

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT No. V, MUMBAI BENCH

C.P. (IB) No. 3169/NCLT/MB/2019

(Under Section 9 of the I&B Code, 2016)

In the matter of:

Spartan Engineering Industries
Pvt. Ltd.

Spartan House Level 1, 111,
New Tejpal Industrial, Estate
Andheri Kurla Road Sakinaka,
Mumbai: 400072.

... Petitioner

V/s

Sivana Realty Pvt. Ltd.

Samriddhi Garden CTS No.
430/C, LBS Road, Opp. Eshwar
Nagrg, Bhandup West, Mumbai-
400078.

...Corporate Debtor

Order Dated: 11.08.2020

Coram:

Hon'ble Member (Judicial), Smt. Suchitra Kanuparthi

Hon'ble Member (Technical), Shri V. Nallasenapathy

For the Petitioner: Adv. KartikiGaldi.

For the Respondent: Mr. Ishan J. Ravindranathi/b Mr. Siddhesh.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This Petition is filed by Spartan Engineering Industries Pvt. Ltd. ("Petitioner") against Sivana Realty Pvt. Ltd. ("Corporate Debtor") for initiating Corporate Insolvency Resolution Process ("CIRP") as provided under section 9 of the Insolvency & Bankruptcy Code, 2016 ("Code") read with rule 6 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 ("Rules") alleging that the Corporate debtor defaulted in making payment to the extent of Rs. 17,80,470/-.
2. The petition reveals that the petitioner is in the business of engineering services and supplied engineering goods to the Corporate Debtor on the basis of four purchase orders issued by them. The petitioner delivered the goods to the Corporate Debtor and raised four invoices to the extent of Rs. 13,26,644/- from 23/01/2018 to 06/03/2018 on the Corporate Debtor. The petitioner also claimed interest to the extent of Rs. 4,53,826/- as on 25/07/2019 on the delay in payment at the rate of 24% per annum. The invoices were raised in the name of Sunshine Housing Pvt Ltd and subsequently the name of the Corporate Debtor was changed to Sivana Realty Pvt. Ltd.
3. The petitioner submits that a demand notice under Section 8 of the Code in Form 3 was sent on 26/07/2019 demanding the above said amount and the same was returned with an endorsement as "Not available" and "No office on this address". Subsequently, the petitioner, on

06/08/2019 sent the demand notice to the Corporate Debtor by E-mail. However the Corporate Debtor neither replied nor paid any amount after the receipt of notice by E-mail. Hence this petition.

4. The Corporate Debtor filed reply to the petition and raised the following contentions. :

a. The present management (Vira Group) of the Corporate Debtor was having some disputes with the erstwhile management (Sunshine Group) of the Corporate Debtor and the Vira Group filed petition under Section 241-242 of the Companies Act, 2013 against the Sunshine Group and finally when the matter was taken in Civil Appeal No. 4247/2018, 4254/2018 & 4281/2018, the Hon'ble Supreme Court by an order dated 06.08.2018 directed the Vira Group and Sunshine Group to settle all their disputes including litigation pending between the two parties by way of mediation.

b. Subsequently multiple mediation meetings were held between the parties before the Bombay High Court Mediation Centre and a Memorandum of Settlement was entered into between the Sunshine Group and the Vira Group wherein it was agreed between the parties that the Corporate Debtor has to be transferred to the Vira Group by Sunshine Group. A copy of the Settlement Memo has been annexed and marked as Exhibit "C" to the Petition.

c. By an order dated 03/12/2018, the Hon'ble Supreme Court of India took the Settlement Memo on record

(treating it as part of the Order under reference) and disposed of the Civil Appeal and copy of the said order has also been annexed to the petition as Exhibit "D"

d. The following clauses of the Memorandum of Settlement has been highlighted by the Corporate Debtor:

"The parties shall indemnify, defend and hold harmless the other Parties from and against any and all losses, cost, expenses, damages, claims, liabilities which may arise out of or as a result of breach of any representation and warranty by the Parties contained in these presents."

(Clause 9.1)

"The Sunshine Group do and each of them doth hereby further indemnifies the Vira Group and its successor and hold them harmless from and against any loss, claim, tax, damage, liability or expense suffered or incurred by Vira Group in connection with or arising from:

- a. Any material litigations pending against, by or affecting the business of the Sunshine Group or its assets/properties, wherein Vira Group had a stake therein;*
- b. Any material claims relating to the affairs, business and properties of the Sunshine Group."*

(Clause 9.2)

"It is agreed between the Parties [viz THE Sunshine Group and the Vira Group] hereto that the Vira Group shall not be responsible or held liable for any of the liabilities including secured and unsecured borrowings, inter corporate deposits, loans from shareholders, debenture holders, loans from associates or any other deposits or loans taken from any person or entity prior to the date of execution of this settlement and that the responsibility for the fulfilment of any commitment or repayment or payment or clearance or settlement of such deposits or loans taken by [the Respondent] prior to the date of execution of this Settlement shall be completely and unconditionally borne by the Sunshine Group at its own risk and costs, which the Sunshine Group hereby unconditionally agrees to."

