

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 1138/MB-IV/2021

Under Section 9 of the IBC, 2016

In the matter of

K. Consultants

...Operational Creditor

v/s.

LOKHANDWALA KATARIA

CONSTRUCTION PRIVATE LIMITED

[CIN: U45200MH1998PTC117468]

...Corporate Debtor

Order Delivered on: 10.08.2023.

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor:

Ms. Meena Shah, Ld. Counsel.

For the Corporate Debtor:

Ms. Naseem Patrvala, Ld. Counsel.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application being CP (IB) No.1138/MB-IV/2021 filed on 11.08.2021 by K. Consultants (“Operational Creditor/Applicant”), under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) in the matter of Lokhandwala Kataria Constructions Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

1.1. The Applicant claimed total amount due including interest amounting to Rs. 4,48,61,350/- (Rupees Four Crores, Forty-Eight Lakhs, Sixty-One Thousand, Three Hundred and Fifty Only) in default. The specific date of default is not stated in part IV of the petition; however, the applicant has enclosed computation of claim amount/ and particulars of debts as follows:

No.	Particulars	Date	Amount
1	Fees for Total Project for Minerva Project	-	7,11,00,000
2	Les Received	During 2016-17	4,11,00,000
3	Less Received	During 2017-18	30,00,000
4	Balance Amount receivable as on 15.01.2019		2,70,00,000
5	Interest @ 18% from 15.01.2019 to 04.04.2021		1,78,61,350
6	Total Amount Payable.		4,48,61,350

2. The Applicant entered into an Agreement for Fund Raising and Consultancy Services with the Corporate Debtor on 25.04.2016, whereunder, the Corporate Debtor was to make payment of an amount of Rs. 7,11,00,000/- (Rupees Seven Crores and Eleven Lakhs Only) to the Operational Creditor. The amount was payable in lieu of the Operational Creditor rendering services to facilitate the obtainment of finance to the Corporate Debtor for its project known as “Minerva” at Mahalaxmi, Mumbai.

- 2.1. Pursuant to services rendered by the Applicant, Indiabulls Housing Finance Ltd. sanctioned a loan of Rs. 650 Crores to the Corporate Debtor, therefore, the Applicant, upon complying with its obligations under the Agreement dated 25th April 2016, raised invoices dated 13th November 2016, 12th December 2016, 27th January, 2017 and 4th May 2018 to claim the amounts accrued to it under the Agreement.
- 2.2. During the year 2016-18, the Corporate Debtor made payments to the tune of Rs. 4,41,00,000/- (Rupees Four Crores and Forty-One Lakhs Only) to the Operational Creditor, leaving a balance of Rs. 2,70,00,000/-.
- 2.3. The Operational Creditor sent a letter dated 15.01.2019 to the Corporate Debtor inter alia recording that an amount of Rs. 2,70,00,000/- (Rupees Two Crores and Seventy Lakhs Only) plus applicable GST was outstanding, due and payable to it by the Corporate Debtor. The letter has been countersigned by the Corporate Debtor's Group Chairman, who has confirmed and accepted the factum of outstanding fees payable.
- 2.4. Another Agreement for Arranging sale of the Project and Consultancy Services between the Operational Creditor and Lokhandwala Infrastructure Pvt. Ltd. ("LIPL") was entered on 30.08.2019. Prior to it, LIPL was admitted into CIRP, and the Agreement did not crystallize and was frustrated due to the proceedings instituted by Dalmia Group against LIPL. This agreement contemplated provision of services for sale of one project by the Applicant, however, the property at Prabhadevi, subject matter of sale in relation to which the Operational Creditor was given mandate to render its services, was given as security to the Dalmia Group under the consent terms to settle their claim, and the Agreement was not acted upon. This agreement had also acknowledged the amount due from the Corporate Debtor to the Applicant, and LIPL had undertaken to pay that amount also. The Corporate Debtor is not a party to this Agreement;

it, in no manner whatsoever, records that the Corporate Debtor is discharged.

