



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 285/9/JPR/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

SHRI RAJESH KUMAR JALAN

...Applicant/Operational Creditor

Versus

JAIPUR DREAM BUILDCON PRIVATE LIMITED

...Respondent/Corporate Debtor

Memo of Parties

Rajesh Kumar Jalan

S/o Late Shri Moti Lal Jalan

Flat No. H-901, Anukampa Platina,

Iskcon Mandir Road, Mansarovar

Ext., Jaipur- 302029 (Rajasthan)

...Operational Creditor/ Applicant

VERSUS

Jaipur Dream Buildcon Private Limited

CIN: U45201RJ2010PTC033645

Office No. 1, 4th Floor, Unique

Destination, Laxmi Mandir Crossing,

Tonk Road, Jaipur- 302015

(Rajasthan)

...Corporate Debtor/ Respondent

CP No. (IB)- 285/9/JPR/2019



For the Operational Creditor : Nikhil Yadav, Adv.
Anand Sharma, Adv.

For the Corporate Debtor : Prakul Khurana, Adv.
Ankit Sareen, Adv.

Order Pronounced On: - 31.08.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application has been filed Mr. Rajesh Kumar Jalan ('Applicant') to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Jaipur Dream Buildcon Private Limited ('Corporate Debtor') under Section 9 of the Insolvency and Bankruptcy code ('IBC') for alleged default on the repayment of Operational Debt amounting to Rs. 13,92,418/- (Rupees Thirteen Lakh Ninety-Two Thousand Four Hundred Eighteen Only).
2. The Corporate Debtor namely M/s Jaipur Dream Buildcon Pvt. Ltd. is a company registered under the Companies Act, 1956 bearing CIN: U45201RJ2010PTC033645, which was incorporated on 23.12.2010 having its registered office at: Office No. 1, 4th Floor, Unique Destination, Laxmi Mandir Crossing, Tonk Road, Jaipur- 302015 (Rajasthan).
3. The details of the transactions leading to the filing of this application averred by the Applicant are as follows:
 - a. It is submitted that the Corporate Debtor approached the Operational Creditor to sell its residential units/ flats in one of its high-rise building



project named as “Unique Mantra” with 6 Towers of 19 floor each. One of the significant and unique selling propositions was the size ranging from 1400 square feet to 2000 square feet as per the brochures. In pursuance of the same the Operational Creditor and the Corporate Debtor executed a Business Associate Agreement stamped on 13.05.2015 (‘Associate Agreement’) with the Corporate Debtor’s Vice President of Sales and Marketing, named Mr. Kunal Budhwar.

- b. With respect to the aforesaid project there were various communications which took place through telephone and emails. Accordingly, the brochure, planning and projections were finalised along with first supply of services vide Debit Note cum Invoice No. RKJ/UB/015/2015 for six(6) flats for Rs. 2,39,256/- (Rupees Two Lakhs Thirty-Nine Thousand Two Hundred and Fifty-Six Only) dated 24.08.2015. Pursuant to the brokerage and commission schedule to the Agreement, the Operational Creditor was duly discharging its obligation to supply the sales services of the flats/ units to the Corporate Debtor in accordance with the terms and conditions agreed. The Applicant has annexed details of invoices raised and remaining outstanding during payment during the period commencing from May, 2015 ending on July, 2019 as Annexure- 2.
- c. During the period from 2015 to 2019, the Operational Creditor raised numerous invoices amounting to a total of Rs. 20,33,595/- (Rupees



Twenty Crores Thirty-Three Thousand Five Hundred and Ninety-Five Only) which were due payment on immediate basis after 15 days from the date of invoice. It is submitted that the last payment of Rs. 42,509/- (Rupees Forty-Two Thousand Five Hundred and Nine Only) was received on 20.09.2016 and since then no payment has been received to discharge the outstanding liability which is clear contravention of the agreed payment terms.

