

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins.) No. 1029 of 2021

IN THE MATTER OF:

INDIABULLS DISTRIBUTION SERVICES LTD.

Having registered office at:

1st Floor, Connaught Place,
New Delhi 110 001

And having its branch office at:

Tower-1, F.P. No. 612-613,
Elphinstone Mills, Senapati Bapat Marg,
Mumbai-400013

...Appellant

Versus

Xrbia Chakan Developers Pvt. Ltd.

Office No. 125/126, Patil Plaza Mitram,
Mandal Chowk, Parvati, Pune-411009

...Respondent

Present:

For Appellant: Mr. Rudreshwar Singh, Mr. Saurabh Jain, Mr. Prayag Jain, Advocates

For Respondent: Mr. Saurabh Ajay Gupta, Ms. Srishti Prabhakar, Advocates

With

Company Appeal (AT) (Ins.) No. 1030 of 2021

IN THE MATTER OF:

INDIABULLS DISTRIBUTION SERVICES LTD.

Having registered office at:

1st Floor, Connaught Place,
New Delhi 110 001

And having its branch office at:

Tower-1, F.P. No. 612-613,
Elphinstone Mills, Senapati Bapat Marg,
Mumbai-400013

...Appellant

Versus

XRBI DEVELOPERS PVT. LTD.

Office No. 125/126, Patil Plaza Mitram,
Mandal Chowk, Parvati, Pune-411009

...Respondent

Present:

For Appellant: Mr. Rudreshwar Singh, Mr. Saurabh Jain, Mr. Prayag Jain, Advocates

For Respondent: Mr. Saurabh Ajay Gupta, Ms. Srishti Prabhakar, Advocates

With

Company Appeal (AT) (Ins.) No. 1031 of 2021

IN THE MATTER OF:

INDIABULLS DISTRIBUTION SERVICES LTD.

Having registered office at:

1st Floor, Connaught Place,

New Delhi 110 001

And having its branch office at:

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

Elphinstone Mills, Senapati Bapat Marg,

Mumbai-400013

...Appellant

Versus

XRBIABODE DEVELOPERS PVT. LTD.

Office No. 125/126, Patil Plaza Mitram,

Mandal Chowk, Parvati, Pune-411009

...Respondent

Present:

For Appellant: Mr. Rudreshwar Singh, Mr. Saurabh Jain, Mr. Prayag Jain, Advocates

For Respondent: Mr. Saurabh Ajay Gupta, Ms. Srishti Prabhakar, Advocates

With

Company Appeal (AT) (Ins.) No. 1032 of 2021

IN THE MATTER OF:

INDIABULLS DISTRIBUTION SERVICES LTD.

Having registered office at:

1st Floor, Connaught Place,

New Delhi 110 001

And having its branch office at:

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

Elphinstone Mills, Senapati Bapat Marg,

Mumbai-400013

...Appellant

Versus

XRBIABODE DEVELOPERS LTD.

Office No. 125/126, Patil Plaza Mitram,

Mandal Chowk, Parvati, Pune-411009

...Respondent

Present:

For Appellant: Mr. Rudreshwar Singh, Mr. Saurabh Jain, Mr. Prayag Jain, Advocates

For Respondent: Mr. Saurabh Ajay Gupta, Ms. Srishti Prabhakar, Advocates

With

Company Appeal (AT) (Ins.) No. 1033 of 2021

IN THE MATTER OF:

INDIABULLS DISTRIBUTION SERVICES LTD.

Having registered office at:

1st Floor, Connaught Place,

New Delhi 110 001

And having its branch office at:

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

Elphinstone Mills, Senapati Bapat Marg,

Mumbai-400013

...Appellant

Versus

XRBI WARAI DEVELOPERS PVT. LTD.

