

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

C.P. (IB) 632/MB/2023

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016)

In the matter of

DMI Finance Private Limited

Having its address at- Express Building, 3rd Floor, 9-10, Bahadur Shah Zafar Marg
New Delhi - 110002

..... Petitioner/ Financial Creditor

Versus

Prashanti Land Developers Private Limited

Having its address at- G-2/3, Gujlaxmi Apartments, Off Ram Mandir Road, Babhai Naka Borivali (West), Mumbai - 400092, Maharashtra

..... Respondent/Corporate Debtor

Order Delivered on :- 26/02/2024

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Financial Creditor : Adv. Nitish Bangera

For the Corporate Debtor : Adv. Ashmita Goradia

ORDER

Per: Kuldip Kumar Kareer, Member (Judicial)

1. The present petition has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") by **DMI Finance Private Limited** (hereinafter called as "Financial Creditor") praying inter-alia for initiation of Corporate Insolvency Resolution Process (CIRP) against **M/s Prashanti Land Developers Private Limited** (hereinafter called as "Corporate Debtor") by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter called "the Code") for resolution of an unresolved Financial Debt of Rs. 1,18,28,65,426/- (Rupees One Hundred and Eighteen Crore Twenty-Eight Lakh Sixty Five Thousand Four Hundred and Twenty Six) as on 28.02.2023.

The submissions of the Financial Creditor are as follows:

2. The Financial Creditor had executed a term loan agreement dated July 6, 2017 ("Term Loan Facility") with Kandivali Balaji Investment Pvt. Ltd. ("Principal Borrower") for a term loan facility of Rs. 40,00,00,000/- (Rupees Forty Crore). Accordingly, the financial debt was disbursed by the Financial Creditor to the Borrower in various tranches, starting from July 12, 2017 till May 15, 2018, pursuant to the notice of drawal issued by the Borrower. The Financial Debt payable by the Corporate Debtor has been calculated for the period starting from July 12, 2017 till February 28,2023 along with the interest in the following manner:-

Loan Disbursement Date	Amount (In Rs.)
July 12, 2017	38,85,00,000/-
August 11, 2017	33,50,000/-
May 15, 2018	70,00,000/-
Total	39,88,50,000/-

3. Further, Term Loan Agreement was secured by creating Security Interests to secure the Term Loan Facility. Thus, the Corporate Debtor executed the deed of corporate guarantee dated July 6, 2017 ("Corporate Guarantee Deed"), in favour of the Financial Creditor.
4. As mentioned above, the Obligations of the Principal Borrower were to be secured by creating security interests in the form of mortgage, guarantee, and receivables over the escrow accounts ("Security Interests"), which were to be created in the favour of the Financial Creditor by the Obligors (including the Corporate Debtor), as per the terms of Article 3 read with Schedule 7 of the Term Loan Agreement..

5. Accordingly, the following Security Interests were created in favour of the Financial Creditor for securing the Obligations of the Borrower:

- (a) First charge by way of mortgage on the Victory Platinum Project [as defined in Schedule 7, Clause 1 (p) of the Term Loan Agreement] and Victory Platinum Project Land [as defined in Schedule 7, Clause 1 (q) of the Term Loan Agreement] including entire right title and interest of the Corporate Guarantor along with all existing and future buildings and constructions and rights to develop the Victory Platinum Project thereon, in favour of the Financial Creditor in a form satisfactory to the Financial Creditor.
- (b) First charge by way of hypothecation over the Project Receivables i.e., Victory Heights Receivables [as defined in Schedule 7, Clause 1 (t) of the Term Loan Agreement] and Victory Platinum Receivables [as defined in Schedule 7, Clause 1 (u) of the Term Loan Agreement].
- (c) First charge by way of hypothecation on all movables including plant and machinery pertaining to the Victory Platinum Project, in a form satisfactory to the Financial Creditor.
- (d) Escrow of the Project Receivables [as defined in Schedule 7, Clause 1 (j) of the Term Loan Agreement] and first charge by way of hypothecation over the Escrow Accounts in respect thereof in favour of the Financial Creditor, in a form satisfactory to the Financial Creditor and the Escrow was to be operated in accordance with the escrow agreement and Schedule 7 B of the Term Loan Agreement.