- d. The payments made by the Corporate Debtor attracts TDS and in respect of the same Form 26 AS- Annual Tax Statements under Section 203 AA of the Income Tax Act, 1961 was generated to substantiate that the Corporate Debtor acted on the terms and conditions agreed upon as per the Agreement.
- e. The Applicant pointed out that certain developments took place immediately after the bookings were made by various buyers in the project 'Unique Mantra' and soon thereafter the Corporate Debtor filed applications before the Jaipur Development Authority for change in map approvals. The Jaipur Development Authority issued revised map of the project to the Corporate Debtor and the Corporate Debtor continued to send emails to the respective buyers seeking money towards the purchase of flats/ units in initiation project which now was changed. The information of such change was not communicated to the buyers. Thereafter, the Corporate Debtor applied for the changes in the



map approval from Jaipur Development Authority for a second and third time. The letters issued by Jaipur Development Authority to the Corporate Debtor have been annexed at Annexure- 7 of the application.

- f. After adjustment of the last payment received for supply of services as per the specifications, actual outstanding invoices which the Corporate Debtor has failed to discharge is to the tune of Rs. 13,92,418/- (Rupees Thirteen Lakhs Ninety-Two Thousand Four Hundred and Eighteen Only). The Corporate Debtor has failed to pay the aforesaid amount even after receiving the services in full. The Applicant had also preferred legal notice vide letter dated 14.08.2019 and 09.09.2019.
- g. The Applicant has submitted that the first incident of default had occurred on 10.01.2017 and the same is continuing. In compliance of the statute, the Applicant sent a demand notice dated 18.09.2019 to which the Corporate Debtor replied vide letter dated 27.09.2019.
- h. The aforementioned details as reflected in Part IV of the application are as follows:

PART IV
PARTICULARS OF FINANCIAL DEBT

1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	INR 13,92,418/- (Rupees Thirteen Lakhs Ninety-Two Thousand Four Hundred Eighteen Only)
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2.	Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default is INR 13,92,418/- (Principal Amount) + INR Nil (Interest) making a total outstanding of INR 13,92,418/- which fell due from 10.01.2017 and continued.

4. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply vide Dairy No. 2783/2019 dated 28.11.2019 stating as follows:

- a. The Corporate Debtor has submitted that there exists a pre-existing dispute in terms of the Section 9(5)(ii)(d) of the IBC, 2016. Such dispute is evident from the correspondence between the Applicant and the Corporate Debtor vide letters dated 14.08.2019, 28.08.2019, 09.09.2019 and 27.09.2019. Copies of these letters have been annexed as Annexure- R1.
- b. The Corporate Debtor has relied on the judgment of the Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. AIR 2017 SC 4532* whereby it has been categorically held that existence of dispute is not necessary to be demonstrated by any record of suit or arbitration proceedings. Accordingly, a dispute may be evidenced by the letters exchanged between the parties before issuance



of notice under Section 8 of the IBC, 2016. From bare perusal of letter response dated 28.08.2019 to legal notice send by the Applicant dated 14.08.2019, it is abundantly clear that the Corporate Debtor has denied any liability to pay any amount even before issuance of the demand notice dated 18.09.2019. It is further submitted that no commission or brokerage is payable to the Applicant under Clause 5 of the Associate Agreement for the reason that none of the customers felicitated by the Applicant are continuing and such customers have cancelled their respective bookings; the commission payable to the Applicant was linked to the receipt of monies from the aforesaid customers.

- c. The Corporate Debtor has submitted that the Applicant is an unscrupulous broker with a history of registering fake bookings, receiving part commission and subsequently getting the bookings cancelled without refunding the part commission already paid. In the present case also, the Applicant has followed the exact design in as much as the customers liaised by the Applicant have sought cancellation of the bookings and on the basis of the same the entire amount deposited by such customers has already been refunded by the Corporate Debtor whereas the Applicant has still not refunded back the brokerage to the Respondent amounting to INR 5,99,276/- (inclusive of TDS). Therefore, there is a pre-existing dispute between the parties which warrants rejection of the captioned petition.



