

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

CP(IB)No.1024/NCLT/MB/2019

Under Section 7 of the I&B Code, 2016

In the matter of

Dalmia Group Holdings

...Financial Creditor/ Applicant
v/s

**Lokhandwala Kataria Construction
Private Limited**

...Corporate Debtor/Respondent

Order Dated 19th September 2019

Coram: Hon'ble Member (Judicial) :Mr V.P. Singh
Hon'ble Member (Technical) :Mr Rajesh Sharma

For the Applicant : Adv. Karl Shroff, Adv. Sovra Ghosh,
Adv. Shivani Parikh

For the Respondent: Adv. Mutahhar Khan

Per: Rajesh Sharma, Member (Technical)

ORDER

1. This is an application being CP 1024(IB)/MB/2019 filed by **Dalmia Group Holdings**, proprietorship of Mridu Hari Dalmia Parivar Trust, the Financial Creditor or Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against **Lokhandwala Kataria Construction Private Limited**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**). The Application was filed on 12.03.2019
2. The Application is filed claiming a total default of ₹49,26,52,296/- (Rupees Forty Nine Crore Twenty Six Lakh Fifty Two Thousand Two Hundred and Ninety Six only) including interest as on 15.02.2019. The Application is filed by Mr. Rakesh Aggarwal, authorised by Mridu Hari Dalmia Parivar Trust, being the proprietor of the Financial Creditor. The Application and the Respondent entered into a Memorandum of Understanding dated 01.09.2015 in respect of construction of a residential project by the name of "Minerva" on J.R Boricha Marg, Mahalakshmi, Mumbai-400011. The Respondent sought to avail financial facilities from the Applicant by selling nine flats in the said project, with a right to buyback those flats after a period of 24

months but before the expiry of 36 months from the date of advance. Copy of the Memorandum of Understanding dated 01.09.2015 is annexed to the Application.

3. The Applicant submits that the total consideration for buying the said flats was ₹65,38,00,000/- (Rupees Sixty Five Crore Thirty Eight Lakh only) out of which the Applicant agreed to disburse an amount of ₹36,00,00,000/- (Rupees Thirty Six Crore only) as an advance with an obligation to pay the balance amount at the time of taking possession of the said flats.
4. The Applicant further submits that on 01.09.2015 the Applicant and the Respondent also executed a Buy Back Agreement, Deed of Personal Guarantees and Deed of Corporate Guarantee. Copies of the agreements mentioned supra are annexed to the Application.
5. The Applicant submits that the Respondent executed nine separate undated agreements for sale in favour of the Applicant wherein the Respondent agreed to sell the flats to the Applicant for consideration. Copies of the undated agreements of sale are annexed to the Application.
6. The Applicant submits that as per the Memorandum of Agreement, the Respondent is to repay with quarterly interest at 21% interest per annum. The Respondent has paid the quarterly interest till the first quarter of the financial year 2017-18, however, such instalments were not paid on time and were delayed payments. The Applicant submits that the Respondent has defaulted in making payments from the second quarter of the financial year 2017-18 and has not honoured the terms of the MOU dated 01.09.2015.
7. It is submitted that the Applicant issued a letter dated 08.05.2018 demanding the payments of outstanding interest instalments for September 2017, December 2017 and March 2018 including default interest and other non-compliances. The Respondent in response to the abovementioned letter has admitted its liability to repay the debt in its email dated

09.05.2018. Copy of the email dated 09.05.2018 is annexed to the Application. The relevant extract from the reply in e-mail has been reproduced hereinbelow:

"With respect to para 1 we admit that there has been some delay at our end in making payments. We assure of honouring our commitments at the earliest and considering our long standing relations would request you for a waiver of the default interest outstanding as claimed. The appalling market conditions have been a reason for us not being able to comply with some of our obligations towards you and we sincerely regret for the same"

