

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI  
Company Appeal (AT) (Insolvency) No. 1085 of 2021**

[Arising out of Order dated 06.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court III, in C.P. No. 315/IBC/MB/2019]

**In the matter of:**

**Rajeev R. Jain, Director (Suspended)**

3<sup>rd</sup> Floor, Multiplex Building,  
Nirmal Lifestyle, L.B.S. Marg,  
Mulund (West), Mumbai- 400 080

**...Appellant**

**Vs.**

**1. AASAN Corporate Solutions Private Limited**

4<sup>th</sup> Floor, Piramal Tower Annexe,  
Ganpatrao Kadam Marg,  
Lower Parel, Mumbai- 400 013

**2. Nirmal Lifestyle Realty Private Limited**

(Through Interim Resolution Professional)  
Jawahar Talkies Compound,  
Dr. Rajendra Prasad Road, Mulund (West)  
Mumbai- 400 080

**...Respondents**

**For Appellant:**

**Mr. Arun Kathpalia, Senior Advocate with Mr. Ashok Paranjpe, Mr. Kunal Vajani, Mr. Shreyas Lele, Mr. Kunal Mimani, Advocates.**

**For Respondents:**

**Mr. Amit Sibal, Senior Advocate with Mr. Denzil Arambhan, Ms. Amisha Patel, Ms. Priyakshi Bhatnagar, Mr. Kaustubh Prakash, Mr. Vinamra Kaporiha, Advocates for R1.**

**Mr. Pranaya Goyal, Mr. Aman Gandhi, Mr. Vardaan Bajaj, Ms. Nanki Grewal, Advocates for Caveator (R1)**

**Mr. Karan Grover, Mr. IPS Oberoi, Advocates for R2.**

**J U D G M E N T**  
**(12<sup>th</sup> January, 2022)**

**Ashok Bhushan, J.**

1. This Appeal has been filed against judgment dated 06.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-III, by which C.P. No. 315/IBC/MB/2019 filed by the Respondent- Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) has been admitted. The Appeal has been filed by Rajeev R. Jain, Director (Suspended) of the Corporate Debtor challenging the impugned judgment. The brief facts of the case giving rise to this Appeal are:-

The Corporate Debtor obtained two loans from the Financial Creditor by means of two deposits agreements dated 31.03.2017 for an amount of Rs. 230,00,00,000/- and 27.10.2017 for an amount of Rs. 277,00,00,000/- respectively. The first deposit was secured by Deed of Mortgage dated 30.03.2017 bearing Registration No.3102 of 2017 and other security documents. Similarly, the second agreement was also secured by Deed of Mortgage and other security documents. As per the terms of the First Deposit Agreement, the first loan was repayable on the expiry of three months from the date of first loan. The date for payment was extended till 31.03.2018. By 31.03.2018, the Corporate Debtor was liable to repay the outstanding principal amount of Rs. 217,60,00,000/- and interest of Rs. 23,70,19,226/-. An Application under Section 7 of the ‘I&B Code’ was filed by the Financial Creditor claiming default of debt of Rs. 258,36,32,228/-.

After issuance of notice by the Adjudicating Authority, the Corporate Debtor appeared and opposed the Application. The Corporate Debtor objected to the petition on the ground that (i) Financial Creditor has committed breach of contract in not fully making the payment of advance amount of Second Deposit Agreement (ii) amounts under the First Deposit are secured and amounts under the Second Deposit are also secured. The Adjudicating Authority by impugned judgment admitted the Application.

2. Shri Arun Kathpalia, Learned Senior Counsel appearing for the Appellant in support of Appeal submits that Application under Section 7 ought not to have been filed by the Financial Creditor due to the reason that under the terms and conditions of agreement and mortgage deed, the entire amount was secured and the assets mortgaged were of more value than the amount due. The Appellant ought to have realised its amount from the security as per terms and conditions of the mortgage deed and Application under Section 7 was not maintainable. He further submits that before the Adjudicating Authority a judgment of co-ordinate Bench dated 07.10.2021 in Company Petition (IB) No. 993 of 2020- ***“Beacon Trusteeship Limited vs. Neptune Ventures and Developers Private Limited”*** was referred to where the Adjudicating Authority had occasion to consider similar terms of agreement and mortgage and has rejected Section 7 Application holding that remedy available to Applicant was to realise the amount from security. It was held that there was no default. It is submitted that there being judgment of the co-ordinate Bench rejecting similar Application, the

Adjudicating Authority committed error in not following the co-ordinate Bench judgment and admitting the Application under Section 7.