- d. As per clause 3 of the Associate Agreement, the brokerage that may have been payable to the Applicant is calculated on the basis of the payment received from the third-party customers liaised by the Applicant. All the third-party customers liaised by the Applicant from the projects 'Unique Mantra' have been refunded their entire booking amount as the customers sought cancellation of their bookings in the project. Therefore, the Applicant does not have any legitimate claim to demand any brokerage as alleged in the petition.
- e. The Corporate Debtor highlighted that the Applicant has also filed a petition under Section 7 of the IBC, 2016 numbered as CP No. (IB)-256/7/JPR/2019 on behalf of one erstwhile allottee Abha Kasera, against whom the Corporate Debtor has already tendered and paid/refunded the entire dues. Along with this the wife of Applicant herein, Smt. Anjali Jalan has also filed a Section 9 petition numbered as CP No. (IB)- 288/9/JPR/2019 on similar grounds. It is abundantly clear that the Applicant has attempted to use pressure tactics in filing vexatious and baseless petition with a purely malicious and fraudulent intention.
- f. The Corporate Debtor also submitted that the Applicant is not a real estate agent in terms of the provision of Real Estate (Regulation and Development) Act, 2016 ('RERA'). Accordingly, all acts done by the Applicant in capacity of real estate broker or agent including



demanding any brokerage/ commission from the Corporate Debtor without being registered under the provisions of RERA is in clear violation of Section 9 & 10 of RERA.

- g. The Corporate Debtor has placed reliance on clause 5 of the Associate Agreement according to which the Applicant is liable to refund an amount of INR 5,99,275/- (inclusive of TDS) which has been paid towards the Applicant brokerage on the condition that none of the customers liaised by the Applicant will seek cancellation of their booking. Clause 5 is reproduced as follows:

“5. That in the event of cancellation of any booking, the same shall be regulated as per the terms and conditions of the Applications Form/ Agreement/ Deed of Sale with the prospective buyer. In case if the client is cancelling his booked unit and if the company is refunding the entire deposited amount to the customer and for such case whatever brokerage had been released in the past, the Business associate will deposit/ credit the entire brokerage back to the company and after the entire deposition of received brokerage, amount of the customer will be refunded back to the customer. In case if the client is cancelling his booked unit and if the company is deducting the cancellation charges and for such case if brokerage had been released in the past, then the Business associate will not refund back the brokerage released to him and will not claim the further brokerage for such time.”

5. The Operational Creditor filed his Rejoinder vide Diary No. 2609/2021 dated 06.12.2021 whereby he has submitted the following:
- a. The Applicant has submitted that the Corporate Debtor has planned, prepared and knowingly committed the following set of facts i.e. firstly, it changed the nomenclature and anatomy of the entire project



named 'Unique Manta'; secondly, published a public notice in newspaper in the month of August, 2018; and lastly asked the homebuyers to provide cancellation affidavits and assured and promised the homebuyer for refund along with bank interest. It was also confirmed that the broker/ Applicant herein will be getting the entire amount of service rendered as per Associate Agreement. It is after the cancellation affidavits were obtained and the booking amount was refunded, the Corporate Debtor tried to create a different story alleging that the Operational Creditor failed to retained these clients and hence no brokerage payable to him.

- b. It is seen that the Corporate Debtor in the month of August 2018 through its lawyer/ counsel published a public notice in newspaper concerning the land admeasuring 19563.29 Sq. mtrs. i.e. the land on which project name 'Unique Mantra' is under construction. Soon after the public notice was issued the Corporate Debtor called the Applicant to inform that it will no longer be able to continue with the project 'Unique Mantra' and therefore, will refund the entire booking amount along with bank interest to each allottee in exchange of cancellation affidavit. The Applicant submits that due to the aforesaid actions there was no room for the Applicant to retain any of the homebuyer as the entire anatomy of the scheme has been evaded. The Applicant herein was expected to retain the clients who



made the booking through him however, the same was rendered impossible by the actions of the Corporate Debtor.