8. The Applicant issued Notice dated 27.06.2018 demanding payments to the Respondent and its Guarantors. Further, the Applicant also issued Notices dated 30.07.2018 invoking the personal guarantees and corporate guarantees. Copies of the Notices dated 27.06.2018 and 30.07.2018 are annexed to the Application.
9. The Applicant also issued Notice dated 11.07.2018 under section 138 of the Negotiable Instruments Act, 1881 to the Respondent and its directors. Copy of Notice dated 11.07.2018 and Copy of the Cheque return memo dated 06.07.2018 is annexed to the Application.
10. The Applicant issued Notice dated 24.09.2018 informing the Respondent and its directors that the undated cheque bearing No.019625 for Rs.36,00,00,000/- will be presented for encashment. Subsequently, when the Applicant presented the cheque for encashment, the same was returned with a memo "funds insufficient" on 29.09.2018. Copy of the bank return memo is annexed to the Application.
11. The Corporate Debtor in its Affidavit in Reply contends that although there is a put option under the Buy Back Agreement, the Applicant has initiated insolvency proceedings whereas the Applicant is under an obligation to exhaust the put option.

Further, it is the contention of the Respondent that the Applicant is charging an interest of 21% p.a along with 3% interest p.m for delayed payment which corresponds to 36% p.a. which is unjustified.

12. The Applicant in its Rejoinder has rebutted the contention that 21% compounded interest been charged in accordance with the Memorandum of Understanding and 3% interest has been charged per month under the Buy-Back Agreement and that there is no bar for the Applicant to initiate insolvency proceedings although there is a 'put option' available to the Applicant.
13. The Applicant has annexed the Financial Statements of the Respondent for the period 01.04.2017 to 31.03.2018 to the Rejoinder and the same clearly acknowledges the term loan of ₹36,00,00,000/- and it also reflects the fact that the same is secured by nine flats in the project "Minerva".
14. We have heard the parties and perused the records.
15. The Application is filed by Mr. Rakesh Aggarwal, authorised by Resolution dated 27.02.2019 passed by the Mridu Hari Dalmia Parivar Trust. Copy of the Resolution dated 27.02.2019 is annexed to the Application.
16. The Applicant claims a due of ₹49,26,52,296/- (Rupees Forty Nine Crore Twenty Six Lakh Fifty Two Thousand Two Hundred and Ninety Six only) including interest as on 15.02.2019. Table of computation of the amount claimed is annexed to the Application.
17. The Applicant and the Respondent have entered into MOU dated 01.09.2015 with an understanding that the Applicant grants financial facilities to the Respondent by buying nine flats in the Respondent's residential project named "Minerva" on J.R Boricha Marg, Mahalakshmi, Mumbai-49000011, however, the Respondent retained the right to buy back the said flats after a period of 24 months but before the expiry of the 36 months from the date of the disbursement of the advance amount by the

Applicant. The Applicant disbursed a sum of ₹36,00,00,000/- (Rupees Thirty Six Crore only) as advance amount out of the total consideration of ₹65,38,00,000/- (Rupees Sixty Five Crore Thirty Eight Lakh only) for purchase of the flats. The Applicant was to pay the balance consideration at the time of taking possession of the said nine flats.

18. The advance consideration of ₹36,00,00,000/- (Rupees Thirty Six Crore only) is loan/ finance granted by the Applicant to the Respondent as the same is given for the time value of money, the said financial facility thus amounts to financial debt within the meaning of section 5 (8) of the I & B, Code 2016. Copies of the MOU dated 01.09.2015, the Buy Back Agreement dated 01.09.2015, the Corporate Guarantee dated 01.09.2015, Personal Guarantee dated 01.09.2015, the undated agreements of sale, and the financial statement of the Respondent for the period 01.04.2017 to 31.03.2018 are annexed to the Application. It is pertinent to mention that all the documents mentioned above establish the financial debt.
19. It is further relevant to note that the Applicant has issued letter dated 08.05.2018, Notice of default dated 27.06.2018, Notice invoking personal guarantees of the Directors Mohammed A. Lokhandwala, Aliasagar Lokhandwala and Moiz Mohammed Lokhandwala and demanding the amount in default, the Notice dated 30.07.2018 issued to Lokhandwala Infrastructure Private Limited invoking corporate guarantee, Notice dated 11.07.2018 under section 138 of the Negotiable Instruments Act, 1881, Notice dated 24.09.2018 addressed to Lokhandwala Kataria Construction Private Limited, Lokhandwala Infrastructure Private Limited and its directors for encashing the undated cheque bearing No.019625 for a sum of ₹36 crore. Copies of all the notices mentioned supra are annexed to the Application.
20. The Respondent's Reply in e-mail dated 09.05.2018 admitting to the default is also annexed to the Application. The copies of the various Bank return memos dated 16.04.2018, 06.07.2018 and 29.09.2018 dishonouring the cheques issued by the Respondent

for the dishonoured cheques issued by the Respondent is also annexed to the Application.