Office No. 125/126, Patil Plaza Mitram,

Mandal Chowk, Parvati, Pune-411009

...Respondent

Present:

For Appellant: Mr. Rudreshwar Singh, Mr. Saurabh Jain, Mr. Prayag Jain, Advocates

For Respondent: Mr. Saurabh Ajay Gupta, Ms. Srishti Prabhakar, Advocates

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This order shall dispose of a batch of five appeals bearing CA (AT) (Ins) No. 1029 of 2021 'Indiabulls Distribution Services Ltd. Vs. Xrbia Chakan Developers Pvt. Ltd.', CA (AT) (Ins) No. 1030 of 2021 'Indiabulls Distribution Services Ltd. Vs. Xrbia Developers Ltd.', CA (AT) (Ins) No. 1031 of 2021 'Indiabulls Distribution Services Ltd. Vs. Xrbia Aobode Developers Pvt. Ltd.', CA (AT) (Ins) No. 1032 of 2021 'Indiabulls Distribution Services Ltd. Vs. Xrbia Developers Ltd.' and CA (AT) (Ins) No. 1033 of 2021 'Indiabulls Distribution Services Ltd. Vs. Xrbia Warai Developers Pvt. Ltd.' as the issue

involved in the aforesaid appeals are common and the impugned order has been passed on the same date i.e. 13.08.2021 dismissing the application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the same findings.

CA (AT) (Ins.) No. 1029 of 2021

2. This appeal is against the order dated 13.08.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) by which CP (IB) No. 4436/IBC/MB/2019 filed by the Appellant (Indiabulls Distribution Services Ltd.) for a total claim of Rs. 17,35,762/- has been dismissed. The claim of the Appellant is based on the agreement dated 09.03.2016, entered into between Xrbia Chakan Developers Pvt. Ltd. (Developers) with Indiabulls Distribution Services Ltd./Appellant (Consultant) to market the units in the project 'Xrbia Eiffel City II'. The Appellant was to book the unit for the prospective customers and was entitled to its commission/brokerage. Before filing the application under Section 9 of the Code, the Appellant served a demand notice in Form-3 in compliance with Section 8 of the Code on 19.02.2019 in respect of an amount of Rs. 17,35,762/-, to which no reply was filed.

CA (AT) (Ins.) No. 1030 of 2021

3. The Appellant filed an application under Section 9 of the Code before the Adjudicating Authority bearing CP (IB) No. 4434/IBC/MB/2019 claiming an amount of Rs. 61,69,488/-. Agreement dated 09.03.2016 was entered into between Xerbia Developers Ltd. (Developers) and Indiabulls Distribution Services Ltd./Appellant (Consultant) as per which the Appellant

was to market the units of the project 'Xrbia Vangani' of the Corporate Debtor. The Appellant was to receive brokerage on account of the booking of the units for sale to the prospective buyers. The demand notice dated 19.02.2019, in Form-3, was served in compliance with Section 8 of the Code to which reply was filed by the Respondent on 05.08.2019.

CA (AT) (Ins.) No. 1031 of 2021

4. The Appellant filed an application under Section 9 of the Code before the Adjudicating Authority bearing CP (IB) No. 4421/IBC/MB/2019 for a total claim of Rs. 1,67,662/-. The claim is based upon an Agreement dated 09.03.2016, entered into between Xrbia Abode Developers Pvt. Ltd. (Developers) with Indiabulls Distribution Services Ltd./Appellant (Consultant) as per which the Appellant was to get his brokerage on booking of the units in the project 'Xrbia Abode City'. The Appellant served a demand notice dated 19.02.2019 in, Form-3, in compliance with Section 8 of the Code which was replied by the Respondent on 05.08.2019.

CA (AT) (Ins.) No. 1032 of 2021

5. The Appellant filed an application under Section 9 of the Code before the Adjudicating Authority bearing CP (IB) No. 4415/IBC/MB/2019 in respect of claim of Rs. 8,99,276/- based on the Agreement dated 09.03.2016, entered into between Xrbia Developers. Ltd. (Developers) with Indiabulls Distribution Services Ltd./Appellant (Consultant) as per which the Appellant was to get his brokerage on booking of the units in the project called 'Xrbia Express City'. The demand notice dated 19.02.2019 was served

by the Appellant in, Form-3, to which reply was filed by the Respondent on 05.08.2019.

