

IN THE NATIONAL COMPANY LAW
TRIBUNAL COURT – V, MUMBAI BENCH

C.P. (IB) 3990/MB/2019

Under section 9 of the IBC, 2016

In the matter of

Sunteck Realty Limited

37-40, Subhash Road,

Vile Parle (East), Mumbai — 400 057

... Petitioner

v/s

Goodwill Theatres Private Limited

Novelty Chambers, 2nd Floor, MS Ali Road,

Mumbai — 400 007

... Corporate Debtor

Order delivered on: 07.01.2021

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

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

For the Petitioner: Mr. Rohan Cama, Advocate, Ms. Jasmine Sheth, Advocate a/w

Mr. Deepu Jojo, Advocate i/b Wadia Ghandy and Company

For the Corporate Debtor: Mr. Bipin Joshi, Advocate

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This Petition is filed by the Petitioner, Sunteck Realty Limited, under Section 9 of Insolvency & Bankruptcy Code, 2016 (**Code**) against the Corporate Debtor, Goodwill Theatres Private Limited, alleging that the Corporate Debtor committed default in making payment to the extent of Rs. 3,12,39,529/- including interest @ 24% p.a. by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy Rules, 2016.
2. The Petitioner company is a reputed developer and has undertaken several projects of large magnitude in Mumbai.
3. The Corporate Debtor is the owner of the property bearing CTS No. 124 and admeasuring 2463.23 sq. mts. at M. S. Ali Road, Grand Road, East, Tardeo Division, Mumbai- 400007 along with the building known

as Novelty Talkies. The said Land and the said Building shall be collectively referred to as "the said property".

Facts of the case:

4. The Corporate Debtor approached the Petitioner and requested the services of the Petitioner with regard to the redevelopment of the said property. Both the parties executed the Term Sheet dated 02.08.2018, thereby appointing and engaging the Petitioner as a Project Manager for performing services in relation to the said property in the manner set out therein. The terms and the conditions as entailed in the term sheet obligated the Petitioner to pay an amount of Rs. 2.51 crores as an advance towards aforesaid transactions. The exit option also clearly stipulated that in the event of failure to execute the Development Management Agreement between the parties, the said Term Sheet will stand automatically terminated subject to the Corporate Debtor repaying the advance amount along with the interest @ 15 % p.a. within 60 days of the termination of the Term Sheet and at the rate of 24 % p.a. after 60 days of termination of the Term Sheet. The Petitioner has enclosed a Bank Statement dated 03.08.2018 showing the transfer of money to the Corporate Debtor.
5. As per the Term Sheet on failure to execute the Development Management Agreement within 60 days, the said Term Sheet will automatically be terminated unless mutually extended in writing. Post execution of Term Sheet between September 2018 to October 2018, emails were exchanged between respective advocates of the parties to enable the Petitioner to seek the title documents and information pertaining to the said property and also authorize the publication of public notice investigating title to the said property of the Corporate Debtor. Further emails were exchanged to share the draft of Development Management Agreement.
6. Meetings were held between the parties and their respective advocates on 31st October, 2018 at which the terms and conditions between the parties were discussed with regard to the Development Management Agreement. However, the parties were not able to come at a consensus with regard to several critical terms and conditions of the Development Management Agreement.
7. The Petitioner, thereafter, sent three emails dated 12.09.2018, 03.10.2018 and 04.10.2018 discussing the draft of Development Management Agreement. The Petitioner has also attached the objection dated 20.10.2018 to the public notice received from the

Markand Gandhi and Co. The series of correspondences exchanged between the Counsels for the Petitioner and the Corporate Debtor were annexed with the Petition.

