



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

CP (IB) No. 1155/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

RSM Infra Partners

...Operational Creditor/Applicant

V/s

Siddhivinayak Skyscrapers Private Limited

[CIN: U45200PN2010PTC135518]

...Corporate Debtor/Corporate Debtor

Order Dated: 12.04.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Rohit Gupta a/w Mr.. Amrut
Bairagra i/b M/s. M.T. Miskita &
Co., Advocates.

For the Corporate Debtor(s) : Mr. Smit Shah i/b Mr.
Mangesh Shirsat, Advocate.

Per: Prabhat Kumar, (Member Technical)

1. This is an Application being C.P. (IB) No. 1155/MB/C-IV/2020 filed on 24.07.2020 by Mahendra Rathor, Partner of RSM Infra, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code,



2016 (I&B Code) against Siddhivinayak Skyscrapers Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

1.1. The date of default as mentioned in the Part IV of the Application is 15.01.2020.

2. The Operational Creditor on 02.08.2016 executed a Memorandum of Agreement (MOA) with the Corporate Debtor for the purpose of assignment of rights of lease in a plot of land under the following circumstances-

2.1. The Applicant submits that one M/s. Kuber Builders, a sole proprietor concern of Mr. Pradyuman Kumar Sharma ("Kuber") had acquired the leasehold right in a plot of land situated at Kharghar, Navi Mumbai from City Industrial Development Corporation of Maharashtra ("CIDCO") vide Agreement dated 15/05/1996. Kuber and its group of companies had disputes with depositors/investors and various proceedings were initiated before various courts of law, judicial and quasi-judicial bodies and statutory authorities (collectively, the "Proceedings") against them, and one such Proceedings is Special Case No. 7/2000 filed by the State of Maharashtra ("Sessions Court Proceedings") in the court of the special designated court of sessions at Mumbai (the, "Sessions Court").

2.2. Subsequently, the Corporate Debtor arrived at an agreement with Kuber and its group companies under which the Corporate Debtor agreed to purchase the said Plot as well as certain other Plots with a clear and marketable title free from all encumbrances, claims, demands, doubts and disputes together with the quiet, vacant and peaceful possession thereof, and free from the Proceedings, including



the Sessions Court Proceedings, whereby the Corporate Debtor agreed to step into the shoes of Kuber and, inter alia, substituted Kuber in said Agreements vide Memorandum of Understanding dated 16.06.2016 made by and between the Corporate Debtor on the one hand and Kuber and its group companies represented by the Promoters on the other hand. The Corporate Debtor vide this MOU agreed to pay to Kuber and its group of companies a lump sum consideration of Rs.97,00,00,000/- (Rupees Ninety-seven Crores Only) for purchasing and acquiring the said land and other plots with a clear and marketable title free from all encumbrances, etc. and pursuant to to the same, a part consideration amount of Rs.2,00,00,000 /- (Rupees Two Crores Only) was paid by the Corporate Debtor to Kuber and Promoters.

2.3. The Applicant further submits that the Corporate Debtor also agreed to transfer and assign the entire right, title and interest held by the Corporate Debtor under the MOU in respect of the said Plot to the Applicant, whereby the Applicant would directly step into the shoes of Kuber as the prospective lessee of the said Plot, the lease of which is to be granted by CIDCO. The consideration payable by the Operational Creditor to the Corporate Debtor including the agreed consideration payable to Kuber was finalised for Rs. 40,00,00,000/- (Forty Crores Only).

2.4. The Applicant further submits that it was agreed between the Corporate Debtor and the Applicant that the Corporate Debtor shall cause Kuber to recognise the Applicant in their place and stead; that the Corporate Debtor shall cause Kuber to procure directly in Applicant's favour, the Assignment of the said Agreements executed by CIDCO in respect of the said Plot; and that the Applicant would acquire a clear and marketable title thereto from all encumbrances,



claims, demands, doubts and disputes together with the quiet, vacant and peaceful possession thereof, and free from the proceedings in all respects. It was agreed between the Corporate Debtor and the Applicant that upon introducing the Applicant as the nominee in the Sessions Court Proceedings a composite agreement by and between the Corporate Debtor, Applicant and Kuber in respect of the assignment and transfer of the MOU to the extent of the Said Plot will be executed. The Applicant paid a sum of Rs. 1,00,00,000/- (Rupees One Crore Only) to the Corporate Debtor towards the aforesaid transaction after deducting applicable TDS amount. The balance consideration of Rs. 39,00,00,000/- (Rupees Thirty-Nine Crore Only) was to be deposited by the Operational Creditor in the Escrow account with a mutually approved third party escrow agent and the sequence for appropriation of the said amount was mutually decided by the parties.