CA (AT) (Ins.) No. 1033 of 2021

6. The Appellant filed an application under Section 9 of the Code before the Adjudicating Authority bearing CP (IB) No. 4416/IBC/MB/2019 for a claim of Rs.1,28,70,576/- based on the Agreement dated 09.03.2016 entered into between Xrbia Warai Developers. Pvt. Ltd. (Developers) with Indiabulls Distribution Services Ltd./Appellant (Consultant) as per which the Appellant was to get his brokerage on booking of the units in the project called 'Xrbia Courtyard Home'. The demand notice dated 19.02.2019 was served in terms of Section 8 of the Code by the Appellant, in Form-3, to which reply was filed by the Respondent on 05.08.2019.

7. It is pertinent to mention that the amount claimed in all five appeals by the Appellant is Rs. 17,35,762/-, Rs. 61,69,488, Rs. 1,67,662/-, Rs. 8,99,276/- and Rs. 1,28,70,576/- towards his brokerage for the units booked/sold.

8. As we have already observed that all the five applications have been dismissed by the Adjudicating Authority on the ground of a pre-existing dispute which has been based upon the email dated 01.03.2017 and similar findings have been returned, therefore, keeping the first appeal i.e. 1029 of 2021 as the lead case, the facts are being narrated hereinafter as under:-

9. As we have explained in the earlier part of this order that the relationship between the Appellant and the Respondent is based upon an agreement dated 09.03.2016 which is similar in all the five cases except for

the developers who have been developing different projects, namely, “Xrbia Eiffel City II, Xrbia Vangani, Xrbia Abode City, Xrbia Express City and Xrbia Courtyard Home”. However, the terms and conditions in the agreement dated 09.03.2016, executed in all the five cases are the same, therefore, it would be relevant to refer to Para 6, 7 & 10 of the agreement which highlights the manner and extent in which the Appellant would be entitled to its brokerage.

“6. The Consultant shall be entitled to use the Collaterals for offering to book the Unit(s) for the prospective customers and shall be entitled to the commission/brokerage in the event of such customer(s) bookings the Unit(s) which is specified in **ANNEXURE-C**, being 8.5.% of Sale Consideration of the Unit booked for a customer by the Consultant in the Project exclusive of the Service Tax payable under the law prevailing at that time (Brokerage). The aforesaid Brokerage shall become due and payable to the Consultant by the Developer as soon as the Consultant procures a booking and shall be disbursed in the manner as specified in **ANNEXURE-D**. The service tax on the aforesaid Brokerage shall be levied separately & the Brokerage shall be subject to TDS, as applicable from time to time. The Developer undertakes to issue/handover cheque(s) in favour of Consultant towards discharge of its Obligation. It is agreed & undertaken by the Developer that it shall issue cheque(s) towards discharge of its obligation on completion of respective milestones (I). In case of Identified Customer(s) who have booked Unit via Self-Funded means then in such cases the Developer shall issue a cheque of amount equivalent to 50% of the marketing fee/brokerage amount due to the consultant on receipt of 10% of Sale Consideration from the said Identified Buyer of the Unit(s). The Balance payment of 50% of the marketing fee/brokerage amount due to the Consultant on receipt of next 30% of Sale Consideration from the said Identified Buyer of the Unit(s). (II). In case of Identified Customer(s) who have booked Unit & availed Finance facility from a Financial Institution then in such cases the Developer shall issue a cheque, of amount equivalent to 50% of the marketing fee/brokerage amount due to the Consultant on receipt of 10% of Sale Consideration from the said Identified Buyer of the Unit(s). The Balance payment of 50% of the marketing fee/brokerage amount due to the Consultant on receipt of next

10% of Sale Consideration from the said Identified Buyer of the Unit(s).

It is specifically agreed by the parties that the pay out of marketing fee shall be made on 7th of each month for the Unit(s) booked in previous month by a customer(s) identified by the Consultant."

