

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : COURT-IV

IA-3322/2023 IN C.P.(IB)-68/(MB)/2021

Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016.

Application moved by:

Godrej Properties Ltd. ... Applicant

Vs.

Bhrugesh Amin ... Respondent/RP

In the matter of

Beacon Trusteeship Limited

... Financial Creditor

Vs.

Modella Textile Industries Limited

... Corporate Debtor

Order Pronounced on : **31.10.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant(s) : Mr. Viraj Parikh a/w Mr. Daneet, Adv.

For the RP/Respondent No.1 : Mr. Ravi Kadam, Ld. Sr. Counsel a/w Ms.
Khushboo Shah, Adv.



ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Application IA-3322/2023 is filed by the Applicant, M/s Godrej Properties Limited, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") challenging the illegal and arbitrary rejection of a part of the Applicant's claim as an Operational Creditor by the Respondent Resolution Professional, during the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor, M/s Modella Textile Industries Limited. The Applicant has claimed following amounts set out in detail hereinbelow –
 - a. Tax Invoice for charges of Development Manager Fees amounting to Rs.11,80,00,000/-
 - b. Tax Invoices for the period November 2018 – August 2019 for expenses paid on behalf of the Corporate Debtor amounting to Rs.2,44,54,532/-
 - c. Tax Invoices for the period April 2018-September 2019 for overhead apportionment amounting to Rs.4,12,59,171/-
 - d. Tax Invoices raised by T5 Communication LLP amounting to Rs.3,30,28,676/-
 - e. Invoices raised towards legal fees amounting to Rs.91,10,850/-
2. By an order dated May 4, 2022 this Tribunal admitted the Company Petition C.P. (IB)/MB 68 of 2021 and directed the initiation of CIRP against the Corporate Debtor. Sh. Bhugesh Amin was appointed as the Resolution Professional ("Resolution Professional/RP") of the Corporate Debtor.
3. The Resolution Professional invited the claims of the creditors of the Corporate Debtor by issuing a Public Announcement on May 6, 2022. Pursuant to the said public notice, the Applicant submitted its claim as an operational creditor in Form B for an amount of Rs. 35,53,35,347/- as on 12th July, 2022 ("Proof of Claim"). A copy of the Form B dated 12th July, 2022 along with its annexures as submitted by the Applicant is annexed hereto as Exhibit-A.
4. Accordingly, vide email dated May 2, 2023, the Resolution Professional admitted the claim of the Applicant to the tune of Rs.17,22,68,177/- out of the total of Rs. 35,53,35,347/-.



5. A few facts germane to the filing of the present Application are as under:

5.1. A Development Management Agreement dated 13th September, 2017 was executed by and between the Applicant and the Corporate Debtor ("DMA") in respect of an ongoing project of the Corporate Debtor named and styled as "Godrej Alive" being undertaken at land admeasuring 57962 square meters situated at Village Panchpakahdi, Dist. Thane ("Project"). Under the DMA, the Corporate Debtor had appointed the Applicant as a Development Manager to inter alia supervise and manage the construction and development of the Project. In consideration, the Applicant claims to be entitled to (i) an up-front consideration of Rs.10,00,00,000/- (Rupees Ten Crores only); (ii) 10% of revenue in saleable area; and (iii) monthly development management fee, on the terms and conditions as more particularly set out in the DMA, more specifically detailed out in Clause 10.1.1 and 10.1.2 of the DMA.

5.2. In accordance with the terms of the DMA, flats were sold and allotted to various flat purchasers / allottees by the Applicant upon them making certain part payments to the Corporate Debtor. However, since the development of the Project could not commence, majority of the allottees sought for cancellation of their respective allotments. The Applicant thus acquired the said flats from such allottees by way of assignment agreements / deeds, upon refund/ payment of a lumpsum amount to such allottees, making the Applicant the allottee of such flats. Pursuant to the terms of the said assignment agreements / deeds, the Applicant was entitled to recover the amounts paid against each flat from the Corporate Debtor, accordingly, the amounts so returned to the allottees have been admitted as Claim of the Applicant by the Resolution Professional. However, the Applicant has raised claims in relation to services performed under the said DMA in this Application.

