

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

CP (IB) -4415/IBC/MB/2019
Under Section 9 of the I&B Code, 2016

In the matter of

Indiabulls Distribution Services Ltd,

Having registered office at:

1st Floor, Connaught Place,

New Delhi 110 001

And having it branch office at:

8th Floor, Indiabulls Finance Centre

Tower-1, F.P. No. 612-613, Elphinstone

Mills, Senapati Bapat Marg,

Mumbai-400 013

....Petitioner

vs.

Xrbia Developers Limited

Office No. 125/126, Patil Plaza Mitram

Mandal Chowk, Parvati,

Pune-411 009

....Respondent

Order delivered on: 13.08.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

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

Appearance:

For the petitioner: Ms. Poonam Gupta

For the respondent: Mr. Akshay Petkar a/w Mr. Aniket Malu

Per: Shri Chandra Bhan Singh, Member (Technical)

ORDER

1. This petition has been filed by Indiabulls Distribution Services Ltd. (hereinafter called the 'Petitioner') for initiation of Corporate Insolvency Resolution Process (CIRP) against Xrbia Developers Limited (hereinafter called the 'Respondent') under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code').

2. The counsel for the petitioner submitted that the petitioner and respondent entered into an arrangement vide an Agreement dated 9.03.2016, whereby the respondent authorised the petitioner to act as marketing representative for a real estate project namely “Xrbia Express City” being developed by the respondent. The petitioner had sold 02 flats/units in the aforementioned project and as per the terms of the agreement between the parties a sum of Rs.8,99,276/- is due and payable by the respondent to the petitioner. The petitioner mentioned that this amount is due since 30.09.2016.
3. The counsel for the petitioner further mentioned that the petitioner vide its demand notice dated 20.12.2016 and vide a reminder letter dated 10.01.2017, requested the respondent to make payment of the outstanding amount of Marketing fee/brokerage as agreed between them. Again, the petitioner vide an email dated 07.02.2017 requested the respondent for making the payment of the outstanding amount. Thereafter, the respondent vide its email dated 08.02.2017 apologized for the delay in making the payment and assured to make the payments by 15.02.2017.
4. The counsel for the respondent on the other hand has raised question on the very maintainability of this petition. He submitted that the Petition is defective on account of non-compliance with mandatory requirement u/s 9(3)(b) of IBC. As per section 9(3)(b), the petitioner was required to furnish an affidavit to the effect that no notice given by respondent relating to the dispute of unpaid operational debt. However, in the present case, the petitioner has not annexed the affidavit as required u/s 9(3)(b) of IBC. He submitted that for the sole reason, the Petition needs to be rejected. Also, the Petitioner after being pointed out has made an attempt to submit merely some cover letter to claim.

5. The counsel for the respondent further mentioned that there is a pre-existing dispute between the parties. There were email exchanged between the parties which contains an attachment being a Microsoft Excel file named 'Indiabulls CD calling data (1)' (**"the Excel sheet"**). The said excel file is a detailed explanation in a tabular format/excel format of all the customers who had booked units in the said Project without the involvement or any connection reference of the Petitioner whatsoever. The said excel sheet also provides links to the audio file of call recordings with each customer from Respondent to verify whether the booking has been done through Petitioner or not. In the said call recordings most of the customers have categorically admitted and informed that they have booked the units in the said Project through referral, friend, advertisement hoarding, customer care or direct walk-in.
6. The counsel for the respondent further stated that as per Clause 7 of the said Agreement, the Petitioner was liable to achieve booking of 100 Units within 6 months from the date of execution of the Agreement. However, the Petitioner breached the Agreement, as it failed to book 100 units in the Project. Also, as per clause 10 of the Agreement dated 09.03.2016, if the customer pays less than 40% or 20% of the sale consideration then the brokerage if any paid to the Petitioner shall be adjusted from the brokerage due on any other unit in the said project.
7. The counsel for the respondent submitted that, the first invoice attached pertains to Mr. Sanjay Tari. The said customer has made a payment of less than 40% of the total consideration of the flat and therefore the Petitioner was not eligible for any brokerage on the said flat. The same was communicated to the Petitioner vide email dated 01.03.2017 in the Excel sheet. However, a brokerage

of Rs.1,87,302/- (Rupees One Lakh Eighty-Seven Thousand Three Hundred and Two Only) was paid to the Respondent and the same was to be adjusted against other payments.

8. He further submitted that the second invoice amounting to Rs.7,45,085/- (Rupees Seven Lakh Forty-Five Thousand Eighty-Five Only) pertains to Mr. D. R. Sharma. On enquiry with the customer, it was revealed that the flat was booked with the reference of his friend and not through the Operational Creditor. The recording of the same was attached in the Excel sheet sent by the Respondent vide its email dated 01.03.2017. Therefore, the question of paying any brokerage to the Petitioner does not arise.
9. He also submitted that the Respondent vide its email dated 01.03.2017 informed the Petitioner about the disputed debt and also provided the call recording of the customer along with details of non-payment of consideration of the flat by the customers. He therefore stated that it is explicit that the Respondent has raised the dispute before the filing of the Petition and issuance of demand notice. The Respondent categorically indicated the claimed invoices subject to the agreement entered into between the parties and since the bookings were not made with the involvement of the Operational Creditor, no amount was payable to the Operational Creditor.
10. The counsel for the respondent further submitted that Also, we believe that there are discrepancies as to the amount of debt and the date when the amount became due. As per Part-IV of Form-5, the amount of Rs.8,99,276/- fell due as of 30.09.2016. Whereas, the notice issued thereafter on 20.12.2016 states the amount due as Rs.6,84,784/- and as per the email dated 07.02.2017 the amount due and payable was Rs.6,37,876/-. Further, the amount of debt does not match the invoices attached to the Petition which

states as Rs.11,19,784/-. This clearly states that the amount claimed by the Petitioner is frivolous and not crystalized.