2.5. Emails dated 16.1.2020 & 17.1.2020 were exchanged between LIPL and Godrej Properties Ltd. (prospective buyer identified by the Operational Creditor), and the Operational Creditor apropos sale of the property, subject matter of the Agreement. An Email dated 17.1.2020 was addressed by LIPL to Godrej Properties Ltd., and the Operational Creditor annexed the final Term Sheet apropos sale of the property. But, the subject matter property came to be transferred to Dalmia Group by the Corporate Debtor, pursuant to settlement of its debts.

2.6. A Demand Notice was issued on 8.7.2021 by the Operational Creditor to the Corporate Debtor under Section 8 of the Code, and the Corporate Debtor had not disputed its liability to the Applicant.

2.7. The Operational Creditor sent another e-mail dated 3.9.2021 to LIPL annexing the fresh draft mandate for arranging sale / JV/ JDA for Project & Consultancy Services, however, no agreement came to be concluded thereafter.

3. The Corporate Debtor filed its affidavit in reply dated 1st March 2022, as well brief note, contending that (a) there exists prior dispute in as much as payment terms came to be varied in terms of agreement with LIPL, an associate company of the Corporate Debtor; (b) The applicant has suppressed the existence of such agreement; (c) the debt stands assigned pursuant to this agreement to LIPL, its sister concern having common signatories; (d) invoices have been issued by the Applicant, R.M. Chaturvedi & Co. and Rajesh Chaturvedi and payments were accepted by all three entities towards alleged debt; (e) confirmation relied by Applicant is signed by the same person who had signed the agreement for services with LIPL i.e. Group Chairman, and in

case this confirmation signed by Group Chairman on behalf of Corporate Debtor is not taken into consideration, the claim is time barred.

3.1. It was submitted that the letter dated 15.1.2019, pleaded as confirmation of account by the Applicant, was signed by Mr. Mohammed A Lokhandwala, as Group Chairman, and not on behalf of the Corporate Debtor, and the last payment to the Applicant was made on 04.05.2018, the petition having been filed on 6.8.2021 is barred by limitation.

3.2. It was further submitted that Section 62 of Contract Act also covers an ‘alteration’, which is also the case here, as payment terms have been altered with consent of all parties. Neither of the Lokhandwala Companies, having the same Directors and Shareholders, and being Group Companies and sister concerns, have raised objections, and Operational Creditor is a party to both Agreements. The consent is clear. There is an evidence also of discussion of further ‘Mandate’, amounting to further alteration and/or variation and/or novation, also by Operational Creditor, as the same had been approved by the said Chaturvedi vide email dated 03-09-2021, even though same was not executed due to untimely demise of Mr. Moiez Lokhandwala, one of the proposed signatories on 27-09-2021.

3.2.1. It is contended that the Unilateral assertion by Applicant that subsequent Agreement ‘frustrated / nullity / abandoned / irrelevant’ cannot avail the Applicant, the same has to be determined judicially by a Forum of competent jurisdiction which admittedly had not been done. This Tribunal cannot go into those issues, as the Procedure under IBC is summary, distinct from a civil action.

3.2.2. Judgement reported *Union of India vs Kishorilal Gupta And Bros at AIR 1959 SC 1362*, cited by Operational Creditor, helps the Respondent’s case rather than Applicant’s. The intention of the parties was clearly to

vary and alter the terms of the suit Agreement. It has been laid down in Mobilox case AIR 2017 SC 4532, that the Court must be satisfied that there is a dispute that is not plainly vexatious or frivolous and there is a claim that may have some substance not whether it will succeed or not.