**3.** Shri Amit Sibal, Learned Senior Counsel appearing for the Respondent refuting the submission of the Learned Counsel for the Appellant contends that Application filed under Section 7 by the Financial Creditor was well within the jurisdiction and fully maintainable. Even under the terms and conditions of the Mortgage Deed, it was right of the Mortgagee to seek remedy by realising his dues from security or to take any other remedy available in law. It is submitted that the terms and conditions of the loan Agreement as well as the Mortgage Deed did not put any embargo on the right of the Financial Creditor to take recourse of Section 7 of the 'I&B Code'. Insofar as the judgment of the co-ordinate Bench relied by Counsel for the Appellant, it is submitted that the Adjudicating Authority has given reason for not following the said judgment and in any view of the matter, the said judgment was not in conformity with 'I&B Code' and ought not to have been followed.

**4.** We have considered the submissions of the Learned Senior Counsel for the parties and perused the record.

**5.** In the present case, there is no dispute between the parties regarding debt or default committed by the Corporate Debtor. In paragraph 29 of the judgment, Adjudicating Authority has noticed this in following words: -

*“29. It is important to mention here that the Corporate Debtor is neither disputing the debt nor the*

*default committed by them in this case. The only contention of the Corporate Debtor is that the remedy of the Financial Creditor is to proceed against the mortgage securities as per the order of Beacon Trusteeship Limited Vs. Neptune Ventures and Developers Private Limited.”*

6. Shri Arun Kathpalia, Learned Senior Counsel referred to the terms and conditions of the Mortgage Deed specially clause 6 and clause 11.3. Referring to clause 6 of the Mortgage Deed, it is submitted that there was provision for ‘covenant for re-conveyance’ and by the mortgage, the properties were already covenant to the mortgagee. Hence, there was no default and mortgagee could have realised his dues from the secured assets. He has also placed reliance on clause 11.3 which require that in event default occur, the Mortgagee shall, sell, call in, collect, convert into money or otherwise deal with or dispose of the Mortgaged Properties. Clause 11.3 and 11.3.1 is as follows:-

**“11.3. ....Powers**

*If any one or more of the Events of Default occur, the Mortgagee shall, without prejudice to any other rights and remedies it may have and without prior notice to the Mortgagors:*

*11.3.1. sell, call in, collect, convert into money*

*or*

*otherwise deal with or dispose of the Mortgaged Properties, of any flats/ units/ premises comprised therein, or any part of the Mortgaged Properties on an instalment basis or otherwise and*

*generally in such manner and upon such terms whatever as the Mortgagee may consider fit.”*

7. Shri Amit Sibal, Learned Senior Counsel for the Respondents, on the other hand, has also placed reliance on clause 11.3 of the Mortgage Deed and has also referred to clause 19.4 which deal with ‘Other Remedies’. Clause 19.4 is as follows:-

**“19.4. Other Remedies**

*The rights and remedies conferred upon the Mortgagee under this Indenture shall not prejudice any other rights or remedies, to which the Mortgagee may, independently of this Indenture, be entitled or any collateral or other security now or hereafter held by the Mortgagee.”*

8. When we look into clause 11.3 and clause 19.4 of the Mortgage Deed, it is clear that there no kind of embargo has been put on the mortgagee to necessarily realise his dues from the secured assets. Clause 11.3 itself provides *“If any one or more of the Events of Default occur, the Mortgagee shall, **without prejudice to any other rights and remedies it may have and without prior notice to the Mortgagors**”.*

9. Similarly, clause 19.4 specifically reserves the other remedies available to the Mortgagee which clearly mentioned that the rights and remedies conferred upon the Mortgagee under this indenture shall not prejudice any other rights or remedies, to which the Mortgagee may, independently of this Indenture, be entitled. Thus, if the law provides any

other remedy to Mortgagee the same can very well be availed by him. It is the choice of the mortgagee to recover his dues from secured assets or to take other recourse of remedy as provided under law.

**10.** Section 7 of the 'I&B Code' is special remedy provided to Financial Creditors. The Financial Creditor can take recourse to Section 7 **when a default has occurred**. Present is a case where Application under Section 7 has been filed when a default has occurred. The remedy under Section 7 is special remedy and the provision of 'I&B Code' has been given overriding effect from any other law or instrument. Section 238 of the 'I&B Code' provides:-

***“238. Provisions of this Code to override other laws. -***

*The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

**11.** A reading of Section 238 indicates that provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any **instrument having effect** by virtue of any such law. Thus, what is overridden by the 'I&B Code' is both inconsistency with any other law or any instrument having effect. The mortgage is an instrument. The terms and conditions of the mortgage thus cannot claim any superior status and proceedings under Section 7 can be availed irrespective of any contrary or inconsistent condition in mortgage.

