

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

CP (IB) No.3106/MB-IV/2019

Under Section 9 of the IBC, 2016

In the matter of

Ultra Tech Cement Limited

...Operational Creditor

v/s.

Darshan Developers Private Limited

[CIN: U45200MH2003PTC143256]

...Corporate Debtor

Order Delivered on:26.07.2021

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mrs. Suchitra Kanuparthi
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner: Mr. Amit Tungare, Advocate.

For the Respondent: Ms. Ayushi Anandpara, Advocate.

ORDER

Per: Rajesh Sharma, Member (Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (**IBC**) by **Ultra Tech Cement Limited**, (“the Operational Creditor”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Darshan Developers Private Limited** (“the Corporate Debtor”), [CIN: U45200MH2003PTC143256].

2. The Corporate Debtor is a company incorporated on 24.11.2003 under the Companies Act, 1956, as a private company limited by shares with the Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U45200MH2003PTC143256. Its registered office is at 4th Floor, HDIL Towers, Anant Kanekar Marg, Bandra (E), Mumbai Maharashtra-400051. Therefore, this Bench has jurisdiction to deal with the present petition.
3. The present petition was filed by the Operational Creditor before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a total sum of Rs.80,23,000/- (Rupees eighty lakh twenty-three thousand only) including the interest at the rate of 18% p.a. The date of default is 08.09.2018.
4. The case of the Operational Creditor is as under:
 - a) The Operational Creditor submits that the Operational Creditor has supplied ready mix concrete to the Corporate Debtor vide purchase order dated 13.08.2018. The Purchase Order is placed at pp12-15 of the Petition. For this purpose, the Operational Creditor has issued various invoices which are placed at pp16-104 of the Petition.
 - b) The Operational Creditor submits that the Corporate Debtor vide its email dated 15.01.2019 has confirmed the balance of Rs.79,90,500/- (Rupees seventy-nine lakh ninety thousand five hundred only) as due and payable to the Operational Creditor which is at p.107 of the Petition.
5. The Last date of invoice is 07.09.2018 which is placed at p.104 of the Petition. The date of default as per the mode of payment in the last invoice is 08.09.2018.

6. Invoices have been placed on record at pp.16-104. The invoices provide for interest at the rate 18% per annum in case of delayed payments. The total debt due and payable to the Operational Creditor is Rs.80,23,000/- (Rupees eighty lakh twenty-three thousand only), as mentioned at p.5 of the Petition.
7. The Operational Creditor had served a Demand Notice in Form 3 dated 14.06.2019 to the Corporate Debtor which is at pp108-113 of the Petition in terms of section 8 of the IBC. The said Demand Notice was served on the Corporate Debtor on 24.06.2019. The Corporate Debtor has not filed replied to the Demand Notice.
8. The Corporate Debtor has not filed the reply to the main Company Petition despite giving opportunities to file reply in the matter. The Main CP was RFO on 02.02.2021. On 22.02.2021, the Corporate Debtor has filed written submissions in the matter. However, the written submissions filed by the Corporate Debtor was taken on record vide order dated 22.02.2021.
9. The Corporate Debtor has submitted its written submissions as follows:
 - a) The Corporate Debtor submits that vide consent terms dated 13.02.2020, sum of Rs.80,23,000/- (Rupees eighty lakh twenty-three thousand only) was agreed to be paid by the Corporate Debtor in the following manner:
 - i) 21.02.2020 - Rs.25,00,000/- (Rupees twenty-five lakh only)
 - ii) 25.03.2020 – Rs.55,23,000/- (Rupees fifty-five lakh twenty-three thousand only)
 - b) The Corporate Debtor submits that pursuant to the consent terms, 1st instalment of Rs.25,00,000/- (Rupees twenty-five lakh only) was paid by the Corporate Debtor. However, due to the outbreak of the Covid-19 pandemic and the ceasing of all business activities, the Corporate Debtor

failed to make payment of 2nd instalment i.e. Rs.55,23,000/- (Rupees fifty-five lakh twenty-three thousand only).