- c. The Applicant has submitted that contention of the Corporate Debtor that the letters dated 14.08.2019, 28.08.2019 & 09.09.2019 along with reply to demand notice dated 27.09.2019 establish a pre-existing dispute between the parties is baseless. The letters are only a strategic manoeuvre argument to escape the clutches of the IBC.
- d. The Corporate Debtor has relied on Clause No. 5 of the Associate Agreement. The Applicant herein in reply to the aforesaid submits that none of the clients cancelled the booking on their own; it was solely triggered by the unwarranted public notice issued in the newspaper in the month of August, 2018. Further it is submitted that there is no reason why the Applicant has refunded the booking amount of the clients without receiving the entire brokerage from the Applicant as has been mentioned in the Associate Agreement. Lastly, there is no record of any written communication by the Corporate Debtor to the Applicant regarding the refund of the brokerage in the project 'Unique Mantra'. All these above observations clearly demonstrate the malafide intentions of Corporate Debtor to wind up the existing project in which the Applicant has made bookings.
- e. It is also contended that clause 5 of the Associate Agreement has been clearly violated by the Corporate Debtor. The Corporate Debtor



made it impossible for any homebuyer to retain their booked unit and also in respect of the same no prior permission was obtained from the allottee/ homebuyer. There arises no question of refund since the situation is not covered by any clause of the Associate Agreement. Further the Corporate Debtor has not attached a single document to show that the flat allottees made written requests to cancel their bookings. The Corporate Debtor has cancelled all these units by promising to pay the booking amount with bank interest in lieu of cancellation affidavit.

- f. It is submitted that the booking of the unit makes the Applicant entitled to brokerage as mandated under Clause 3 of the agreement i.e. booking of units 1-10 makes the broker entitled to the commission of 3%, booking of units 11-20 makes the broker entitled to the commission of 4 % and for booking of units 21- above, the broker is entitled to the commission of 6%. The payment of the brokerage is described under the disbursement table which also provides a timeline schedule for release of brokerage to the Applicant. All of the aforementioned in no manner disentitles the Applicant from brokerage which became due on booking 22 units.
- g. The Applicant has also submitted that there is no condition under IBC whereby the Applicant/ Operational Creditor is required to be registered as a real estate agent under the RERA Laws. Further the



Applicant has also stated for the satisfaction of the Corporate Debtor that he is a registered agent with RERA holding Registration No. RAJ/A/2019/1140.

6. The Corporate Debtor has filed written submissions vide Diary No. 1339/2022 dated 04.05.2022 whereby the following is submitted:
 - a. The Corporate Debtor submits that there is a pre-existing dispute between the parties and for the same the Corporate Debtor has relied on certain documents i.e., letters dated 28.08.2019 & 27.09.2019. In furtherance of the same issue the Corporate Debtor has also relied on the judgement of *Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.* whereby it is abundantly clear that at the stage of Section 9 Application this Authority is only required to access if there is a plausible dispute which has been raised before the issuance of Section 8 notice. Accordingly, the Authority is not required to examine the dispute on merits or to classify the claimed amount between disputed amount and undisputed amount as the same would involve examination of a dispute on merits which should be left to the Court of Competent Jurisdiction. Further, from the facts in the case there is ample evidence to conclude that there was a pre-existing dispute between the parties.
 - b. The Corporate Debtor has relied on that the following cases whereby the application has been dismissed on the sole ground of pre-existing



dispute; such dispute was raised prior to sending of the statutory demand notice under Section 8-

- i. *R.K. Associate vs. Infra Pranay Infrabuild Pvt. Ltd. CP (IB)- 90/9/JPR/2018*
 - ii. *BD International vs. Banswara Syntex Ltd. IB No. 66/9/JPR/2018*
- c. The Corporate Debtor has submitted that there exists a dispute in relation to Clause 5 of the Associate Agreement with respect to which the Corporate Debtor has sought refund of the amount of the commission already paid to the Operational Creditor. This agreement relates to interpretation of contractual dispute which cannot be adjudicated by the NCLT. For the same reliance has been placed on the judgement of the Hon'ble Supreme Court in *Gujrat Vikas Nigam Ltd. vs. Mr. Amit Gupta & Ors., Civil Appeal No. 9241 of 2019* whereby it is been held that NCLT & NCLAT do not possess requisite jurisdiction under IBC to adjudicate on a contractual dispute.

