

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

CP (IB) No. 892/MB-V/2022

Under Section 7 of the I&B Code, 2016

In the matter of:

IDBI Trusteeship Services Ltd.

...Financial Creditor/Applicant

Vs

**Radius & Deserve Land Developers Private
Limited**

[CIN: U45201MH2006PTC166575]

...Corporate Debtor/Respondent

Order Dated: 03.05.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Karan Sangani, Advocate.

For the Respondent(s) : Mr. Anmol Bhartaria, Advocate.

ORDER

Per: Kuldip Kumar Kareer, Member (Judicial)

1. This is an application bearing C.P. (IB) No. 892/MB-V/2022 filed by IDBI Trusteeship Services Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Radius & Deserve Land Developers Private Limited, Corporate Debtor.

2. The Application is filed by Ms. Jinal Shah, Assistant Manager of the Financial Creditor duly authorised vide its Board Resolution dated 20.11.2018, claiming total default of Rs. 55,00,00,000 (Rupees fifty-five crore only) along with default interest @ 18% per annum as on 19.05.2022.

3. The case of the Financial Creditor is that:

a) The Corporate Debtor has issued secured Non-convertible debentures for financing its construction and development of a residential and mixed-use real estate project in Borivali, Mumbai (“Project”). The details are as follows:

Quantity	Types of Debentures	Amount	Issue Period	
3020	Secured, Non-convertible Debentures	302 Crores	September 2015 to February 2016	NCD-1
10,000	Unlisted, Secured, Non-convertible debentures	100 Crores	December 2017	NCD-2
1,500	Unlisted, Secured, Non-convertible Debentures	15 Crores	January 2018	NCD-3

b) On 15.09.2015, the Corporate Debtor Mr. Sanjay Chhabria, Mr. Santosh Sharda (hereinafter collectively referred as the “obligors”) entered into Debenture Trust Deed (“DTD 1”) governing NCD-1. The obligors and the Financial Creditor entered into subsequent Debenture Trust Deed

dated 07.12.2017 and 05.12.2018 for NCD 2 and NCD3 respectively. The Financial Creditor was appointed as a debenture trustee for all NCDs.

- c) On 20.10.2018, with an agreement, DTD 1 was amended, wherein the payment of interest of approximately Rs. 200 Crores was deferred to 30.11.2018 and time period for redemption of NCD-1 was extended to 17.09.2019.
- d) The Corporate Debtor failed to comply with its payment obligation under DTD 1 and also failed to make payment of redemption amount as per the Amended agreement DTD-1. In this regard, the Financial Creditor filed Commercial Arbitration Petition (L) No. 5939 of 2020, Commercial Arbitration Petition (L) No. 5942 of 2020, and Commercial Arbitration Petition (L) 5945 of 2020, against obligors (collectively “**Arbitration Petitions**”) before Hon’ble Bombay High Court.
- e) On 29.01.2021, all the parties to Arbitration Petitions, including the Financial Creditor, in order to settle the Arbitration Petitions, filed the Consent Terms before the Hon’ble Bombay High Court. The undertaking given by the Corporate Debtor in the Consent Terms was accepted and all the Arbitration Petitions were disposed of by the Hon’ble Bombay High Court by order dated 29.01.2021.
- f) As per the Consent Terms, the entire amount between the parties arising out of or in relation to financial documents including DTDs, was settled for payments of Rs.750,00,00,000/- (settlement amount) payable to Financial Creditor, out of which Rs.550,00,00,000/- was payable jointly and severally by Corporate Debtor, Sanjay Chhabria and Santosh Sarda. The remaining amount of Rs.200 Crore was set to be payable by Mr. Sanjay Chhabria as per the Consent Terms.

- g) As per the Consent Terms, the Corporate Debtor was required to make the payment of Rs.55,00,00,000/- on 30.04.2022 (**April Instalment**). The Corporate Debtor could not make the payment of the April Instalment, and has therefore, violated the Consent Terms filed before Hon'ble Bombay High Court dated 29.01.2021. As a result, Financial Creditor, filed this present Petition against the default amount of Rs.55,00,00,000/- along with interest at 18% p.a. till repayment of April Instalment. The date of default is stated as 30.04.2020, which is the date of the First (April) Instalment.
4. The Financial Creditor has issued letter dated 25.05.2022 to the Corporate Debtor for claiming the default amount of Rs.55,00,00,000/- as on 30.04.2022, under the Consent Terms dated 29.01.2021.
5. The Financial Creditor has filed Bank Statement annexed to the Petition. The Financial Creditor has further filed the NeSL Report dated 20.10.2019.

Reply filed by the Corporate Debtor

6. The Corporate Debtor has filed its Affidavit-in-reply dated 17.01.2023 and submits as under:
- a) The date of default in the present Petition is 30.04.2020, which is directly covered by Section 10A of the Code, i.e. default arising on or after 25th March 2020. It was, therefore, submitted that the present Financial Creditor is barred under Section 10A and therefore, not maintainable. The Corporate Debtor also placed reliance upon the order of NCLAT dated 31.10.2022 in the case of *Plus Corporate Ventures Pvt Ltd Vs. Transnational Growth Fund Limited*.