- (e) First Charge by way of mortgage on the Pune Flat [as defined in Schedule 7, Clause 1 (k) of the Term Loan Agreement] along with proportionate right and interest to the underlying land including all right title and interest of Mr. Himanshu N. Shah [Personal Guarantor No. 2] and Ms. Revati Shah.
 - (f) First charge by way of pledge in a form satisfactory to the Financial Creditor of shares issued by the corporate guarantor i.e., the Corporate Debtor in the present matter, constituting the entire equity shareholding of the said company.
 - (g) Guarantees of the guarantors under the Term Loan Agreement (which also includes the Corporate Debtor herein).
 - (h) Demand Promissory note for an amount up to the principal amount together with all the interest due thereon.
 - (i) In addition to the Security Interests, the Obligations in respect of the Term Loan Facility were to be secured by first and exclusive charge on a fixed deposit held with a scheduled bank for an amount equivalent, at any point time, to the immediately succeeding three (3) months Payment Instalments (DSRA).
6. In addition to executing certain documents in order to create Security Interests to secure the Term Loan Facility, in consonance with Article 3 and Schedule 7 of the Term Loan Agreement, the Corporate Debtor executed the deed of corporate guarantee dated July 6, 2017 ("Corporate Guarantee Deed"), in favour of the Financial Creditor.

7. The Corporate Debtor under Clause 2 of the Corporate Guarantee Deed undertook and agreed that it shall comply with the terms and conditions of the Term Loan Agreement and shall pay the outstanding dues in accordance with the Term Loan Agreement. The relevant part of the said clause has been reproduced hereinunder:-

"2. Covenant to pay:

Pursuant to the Term Loan Agreement and consideration thereof, the Guarantor covenants and agrees with the Lender that the Guarantor shall comply with and shall ensure all Obligors comply with the terms and conditions of the Term Loan Agreement and shall pay the Dues in accordance with the Term Loan Agreement and this Deed and the Guarantor irrevocable and unconditionally...

8. Further, the Corporate Debtor under Clause 3 of the Corporate Guarantee Deed, undertook and guaranteed to pay, forthwith on first demand in writing, without protest or demur or proof or condition, or reference to the obligors, any and all amounts stated in any notice of demand made by the Lender i.e., the Financial Creditor to the Corporate Debtor.
9. It is further submitted that during 2019, the Borrower started defaulting the terms of payment and its Obligations under the Term Loan Agreement. Thereafter, on account of the 'event of default', the Financial Creditor was constrained to invoke the guarantees of all the guarantors by issuing a 'recall of loan cum invocation of guarantee notice' dated May 30, 2019 to the Borrower, the Corporate Debtor and other guarantors under the Term Loan Agreement. However, the Corporate Debtor failed to pay the Financial Debt

within 7 days of the receipt of the recall of loan cum invocation of guarantee notice dated May 30, 2019 (i.e.), by June 7, 2019.

10. Thus, despite the actions taken by the Financial Creditor, the Corporate Debtor has failed to pay the Financial Debt of Rs. 1,18,28,65,426/- (Rupees One Hundred and Eighteen Crore Twenty-Eight Lakh Sixty Five Thousand Four Hundred and Twenty Six) which includes the principal amount, accrued interest, penal interest and other charges, as on February 28, 2023. Hence the Petition.

Reply filed on behalf of the Corporate Debtor

11. In reply, the Corporate Debtor has denied all allegations and/ or contentions and/or submissions made by the Petitioner in the Petition which are inconsistent with and/or contrary to what has been stated herein. Further, nothing shall be deemed to have been admitted for the reasons of non-traverse.
12. It is further submitted that the Petitioner has filed the present Petition to mislead this Hon'ble Tribunal. The Petitioner is guilty of suppressio veri and suggestio falsi as various false, incorrect, misleading statements have been made in the Petition. In fact, the Petition is not maintainable. The Petitioner has not come to this Tribunal with clean hands and has suppressed material facts and information and is thus guilty of playing a fraud on this Hon'ble Tribunal.
13. It is stated that the facts suppressed by the Petitioner are as under:-
 - (a) The Petitioner sought to grant term loan of Rs. 40,00,00,000 to Kandivali Balaji Investment Private Limited ("Kandivali Balaji")

vide Term Loan Agreement dated 29.06.2017 ("Loan Agreement") executed between Kandivali Balaji and Petitioner. For the purpose of the loan, the Petitioner had perused the financial statements of FY 2016-17 of Kandivali Balaji. The amount of approximately 38 crores after certain deductions of charges was disbursed on 12.07.2017 and 11.08.2017.

- (b) Kandivali Balaji and the Respondent were group companies wherein projects were undertaken by Respondent. The Respondent had ongoing projects at the time of the loan. Kandivali Balaji for the purpose of the Respondent's projects transferred the amounts to Respondent as received by it from the Petitioner on the same dates of disbursements.
- (c) However, the Petitioner had not disclosed certain facts regarding the loan and certain terms of the documents were not favourable to Kandivali Balaji. The Petitioner sought to disburse the entire loan despite being aware of the issues raised by the directors of Kandivali Balaji. The Petitioner was aware that Kandivali Balaji transferred the entire disbursed amount to the Respondent on the same dates of disbursement. The Respondent on instructions of Kandivali Balaji returned the entire loan back to the Petitioner on the same dates of disbursements. Since the entire loan was returned, the Petitioner assured the directors of Kandivali Balaji and Respondent that they shall not misuse the already signed documents. The trail of repayment is reflected in the bank account statements of Kandivali Balaji and Respondent. The bank account statement of Kandivali Balaji and Respondent statement reflecting disbursal and repayment in months of July and August is annexed with the reply.