8. The Petitioner submitted that there were mutually discussions on the Term Sheet till November/ December 2018. However, both the parties mutually agreed to terminate the Term Sheet and accordingly the Development Management Agreement was never executed between the parties in terms of the Term Sheet. Thus, the Corporate Debtor ought to have paid the amount of Rs. 2.51 crores to the Petitioner immediately.
9. On 3rd July, 2019, the Petitioner called upon the Corporate Debtor to refund the amount of the advance paid. The Corporate Debtor also on 05.08.2019 shared a draft of Deed of Cancellation of the Term Sheet and the same was also not executed. It is in the admitted position that the Corporate Debtor in its draft Deed of Cancellation admitted his liability to pay the aforesaid amount, though the draft of Deed of Cancellation was never executed. The Petitioner vide email dated 08.08.2019 shared the revised draft of Deed of Cancellation with the Corporate Debtor. The Petitioner further issued another Letter of Reminder on 12.08.2019 to the Corporate Debtor seeking refund of the money paid. The Corporate Debtor failed to pay the said amounts and demand notice was issued under Section 8 seeking a recovery of Rs. 3,05,95,868/- inclusive of interest from 03.10.2018.
10. The Corporate Debtor replied to the above said demand notice on 13.09.2019 and sought to wriggle out of their obligation under their Term Sheet. The Corporate Debtor also raised the defense that the Petitioner does not fall under the definition of the Operational Creditor. The Corporate Debtor also alleged that due to breach of Term Sheet, they incurred certain damages and hence, there is serious *bonafied* dispute between the parties.

Reply of the Corporate Debtor to the Petition:

11. The Corporate Debtor filed his Reply and sought for rejection of the Petition on the following grounds:
 - a. In terms of Clause 17 of the Term Sheet, the Term Sheet will automatically be terminated in the event the parties fail to execute the Development Management Agreement within 60 days of the execution of the Term Sheet unless extended in writing. However, the Corporate Debtor states that the Term Sheet was in fact extended by the parties conduct in view of the correspondence exchanged between the parties

and their Counsels. The parties were negotiating the terms and conditions of the Development Management Agreement till December, 2018 and despite the time line set out for execution of the Development Management Agreement, the Petitioner constantly called upon the Corporate Debtor to complete the title diligence. As such, series of trail mails were exchanged dated 23.10.2018, 17.11.2018, 30.11.2018 and 18.12.2018. The Corporate Debtor hence claims that in view of exchange of emails/ letters between the parties the Term Sheet is deemed to be extended. The Corporate Debtor also objected to the amount claimed by the Petitioner and stated that there is an error in the calculation of the purported amount due. Hence, there is no question of payment of the 24 % interest as there is a deemed extension of Term Sheet by conduct of the parties and hence, there is pre-existing dispute between the parties. The termination of the Term Sheet is denied by the Corporate Debtor and the repayment of the principal amount along with the interest as purported in the Cancellation Deed.

b. The Corporate Debtor further stated that the Petitioner relied upon the date of 03.10.2018 as date of termination, however, there was no communication regarding such termination on 03.10.2018 to the corporate debtor herein and hence the Petition should be dismissed.

c. The Corporate Debtor submits that it has duly complied and performed all its obligations under the Term Sheet, whereas the Petitioner has breached the terms and conditions of the Term Sheet. The Corporate Debtor also submitted that prior to the draft of the Cancellation Deed being circulated to the Petitioner, the Corporate Debtor believed that the Development Management Agreement was still to be executed between the parties. The Petitioner is not an Operational Creditor in terms of the Code and the Term Sheet is not a binding agreement between the parties. The Term Sheet is merely an agreement to enter into an agreement and is not a concluded agreement between the parties. Also, the Petitioner has not provided any goods or services to the Corporate Debtor to claim relief under Section 9 of the Code.

d. Though the Term Sheet is an instrument chargeable with stamp duty, the parties had not paid stamp duty on the Term Sheet.

e. The Petitioner is liable to compensate the Corporate Debtor for the losses caused to the Corporate Debtor due to the Petitioner's unilateral and wrongful termination of Term Sheet. The Corporate

Debtor vide its Dispute Notice dated 13.09.2019 have reiterated that they were relying on the financial support that was being accorded/ granted to the Petitioner in terms and pursuant to the Term Sheet to repay several outstanding facilities availed by the Corporate Debtor from financial institutions. Due to the Petitioner's unilateral and sudden conduct of the termination of Term Sheet, the Corporate Debtor has suffered heavy financial losses including its compliances qua the consent terms filed before the Hon'ble Bombay High Court. The Corporate Debtor also mentions that the Corporate Debtor has paid an amount of Rs. 50 lacs to Mr. Jignesh Hirani, a broker, upon the receipt of money paid under the Term Sheet which has caused loss to the Corporate Debtor.