- b) The Financial Creditor has deliberately misconstrued and misinterpreted the Consent Terms dated 29.01.2021 and Order dated 29.01.2021 passed by High Court of Bombay.
- c) The Financial Creditor suppressed the Order dated 23.09.2022 passed by NCLT Mumbai in CP (IB) N. 239 (MB) of 2022, IDBI Trusteeship Services Ltd vs Radius and Deserve Builders LLP rejecting the petition as being barred under Section 10A of IBC and Notification dated 24.09.2020. The said order was passed in the Petition filed by the Financial Creditor and pertains to the Financial Documents covered under Consent Terms dated 29.01.2021. The reason for the dismissal of order dated 23.09.2022, is clearly applicable to the present case.
- d) The amount claimed by the Financial Creditor was for “April instalment” on the basis of DTD, where the “April Instalment” was scheduled on the basis of Consent Terms, and not on DTD. It was also submitted that the interest claimed by the Financial Creditor is contrary to the Consent Terms.
- e) The Consent Terms did not contemplate initiation of CIRP against Corporate Debtor for default under Consent Terms. It has been further submitted that the Arbitration Petitions were resolved under Consent Term dated 29.01.2021, therefore, the default in payment of “April Instalment” under the Consent Terms, cannot be treated as “A debt”.
- f) The Present Petition is filed by reagitating the claim under the financing documents, and the dispute regarding the financing documents has been settled and resolved under Consent Terms dated 29.01.2021. The Financial Creditor, being agreed to give up all their objections and complaints under **Clause 42** of the Consent Terms, cannot reagitate their

objections through this present Petition. It has further submitted that this violation led to the Abuse of process of law and the court.

Findings

7. We have heard the Learned Counsel for the Financial Creditor and the Corporate Debtor and perused the records.
 - a) It is observed that the Corporate Debtor issued Secured, Non-Convertible Debentures to borrow funds as set out in Part-IV of the Petition. Vide Agreement dated 20.10.2018, the Debenture Trust Deed dated 15.09.2015 was amended, thereby deferring the payment of interest of Rs.200 crore to 30.11.2018 and extended the time for redemption of Non-Convertible Debentures to 17.09.2019. Aggrieved by the default of the Corporate Debtor, the Financial Creditor filed Commercial Arbitration Petitions before the Hon'ble Bombay High Court wherein the matter was settled between the parties and vide order dated 29.01.2021 the Arbitration Petitions were disposed of in terms of the Consent Term dated 29.01.2021 and the undertakings were given by the Corporate Debtor in the Consent Term were accepted as undertakings to the Hon'ble Bombay High Court. It was further recorded in the Order that the Consent Terms are executable as an order of the Order of the Court as stipulated in part 7 of the order dated 29.01.2021.
 - b) The Corporate Debtor has contended that the Financial Creditor has mentioned the Date of Default as 30.04.2020 which comes under the purview of Section 10A of the Code. It is observed from the material on records that the present Petition is filed for the default occurred pursuant to breach of Consent Terms as recorded by the Hon'ble Bombay High Court in its Order dated 29.01.2021 and not filed for the default which is

occurred for the payment under the Debenture Trust Deed executed between the parties. Hence, the date of default as contended by the Corporate Debtor to be 30.04.2020 cannot be considered as the original date of default under the present Petition as the default with respect to the Consent Terms was occurred on 30.04.2022 on which the Financial Creditor has also relied upon in Part-IV of the Petition.

- c) As regards to the contention of the Corporate Debtor that the Consent Terms did not contemplate initiation of CIRP against Corporate Debtor for default under Consent Terms, it is observed by the Bench that, as per Clause 18 of the Consent Term dated 29.01.2022 it was agreed between the parties that the rights of the Financial Creditor would not be prejudiced for taking action available in law for breach of Consent Terms. Clause 18 is incorporated as follows:

“18. It is agreed, declared and undertaken that the aforesaid is without prejudice to the rights of ITSL under the Financing Documents and these Consent Terms including to take any action available in law for breach of these Consent Terms including on account of default in meeting repayment obligations of the Obligor and/ or Radius LLP.”

- d) It was further agreed between the parties under clause 19 of the Consent Terms that:

“Insolvency

19. Notwithstanding anything contained in these Consent Terms, it is agreed, declared and undertaken that prior to payment of the entire Settlement Amount alongwith Default Interest, if Radius is admitted

into corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (“Code”):

19.1 the entire Outstanding Amount (not limited to the Settlement Amount) under the Financing Documents will become due to ITSL and ITSL shall have the right to claim the entire Outstanding Amount in such proceedings under the Code.

19.2”

- e) Upon perusal the above discussed provisions of the Consent Terms, this Bench is of the view that the Corporate Debtor nowhere in its reply has denied or disputed the outstanding amount as claimed by the Financial Creditor. The Corporate Debtor is only taking excuses to avoid its liability to pay the outstanding dues to the Financial Creditor. Hence, this Bench is of the opinion that the Petition filed by the Financial Creditor is complete and is liable to be admitted.
8. The Applicant has proposed the name of Mr. Avil Jerome Menezes, a registered Insolvency Resolution Professional as Interim Resolution Professional (IRP) to carry out the functions as mentioned under I&B Code.

ORDER

- a. The Application bearing C.P. (IB) No. 892/MB-V/2022 filed by IDBI Trusteeship Services Limited, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 seeking initiation of Corporate Insolvency Resolution Process against Radius & Deserve Land Developers Private Limited, Corporate Debtor is **admitted**.

- b. This Bench hereby appoints **Mr. Avil Jerome Menezes**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00017/2016-2017/10041 as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of Rs. 5 Lakh towards the initial CIRP costs 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 or 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 Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

SD/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

SD/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)