7. The Operational Creditor also filed its Written Submissions pursuant to the order dated 15.07.2022 whereby the following has been contended:

- a. The Application has been filed by the Operational Creditor in its capacity under Section 5(20) of the Code. Furthermore, the amount claimed as operational debt falls under the definition of 'Operational Debt' and 'Claim' laid down under Section 5(21) and 3(6)(b) respectively.



- b. The Corporate Debtor announced one luxurious residential project in the name of 'Unique Mantra' in Jagatpura area of Jaipur. The said project was announced in 2015 and was claimed to be the tallest project in Jagatpura area of Jaipur with world class amenities. The Operational Creditor performed services for the Corporate Debtor on the basis of Associate Agreement. The Operational Creditor brought 7 clients who made bookings and thereby the Operational Creditor became entitled to receive brokerage in terms of the agreement against services rendered.
- c. It is important to note that the operational creditor raised invoices in respect of his own and his wife Smt. Anjali Jalan's dues. The Corporate Debtor made part payment of Rs. 6,41,177/- (Rupees Six Lakhs Forty-One Thousand One Hundred and Seventy-Seven Only) against the invoices amounting to Rs. 20,33,595/- (Twenty Lakhs Thirty-Three Thousand Five Hundred and Ninety-Five Only). Clause 4 of the Agreement dated 13.05.2015 stipulates the payment of commission within 15 days from the Bills received. The Corporate Debtor raised no objection to the aforementioned invoices raised.
- d. The Corporate Debtor without disclosure to the allottees or the Operational Creditor, changed the anatomy of the project. The project was first renamed to Unique Mantra-Phase I and Phase II and later on renamed to Unique New Town-Phase I and Phase II with the date of



completion in 2022. Further the Corporate Debtor coerced the allottees of the project into obtaining cancellation affidavits in lieu of return of principal amount along with interest.

- e. The Operational Creditor has also contended that the Corporate Debtor, in its reply to the demand notice, has relied on Clause 5 of the Associate Agreement for the first time to deny their liability. It is important to note that no such proceedings were ever initiated by the Corporate Debtor prior to the issuance of demand notice under Section 8 of the Code.
8. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply, written submissions and the documents enclosed with the application.
9. This Adjudicating Authority having perused all the relevant papers and finding them in order notes that the Registered Office of the Respondent is situated in Jaipur, and therefore Adjudicating Authority has jurisdiction to entertain and try this Application. Further this matter is within the purview of Laws of Limitation, as the time period of default is in the year 2017 and the Application has been filed before this Adjudicating Authority on 30.10.2019, hence the period of three years after the default occurred had not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.



10. It is clear from the facts produced before us that the parties to the case had entered into an Associate Agreement whereby the Operational Creditor and his wife Smt. Anjali Jalan were appointed as Business Associates for India & Overseas for the purpose of selling the Corporate Debtor's ongoing and upcoming commercial properties- for which the Group has given its consent; in the present matter- Unique Mantra. The percentage of brokerage and its payment is mentioned in clause 3 & 4 of the Associate Agreement dated 13.05.2015. Clause 5 of the Associate Agreement talks about the conditions in case of the cancellation of any booking.
11. From the bare reading of the facts produced before us, it is evident that the Operational Creditor was providing services to the Corporate Debtor in lieu of the Associate Agreement. The Operational Creditor raised number of invoices during the period from 2015 to 2019 which have been annexed as Annexure 2 of the petition. The total of the said invoices amounts to Rs. 20,33,595/- (Twenty lac thirty-three thousand five hundred ninety-five). It is seen that the first invoice was for Rs. 2,39,256/- (Rupees Two Lac Thirty-nine thousand two hundred fifty-six). The last payment of Rs. 42,509/- (Rupees Forty-Two Thousand Five Hundred and Nine Only) was received on 20.09.2017. Certain others sums were also received by the Operational Creditor and therefore the amount which is due till date is Rs. 13,92,418/- (Rupees Thirteen Lakhs Ninety-Two Thousand Four Hundred Eighteen). It is clear from the aforementioned that the Operational Creditor



was rendering services to the Corporate Debtor and the Corporate Debtor in return of these services was paying a brokerage amount to the Operational Creditor.