However, as noticed above, the mortgage entered between the parties in the present case does not have any inconsistent condition rather the mortgage itself reserves and protects other remedies which are available to the Financial Creditor in any other law.

**12.** Now we come to the second submission of the Learned Counsel for the Appellant that there being judgment of the co-ordinate Bench in **“Beacon Trusteeship Limited”** (supra), the Adjudicating Authority ought to have followed the decision and rejected the Section 7 Application. The judgment of co-ordinate Bench in **“Beacon Trusteeship Limited”** has been noticed and considered by the Adjudicating Authority in the impugned judgment in paragraph 28 which is to the following effect:-

*“28. After hearing the submissions on both sides and upon perusing both the orders passed by the same Judicial Member, this bench is of the considered opinion that no credence can be given to the order relied upon by the Corporate Debtor in Beacon Trusteeship Limited Vs. Neptune Ventures and Developers Private Limited in view of contrary stand of the same Judicial Member in the other order i.e. IDBI Trusteeship Services Ltd. V. Ornate Spaces Pvt. Ltd. It is important to mention here that the Judicial Member Smt. Suchitra Kanuparthi in the above order IDBI Trusteeship Services Ltd. in para 5 having clearly observed that the Corporate Debtor has created an English Mortgage and the Financial Creditor in the above case already filed commercial suit against the Corporate Debtor on the file of*

*Hon'ble Bombay High Court, admitted the Company Petition and ordered initiation of CIRP. In the light of above contradictory observations of the same Judicial Member in both the above rulings, relied by the Corporate Debtor, this Bench is of the opinion that the entire argument of Mr. Gaurav Joshi deserves to be rejected.”*

**13.** The reason given by the Adjudicating Authority in not following the coordinate Bench judgment was that the same Judicial Member has taken a contrary view in another matter i.e. **“IDBI Trusteeship Services Ltd. V. Ornate Spaces Pvt. Ltd.”**

**14.** Learned Counsel for the Appellant submits that on principle of stare decisis, the Adjudicating Authority was bound by the judgment of the coordinate Bench.

**15.** Doctrine of stare decisis means to stand by decided cases. The principle behind the doctrine is that men who are governed by law should be fixed definite and known and when a law is declared by Court of Competent Jurisdiction in absence of any palpable mistake or error, it is required to be followed. Doctrine of stare decisis is wholesome doctrine which gives certainty to law and guide the people to mould their affairs in future. The doctrine is fully attracted on the statutory Tribunal which is well settled. We may refer to judgment of the Hon'ble Supreme Court in **“Sub-Inspector Rooplal and Anr. Vs. Lt. Governor Through Chief Secretary, Delhi and Others- (2000) 1 SCC 644”** where in paragraph 12 the Hon'ble Supreme Court held that in context of Central Administrative Tribunal, the Tribunal

was bound by co-ordinate Bench. In paragraph 12, following has been laid down:-

*“12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a coordinate Bench of the tribunal has overruled, in effect, an earlier judgment of another coordinate Bench of the same tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the tribunal was of the opinion that the earlier view taken by the coordinate Bench of the same tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law from the foundation of administration of justice under our system. This is a fundamental principle which every Presiding Officer of a Judicial Forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bounded by the enunciation of law made by the superior courts. A coordinate*

*Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. This Court in the case of Tribhuvandas Purshottamdas Thakar v. Ratilal Motilal Patel, [1968] 1 SCR 455 while dealing with a case in which a Judge of the High Court had failed to follow the earlier judgment of a larger Bench of the same court observed thus:*

*"The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J., in Pinjare Karimbhai's case and of Macleod, C.J., in Haridas `s case did not lay down the correct Law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that he should not ignore it Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by Courts of coordinate authority or of superior authority. Gajendragadkar, C.J. observed in Lala Shri Bhagwan and Anr, v. Shri Ram Chand and Anr.*

*"It is hardly necessary to emphasise that considerations of judicial propriety*

*and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be re-considered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."*

**16.** The same principle has been reiterated by the Hon'ble Supreme Court in "**Collector of Central Excise, Kanpur vs. Matador Foam and Others.- (2005) 2 SCC 59**".

**17.** There can be no doubt that the principle of stare decisis is fully applicable on judgments delivered by the NCLT as well as this Appellate Tribunal. Both NCLT and this Tribunal are bound by doctrine of stare decisis. At this juncture, we may clarify that what is binding as a precedent on Company Law Tribunal is the judgment of jurisdictional Tribunal. Judgment delivered by NCLT in other jurisdiction have only persuasive value. The present is a case where judgment of the co-ordinate Bench of jurisdictional Tribunal was cited. We have gone into the reasons given by the

Adjudicating Authority as given in paragraph 28 for not following the judgment of **“Beacon Trusteeship Limited”** but due to one reason we do not propose to deal the same in any further. The reason is that the judgment of Tribunal in **“Beacon Trusteeship Limited”** was rendered in the context of Section 7 of the ‘I&B Code’ with reference to conditions of a Mortgage Deed. The Debenture of Trust Deed cum Indenture of Mortgage was extracted including clause 17.1.

