Section 71(10) of the Act.
13. With regard to the language used in the section it would presently be profitable to revisit Section 71(10) of the Act which reads as follows:

“(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”.

14. As the language of sub-section 10 indicates, failure to redeem the debentures on the date of their maturity or failure to pay interest on the debentures when due, would trigger the mischief thereunder. It is contended by the Respondent that the word ‘may’ appearing in sub-section 10 cannot be construed as mandatory but is only directory in nature. It is further submitted that sub-section 11 of section 71 of the Act uses the word ‘shall’. The use of the word ‘shall’ in sub-section 11 is clearly demonstrative of the fact that the action contemplated under sub-section 10 cannot be mandatory.
15. The sub-section lays down the conditions and circumstances where the Tribunal may direct the Company to redeem the debentures forthwith on payment of principal and interest due thereon. The conditions as indicated are that the Company either failed to redeem the debentures on the date of their maturity or fails to pay the interest thereon on their due date. The other condition being, before passing an order, the Tribunal is required to hear the parties concerned. In the instant case the parties have been heard at length and the condition regarding hearing has been fulfilled. In addition, as already held the Respondent has failed to pay the interest on the debentures on the date they were due.
16. Sub-section 11 of Section 71 of the Act is a penal provision for non-compliance of the order of the Tribunal passed under Section 71 of the Act. Penal provisions are the result of violation of the order of an Authority. Therefore there could not be any comparison between the words used in a penal provision and those in other provisions prescribing procedure for the Tribunal to deal with a default in performance of a contract between parties.

17. The use of word 'shall' in sub-section 11 would not decide whether the word 'may' used in the preceding sub-section would be mandatory or directory. What is required to be seen is the context in which the word is used and the attendant conditions provided in the section / sub section. Therefore the language of sub-section 11 would hardly have any bearing and relevance in interpreting the language of sub-section 10.
18. Learned senior counsel appearing for the Respondent further relied upon sub-rule 4 of Rule 73 of the Rules to canvass that the Tribunal is not bound to pass an order under sub-section 10. The procedure prescribed under sub-rule 4 indicates that depending upon the circumstances enumerated therein, the Tribunal may stay its hands in passing an order under sub-section 10 of Section 71 of the Act. It will accordingly be appropriate to quote the relevant provision.

“73. Application under sections 71(9), 71(10), section 73(4) or section 74(2) and 76(2).-

xxx xxx xxx

(3) The Tribunal shall pass an appropriate order within a period of sixty days from the date of receipt of application under sub-rule (1):

Provided that the Tribunal shall, before making any order under this rule, give a reasonable opportunity of being heard to the company and any other person interested in the matter.

(4) The Tribunal may, if it is satisfied, on the application filed under sub-rule (1), that it is necessary so to do, to safeguard the interests of the company, the debenture holders or the depositors, as the case may be, or in the public interest, direct, by order, the company to make repayment of such deposit or debenture or part thereof forthwith or within such time and subject to such conditions as may be specified in the order:

Provided that while passing the order, the Tribunal shall consider the financial condition of the company, the amount or deposit or debenture or part thereof and the interest payable thereon.”

xxx xxx xxx

Sub-rule 3 quoted above indicates that the Tribunal shall pass appropriate order within 60 days from the date of receipt of the Application under Section 71(10) of the Act. However, before making an order reasonable opportunity of being heard has to be given to the Company or any other person interested in the matter. In our considered opinion reasonable opportunity has been granted to the Respondent Company and the Company has been heard at length in the matter. Bank of Baroda, one of the ICA lenders, approached this Tribunal through CA No. 130 of 2021 to be impleaded in the Petition. This Tribunal by order dated 27.05.2021 refused to entertain the prayers and held that the Bank would not come within the parameters of 'any other person interested' so far as the prayers made in the Petition. It is further submitted by the Respondent that the Resolution bids due to be voted by the ICA lenders would help in monetisation and maximization of the value of the Respondent. An order in the Petition may derail such process and that would be against the public interest. We have indicated in the order dated 27.05.2021 in CA No. 130 of 2021 that issue of debentures is a contract *in personam* and not a contract *in rem*. The debenture holders who are substantial in number are also members of the public. Therefore, their prerogative in timely receipt of interest against their investment (debentures) cannot be sacrificed at the altar of public interest. The submissions regarding consideration of the Resolution bids would have no bearing in the instant Company Petition. The amount of debentures is substantial and the Respondent having taken the deposit, there is no reason why any indulgence should be shown to the Respondent on the ground that any Resolution Process is underway.

19. Sub-rule 4 indicates that when the Tribunal is satisfied that it is necessary to pass an order under Section 71(10) of the Act to safeguard the interest of the Company, the debenture holders or the depositors or in the public interest, it

would do so. The sub-rule is an aid to the Tribunal to pass an order if it thinks necessary to do so in order to safeguard *inter alia* the interest of the Company or the debenture holders. The only condition it stipulates that while passing an order the Tribunal may order repayment *inter alia* of the debentures or part thereof. The sub-rule doesn't indicate that the Tribunal would not pass an order or refuse to pass an order despite the conditions prescribed in sub-section 10 of Section 71 of the Act having been fulfilled. Besides the Rules being a subordinate legislation would not override the express provision in the principal legislation. The Rules are meant to facilitate the object and purpose of the provisions of the principal legislation. Therefore, the Rules cannot be read to thwart the requirements of the Act.

20. As already indicated when the conditions prescribed in sub-section 10 are fulfilled the Tribunal would have no option than to order redemption of the debentures and the payment of interest thereon. While passing such an order the Tribunal would however consider whether the payment is to be made in whole or in part and the time limit within which those have to be made, in terms of sub-rule 4. In our considered opinion when the conditions mentioned in sub-section 10 are fulfilled the word 'may' would assume mandatory characteristics and would need to be read as 'shall'. In this connection the observation made by the Hon'ble NCLAT in *Akhil R. Kothakota (supra)* may profitably be quoted.

“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.”

21. The facts of the referred case may be different in as much as the learned NCLT had directed the parties for a settlement. While deprecating such a view the Hon'ble NCLAT observed *supra*. The principle enunciated with regard to the

ramifications of sub-section 10 is independent of facts of the particular case. In view of the discussion supra we are unable to accept the contentions raised by the Respondent.

22. The Petitioner / debenture trustee represents 1348 debenture holders who are the members of the public. Therefore, under the garb of public interest their interest cannot be foregone nor the mandate under sub-section 10 of Section 71 of the Act can be diluted. Hence ordered.

ORDER

The Application be and the same is allowed on contest. The Respondent is directed to pay the interest on the debentures at the contractual rate, calculated till realisation, within a period of two months hence and redeem the debentures on payment of the principal within three months thereafter. No order with regard to prayer no. 2 need be passed since order for payment in terms of Section 71(10) of the Act has been passed. There would however be no order as to costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Janab Mohammed Ajmal
Member (Judicial)