4. The Applicant filed a note in response to reply of the Corporate Debtor stating that, the Corporate Debtor has in its Affidavit in Reply and/or subsequent pleadings not disputed that:
- i. The amount of Rs. 4,48,61,350/- (Rupees Four Crores, Forty-Eight Lakhs, Sixty-One Thousand, Three Hundred and Fifty Only) was the balance amount due and payable by it to the Operational Creditor under the Agreement for Fund Raising & Consultancy Services dated 25th April 2016;
 - ii. There had been a default inasmuch as the Corporate Debtor had failed and neglected to make payment of the aforesaid outstanding amount;
 - iii. No notice of dispute was issued by the Corporate Debtor; and
 - iv. No reply was sent by the Corporate Debtor to the Demand Notice dated 8th July 2021

4.1. The fundamental defense raised by the Corporate Debtor is that the Agreement for Fund Raising & Consultancy Services dated 25th April 2016 stands novated in view of the Agreement dated 30th August 2019 for Arranging Sale of the Project Agreement and Consultancy Services between the Operational Creditor and LIPL.

- 4.1.1. Section 62 of the Indian Contract Act, 1872 *inter alia* provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed. It reads thus:

“62. Effect of novation, rescission, and alteration of contract — If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.

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- 4.1.2. Upon a plain reading of the aforesaid Section 62, it is apparent for Novation to take place, it is necessary for the "parties" to a contract to agree to the substitution, rescinding and/or alteration of the original contract.
- 4.1.3. In the facts and circumstances of the present proceedings, the original contract is the Agreement for Fund Raising & Consultancy Services dated 25th April 2016. The only parties to the Agreement dated 25th April 2016 are the Operational Creditor and Corporate Debtor. It is an admitted position that the parties to the Agreement for Arranging Sale of the Project and Consultancy Services dated 30th August 2019 are the Operational Creditor and LIPL. The Corporate Debtor is not a party to the Agreement dated 30th August 2019, or further draft agreement shared by the Operational Creditor to LIPL.
- 4.1.4. Pertinently, LIPL is a separate and distinct legal entity from the Corporate Debtor. In the absence of the essential ingredient of the Corporate Debtor being a party to the Agreement dated 30th August 2019, it cannot be said that there was any novation and/or any substitution, rescission and/or alteration of the original contract viz. the Agreement dated 25th April 2016.
- 4.1.5. Furthermore, the Agreement dated 30th August 2019 does not contain any mention of the Agreement dated 25th April 2016, let alone any substitution, rescission and/or alteration of the Agreement dated 25th April 2016. The Agreement dated 30th August 2019 merely contains reference to the outstanding amounts payable by the Corporate Debtor. In this regard, it was an additional provision for payment to the Operational Creditor by LIPL. Neither was the Corporate Debtor discharged of its liability nor was it absolved of its liability to make payment to the Operational Creditor under the Agreement dated 30th August 2019. The Agreement dated 30th August

2019 does not record any intention to discharge or absolve the Corporate Debtor of the liability to make payment to the Operational Creditor.

4.1.6. It is an undisputable position that the Agreement dated 30th August 2019 was not validly executed in view of the fact that by the Order dated 8th August 2019, this Hon'ble Tribunal admitted Company Petition No. 1023 of 2019 filed by Dalmia Group Holdings against LIPL. The Agreement dated 30th August 2019 is therefore rendered as invalid, non-est and void. In such circumstances, the Agreement dated 30th August 2019 is unenforceable and cannot novate the Agreement dated 25th April 2016.

4.1.7. Even assuming whilst denying that the Operational Creditor had knowledge, the Agreement dated 30th August 2019 was frustrated inasmuch as LIPL provided the subject property as Security under the Consent Terms dated 9th October 2019. In addition, the emails relied upon by the Corporate Debtor and in particular the email dated 3rd September 2021 demonstrates that the Agreement dated 30th August 2019 was not acted upon. Therefore, there cannot be any novation.