**18.** The Mortgage Deed is an instrument which cannot come into way of Section 7 Application and shall be overridden by virtue of Section 238 of the ‘I&B Code’. Learned Tribunal did not advert to Section 238 in its judgment which makes the judgment of the Tribunal in **“Beacon Trusteeship Limited”** *per incuriam*. It is well settled that *per incuriam* is exception to the rule of precedent. *Incuria* literally means carelessness. In practice, *per incuriam* appears to us *per ignorantiam*. When judgment is rendered in ignorance of binding statute or binding authority the judgment is said to be *per incuriam*.

**19.** We may also refer to recent judgment of the Hon’ble Supreme Court in **“Gujarat Urja Vikas Nigam Limited vs. Amit Gupta and Others- (2021) 7 SCC 209”** where the Hon’ble Supreme Court had occasion to consider Section 238 in reference to a Power Purchase Agreement. In paragraph 40, the Hon’ble Supreme Court has held that in view of non obstante clause in Section 238 of the ‘I&B Code’, the conditions of the Power Purchase

Agreement shall be overridden. In paragraphs 40.1, 40.1.1 and 40.1.2, following was laid down:-

**40.1.** *In relation to the application of Section 238 of the IBC to the PPA, it was submitted that:*

**40.1.1.** *Under Article 9.3.1 of the PPA, the third respondent is required to remedy the default (if any) within 30 days of service of the default notice. If read in this manner, on the receipt of a default notice during the pendency of the CIRP, the third respondent would be required to complete the reorganization process within 30 days so as to obviate the consequence of the PPA getting terminated. The IBC provides a period of 330 days for the completion of the CIRP. There is a dichotomy between the provisions of the PPA and the IBC. The timelines under the PPA for curing a default are inconsistent with those under the IBC for completing the CIRP with respect to the third respondent. In view of the non-obstante clause in Section 238, the provisions of the IBC would override those of the PPA.*

**40.1.2.** *The argument that the PPA is not an –instrument under the IBC is incorrect. Since the term –instrument has not been defined in the IBC, it may bear a meaning drawn from the definition in other statutes. The PPA is approved by the GERC and has the force of law under the Electricity Act. The PPA sets out the rights and liabilities of the parties and is an instrument for the purposes of Section 238. Being an –instrument, which is*

*inconsistent with the provisions of the IBC, the latter would have overriding effect over the former, in view of Section 238 of the IBC. Therefore, the right to terminate would only arise in case the third respondent fails to cure the default, i.e., resolve itself in accordance with the IBC”*

**20.** There can be no doubt that registered mortgage is instrument which shall also be overridden by Section 238 which specifically provides for overriding of provisions of ‘I&B Code’ to a contrary provisions of law as well as an instrument made under any other law. The Tribunal while deciding **“Beacon Trusteeship Limited”** did not advert to Section 238 of the ‘I&B Code’ which had overriding effect on any clause of any Debenture of Trust Deed cum Indenture of Mortgage. In paragraphs 26 and 27 of **“Beacon Trusteeship Limited”**, following was observed:-

*“26. Therefore, in terms of the English Mortgage, the Mortgagor has a recourse to repay the mortgaged debt and has the right to seek reconveyance of the properties to the mortgagor upon complete satisfaction of Debt.*

*27. The Petitioner has absolute rights in the mortgaged property and cannot initiate any action under section 7 upon non-payment of dues under the Debenture Trust Deed, the petitioner has agreed to recourse and sell the mortgaged assets and recover the money due”.*

**21.** We are of the view that the above view taken by the Tribunal in **“Beacon Trusteeship Limited”** is not inconsonance with Section 7 read

with Section 238 of the 'I&B Code'. The Financial Creditor has full right to initiate action under Section 7 for non-payment of dues. We, thus, are of the view that the judgment of the co-ordinate Bench in "**Beacon Trusteeship Limited**" was not a binding precedent to be followed by any other co-ordinate Bench. We, thus, are also of the view that no error has been committed by the Adjudicating Authority in admitting Section 7 Application filed by the Financial Creditor. There is no merit in this Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Justice Jarat Kumar Jain]**  
**Member (Judicial)**

**[Dr. Alok Srivastava]**  
**Member (Technical)**

**New Delhi**  
Anjali