12. Admittedly, the Corporate Debtor in its reply has admitted the payment of Rs. 5,99,276/- (Five Lac Ninety-Nine Thousand Two Hundred Seventy-Six) to the Operational Creditor. Hence, it is clear that the Applicant was providing services to the Corporate Debtor.
13. The Corporate Debtor has admitted that all the third-party customers liaised by the Applicant as well as other customers for the project “Unique Mantra” have been refunded back their entire booking amount as such the customers sought cancellation of their bookings in the project. Consequently, the Corporate Debtor returned the booking amount to all the customers who were allotted flats in the project named “Unique Mantra”. The Corporate Debtor contends that he is not liable to pay the Applicant in lieu of clause 5 of the Associate Agreement. Whereas the Corporate Debtor in its reply has admitted the payment of Rs. 5,99,276/- (Five Lac Ninety-Nine thousand two hundred seventy-six) to the Operational Creditor. It is apparent from the aforesaid that the Operational Creditor rendered its services properly in pursuance to the agreement between the parties. Hence, there appears to be no reason why the Operational Creditor should not be paid for the services rendered.



14. For ease of reference Clause 5 of the Associate Agreement is being reiterated as follows:

“ In the event of cancellation of any booking, the same shall be regulated as per the terms and conditions of the Application Form/Agreement/Deed of Sale with the prospective buyer. In case if the client is cancelling his booked unit and if the company is refunding the entire deposited amount to the customer and for such case whatever brokerage had been released in the past, the Business associate will deposit/credit the entire brokerage back to the company and after the entire deposition of received brokerage, amount of the customer will be refunded back to the customer. In case if the client is cancelling his booked unit and if the company is deducting the cancellation charges and for such case if brokerage had been released in the past, then the Business associate will not refund back the brokerage released to him and will not claim the further brokerage for such unit.”

15. Mere reading of the clause shows that in case the company is refunding the entire deposited amount, the entire brokerage released in the past will be deposited by the business associate. Only after the entire brokerage which has been released in the past is deposited by the Business Associate, the customer will be refunded the amount against the cancellation of the booking unit. The Corporate Debtor has admittedly refunded the full amount of the booking unit to the customers but there is no trace of any transaction of refund which has been refunded by the Applicant/ Business Associate. Hence, the Corporate Debtor has refunded the amount of the booking to the customers without taking the brokerage back from the Applicant/Business Associate. Further there is neither any document on record which shows that the Corporate Debtor informed the



Applicant/Business Associate to refund the brokerage in lieu of the cancellation of the booked units nor there is any document to show that the Applicant/Business Associate refunded the brokerage amount in lieu of the cancelled bookings. Therefore, it is apparent that the Corporate Debtor refunded the booking amount to the customers without taking the brokerage from the Applicant/Business Associate.

16. It is important to note that clause 5 is clear with respect to the cancellation of the booked unit but the whole agreement is silent as to the scenario when the whole project is no more in existence. As in the present case the applicant is claiming the brokerage against the units booked but from the admission of the Corporate Debtor, it is clear that these bookings have been cancelled and the homebuyers have been refunded the full amount. The Applicant has contended that the full refund was made by the Corporate Debtor as it failed to initiate the project and intends to launch another project which is apparent from the notice published by the counsel of the Corporate Debtor in the month of August, 2018. The said public notice states that one of the Advocate's client is intending to deal with the Corporate Debtor owning the land in respect of part A of the residential group housing land admeasuring 19563.290 sq. meters corresponding to Khasra No. 712, 713, 830/714, 715, 716, 717, 831/718, 719, 720, 833/721 situated at village Mehal Jagatpura, Tehsil Sanganer, Jaipur, Rajasthan. It was also mentioned that any person having any right, title, interest, claim



or demand of any nature in respect of the aforesaid land shall be brought to the notice in writing along with documentary proof failing which such claim shall be disregarded. Hence, it is clear that this project named as “Unique Mantra” is no more in existence. The Business Associate Agreement relied upon by the parties to the case is silent with respect to the scenario where the said project against which the business associate i.e. the Operational Creditor herein has provided is no more in existence and the services provided by the Applicant have been deemed redundant.