- c) The Corporate Debtor submits that the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 was promulgated on 05.06.2020. The same is placed at p.10 as Annexure 'A' of the written submissions filed by the Corporate Debtor. The Ordinance provided as follows:

*“..2. In the light of the extraordinary economic situation caused by the COVID-19 pandemic, a need was felt to temporary suspend initiation of corporate insolvency resolution process under the Code, initially for a period of 6 months or such further period, not exceeding one year from 25th March, 2020, to provide relief to companies affected by COVID-19 to recover from the financial stress without facing immediate threat of being pushed to insolvency proceedings. **The benefit of the above said suspension will be available to all those defaults of the Corporate Debtor that occur from 25th March, 2020 and till the end of the period of suspension**”*

On the basis of the above-mentioned Ordinance, section 10A was introduced in the Code. Section 10A is as follows:

“10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

- d) The Corporate Debtor submitted that the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 was replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 on 23.09.2020. In view of the above, the Corporate Debtor has defaulted in making payment of the second instalment is squarely covered by the Amendment Act insofar as the Corporate Debtor was required to make the payment by 25.03.2020 and as such the Corporate Debtor defaulted in making payment on 26.03.2020. However, in view of the purport of the Amendment Act, no action for the commencement of CIRP can be initiated against the Corporate Debtor.
- e) Further, the Corporate Debtor submitted with respect to the execution of the consent terms that, the Operational Creditor's right to payment is only under the consent terms and the default gives rise to fresh cause of action. It is not open for the Operational Creditor to seek to reinforce its rights under the captioned Company Petition as it stands on date, has not been amended with any further facts with a view to surreptitiously refrain from stating that the default in payment of monies happened only on 26.03.2020. This conduct of Operational Creditor cannot come under the ambit of the Amendment Act of 2020 of the IBC.
- f) In view of the above made submission, the Corporate Debtor has relied upon the Judgment of Hon'ble Gujrat High Court in *Gujrat State Financial Services Ltd. V. Amar Polyester Ltd. (1997 SCC Online Guj 350)* wherein it was held as follows:

“8. It is admitted fact that the present applicant had filed Company Petition No. 245 of 1996 under Section 433 of the Companies Act, 1956. Said application was filed by the present applicant after serving notice under Section 434 on the respondent. As a matter of fact, there is no dispute that the respondent is owing debt to the present applicant. The proceeding under Section 433 of the Act is the proceeding to be initiated for the purpose of winding-up of the company. It is not a proceeding meant for recovery of debt. Admittedly, after filing of Company Petition No. 245 of 1996 the applicant has entered into the consent terms with the respondent-company, its debtor, and had entered into agreement to receive its debts by instalments. When the creditor enters into agreement with the debtor and accepts to receive its debt in instalments, then that conduct of creditor itself shows that the claim of the creditor, which is made in Company Petition that the debtor is not in a position to satisfy its debts, is not correct. The consent terms are voluntarily executed by the creditor and creditor agrees and allows the debtor to satisfy its debts in instalments, thereby the cause of action in the Company Petition goes away. Merely because subsequently the debtor makes default in payment of instalments would not revive the original cause of action, though that conduct of debtor may amount to a fresh cause of action. As stated earlier, the company proceeding is not meant for recovery of debt or dues. This is a proceeding, which is to be initiated in public interest for just and reasonable cause and not for the purpose of protecting interest of any single creditor. Therefore, in the circumstances, even if there happen to be a consent term saying that the petition could be revived by the creditor for failure of the consent terms, the Company Petition which once stands disposed of on account of creditor accepting claim of the respondent that he will satisfy his debt, will not give a right to have revival of the proceeding. The foundation for the proceeding under the Companies

Act is inability of debtor to pay its debt. Therefore, when the creditor by his own conduct accepts the position that the debtor will be in a position to satisfy its debt by entering into consent terms and by his own conduct he shows no cause of action surviving. The moment he enters into consent terms there is nothing to proceed "with the Company Petition. In the circumstances, I hold that merely because the term in consent giving liberty to revive the proceeding, it will not change the law and will not give right to the creditor to ask the Court to revive the proceeding."

- g) The Corporate Debtor submits that the consent terms were taken on record and accepted by this Tribunal vide its order dated 13.02.2020. Further, there is also no default clause under the consent terms that permits the Operational Creditor to revive his claim.
- h) The Corporate Debtor submits that once the consent terms are taken on record by this Tribunal, the Tribunal has put its imprimatur upon the consent terms, and the remedy, if any, available to the Operational Creditor, is only for default under the consent terms itself, and otherwise. In this regard, Corporate Debtor is placing reliance on the Judgment of Hon'ble Bombay High Court in ***Bajranglal Gangadhar Khemka & Anr. V. M/s. Kapurchand Ltd.*** and submits as under:

"It is necessary to understand what the true nature of the committal proceedings is in a case like this. As pointed out by Oswald on Contempt of Court, an undertaking entered into or given to the Court by a party or his counsel or solicitor is equivalent to and has the effect of an order of the Court. So far as any infringement thereof may be made the subject of an application to the Court to punish for its breach. Therefore, when an undertaking is given by a party to the Court, it becomes an order of the Court and a particular mode is prescribed for enforcing that particular order. That mode is that proceedings for contempt can be

taken out for the enforcement of that order. Therefore, if we find in this case that an undertaking was given by the party to the Court resulting in that undertaking becoming an order of the Court, then it would be open to the party aggrieved by the non-compliance with the order to come to Court and ask for committal of the party in default.

