NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 103 of 2020

IN THE MATTER OF:

PNB Housing Finance Ltd. ...Appellant

Versus

J.S.S. Buildcon Pvt. Ltd. ...Respondent

Present: For Appellant : Mr. Prashant Tripathi, Advocate

O R D E R

23.01.2020 The 'PNB Housing Finance Limited' disbursed loan to the number of allottees and pursuant to 'Tripartite Agreement' executed on different dates between 'PNB Housing Finance Limited' (Financial Creditor), 'individual allottees' and 'JSS Buildcon Pvt. Ltd.' (Corporate Debtor). On behalf of the allottees, the amount was disbursed in the account of the 'Corporate Debtor' (Promoter/Developer) of infrastructure. 14 allottees who borrowed loan from the 'PNB Housing Finance Limited', as detailed below, defaulted in making the payment :

Borrowers	Date of Loan Agreement	Loan Amount (disbursed to Corporate Debtor)
Vansh Sachdeva	25.02.2015	52,86,640/-
Ishwar Singh	19.09.2014	37,79,522/-
Alpana Deva	27.01.2015	65,97,425/-
Aman Duggal	30.12.2014	53,29,797/-
Jagtar Singh	29.12.2014	47,48,944/-
Atul Jagatnarayan Mishra	28.09.2014	44,75,080
Raju Srivastav	14.10.2014	37,98,800/-
Puneet Khanna	20.01.2015	37,89,370/-
Aakash Sachdeva	08.04.2015	49,74,149/-
Rajesh Kumar	01.10.2015	42,31,200/-
Arvind Kumar	11.06.2015	27,00,000/-

Shikha Singhal	17.03.2015	65,15,599/-
Amit Kumar	28.07.2015	43,23,896/-
Nisha Rathneesh	11.05.2015	44,86,593/-
TOTAL		**6,50,37,015/-**

2. The 'PNB Housing Finance Limited' (Financial Creditor) having noticed moved an application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016 **('I&B Code'**, for short) against the builder – 'JSS Buildcon Pvt. Ltd. (Corporate Debtor) on the ground that it has defaulted in making the payment.

3. The 'Corporate Debtor' on appearance before the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench specifically stated that it do not owe any financial debt to 'PNB Housing Finance Limited' (Appellant) as alleged and the transactions do not fall within the meaning of Section 5(8) of the 'I&B Code'. There has been no default on the part of the 'Corporate Debtor' and, therefore, the petition under Section 7 of the 'I&B Code' is misplaced and liable to be dismissed. The Adjudicating Authority found merit in arguments advanced by the 'Corporate Debtor' and observed as follows:

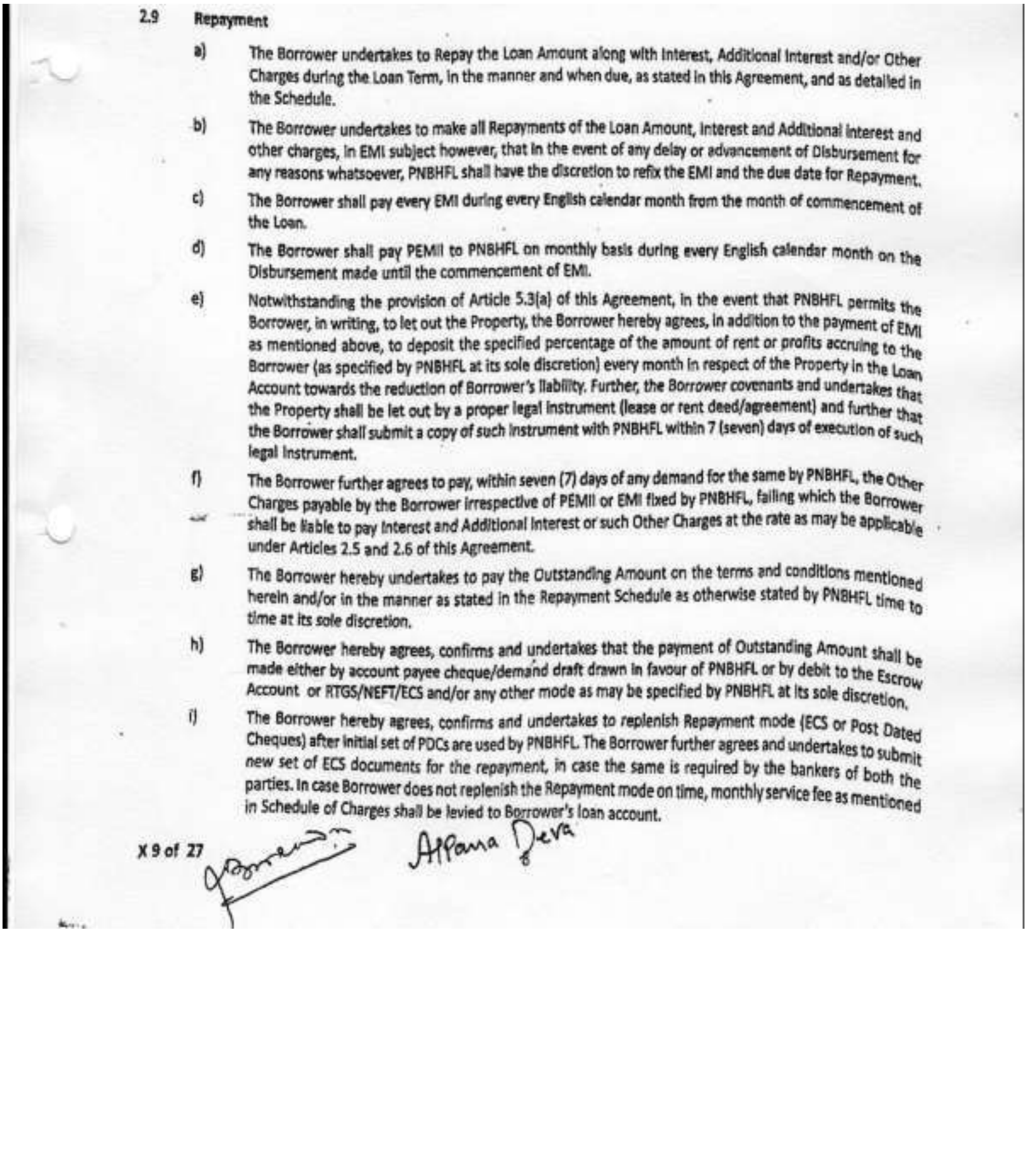
> *"6. We find merit in the arguments advanced by the ld. counsel for the Corporate Debtor. It is common knowledge that housing finance companies offer loans to people seeking financial assistance for the purpose of booking units in a particular project, and have a tie up with the developers for procuring business from*

> *such borrowers. The loan applications in this case were made individually by the borrowers. The accounts were opened by the borrowers with the Financial Creditor and money disbursed in the said account by the financial creditor to the borrowers was disbursed automatically to the Corporate Debtor as per Standing instructions. The Tripartite agreement is only by way of security that the Respondent would withhold the allotment in the event of default by the borrower and realization of any excess amount would be given to the Financial Creditor. The financial Creditor had only sought security by creating mortgage of the residential units for the loans availed by the allottees, and the Corporate Debtor gave due permission for the same to enable the borrower procure financial assistance."*

4. We have heard the learned counsel for the Appellant and being satisfied that while we condone the delay of one day in preferring the appeal, we hold that 'PNB Housing Finance Limited' who has mortgaged the flats cannot be treated as 'Financial Creditor' of 'J.S.S. Buildcon Private Limited' for the facts and reasons discussed below.