- (d) Despite representing to the Respondent that the signed documents shall not be misused, the Petitioner issued letter dated 30.05.2019, addressed to Kandivali Balaji, Respondent and all the directors of the entities seeking repayment of loan amount under the Loan Agreement.
- (e) The Petitioner thereafter addressed statutory notice dated 9.03.2021 under Section 13(2) of the SARFAESI Act, 2002 to Kandivali Balaji, Respondent and its directors. The Corporate Debtor informed the Petitioner that Respondent was unable to repay a huge sum of money immediately and that Petitioner consider the effect of demonetisation and Covid -19 on the real estate business. I do not dispute the existence of the Loan Agreement, however I state that the purported loan being referred to is not the loan under the Loan Agreement.

14. It is further submitted that in 2021, the Petitioner initiated arbitration against Kandivali Balaji and the Respondent for the same purported debt. The Order of the Hon'ble Delhi High Court dated 7.12.2021 appointing an arbitrator on application of the Petitioner is annexed with the reply as Exhibit D. The 1st minutes of the arbitration proceedings dated 07.01.2022 is also annexed with the reply as Exhibit E. The Petitioner initiated Arbitration proceedings against Kandivali Balaji and the Respondent as admittedly there was a dispute under Article 11.1 of the Loan Agreement. The same is reflected in the Order of the Hon'ble Delhi High Court as annexed at Exhibit B. The Arbitration Proceedings have been filed for the purpose of recovery of the purported debt under the Loan Agreement. As per Section 5(6) of the Code, any arbitration proceedings with respect to the same alleged debt is a Dispute.

Therefore, the Petition on the ground of existence of dispute alone is liable to be dismissed.

15. It is submitted that the aforesaid facts and the bank account statements of Kandivali Balaji and Respondent that the Financial Creditor has received the money back on the same dates of disbursement. As such, the purported debt is repaid and there is no default by either Kandivali Balaji or Respondent under the Loan Agreement. Even otherwise the claim of the Petitioner, therefore does not fall within the ambit of definition of 'Financial Debt' as defined under Section 5(8) of the Code. The Petitioner is not a Financial Creditor as there is no Financial Debt owed to it.
16. In the end, the Corporate Debtor has prayed for the dismissal of the Petition.

Analysis and Findings:

17. We have heard the Counsel for the parties and gone through the record.
18. During the course of arguments, it has been contended by the Counsel for the Financial Creditor that a loan of Rs. 40 crores was advanced to the principal borrower i.e. Kandivali Balaji Investment Private Limited on the basis of loan agreement dated 06.07.2017. The Corporate Debtor stood as a guarantor for the said loan and executed deed of corporate guarantee dated 07.07.2017 in favour of the Financial Creditor. Counsel for the Financial Creditor has further contended that a sum of Rs. 39.88 crores was disbursed to the principal borrower between 12.07.2017 and 15.05.2018. However, subsequently, the principal borrower committed default in repayment of the loan with the result that a notice under SARFESI Act was issued to the

principal borrower as well the Corporate Guarantor on 09.03.2021. Prior to this, recall cum invocation of guarantee notice dated 30.05.2019 was also issued and despite the issuance of the notice, the principal borrower as well as the Corporate Debtor in the capacity of Corporate Guarantor has failed to repay the loan amount. Counsel for the Petitioner has further referred to the reply dated 26.03.2021 sent by the principal borrower as well as the Corporate Debtor wherein the liability has been admitted and acknowledged. Thus, according to the Counsel for the Petitioner, the factum of existence of financial debt and its default stands proved on record and, therefore, the Petition under Section 7 of Insolvency and Bankruptcy Code, 2016 deserves to be admitted.