Mr. Desai has also relied on the statement of the law as to undertakings that appears in Halsbury's "Laws of England" Vol. VII, p.35. Halsbury, in para 51, puts in this way: -

"The breach of an undertaking given to the Court by a person or corporation, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction, is misconduct amounting to contempt."

According to Mr. Desai, there was no sanction given in this case for a particular course of action or inaction, and, therefore, even if the undertaking was given to the Court, it could not be made the subject-matter of contempt proceedings. In our opinion, Mr. Desai reads the expression "sanctions" used in Halsbury in much too narrow a sense. The very fact that the Court passed a decree after an undertaking was embodied in the consent terms clearly shows that the Court did sanction a particular course; and that course was the putting of its imprimatur upon the consent terms."

- i) The Corporate Debtor has further submitted that by the Notification dated 24.03.2020, issued by the Ministry of Corporate Affairs, the minimum amount of default on the basis of which a Petition for Insolvency could be filed was increased from Rs. 1 lakh to 1 crore. However, in the view of the above notification, the default amount in the present Company Petition is Rs.55,23,000/- (Rupees fifty-five lakh twenty-three lakh only) and not 1 crore. Therefore, no CIRP can be initiated against the Corporate Debtor.

Findings:

10. We have heard the arguments of Learned Counsel for Operational Creditor and Corporate Debtor and perused the records.
11. The written submissions have filed by the Corporate Debtor and has taken on record vide order dated 22.02.2021.
12. The Bench has observed that the consent terms dated 13.02.2020 were entered into between the Operational Creditor and the Corporate Debtor. However, the Corporate Debtor has breached the consent terms and hence the matter was finally listed for the admission of the Company Petition.
13. As regards to the payment of 1st instalment, i.e. part payment:

It is observed from the records that the Corporate Debtor has submitted that the 1st instalment of Rs.25,00,000/- (Rupees twenty-five lakh only) has been paid by the Corporate Debtor. But the Corporate Debtor has not submitted any proof of payment made by him. It is also observed that the Corporate Debtor nowhere in the Petition has denied its liability to pay the default amount.

14. As regards to the revival of the Company Petition the Bench observed that:

The Petition was filed in July 2019. Lockdown was declared by the Central Government on 25.03.2020. Consent Terms were entered between the Operational Creditor and Corporate Debtor on 13.02.2020. The Corporate Debtor defaulted the terms of consent terms on 26.03.2020.

The Company Petition was not withdrawn by the Operational Creditor nor it was dismissed by this Tribunal, therefore there is no question of reviving the Company Petition filed by the Corporate Debtor. Therefore, this Bench

has denied the contentions made by the Corporate Debtor that there is any new cause of action arose in the matter.

It is pertinent to note that the Corporate Debtor did not have any intention to make the default good. The Corporate Debtor has taken the shield of lockdown situation to avoid the liability to pay.

15. It is also noticed from the petition that-
 - a) There is unequivocal admission of liability on the part of the Corporate Debtor in its email dated 15.06.2019 sent to the Operational Creditor at p.107 of the Petition;
 - b) The date of default is 08.09.2018;
16. Therefore, the Petition made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.
17. The Operational Creditor has proposed Mr. Ajit Gyanchand Jain as Interim Resolution Professional (IRP) in the matter.
18. It is, accordingly, hereby ordered as follows: -
 - (a) The petition bearing **CP(IB) 3106/MB-IV/2019** filed by **Ultra Tech Cement Limited**, the Operational Creditor, under section 9 of the IBC read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency

Resolution Process (CIRP) against **Darshan Developers Private Limited [CIN U45200MH2003PTC143256]**, the Corporate Debtor, is **admitted**.

- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
- (i) 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;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium,-
- (i) 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;

- (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) Mr. Ajit Gyanchand Jain, registration No. IBBI/IPA-001/IP-P00368/2017-18/10625, as Interim Resolution Professional 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.
- (g) 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.
- (h) The Operational Creditor shall deposit a sum of Rs.3,00,000/- (Rupees three lakh only) with the IRP to meet the expenses arising out of issuing

public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- (i) 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.
- (j) 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/-

Rajesh Sharma
Member (Technical)

26.07.2021

Sd/-

Suchitra Kanuparthi
Member (Judicial)