Appellant has filed one of the sample 'Loan Agreements' with the 'Borrower' (Allottee). In the said Agreement, clause 2.9 relates to 'Repayment' and clause 2.10 relates to 'Delay in payment' and reads as follows :-

"*2.9* **Repayment**



2.9 **Repayment**

a) The Borrower undertakes to Repay the Loan Amount along with Interest, Additional Interest and/or Other Charges during the Loan Term, in the manner and when due, as stated in this Agreement, and as detailed in the Schedule.

b) The Borrower undertakes to make all Repayments of the Loan Amount, Interest and Additional Interest and other charges, in EMI subject however, that in the event of any delay or advancement of Disbursement for any reasons whatsoever, PNBHFL shall have the discretion to refix the EMI and the due date for Repayment.

c) The Borrower shall pay every EMI during every English calendar month from the month of commencement of the Loan.

d) The Borrower shall pay PEMII to PNBHFL on monthly basis during every English calendar month on the Disbursement made until the commencement of EMI.

e) Notwithstanding the provision of Article 5.3(a) of this Agreement, in the event that PNBHFL permits the Borrower, in writing, to let out the Property, the Borrower hereby agrees, in addition to the payment of EMI as mentioned above, to deposit the specified percentage of the amount of rent or profits accruing to the Borrower (as specified by PNBHFL at its sole discretion) every month in respect of the Property in the Loan Account towards the reduction of Borrower's liability. Further, the Borrower covenants and undertakes that the Property shall be let out by a proper legal instrument (lease or rent deed/agreement) and further that the Borrower shall submit a copy of such instrument with PNBHFL within 7 (seven) days of execution of such legal instrument.

f) The Borrower further agrees to pay, within seven (7) days of any demand for the same by PNBHFL, the Other Charges payable by the Borrower irrespective of PEMII or EMI fixed by PNBHFL, failing which the Borrower shall be liable to pay Interest and Additional Interest or such Other Charges at the rate as may be applicable under Articles 2.5 and 2.6 of this Agreement.

g) The Borrower hereby undertakes to pay the Outstanding Amount on the terms and conditions mentioned herein and/or in the manner as stated in the Repayment Schedule as otherwise stated by PNBHFL time to time at its sole discretion.

h) The Borrower hereby agrees, confirms and undertakes that the payment of Outstanding Amount shall be made either by account payee cheque/demand draft drawn in favour of PNBHFL or by debit to the Escrow Account or RTGS/NEFT/ECS and/or any other mode as may be specified by PNBHFL at its sole discretion.

i) The Borrower hereby agrees, confirms and undertakes to replenish Repayment mode (ECS or Post Dated Cheques) after initial set of PDCs are used by PNBHFL. The Borrower further agrees and undertakes to submit new set of ECS documents for the repayment, in case the same is required by the bankers of both the parties. In case Borrower does not replenish the Repayment mode on time, monthly service fee as mentioned in Schedule of Charges shall be levied to Borrower's loan account.

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j) In case the payment of the Outstanding Amount is required to be made to PNBHFL through Escrow Account, the Borrower shall:

(i) Issue necessary irrevocable instruction to its/his/her/their banker in the prescribed manner to debit the Escrow Account with the Outstanding Amount due on the relevant date as per Repayment and/or as otherwise specified by PNBHFL ("**Letter of Instruction**") and shall provide copy of such Letter of Instruction to PNBHFL as acknowledged by such banker and/or if required by PNBHFL, shall provide an original copy of letter issued by such banker stating the compliance of the Article 6 of this Agreement; and

(ii) shall submit the copy of Repayment Schedule and/or any other document(s) as required by PNBHFL to be submitted to its/his/her/their banker.

k) Notwithstanding the Repayment of the Loan Amount and Interest in installments and Other Charges in the manner as stipulated herein, the Borrower shall remain liable to pay all Outstanding Amount after adjustment of the above Repayments.

l) Notwithstanding Article 2.9 above, PNBHFL shall have the right at any time or from time to time to review and reschedule the Repayment terms of the Loan Amount or of the Outstanding Amount thereof. However, PNBHFL shall inform the Borrower regarding such rescheduling of the Repayment terms of the Loan Amount.

2.10 **Delay in Payment**

a) No notice, reminder or intimation shall be given to the Borrower regarding his/her/their obligation(s) to pay the EMI or PEMII regularly on due date. It shall be entirely the responsibility of the Borrower to ensure prompt and regular payment of EMI or PEMII.

b) Any delay or default in payment of EMI or PEMII or Other Charges shall render the Borrower liable to pay Additional Interest on the amount in default as per the rate decided by PNBHFL at its sole discretion, or at such other rate as may be prescribed by PNBHFL treating default for any part of month as a default for the full month.

c) It is agreed to between the Parties that levy of the additional interest by PNBHFL on account of any delay by the Borrower in not making timely payments under the Agreement shall be over and above the applicable penal charges. Any default by the Borrower in making payments for EMI or PEMII and/or any other payments due and payable by the Borrower to PNBHFL shall be treated as an "Event of Default" under Article 7.1 of this Agreement.