Rejoinder by the Petitioner:

12. The Petitioner filed the Rejoinder as against the Reply of the Corporate Debtor and raised the following contentions:
 - a. The petitioner submits that the Corporate Debtor has clearly admitted its liability to pay an advance money of Rs. 2.51 crores along with interest @ 24 % p.a. under the deed of cancellation circulated by the Corporate Debtor on 05.08.2019 and hence, the Corporate Debtor has not shown any justification to retain such advance money.
 - b. As per the Term Sheet dated 02.08.2018, it is construed that upon failure to execute the Development Management Agreement within 60 days, the Term Sheet would automatically stand terminated unless mutually extended between the parties.
 - c. In the reply to Demand Notice, the Corporate Debtor for the first time alleged that there is a bonafied dispute exists between the parties, the same is nothing but a desperate attempt from the Corporate Debtor to wriggle out of its obligation under its said Term Sheet.
 - d. In fact, the Deed of Cancellation was shared by Mr. Jignesh Hirani by 05.08.2019 acting on behalf of the Corporate Debtor. The Petitioner only revised the Deed of Cancellation vide email dated 08.08.2019.
 - e. The Petitioner, in view of execution of Term Sheet, is an Operational Creditor under the Code and therefore, claims that the advance money paid by the Petitioner to the Corporate Debtor for availing goods and services is an *ex-facie* debt under Code. The nomenclature of the said Term Sheet is itself

explanatory which states that the Corporate Debtor agrees to appoint and engage the Petitioner for performance of the services. The Petitioner also submits that the Term Sheet only discusses the basis of commercial terms and obligations of each party which would be entered upon the broad agreement. Therefore, no stamp duty is paid on the Term Sheet under the Maharashtra Stamp Act, 1958.

- f. The Petitioner also submits that there is no question of liability of payment to the Corporate Debtor towards loss incurred by them. There was exchange of various mails between the parties which evidence that the parties were not at ad-idem on critical terms pertaining to the conditions of Development Management Agreement and hence the parties mutually decided to call off the transactions.

13. Written Submissions of the Petitioner:

- a. The Term Sheet came to be executed between the parties on 02.08.2018 under the Term Sheet. The Petitioner being the Project Manager was to perform services in relation to the project including but not limited to arranging finances for the project and short fall funding. The Petitioner was to receive a payment of profit share of 15 to 20 % from the total receivables from the project.
- b. The Petitioner paid an amount of Rs. 2.51 cores as per the Clause 13 of the Term Sheet and further in view of the termination of the terms, the Corporate Debtor was liable to refund the money along with interest @ 15 % p.a. within 60 days and @ 24 % p.a. after 60 days.
- c. The Petitioner relied upon Clauses 13, 15 and 17 of the Term Sheet and the correspondences vide trail mails between the parties and their counsels.
- d. The Deed of Cancellation as circulated by the Corporate Debtor itself shows that is admission of liability of payment of refund of monies.

14. Written Submissions of the Corporate Debtor:

- a. The Corporate Debtor claims that the Petitioner is not an Operational Creditor under Section 5(20) of the Code and the amount claimed is not an operational debt.

- b. It is admitted fact that the Petitioner has not provided any goods and services under Term Sheet despite being obligated to do so the amount claimed therefore cannot qualified to be an Operational Debt. The Term Sheet is in the nature of a Joint Development Agreement, where the Petitioner and the Corporate Debtor would share the receivables from the said Project and is not entitled to a fixed fee.
- c. The Corporate Debtor further claims that the Term Sheet is in the nature of concluded contract duly signed between the parties and non-execution of Development Management Agreement does not execute the performance of the obligations undertaken by the parties under the Term Sheet.
- d. The parties have not agreed to the mutual agreement of the Term Sheet as alleged by the Petitioner.
- e. There is a pre-existing and *bonafide* dispute between the parties and the Corporate Debtor has suffered the loss and injury by the Petitioner's breach.
- f. The draft Deed of Cancellation does not amount of admission of the moneys paid to the Petitioner.
- g. The Petitioner argued that the token money is the advance money paid toward services and has to be rejected.