(Clause 9.5)

"Sunshine Group hereby confirms that no personal/corporate guarantees of Vira Group have been furnished to any of its Lenders as a security for due repayment of the finance assistance availed by them and shall at all times indemnify and keep indemnified Vira Group from and against any and all losses, cost, expenses, damages, claims, liabilities which may arise out of or as a result of breach of the aforesaid representation."

- e. The erstwhile management of the Corporate Debtor had poorly managed the affairs of the Corporate Debtor causing great deal of hardship to the Vira Group in ensuring the smooth functioning of the Corporate Debtor. Even the Municipal/Property tax of the Respondent payable to the Municipal Corporation of Greater Mumbai was not paid by the Corporate Debtor and hence the Municipal Corporation of Greater Mumbai issued "Stop Work" notice on 28/03/2018 pertaining to a development project undertaken by the Corporate Debtor and the said "Stop Work" notice is still in effect and the development of the concerned project has come a halt. The materials which were purportedly supplied by the petitioner has remained unutilised and the same can be collected back by the petitioner.
- f. The petitioner is a vendor who was shortlisted by the erstwhile management (Sunshine Group) and the Vira Group has nothing to do with the same. The materials which are lying at the site of the corporate debtor if the petitioner supplied by the petitioner can be collected from the site of the corporate debtor if the petitioner decides to do so and this offer is made to show the bonafides of the Corporate Debtor. The claim of the petitioner, if upon reconciliation, found to be matching with the work undertaken by the petitioner, then the materials supplied by the

petitioner which is commensurate with the value with that of the claim can be returned to the petitioner.

- g. This prevailing situation does not warrant any adverse order against the new management of the Corporate Debtor (i.e. Vira Group) under the Code. The interest claimed at the rate of 24% is usurious in nature and the entire claim of the petitioner has to be set aside as provided under Section 3 & 4 of the Usurious Loans Act, 1918. Without prejudice to the contentions raised, the Corporate debtor is willing to handover all the goods supplied by the petitioner to the Corporate Debtor for settling this dispute.
- h. The erstwhile management of the Corporate Debtor (Sunshine Group) has not handed over any of the documents pertaining to these transactions. The new management of the Corporate Debtor (Vira Group) shall not be made to bear the brunt of the action of the erstwhile management of the Corporate Debtor (Sunshine Group). Without prejudice to the above contentions, it is submitted that the interest charged by the petitioner at the rate of 24% p.a. on the defaulted amount is usurious in nature and hence the entire amount claimed by the petitioner has to be set aside relying on the provisions of Section 3 & 4 of the Usurious Loans Act, 1918 which provides as below: -

"Re-opening of transaction. Notwithstanding anything in the Usury Laws Repeal Act, 1855 (28 of 1855), where, in any suit to which this Act applies, whether

heard ex parte or otherwise, the Court has reason to believe,

- (a) that the interest is excessive; and*
- (b) that the transaction was, as between the parties thereto substantially unfair, the Court may exercise all or any of the following powers, namely may,-*
 - (i) re- open the transaction, take an account between the parties and relieve the debtor of all liability in respect of any excessive interest*
 - (ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re- open any account already taken between them and relieve the debtor of all liability in respect of any- excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;*
 - (iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just: Provided that, in the exercise of these powers, the Court shall not-*
 - (i) re- open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more*

than 2 twelve] years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation.- In the case of a suit brought on a series of transactions the expression "the transaction" means, for the purposes of proviso (i), the first of such transactions.

(2) (a) *In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.*

(b) *In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.*

(c) *In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any*

previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(d) In considering whether a transaction was substantially un- fair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time- of the loan so far as the same were known, or must be taken to have been known, to the creditor. Explanation.- Interest may of itself be sufficient evidence that the transaction was Substantially unfair.

(3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan 1 or for the redemption of any such security].

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was bona fide, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section. For the purposes of this sub- section, the word" notice" shall have

the same meaning as is ascribed to it in section 4 of the Transfer of Property Act, 1882 (4 of 1882).