5. The Agreement shows that for delayed payment, the Appellant – 'PNB Housing Finance Limited'has agreed to levy additional interest on the borrower (allottee) and any default by the borrower in making payment for EMI or PEMI or any other payments having treated as an 'event of default' under Article 7.1 of the Agreement. Therefore, in each case, there will be a separate default and a 'corporate insolvency resolution process' cannot initiated against them.

6. Learned counsel for the Appellant have also relied on one ofthe 'Tripartite Agreement' dated 15th December, 2014 reached between one of the allottee (Borrower), 'PNB Housing Finance Limited' and by the builder, relevant of which reads as follows:

"1. That on application for grant of housing loan of the Borrowers and on receipt of intimation from the Builder that the property has been allotted to the Borrowers, PNBHFL has sanctioned the housing loan for purchase of Property of Rs.68,00,000/- (Rupees Sixty Eight Lakh Only) to the Borrowers according to its rules, but the actual payment in instalments will be made by PNBHFL directly to the Builder as per the norms of PNBHFL. Any amount towards purchase price in excess of the "Housing Loan for purchase of Property" sanctioned by PNBHFL will be paid by the Borrowers directly to the Builder as per sale agreement between the Builder and the Borrowers and original money receipts will be submitted to PNBHFL.

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7. Further, the Builder, in the event of default of repayment of loan by the Borrowers, shall on written intimation/ instructions of PNBHFL cancel the allotment of the Property of the Borrowers and refund, the entire amount advanced/ funded by PNBHFL directly to PNBHFL and the Builder shall have right to recover/ forfeit the earnest money.

xxx xxx xxx

13. The Builder will not transfer the said Property to any other member or other person without obtaining the previous written consent/ NOC from PNBHFL.

14. In the event of default by the buyer/s or Mortgagor/s or Borrowers, if PNBHFL exercise its right enforces the security by sale, the Builder would accept the purchaser/s of the Property as a buyer, on such purchaser's complying with the necessary formalities which are required to become a buyer of the Builder.

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16. The Borrowers and the Builder assume full responsibility for and unconditionally agree to indemnify, defend and hold harmless PNBHFL from and against any and all claims, actions, liabilities, losses, damages, costs and expenses (including but not limited to attorneys fees) arising from failure of Borrowers and Builder to perform any of their respective obligations under this and/or any other Agreement with PNBHFL and/ or from the negligence or misconduct of the Borrowers and the Builder."

7. The aforesaid agreement shows that the agreement relates to individual allottee (Borrower) and in the event of default of repayment of loan by the Borrower, on written intimation and instructions of 'PNB Housing Finance Limited' the builder will cancel the allotment of the flats and thereafter the amount is payable to the Punjab National Bank. However, nothing is brought on the record by the Appellant to show that any cancellation of the allotment was made and notice was issued to the individual allottees by the 'PNB Housing Finance Limited'.

8. In terms of clause 13 of the said 'Tripartite Agreement', the builder cannot transfer the property to any other member or other persons without obtaining the written consent/NOC from 'PNB Housing Finance Limited'. Further clause 14 shows that default by the buyers or mortgagor of borrowers, the 'PNB Housing Finance Limited' has right to exercise to enforce security by sale and in such case, the builder will accept the purchaser as a buyer and comply with the necessary formalities as 'PNB Housing Finance Limited' has right to sell the property as a mortgager. Therefore, 'PNB Housing Finance Limited', who claimed to be mortgager of the premises of the allottees cannot move the application under Section 7 of the 'I&B Code' on the basis of the Tripartite Agreement, which is not maintainable.

We find no merit in this appeal. The appeal is dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Shreesha Merla]
Member (Technical)

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