17. The rule of *contra proferentem* states that in case of ambiguity in a contract term the rule of *contra proferentem* states that it should be construed against the drafter of the contract. In the present case the Corporate Debtor stated that this agreement relates to interpretation of dispute which cannot be adjudicated by this Authority. We are not adjudicated on the interpretation of this particular clause. However, we are inclined to rule that there is ambiguity in the contract and the Operational Creditor ought to be given the benefit as per the rule of *contra proferentem*.

18. The Corporate Debtor has stated that there was pre-existing dispute and relied on the letters dated 28.07.2019 and 27.09.2019. It is seen that these two aforementioned letters are merely replies to the notices sent by the Operational Creditor. There is no mention of brokerage which the



Corporate Debtor is seeking to be refunded. Therefore, there is no pre-existing dispute prior to the issuance of demand notice.

19. It is also noteworthy that the Corporate Debtor has itself breached the contract by refunding the amount to the customers without taking the repayment of the brokerage which was released to the Applicant/Business Associate. Nowhere has the Corporate Debtor asked the Operational Creditor to refund the brokerage which has already been paid to them which shows the lackadaisical attitude of the Corporate Debtor in complying with Clause 5 of the Associate Agreement. The Corporate Debtor is trying to rely on the Associate Agreement to prove that the Applicant/Business Associate is not entitled to any amount but at the same time the Corporate Debtor is violating the said agreement by refunding the full amount to the homebuyers/customers without complying with the clause relied upon. It seems that the Corporate Debtor is trying to blow hot and cold at the same time which cannot be allowed.
20. The alleged project 'Unique Mantra' is no longer in existence; hence this renders the action of the Applicant/Business Associate impossible to retain those clients which booked a unit in the aforementioned project. The Corporate Debtor on the other hand has admittedly stated that it had paid the Applicant certain sums of monies against the services rendered but since the project has been rendered null and void, the Applicant cannot be expected to retain those clients which had booked the unit in the specific



project which no longer exists. We are of the view that the Operational Creditor duly rendered its services and raised proper invoices which were not disputed at that point in time. There was no dispute raised at the point of time when the invoices were raised by the Applicant as the project 'Unique Mantra' was in existence. When the Corporate Debtor launched a new project on the same piece of land as that of the earlier project, the customers were returned the full amount of the booking and cancellation affidavits were signed by them. Therefore, the Applicant has fully complied with the Associate Agreement and duly rendered its services against which he ought to be paid.

21. It is evident from the reasons stated hereabove that the amount of brokerage is due to the Operational Creditor. The Corporate Debtor has raised the contention of pre-existing dispute gist to flout the principle of law which states that if there is a pre-existing dispute between the parties an application under Section 9 is not maintainable. This operational debt is clearly exceeding the threshold limit as provided in the statute.

22. In Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9.

Para 34 is as follows:-

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:



- (i) *Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) *Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) *Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

23. Therefore, in the present matter at hand, there is a clear debt, repayment of which has been defaulted by the Corporate Debtor and there appears to be no pre-existing dispute between the parties.
24. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional (‘IRP’) but it is not obliged to do so. In the instant case, the Operational Creditor has proposed the name of Mr. Arvind Kaushik. Hence, this Bench is appointing Mr. Arvind Kaushik as the IRP.
25. In view of this Mr. Arvind Kaushik, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-001/IP-



P00291/2017-2018/10535 (email: ca73588@gmail.com), is hereby appointed as the IRP. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.

26. Consequences of initiation of CIRP shall be inter-alia as follows:

- (i) The IRP appointed by the Adjudicating Authority, Mr. Arvind Kaushik, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.
- (ii) Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.
- (iii) The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray his expenses to be incurred and



fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- (iv) In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

27. Accordingly, CP No. (IB)- 285/9/JPR/2019 is admitted.

DEEP
CHANDRA
JOSHI

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DEEP CHANDRA JOSHI
Date: 2022.08.31
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(DEEP CHANDRA JOSHI)
JUDICIAL MEMBER

PRASANTA
KUMAR
MOHANTY

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(PRASANTA KUMAR MOHANTY)
TECHNICAL MEMBER