5.3. It is claimed by the Applicant that it has indisputably performed its obligations under the DMA which are subsisting and valid as on date, and is entitled to the payment of its dues payable to it in terms of the DMA in lieu of the services



provided to the Corporate Debtor. It is also submitted by the Applicant that the Resolution Plan cannot modify, change or disregard any contract, except on following due process of law, accordingly, the Resolution Plan did not follow the terms of the DMA, and merely by the acceptance of Resolution Plan, the rights of the Applicant are not extinguished. The invoices raised by the Applicant by which the debt is claimed are as follows:

- i) For the services rendered by the Applicant to the Corporate Debtor in terms of the DMA and for the Applicant's dues under the DMA, on September 15, 2017, the Applicant issued its Invoice bearing No. CI003000 of Rs.11,80,00,000/- (Rupees Eleven Crores Eighty lacs only) towards Development Management Fees in accordance with Article 10.1.2 of the said DMA.
- ii) In addition to the above, the Applicant has raised Tax Invoices for the period November 2018 - August 2019 for the expenses paid and incurred by the Applicant for and on behalf of the Corporate Debtor amounting to Rs. 2,44,54,532/- (Two Crore Forty-Four Lakh Fifty-Four Thousand Five Hundred and Thirty Two only). These invoices are claimed to be the liability and duty of the Corporate Debtor under the DMA;
- iii) Tax Invoices for the period April 2018-September 2019 for overhead apportionment amounting Rs.4.12,59.171/- (Four Crore Twelve Lakhs Fifty-Nine Thousand and One Seventy One only). These were expenses, the Corporate Debtor is claimed to be liable to bear and pay.
- iv) Tax Invoices raised by T5 Communication LLP, marketing agency, amounting to Rs.3,30,28.676/- (Three Crore Thirty Lakh Twenty Eight Thousand Six Hundred and Seventy Six only) These were expenses the Corporate Debtor is claimed to be liable to bear and pay; and
- v) Invoices raised towards legal fees amounting to Rs.91,10,850/- (Ninety One Lakh Ten Thousand Eight Hundred and Fifty only), the supporting documents for which have all been submitted to the



Resolution Professional. The Corporate Debtor is claimed to be for the legal fees incurred by the Applicant.

- 5.4. Upon the initiation of the CIRP against the Corporate Debtor, the Applicant filed its Proof of Claim i.e., Form B. dated July 12, 2022 with the Respondent. By an email dated 11 October, 2022, the Respondent RP sought for certain clarifications regarding the claims made by the Applicant in the Proof of Claims. The Applicant responded to the Respondent's queries, in detail, vide its email dated 8th November, 2022 and provided all clarifications required. By further emails dated 15th November, 2022 and 1st February, 2023, the Respondent once again sought for certain clarifications as regards the Applicant's proof of Claim. The same was responded to by the Applicant vide its detailed email dated 1 February 2023. The Applicant, vide these communications, clarified its claim of Interest on DM Fees of INR 10 Crores + Applicable Taxes in terms of Clause 12.2 of the DMA, which lays down the requirement of the Applicant to make payment towards the project of the Corporate Debtor. However, owing to the outstanding DM fees, the Applicant was entitled to levy of interest @20% per annum as shortfall funding which forms part of operational dues of the Corporate Debtor.
- 5.5. The Applicant stated that the Respondent / Resolution Professional, in the guise of examining, collating and verifying the claim of the Applicant had conducted an adjudicatory exercise. without having any authority, power, entitlement, or jurisdiction to do so. In fact, the provisions of the Code and the settled position in law do not permit the Respondent to adjudicate upon a claim submitted by any creditor, and had brazenly exceeded his power and jurisdiction, for reasons best known to him.
- 5.6. The Applicant also submitted that its entire claim fell within the ambit and definition of an operational debt, as prescribed under the provisions of the Code, and the Respondent ought to have admitted the Applicant's claim in its entirety, especially in view of the fact that none of the invoices raised by the Applicant were ever disputed by the Corporate Debtor and the same have been issued in consonance with the provisions of the DMA.