2.5. The Applicant further submits that the Corporate Debtor failed to introduce the Applicant as a nominee in the Sessions Court proceedings or to execute the Composite Agreement as per Clause 11 of the MOU dated 02.08.2016. The Corporate Debtor, by its letter dated 24.07.2019, agreed to extend the said MOU till 15.01.2020, and stated that if for any reason whatsoever it fails to comply with its obligations under the MOU and procure in Applicant's favour, title to the said plot, by the Final Closing Date, it would refund to the Applicant, the said amount of Rs. 1,00,00,000/- (Rupees One Crore Only) paid by the Applicant to the Corporate Debtor under the MOU, together with the interest thereon within 3 days of such final closing date. The Corporate Debtor has failed to comply with its obligations under the MOU and the letter dated 24.07.2019.



- 2.6. The Applicant issued a Demand Notice dated 09.03.2020 in Form No.3 in terms of Rule 5 (1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 u/s. 8 of the Insolvency and Bankruptcy Code, 2016 upon the Corporate Debtor demanding a sum of Rs. 1,66,37,808/-. The Corporate Debtor has not replied to the said demand notice.
3. The Corporate Debtor has filed its reply dated 16.01.2021 stating that the amount claimed in the petition does not qualify as an Operational Debt u/s. 5(21) of the Insolvency and Bankruptcy Code, 2016 and that the interest claimed @18% p.a. is illegal. It further states that the Applicant failed to deposit the balance amount of Rs. 39 crores in the escrow account as agreed by it as per clause 8 of the MOU dated 02.08.2016. The Corporate Debtor has disputed the statement of claim annexed by the Applicant to the present Application. The Corporate Debtor further states that the Applicant has failed to demonstrate how the Applicant falls within the ambit of Operational Creditor as defined in section 5(20) of the Code. The Corporate Debtor further states that the letters dated 02.08.2016 and 24.07.2019 do not constitute as proof of debt as claimed in the petition. The Corporate Debtor has also disputed the authority letter attached to the petition.
4. The Operational Creditor has filed written submissions dated 04.03.2023 wherein it stated that both the parties are engaged in the real estate business and the amount of advance paid by it to the Corporate debtor constitutes advance towards supply, which the Corporate Debtor has failed to make. Accordingly, the amount of advance, having become refundable upon said failure, is an operational debt and it is an operational creditor.
5. The Corporate Debtor has also filed written submission dated 20.02.2023 thereby reiterating the abovementioned defences contesting the



maintainability of the present application. It has further cited the decision of this bench in the case of Tata Chemicals Limited v/s. Raj Process Equipment's and Systems Private Limited [CP IB 21/2018] and a judgement of the Hon'ble Supreme Court in the case of S.S Engineers v/s. Hindustan Petroleum Corporation Limited and Ors. in which it was held that there should be an undisputed debt and default for initiation of CIRP against the Corporate Debtor.

6. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

6.1. We notice that the present petition has been filed u/s 9 of the Code, which provides for filing an application by an Operational Creditor in case of default in payment of operational debt in relation to which no prior dispute exists. The Operational debt is defined u/s 5(21) of the Code to mean "*a claim in respect of provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*". In the present case, the amount of debt claimed in default is an amount paid as advance towards an agreement for transfer of leasehold rights in an immovable property and such debt has arisen from the failure of the Corporate debtor to fulfil its obligations under an agreement for transfer of leasehold rights in an immovable property. The agreement under which the advance claimed as debt was paid is essentially an agreement for purchase of leasehold rights in an immovable property. The immovable property is neither the goods; nor services; nor a claim for repayment of dues arising under any law. Hence, the amount claimed as debt is not an operational debt, consequently, the applicant can not claim to



be an Operational creditor so as to entitle it to file the present application u/s 9 of the Code.

6.2. We find that the cases relied upon the Corporate Debtor in its written submissions do not help the case of the Corporate Debtor as there is no relevance to the present case with respect to issue involved in those cases.

7. In view of the above, we find that the present application under Section 9 of the Code for initiation of CIRP against the Corporate Debtor deserves to be dismissed.

ORDER

This Application being C.P. (IB) No. 1155/NCLT/MB/C-IV/2020 filed under Section 9 of I&B Code, 2016, filed by RSM Infra, Operational Creditor/ Applicant against Siddhivinayak Skyscrapers Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.

We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)