5. In support of the Contention that this Tribunal can apply the Usurious Loans Act, 1918 to the proceedings under the Code relying on the following judgments:-

- a. *Union of India v. R Gandhi, President, Madras Bar Association (2010 (11) SCC 1) - to emphasize the point that NCLT is akin to a court of law and not a mere adjudicating authority.*
- b. *Bhadu & Ors v. Ganpati &Anr ("Bhadu Case") (AIR 1931 NAG 25) – to say that courts have power in terms of Section 3 of the Usurious Loans Act, 1918 to reduce the rate of interest if it finds the same to be excessive.*
- c. *Amar Chand v. Nawab Din (AIR 1937 Lah 629) – to say that Insolvency court such as NCLT are entitled to reduce the rate of interest if sufficient justification for the same exists.*
- d. *Mohammad Hussain v. Hanuman Prasad ("Mohammad Hussain's case") (AIR 1942 Oudh 273) – to say that the courts must while applying the loans of the Usurious Loans Act, 1918 not merely set aside the exorbitant interest levied by a creditor, must necessarily re-open the transaction and determined the true amount due to the creditor by taking into consideration the nature of transaction and interalia a risk involved entering into a loan transaction.*

- e. *GeetuLakhpat&Anr. v. Jaipal* ("GeetuLakhpat") (2011) 181 DLT 4 – wherein the Hon'ble Delhi High Court *inter alia* held that an interest rate of 24% p.a. is against public policy (especially considering the present economic scenario) and reduced the rate levied by creditor to 7.5% p.a.
- f. *BaijnathPandav. The State of E.C. Dennet* ("BaijnathPandav") (AIR 1925 All 400) – wherein the Hon'ble Allahabad High Court upheld a decision of a learned district judge wherein the interest rate of 75% p.a. was reduced to 12% p.a.
- g. *Dayawati&Anr. v. Indrajit&Ors.* – wherein it was held that Section 3 of the Usurious Loans Act, 1918 mandatory for a court to re-open a transaction if that is reason to believe that the rate of interest levied is excessive.
- h. *Penumesta China Venkatraju v. Pulavarthi Lakshmanaswami & Anr* ("Venkatraju's Case") (AIR 1931 Mad 729) wherein Hon'ble Madras High Court has held that Insolvency Courts have the requisite jurisdiction to adjudicate upon the rate of interest levied by a creditor upon the debtor, whether the same is excessive or not in terms of Usurious Loans Act, 1918.

6. The Corporate Debtor further submits that the Judgment of the Hon'ble NCLAT dated 29/11/2018 in the case of *Naveen Luthra v. Bell Finvest (I) Ltd &Anr*), wherein it was held that the Usurious Loans Act, 1918 is not applicable for initiation of Corporate Insolvency Resolution Process

("CIRP"), is no longer a good law in view of the Order of the Hon'ble Supreme Court dated 25/11/2019 *in Naveen Luthra v. Bell Finvest (I) Ltd &Anr* (Civil appeal No. 654/2019) wherein it was ordered as below:

"Heard learned counsel for the appellant and perused the relevant material.

We are not inclined to interfere with the order impugned in the appeal. The same is, accordingly, dismissed. However, it will be open for the appellant to press the issue of rate of interest and application of the Usurious Loans Act, before the National Company Law Tribunal, if so advised."

7. As far as the above contention of the Corporate Debtor that NCLT as an Adjudicating Authority to decide on the applicability of Usurious Loans Act, 1918 to this proceeding is concerned, we are of the firm view that the invoices provide for 24 % interest on delayed payments and the same is not excessive or exorbitant considering the present market conditions. Hence the said request of the Corporate Debtor is rejected.
8. The contentions of the Corporate Debtor that in view of the settlement entered into between the Vira Group and sunshine Group, the Corporate Debtor herein is not liable for the amount claimed in this petition based on the Clause 9.5 of the settlement memo dated 31/10/2018. We are unable to accept the contention of the Corporate Debtor that the Corporate debtor is not liable to the petitioner. The petitioner was not a party to the settlement entered into

between the Vira Group and Sunshine Group. The corporate debtor has not raised any dispute with regard to the debt or quality of goods supplied. The debt and default on the part of the Corporate debtor is writ large in the petition and in fact the Corporate debtor himself is ready to returned back some of the unutilised goods remaining with them to the petitioner.

9. This Bench having been satisfied with the Petition filed by the Petitioner which is in compliance of provisions of section 9 of the Insolvency and Bankruptcy Code admits this Petition declaring moratorium with the directions as mentioned below:

- (a) 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.
- (b) 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.

- (c) 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.
- (d) That the order of moratorium shall have effect from this day 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.
- (e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (f) That this Bench hereby appoints Mr. Neehal Mahamulal Pathan, having office at RS No. 825, Plot No. 27, Sahjeevan Parisar, Karande Mala, near TPM Church behind Circuit House Kolhapur, Kolhapur, Maharashtra -416 003; having email address: ca.neehal@gmail.com; having Registration No. IBBI/IPA-001/IP-P-01561/2018-2019/12406 as Interim Resolution Professional to carry the functions as mentioned under the Code.

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

-sd-

V. Nallasenapathy
Member (Technical)

-sd-

Suchitra Kanuparthi
Member (Judicial)