- 5.7. Finally, the Applicant submits that it is therefore necessary that the decision of the Respondent in rejecting the Applicant's Proof of Claim dated 12th July, 2022 vide his email dated 2nd May, 2023 be set aside. It is further necessary that the Respondent be directed to admit the entire claim of the Applicant as submitted in the Proof of Claim dated 12th July, 2022.
6. The Respondent has filed reply dated 07.08.2023 stating that a claim of Rs.21,67,42,372/- has been admitted out of total claim of Rs.35,53,35,347/-. The difference amounting to Rs.13,85,92,975/- is the amount of claim not admitted, as this amount comprises of Rs.12,57,17,513/- being amount of interest charged on the principal amount of Rs.21,67,42,372/-, which was remaining unpaid, on the basis of clause 12.2.1 of the DMA, and the remaining amount of Rs.12875462/- pertains to legal expenses which are considered to be not claimable in terms of DMA.
7. We heard the counsel and perused the material available on record.
- 7.1. We find that clause 1.1.22 of DMA defines development costs to mean and include the total costs for undertaking the development and completion of the project and costs towards the other aspects thereof which shall entirely be borne by the Developer. The definition of the costs is an inclusive definition and further includes, amongst others, development management fees; development management overheads; costs of demolition of any existing units on the said property; service provider costs, consultant costs like project architect, plans costs, QS fees, PMC fees, consultants fees etc.; legal fees, direct site overhead fees, electricity costs, water and sewerage treatment and recycling system costs, applicable taxes in respect of the said property save and except income tax of the developer and developer manager; legal fees in relation to drafting of the agreement to be executed between developer and the purchaser and all notices and communications to be issued to the purchasers; and costs of rectification/clearance of title or removal of any encumbrance excluding existing encumbrances on the said property/projects. Clause 1.1.23 further defines development manager's overheads to mean the overhead amount equivalent to Rs.75 per Sq. ft. of saleable area (excluding



pre-sold area and including commercial area) plus applicable taxes towards regional overhead charges and head office overhead charges of the development manager or managing and supervising the development of the project/property.

7.2. Article 12.1 provides the way the Funding required for development shall be mobilised. Articles 12.1.1 provides that

“As envisaged herein, the Developer shall solely bear the entire Development Costs and Marketing Expenses in respect of the Project and while the prima facie obligation to ensure that sufficient funds are available to meet all financial obligations pertaining to the Project is generally on a developer, it has been commercially and expressly agreed between the parties that in the event, the funds available with the Developer are insufficient to complete construction and development of the Project, then the Developer and the Development Manager shall jointly arrange the necessary construction finance from banks/financial institutions in accordance with this Agreement on best effort basis. However, it is clarified that, the Developer shall be responsible for the repayment of any such construction finance/funding obligations and providing necessary/appropriate security towards the same. If funds cannot be raised in terms of this Article on commercially reasonable terms, then the provisions of Article 12.2 will apply.”


7.3. Articles 12.2.1 provides that –

In the event of any requirement of funds in the Project which cannot be met from the Revenue/Project Receivables then the same shall be sourced in the following manner of precedence:

- (i) Developer will make best efforts to arrange the necessary construction finance for the Project.*
- (ii) The Development Manger shall be entitled to sell the Unit/s at discounted rates which cannot be lower than the minimum sales price agreed with the lenders. However the said discounting shall be done by the Development Manager only for such quantum of sales till Project meets the shortfall funding and same shall be discontinued by the Development Manager after meeting shortfall funding requirement.*



- (iii) *The Development Manager shall assist the Developer to raise the finance/funds required for the Project for which the Developer agrees and undertakes to provide such security and/or collateral as agreed mutually by the Parties; Notwithstanding the above, the Developer shall not avail any loan or raise project finance by creating any Encumbrance excluding Existing Encumbrances on the whole or part of the Property and/or the Premises and/or the Revenue, Escrow Account, Project Account and/or Pass Through Charges Account without prior written consent of the Development Manager.*
- (iv) *If the Parties are unable to meet shortfall of funding by way of abovementioned (i), (ii) and (iii) then:*
- a. *the Development Manager shall infuse funds with interest at the rate of 20% (Twenty per cent) per annum ("DM Funding")*
 - b. *secure all monies provided alongwith interest thereon by the Development Manager/lenders to address the concerned Shortfall funding by creating charge/mortgage in favour of the financial institution and/or the Development Manager upon any unsold Premises and/or Revenue of the Project and/or on the said Property as may be necessary. In the case of an existing lender, the Development Manager shall create a proportionate charge on the Property and other securities/collateral with the existing lender and shall be entitled to pari-passu right on the project cash-flows. All costs and expenses pertaining to the DM funding and/or Shortfall funding obligations stated herein, including without limitation, stamp duty and registration charges payable in relation to the same shall be borne solely by the Developer.*
 - c. *Invoices of INR 2.44 Crores of the Corporate Debtor towards various expense: The Applicant provided invoice summary raised on the Corporate Debtor along with proof of payment such as bank statements shared with the Resolution Professional.*
 - d. *DM Overhead of INR 4.12 Crores + Interest @20% p.a.: The very substratum of the engagement of the Applicant as Development Manager qua the project stands on the basis of payment of DM Fess along with other agreed*



expenses. However, despite the Applicant raising invoices on the Corporate Debtor from time to time, the same remained unpaid and the said monies had to be funded by the Applicant as a shortfall funding attracting interest under Clause 12.2 of the DMA, which is quoted above. The overhead charges are to be repaid in accordance with the terms of the DMA, the invoices pertaining to it are annexed to the Form B.