7. The Consultant shall endeavour to offer to book 100 (One Hundred Only) Unit(s) in the Project within a period of Six (06) months from the date of execution of this Agreement. The Consultant shall be entitled to increase the above-said period of its sole discretion provided however that unbooked/unsold Unit(s) are available in the Project.

10. 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 said Unit(s) has paid Forty percent (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 said project of the Developer."

10. The Appellant, in all the five cases, served demand notice dated 19.02.2019 as prescribed under Section 8 of the Code. In the case of Xrbia Eiffel City II, the Respondent did not file the reply to the demand notice whereas in all other cases, the reply was filed after a period of six months. The Adjudicating Authority has dismissed the application, subject matter of

all five appeals, on the ground that there was a pre-existing dispute between the parties which has been clearly intimated vide email dated 01.03.2017. The said email has been made a part of the memorandum of appeal as Annexure A-7 and is reproduced as under:-

“From: Karan Karnawat karan.k@xrbia.com
 Date: Wednesday, 1 March 2017 at 05:42 PM
 To: smuzumdar@indiabulls.com
 Subject: Indiabulls calling data
 Calling data for Indiabulls customers

Row Labels	Count of Unit No.	Sum of O/s Commission
1) Call Center	3	0
1)Direct Walkin	7	-104094
1) Friend	12	-144209
1) Hoarding	1	0
2) Indiabulls	68	4500999
3) call later	8	0
3) Invalid Phone Number	10	-69526
3) Not Co-operating	2	0
3) Note Reachable	6	0
3) Ringing	14	-32353
3) Switched Off	7	0
Grant Total	138	4150817

11. Counsel for the Appellant has vehemently argued that nothing is clear from the impugned order, passed separately in all the five appeals, by the Adjudicating Authority as to how the email dated 01.03.2017 highlights a pre-existing dispute, therefore, according to the Appellant, the impugned order is a non-speaking order and deserves to be set aside on this ground alone.

12. We have straightway asked Counsel appearing on behalf of the Respondent in the aforesaid appeals to explain the meaning of the email dated 01.03.2017 in order to understand as to how it would tantamount to

a pre-existing dispute to non-suit the Appellant in his application filed under Section 9 of the Code. Counsel for Respondent has failed to give any satisfactory answer and all that has been stated that the Appellant had actually not booked as many flats in all five projects, mentioned hereinabove, as has been claimed in the application filed under Section 9 of the Code.

13. We have heard Counsel for the parties and perused the record with their able assistance.

14. It is an admitted fact that the genesis of their relationship as a developer and consultant is the agreement dated 09.03.2016 as per which the Respondent was liable to pay consultation charges to the Appellant for the booking of the unit(s) in terms of the clauses of the agreement much less clause 6 and 10 which we have reproduced hereinabove. The Appellant has claimed separate amount in separate applications on the basis of number of units booked in the separate projects and also claimed their dues by way of a demand notice before filing the application under Section 9 of the Code. Not only that the demand notice in the case of Xrbia Eiffel City II i.e. CA (AT) (Ins) No. 1029 of 2021 is not replied by the Respondent but also reply to the other demand notices were filed much after the period prescribed under the Code.

15. Be that as it may, the Adjudicating Authority has dismissed the application, filed under Section 9 of the Code by the Appellant, on the ground that there was a pre-existing dispute which was raised before filing the petition and was clearly intimated in the email dated 01.03.2017. The perusal of the said email dated 01.03.2017 does not make out any head or

tail and there is no specific finding recorded by the Adjudicating Authority explaining as to how it has reached to the conclusion that the said email raised a dispute already existing between the parties.

16. In view of the aforesaid facts and circumstances, therefore, we are of the considered opinion that the impugned order is in violation of the principle of natural justice because the impugned order is a non-speaking order. Consequently, all the five appeals are hereby allowed and the impugned orders are set aside. The matter is remanded back to the Adjudicating Authority to decide them afresh by giving reasons and passing a speaking order. The applications are restored to its original number. The parties are directed to appear before the Adjudicating Authority on 01st December, 2022.

The registry is directed to send a copy of this order to the concerned Adjudicating Authority for compliance.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi

15th November, 2022

Sheetal