5. This Bench heard the Counsel, and perused the material available on record.

5.1. There is no dispute that the Corporate Debtor owed a sum of Rs. 2,70,00,000/- plus GST on Rs. 7,11,00,000/-, out of total value of invoice raised by the Operational Creditor on Corporate Debtor in terms of Agreement for fund raising and consultancy services dated 25.04.2016; this amount remained unpaid, when another agreement dated 30th August 2019 came to be entered into with LIPL, one of sister concern of the Corporate Debtor; and the Corporate Debtor is not party to said agreement dated 30.08.2019. The Corporate Debtor has denied its liability to pay this amount contending that this amount was agreed to be discharged by LIPL

to the Operational Creditor, pursuant to such agreement, besides the consideration accruing to the Operational Creditor for the services to be rendered under such agreement to LIPL.

5.2. The main question, that arises for consideration in present case, is whether the debt owed by the Corporate Debtor stands transferred to LIPL, if yes, whether the Corporate Debtor stood discharged qua Operational Creditor as on 30.08.2019.

5.3. It is not in dispute that LIPL was admitted into CIRP on 8th August, 2019 on an application by Dalmia Group and moratorium u/s 14 of the Code commenced, LIPL came out of CIRP upon settlement of debt in default with Dalmia Group and upon filing of consent terms with Dalmia Group on 9.10.2019 i.e. prior to the said agreement dated 30th August, 2019 but after 9th August, 2019; LIPL mortgaged property subject matter of agreement dated 30th August, 2019 to securitise the debt owed to Dalmia Group; and later on transferred the same to it in discharge of such debt owed to it. In these facts, we find that the Group Chairman had no authority to enter into any agreement on or after 8th August, 2019 till 9.10.2019, hence the said agreement dated 30th August, 2019 is void ab-initio having been executed by a person, who could not have bound LIPL. We are of considered view that these undisputed facts are matter of record and does not require any adjudication, but merely requires appreciation thereof, which this Bench is duty bound to taken into consideration. Accordingly, even if it is assumed that the debt in default, the subject matter of present petition, came to be transferred to LIPL under the Agreement dated 30.08.2019, the same could not be said to have stood transferred to LIPL in terms of said agreement dated 30.08.2019. Subsequent draft agreement, shared by the Operational Creditor, was not executed between it and LIPL, hence it can not be said that the debt came

to be transferred to LIPL, in any manner, discharging the Corporate Debtor, even if we do not go into the legality of novation or assignment having taken place vide agreement dated 30.08.2019.

5.4. Accordingly, this Bench is of considered view that the Corporate Debtor owes a sum of Rs. 2,70,00,000/- plus GST on Rs. 7,11,00,000/-, and the same is in default. The dispute raised by the Corporate Debtor pertains to the existence of obligation of the Corporate Debtor to pay the same, and such obligation cannot be, said to have travelled to LIPL, pursuant to Agreement dated 30.08.2019, which was entered into by its Group Chairman on a day when he had no authority to do so on behalf of LIPL in view of commencement of moratorium u/s 14 of the Code in the matter of LIPL. The said dispute is a merely moonshine defence, in the facts of this matter, and can not lead us to conclude that there exists a dispute, which is a claim that may have some substance, as the contention of the Corporate Debtor fails on prima-facie appreciation of facts on record, without going into the merits of legal contentions.

6. Under these circumstances, this tribunal is of the considered opinion that the above company petition is liable to be admitted under Section 9 of the Insolvency and Bankruptcy Code, 2016 by passing the following order.

ORDER

7. The petition bearing CP (IB) No.1138/MB-IV/2021 filed on 11.08.2021 by K. Consultants (“Operational Creditor/Applicant”), under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) in the matter of Lokhandwala Kataria Constructions Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP) is **Admitted**.

I. That this Bench as a result of this prohibits:

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- a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any Operational sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of

section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. The bench hereby appoints **Mr. Ashish Saoji**, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having **Registration Number: IBBI/IPA-001/IP-P01268/2018-2019/12150 ; IBBI Email: ashishsaoji@gmail.com** . He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- VII. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- VIII. The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees Five lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).

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- IX. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- X. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
10.08.2023.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)