Findings:

15. Upon perusal of the documents and after hearing the arguments of both the sides this Bench is of the considered view as follows:
 - a. The binding Term Sheet dated 02.08.2018 between the Corporate Debtor (owner) and the Petitioner (Project Manager) proposed to redevelop the property by constructing residential cum commercial building The Corporate Debtor thus agreed to appoint the Petitioner as its Project Manager for the performance of the services in relation to the project as envisaged under Clause 5 and 6 of the Term Sheet. Clauses 5 and 6 of the Term Sheet are reproduced as below:

"5. Proposed Transaction - The Owner agrees to appoint and engage the Project Manager for the performance of services in relation to the project as an agent / contractor on behalf of the Owner and the Project Manager agrees to accept the engagement to undertake, provide and carry out such services subject to payment of the Development Management Fees by

the Owner.

6. Decision Making - The Project Manager shall take all decisions relating to the said project for the benefit of the Project, in consultation with the Owner. These decisions include but are not limited to Planning, Finance and Project Costs, Construction, Sales & Marketing, Branding, Administration Etc."

- b. The scope of the services of the Project Manager is also defined under Clause 7. The receivables and Development Management Agreement fees was captured at Clause 8 of the Term Sheet.
- c. The obligation/ representation of the Corporate Debtor was also captured in the Clause 9 of the Term Sheet. The Clause 12 envisaged that the Petitioner shall facilitate in arranging such funding required for the said project. Clause 13 of the Term Sheet further required that an amount of Rs. 2.51 crores shall be paid by the Petitioner to the Corporate Debtor at the time of signing this Term Sheet as token amount and further that upon termination of the Term Sheet the Corporate Debtor is liable to pay interest at the token amount of 15 % p.a. in case of termination within 60 days of signing of the Term Sheet @ 24 % p.a. in case of signing after 60 days. Clause 13 is as follows:

"Token amount- A sum of Rs. 2.51 crores shall be paid by the project Manager to the owner at the time of signing this Term Sheet as the Token amount with Cheque No. 039955 drawn on Axis Bank, dated 2nd August, 2018.

In case of Termination of this Term sheet, the owner shall be liable to pay an interest on the token amount at a rate of 15 % p.a. in case of Termination within 60 days of signing the Terms sheet and at rate of 24 % p.a. in case of Termination after 60 days of signing the Term Sheet."

- d. It is also agreed by the parties that as per the Clause 15, the parties would execute the Development Management Agreement on or before expiry of 2 months from signing of its Term Sheet. The parties have also agreed at Clause 17 that in case of failure of execution of Development Management Agreement within 60 days, the Term Sheet will automatically be terminated unless mutually extended in writing.

e. The point for legal consideration arising in this matter is whether the Petitioner is an Operational Creditor as agreed under the terms of binding Term Sheet dated 02.08.2018 and whether the amount claimed under the binding Terms Sheet is an Operational Debt?

f. It is relevant to refer to Section 5(20) of I & B Code which defines as follows;

"operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred"

g. In the instant case, intention of parties while executing the binding Term Sheet clearly indicate that the Petitioner was engaged to perform the services in relation to the project as an agent / contractor on behalf of the owner and the Project Manager to accept engagement to undertake, provide and carry out such services subject to payment of Development Management Agreement fees by the Corporate Debtor. The scope of services of the Petitioner is well defined and the payment of fees under the project to the Petitioner is also well defined. The mutual obligation and covenants as detailed in the binding Term Sheet and thus demonstrates that this is the service which was required to be provided by the Petitioner to the Corporate Debtor and hence, this is construed to be an Operational Debt within the meaning of Section 5(21) of the Code read as follows:

"operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2 [payment] 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."

h. The amount of Rs. 2.51 crores of token amount as paid to the Corporate Debtor is part of the service rendered by the Petitioner to the Corporate Debtor. The Term Sheet envisaged the execution of Development Management Agreement between the parties on or before expiry of 2 months from the date of signing of the Term Sheet.

i. The correspondences and the trail of emails exchanged between the parties goes to show that the critical terms of the Development Management Agreement were not agreed upon and there was no consensus *ad-idem* between the parties and hence, the failure of