21. The Respondent has nowhere raised a contention that it did not receive any amount as stated in the Application. The debt has been admitted by way of its Reply in e-mail dated 09.05.2018 and also by its admission in the audited financial statement of the Respondent for the period 01.04.2017 to 31.03.2018. The Respondent has only raised contentions that even though there is put option under the Buy Back Agreement, the Applicant has initiated insolvency proceedings and states that the Applicant is under an obligation to exhaust the put option. Further, it is the contention of the Respondent that the Applicant is charging interest of 21% p.a. along with 3% interest p.m. which is unjustified.
22. The Respondent has also contended in its reply that the Applicant was bound to first refer the dispute to Arbitration, as per the Memorandum of Understanding, however, it is well established that arbitration clause in the Memorandum of Understanding is no bar to initiate insolvency proceedings under the I&B Code. Therefore, this contention of the Corporate Debtor is not tenable and hence rejected.
23. It is imperative to mention here that the Adjudicatory Authority is not required to determine the quantum of financial debt. The Tribunal is not supposed to ascertain the quantum of amount of default or to pass a decree as to how much is actually due to the applicant financial creditor. Any objection with regard to amount would be maintainable before the Committee of Creditors. Once a default in terms of Section 4 of the Code is established and all other requirements are fulfilled, the insolvency resolution process has to be triggered. In the case of ***M/s Innoventive Industries Limited v. ICICI Bank and Anr***, the Hon'ble Supreme Court of India observed that

"in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the

records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date"

24. In the light of the above judgement, and the facts of the case, it is imperative to mention that the contention of the Respondent that the Applicant has levied high rate of interest is untenable and is of no consequence. Further, the contention of the Respondent that the Applicant ought to have exercised the 'Put option' available to it under the Buy Back Agreement is also untenable as the default is independent of the Buyback Agreement and the proceedings under section 7 of the I & B Code, 2016 is independent of the Buyback Agreement. The contention of the Respondent that the Applicant should have invoked the arbitration clause as per the Memorandum of Understanding does not hold any water as it is well established that arbitration clause is no bar for the Initiation of CIRP.
25. The debt and default of the Corporate Debtor has been established and the Application deserves to be admitted
26. The Applicant has proposed the name of Mr. Ajith Kumar, a registered insolvency resolution professional having Registration Number [IBBI/IPA-003/IP-N 00062/2017-18/10548] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code, and given his declaration; no disciplinary proceedings are pending against him.
27. The Application under sub-section (2) of Section 7 of I&B Code, 2016 is complete. The existing financial debt of more than rupees one lakh against the corporate debtor and its default is also proved. Accordingly, the Application filed under section 7 of the Insolvency and Bankruptcy Code for initiation of corporate

insolvency resolution process against the corporate debtor deserves to be admitted.

ORDER

This Application filed under Section 7 of I&B Code, 2016, filed by **Dalmia Group Holdings**, proprietorship of Mridu Hari Dalmia Parivar Trust, Financial Creditor / Applicant, against **Lokhandwala Kataria Construction Private Limited**, Corporate Debtor for initiating corporate insolvency resolution process is at this moment admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
 - 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 Financial 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 such transactions as may be notified

by the Central Government in consultation with any financial sector regulator.

- 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. That this Bench at this moment appoints Mr. Ajit Kumar, a registered insolvency resolution professional having Registration Number [IBBI/IPA-003/IP-N 00062/2017-18/10548] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
28. The Registry is at this moment directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated registrar is to be submitted today**

Sd/-
RAJESH SHARMA
Member (Technical)

Sd/-
V.P. SINGH
Member (Judicial)

19th September 2019