19. On the other hand, Counsel for the Corporate Debtor has argued that the Petition deserves to be dismissed as there is an existence of dispute with regard to the alleged liability of the principal borrower as well as the Corporate Guarantor. Counsel for the Corporate Debtor has further argued that the matter has been referred to the arbitrator and, therefore, unless and until the matter is decided finally by the arbitrator, there is no definite liability on the part of the Corporate Debtor which is yet to be crystalized. In the light of this fact, the Counsel for the Corporate Debtor has urged that the Petition be dismissed.
20. Counsel for the Corporate Debtor has further argued that the Financial Creditor has not been able to prove on record any disbursement of the loan amount on the basis of which the liability of the principal borrower to the extent of Rs. 39,88,50,000/- could be ascertained. Counsel for the Corporate Debtor has further referred to the statement of account (Exhibit C) (Colly) annexed with the reply which shows that certain entries of Rs. 43,20,000/-,

Rs. 15,35,96,139/- and Rs. 19,00,00,000/- dated 12.07.2017 were reversed and repaid to the Financial Creditor on the same date. Thus, according to the Counsel for the Corporate Debtor, the loan was not disbursed at all and further that the liability of the principal borrower as well as the Corporate Debtor is not ascertainable. Besides, the matter is pending before the arbitrator and, therefore, the Petition deserves to be dismissed.

21. We have weighed the contentions raised by the Counsel for the parties and gone through the records carefully.
22. In order to prove the case, the Financial Creditor has relied upon the term loan agreement dated 06.07.2017, the corporate guarantee deed dated 07.07.2017 and memorandum of hypothecation dated 07.07.2017. Counsel for the Financial Creditor has further relied upon recall notice cum invocation guarantee notice dated 30.05.2019 issued to the principal borrower as well the Corporate Debtor whereby they were called upon to make the outstanding payment of Rs. 47.29 crores. Thereafter, a notice under Section 13 (2) of the SARFESI Act dated 09.03.2021 was also issued but despite the aforesaid notices, the amount was not repaid. It is pertinent to mention in its reply dated 26.03.2021, the Corporate Debtor along with principal borrower has candidly admitted its liabilities and has simply stated that business worsened due to the COVID-19 pandemic and the lockdown announced by the Central Government and further that since it was secured loan, some amicable settlement could be worked out. Thus, the liability to pay the outstanding amount has been candidly admitted in the reply dated 26.03.2021. Even otherwise, it is evident from NeSL report annexed with the Petition that the outstanding liability was more than Rs. 37 crores and the date of default was 17.05.2019. Apart from this, the principal borrower has

already been admitted into insolvency vide order dated 10.11.2022 passed by, NCLT Mumbai Bench, Court No. V in C.P. (IB)-712/MB/2022. Therefore, the argument that the loan was not disbursed to the principal borrower as agitated by the Counsel for the Corporate Debtor, is not tenable.

23. It has also been argued that the matter between the principal borrower and the Financial Creditor is pending before the arbitrator. However, even this contention raised by the Counsel for the Corporate Guarantor is not tenable. In this regard, a reference can, be made to the Order dated 20.09.2022 passed by the Sole Arbitrator (annexed with the rejoinder) whereby the arbitration proceedings are stated to have been terminated on the ground that the parties were negotiating for settlement as well as for non-payment of arbitration fee and other expenses etc. Even otherwise since it is a Petition under Section 7 and not under Section 9, there cannot be any issue with regard to existence of a dispute between the parties when otherwise the financial liability of the principal borrower and the Corporate Debtor is writ large and on this same set of facts, a Petition under Section 7 stands admitted against the principal borrower, the liability of the Corporate guarantor being co-extensive and, therefore, it cannot be said that the present Petition cannot be admitted against the Corporate Guarantor when there is no such bar under the law and it is well settled that a Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 can be admitted against the Corporate Guarantor even when the principal borrower is undergoing insolvency.
24. As a result of above foregoing discussion, we are of the consider view that the Financial Creditor has been able to prove the existence of financial debt and its default and further that the Petition is filed within the period of limitation.

Therefore, the Petition under Section 7 of Insolvency and Bankruptcy Code, 2016 deserves to be admitted and it is ordered accordingly in following terms:-

ORDER

- a. **The above Company Petition No. (IB) 632 (MB)/2023 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Prashanti Land Developers Private Limited.**

- b. This Bench hereby **appoints Primus Insolvency Resolution & Valuation Pvt. Ltd., Registration No: IBBI/IPE-0072/IPA-2/2022-2023/50002** as the Interim Resolution Professional having his address at **C-4-E/135, Janak Puri, New Delhi-110058** and Mumbai Office at **-408, 4th Floor, Manish Chambers, Sonawala Road, Goregaon (East), Mumabi- 400063, Email id:- info@primusresolutions.in, Mobile No:- 9322232269** to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

- c. The Financial Creditor shall deposit an amount of **Rs. 5,00,000/- (Rupees Three Lakhs Only)** towards the **initial CIRP cost** by way of a Demand Draft drawn in favour of the Interim Resolution Professional

appointed herein, immediately upon communication of this Order.

- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the

Central Government in consultation with any financial sector regulator.

- g. That the order of moratorium shall have effect from the date of pronouncement 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 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the concerned Registrar of Companies, Mumbai for updating the Master Data of the Corporate Debtor.

25. **Accordingly, this Petition is admitted.**

26. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)