- execution of Development Management Agreement triggered termination of the Term Sheet automatically under Clause 17 by the end of the term.
- j. The said Term Sheet was not extended as agreed by mutual consent in writing. The conduct of parties by the way of correspondences or by the exchange of trail of emails between the parties cannot tantamount and deem extension of binding Term Sheet between the parties.
- k. This can be further evidenced from the fact that the Deed of Cancellation was emailed by the Corporate Debtor representative Mr. Jignesh Hirani vide email dated 5.08.2019 to the Petitioner which confirmed that both the parties have decided not to proceed with the transaction under the Term Sheet and have agreed to cancel/ repudiate the Term Sheet. The Corporate Debtor had also admitted to refund the amounts paid in advance by the Petitioner as soon as the fresh transaction is crystallized with the prospective investor. The said Deed of Cancellation was revised by the Petitioner wherein the Petitioner has sought payment of immediate refund of money. However, the said Deed of Cancellation was never executed between the parties and hence, the Petitioner issued the letters dated 08.08.2019, 03.07.2019 and the demand notice under Section 8 of the Code dated 31.08.2019 seeking refund of moneys from the Corporate Debtor.

Conclusion:

16. The binding Term Sheet dated 2nd August 2018 is a mere understanding between the parties which captures the basic commercial terms and contend a specific clause that the parties would endeavor to execute the Development Management Agreement and that if the Development Management Agreement is not executed within the stipulated time, the binding Term Sheet would be automatically terminated. The binding Term Sheet thus demonstrates that the Petitioner had undertaken to provide the service to their Corporate Debtor and the same did not fructify and was thus terminated / cancelled. The execution of Development Management Agreement would have qualified the Petitioner to claim the Development Management Agreement fees which is an Operational Debt but since the Development Management Agreement was not executed, the termination of the binding term sheet thus triggers the liability of refund of moneys as agreed under Clause 13 of the Term

Sheet. The token amount was agreed was transferred by the Petitioner to the Corporate Debtor upon execution of the Term Sheet and therefore, as such upon termination of the Term Sheet, the token amount is to be repaid as agreed under Clause 13 and can be construed as the part of the Operational Debt and part services rendered to the Corporate Debtor in accordance with mutual obligations set out in the Term Sheet.

17. Therefore, the binding Term Sheet dated 2nd August, 2018 clearly stipulates the obligation of the Petitioner to pay the money to the Corporate Debtor at the time of execution of the Term Sheet and hence, the liability of refund of such monies paid is well defined in the case of termination of the Term Sheet. Therefore, the Corporate Debtor is liable to refund the token amount to the Petitioner which is part of the services provided to the Corporate Debtor.
18. This Bench is of the considered that this is the fit case of the admission in view of the above findings.
19. The Petition filed by the Operational Creditor is on proper Form 5, as prescribed under the Adjudicating Authority Rules and is complete.
20. The Petition under sub-section (2) of Section 9 of I&B Code, 2016 filed by the Operational Creditor for initiation of CIRP in prescribed Form 5, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is complete. The existing operational debt beyond the threshold limit against the Corporate Debtor and its default is also proved. Accordingly, the Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiation of corporate insolvency resolution process against the Corporate Debtor deserves to be admitted.
21. This Petition is filed under Section 9 of I&B Code, 2016 by Sunteck Realty Limited against Goodwill Theatres Private Limited for initiating corporate insolvency resolution process is **admitted**. We further declare moratorium under Section 14 of I&B Code with consequential directions as below:
 - a) This Bench 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 activity 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 possession of the corporate debtor;
- b) 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;
 - c) 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;
 - d) 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 maybe;
 - e) The public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code;
 - f) This Bench at this moment appoints Mr. Ravi Prakash Ganti, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-002/IP-N00102/2017-18/10245], having email address: gantirp@gmail.com 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.
 - g) Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of appointment of IRP shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

- h) That as prescribed under Section 13 of the Code on declaration of Moratorium, the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
 - i) The appointed IRP shall also comply the other provisions of the Code including Section 15 and Section 18 of the Code. Further, the IRP is hereby directed to inform the progress of the Resolution Plan to this Bench and submit a compliance report within 30 days of the appointment. A liberty is granted to intimate even at an early date, if need be.
22. The Registry is hereby directed to communicate this order to both the parties and to the Interim Resolution Professional immediately.

SD/-
Chandra Bhan Singh
Member (Technical)

SD/-
Suchitra Kanuparthi
Member (Judicial)