- e. Legal fees amounting to INR 91.10 Lakhs: Clause 19.1.6 of the DMA clearly stipulated that Developer shall resolve all litigations at its Costs. In the present scenario, the developer i.e. Corporate Debtor herein failed to resolve the litigations including but not limited to suit filed by Grover family and the Applicant in turn had to fund the project to fulfil the solemn obligation of the Corporate Debtor under Clause 12.2. The Applicant craves leave to rely upon the details of these litigations as and when required.*
- f. Subsequent thereto, the Applicant was surprised to receive an email dated 2nd May 2023 from the Respondent which rejected an amount of Rs.18,30,67,170/- out of the Applicant's total claim of Rs.35,53,35,347/-. Consequently, the Applicant's claim of only an amount of Rs.17,22,68,177/- was admitted by the Respondent. A copy of the Respondent's email dated 2nd May 2023 is hereto annexed and marked as Exhibit-E.*

7.4. We find that the Respondent Resolution Professional has submitted in the reply dated 7.8.2023 and has enclosed thereto an email dated 2.5.2023, which explains that the claim of interest amounting to Rs.12,57,17,513/-, being amount of interest charged on the principal amount of Rs.21,67,42,372/-, and claim of legal expenses amounting to Rs.1,28,75,462/- has been rejected. We find that the claim of the Applicant for a sum of Rs. 21,67,42,372/- has already been admitted and updated. The remaining amount of claim pertains to the claim of interest on the ground that non-payment of these sums, which were to be borne and paid as part of Project cost, kept these funds out of the Applicant indirectly, accordingly constitutes the investment in the nature of shortfall funding in terms of clause 12.2.1(iv) of DMA, thus entitling the Applicant for the interest @ 20% p.a. thereon.



7.5. We find that the claim of reimbursement of the principal amount can be classified into two parts i.e. (i) claim for fees and overhead apportionment which is a recovery from the project development account, and (ii) remaining amount pertains to claim for expenses which were to be borne from the funds for development of the project to be made available by the Corporate Debtor but were initially incurred by the Applicant. In so far as, claim for expenses under part (ii) which were to be borne out of funds to be made available by the Corporate Debtor, we find the contention of the Applicant correct as the Corporate Debtor was under obligation to make available necessary funds at the inception itself to meet out these expenses. Accordingly, the claim of the Applicant for interest on expenses paid on behalf of the Corporate Debtor amounting to Rs. 2,44,54,532/- and invoices of T5 Communication LLP amounting to Rs.3,30,28,676/-. As regards, the claim of interest on development manager fees and overhead apportionment at fixed rate, we feel that these expenses, though, were agreed to be development costs, it cannot be said that corporator should we made liable to pay interest on that in the absence of any specific clause mandating timeline within which these payments were to be made. Accordingly, we hold that interest can be claimed on expenses paid on behalf of the Corporate Debtor amounting to Rs. 2,44,54,532/- and invoices of T5 Communication LLP amounting to Rs.3,30,28,676/-.

7.6. As regards claim for legal expenses, we find that the Applicant has enclosed a copy of invoice in relation to such legal expenses, the said invoice states that the lawyer had charged the fees towards consultancy charge in relation to review of title documents the due diligence development management agreement and lawyers appearance fee in relation to various suit against the project land on which joint development was take place. We find from the DMA this scope of services of the Applicant was primarily in relation to supervision and administration/implementation of the design, planning, construction, security, marking of the project, coordination, supervision and management of all third party advisors including the contractors in



accordance with the advisor. It is clear from the DMA that the activities pertaining to approvals and defending the suit litigations in relation to the project property was on the developer. However, each of the party were required to defend the litigation, which are not against them. The legal services obtained in connection with due diligence, the review of documents the DMA and defending of individual litigations cannot be said to following under the development which were to be borne by the project under development. Accordingly, we find that action of the RP in relation to rejection of claim qua legal charges is correct. Accordingly, the claim on this account is not tenable.

7.7. Since IA-2319 of 2023 has been disposed of approving the plan, the prayers seeking stay in Resolution Plan becomes infructuous.

8. In view of the foregoing, this IA-3322/2023 is **partly allowed**.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

31.10.2023