FINDINGS

11. This Petition has been filed by the Operational Creditor, M/s. Indiabulls Distribution Services Ltd u/s 9 for a total claim amount of Rs.8,99,276/-. The claim is based on an agreement dated 09.03.2016 between the Operational Creditor and the Corporate Debtor wherein the Operational Creditor was appointed as a Consultant/ Broker to market the Units in the Xrbia Express City of the Corporate Debtor situated in district Raigad. This bench notes that the brokerage agreed between the parties was 12.5% of the total sale consideration only on the Units which has been booked by the Consultant (Operational Creditor). The bench notes that Clause 10 of the agreement entered between the parties, is important which is as under.

“In the event, the booking for a particular Unit is cancelled by the customer/buyer/purchaser, the Consultant shall be entitled to receive hundred percent (100%) of the brokerage/commission due and payable by the Developer to the Consultant only if the customer/buyer/purchaser of the said Unit(s) has paid forty per cent (40%) or more than forty percent (40%) of the Sale consideration in case of Self Funded Customers AND in case of identified Customers availing Finance Facility then the Consultant shall be entitled to receive hundred percent (100%) of the brokerage/commission due and payable by the Developer to the Consultant only if the customer/buyer/ purchaser of said Unit(s) has paid Twenty percent (20%) or more than Twenty percent (20%) of the Sale consideration. However, in the event, the customer/buyer/purchaser has paid less than Forty percent (40%) of the Sale Consideration in case of Self Funded Customers AND in case of Identified Customers Identified Customers availing Finance Facility then if customer/buyer/ purchaser has paid less than Twenty percent (20%) of the Sale consideration, then the brokerage, if any, paid for such Unit(s) shall be adjusted from the brokerage due to the Consultant on rebooking of

such Unit(s) or brokerage due on any other unit in the sold project of the Developer”.

12. This bench notes that as per the above clause if unit is cancelled by the prospective purchaser, the Operational Creditor shall not be entitled to any brokerage. In addition, if the purchaser does not pay the minimum of 40%, in case of Self Funded Customer, or 20% in case of a Customer availing loan facility, then no amount will be payable as brokerage fee and any brokerage already paid shall be adjusted from the brokerage future due.

13. This bench notes that in Part-IV of the Petition the total amount claimed by the Petitioner is Rs.8,99,276/- which fell due on 30.09.2016. However, in the invoices which are attached with the Petition, the total amount of debt is Rs.11,19,784/-. Similarly in the notice issued by the Petitioner to the Corporate Debtor on 20.12.2016 the amount due is shown as Rs.6,84,784/-. This shows discrepancies/ lack of clarity on the amount of debt being claimed by the Petitioner. Be that it may, this bench notes that there are pre-existing disputes between the Petitioner and the Corporate Debtor. This bench notes that in this Petition, two invoices have been raised. The 1st invoice is of Mr. Sanjay Tari and the 2nd invoice raised amounting to Rs.7,45,085/- pertains to Mr. D.R. Sharma. The Corporate Debtor has raised disputes regarding both these invoices vide his email dated 01.03.2017 which has been produced as Exhibit 'A' by the Corporate Debtor in his Reply. This email has been sent by Mr. Karan Karnavat of the Corporate Debtor to Mr. S. Muzumdar of the Operational Creditor. This email contains an attachment in Microsoft Excel file under the heading 'Indiabulls CD calling data'. This file contains two sheets, the 1st excel sheet provides explanation in a tabular excel format of all the customers who have booked units in the said project with the involvement of the Operational

Creditor. This excel sheet also provides a link to the audio file of the call recordings with each customer to verify whether the bookings have been done through the Operational Creditor or not. In this call recording, it is clearly mentioned that Mr. D.R. Sharma booked the flat with a reference of his friend and not through the Petitioner. The recording of the same has been attached in the excel sheet as stated by the Corporate Debtor in the email dated 01.03.2017. In view of this, this bench is of the view that no brokerage arises in the flat booking relating to Mr. D.R. Sharma. As far as Mr. Sanjay Tari is concerned, it has been mentioned in the email that the actual commission due was about Rs.1.74 lakh against which a commission of Rs.1.87 lakh has been paid. Therefore, it is clear that they have paid an extra commission which as per the terms of the agreement was to be adjusted against other payments as and when due.

14. In view of this it is clear to the bench that the Corporate Debtor had raised dispute before filing of the Petition. The Corporate Debtor had clearly intimated in its email dated 01.03.2017 about the dispute between the parties and also that no amount was payable to the Operational Creditor.
15. In view of the above, the Petition CP(IB)-4415/IBC/MB/2019 is **“dismissed”**.
16. Registry is directed to inform the Order to both the parties.

Sd/-

CHANDRA BHAN SINGH
Member (Technical)

Sd/-

H. V. SUBBA RAO
Member (Judicial)