

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 541 of 2022

(Arising out of Order dated 04.05.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-IV in Company Petition No.(IB)-05(ND)/2021)

IN THE MATTER OF:

Mr. Rajiv Sharma
Former Director of
M/s Elixir Buildcon (P) Ltd.
323, Aggarwal Plaza,
Plot No.3 DDA Community Centre,
Sector – 14, Rohini, Delhi – 110085.

.... Appellant

Vs

1. Deepak Gupta,
S/o Sh B.L. Gupta,
R/o D-9, Sector 55 Noida,
District-G.B. Nagar – 201301.
2. M/s Elixir Buildcon (P) Ltd.
Through its Interim Resolution Professional
Mrs. Reshma Mittal, CA
R-4/39, Raj Nagar,
Ghaziabad.

... Respondents

Present:

For Appellant:

**Mr. Arun Kathpalia, Sr. Advocate
with Mr. Abhijeet Sinha, Mr. Rishi
Aggarwal, Ms. Shruti Arora, Mr.
Shivam Shukla and Ms. Mansi
Taneja, Advocates.**

For Respondent:

**Mr. Ramji Srinivasan, Sr. Advocate
with Mr. Sumesh Dhawan, Ms. Vatsala
Kak and Mr. Shaurya Shyam,
Advocates.**

**Mr. Aditya Trehan Advocate with Ms.
Reshma Mitta, CA for R-2.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Suspended Director of the Corporate Debtor has been filed challenging the order dated 04.05.2022 passed by the National Company Law Tribunal, New Delhi Bench-IV by which Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) filed by Respondent No.1-Deepak Gupta has been admitted.

2. Brief facts of the case necessary for deciding this Appeal are:

- (i) On 25.01.2013, Respondent No.1 and Respondent No.2 – the Corporate Debtor M/s Elixir Buildcon (P) Ltd. entered into Memorandum of Understanding (“**MoU**”) for the purpose of real estate transaction. As per MoU, Respondent No.1 (Second Party in the MoU), who was in the business of investments in real estate/ bulk bookings of flats, offered to purchase 30,000 Sq. Ft at the agreed rate of Basic Sale Price of Rs.2,800/- Sq. Ft. The Second Party agreed to pay 15% of the Basic Sale Price, that is, Rs.1,26,00,000/- at the time of execution of the of the MoU. The amount of Rs.1,26,00,000/- was paid by the Second Party and the MoU containing several clauses was entered, which we shall notice hereinafter.
- (ii) One of the clauses in the MoU was that if the First Party failed to launch the Scheme within 180 days from the date of signing of the MoU, First Party shall be liable for default and breach of

the MoU. As per Clause 9 of the MoU, it was stipulated that the agreement shall continue for the period of 36 months from date of signing of the MoU or till the possession of all flats/ units as provided in schedule “B”, or till transfer/ assignment of the entire super built up area/ flats in favour of nominees of the Second Party, whichever is earlier. Clause 11 contemplates that if First Party breaches any of the commitments made under the agreement, the entire transaction shall be voidable at the option of the Second Party and till the date of exercise of such option by the Second Party, the First Party shall refund the entire amount with 12% per annum interest. In addition thereto, the First Party was also to indemnify/ compensate to the Second Party with an amount equal to interest @24% on the amount paid.

- (iii) The Second Party on 07.03.2020 issued notice exercising option on the ground that First Party failed to launch the Scheme within 180 days from the date of signing of the MoU. The Corporate Debtor replied the letter dated 07.03.2020 on 15.04.2020 denying any debt or default.
- (iv) Respondent No.1 filed an Application under Section 7. In Section 7 Application, the Financial Creditor claimed a principal amount of Rs.1,26,00,000/- with interest plus liquidated damages @ 36% amounting to Rs.9,65,97,937/-. In

Part-IV of the Application date of default is mentioned as 22.03.2020.

- (v) Notices were issued on the Application, on which a reply was filed by the Corporate Debtor, objecting the Application on the ground that:
 - (a) Debt is time barred;
 - (b) There being no financial debt within the meaning of Section 5(8), the application is liable to be struck down;
 - (c) Purported claim arises not out of agreement, but on alleged breach and the NCLT does not have jurisdiction to determine the factum of breach and it can only be decided by the competent authority (Arbitral Tribunal).
- (vi) The Adjudicating Authority vide impugned order dated 04.05.2022 relying on Clauses 9, 10 and 11 of the MoU held that breach of terms of MoU is evident as till date no allotment letter or transfer letter has been issued to the Second Party by the Corporate Debtor. Adjudicating Authority further held that the limitation shall apply within a period of three years from the date of exercise of option by Second Party, that is, starting from expiry of 15 days from 07.03.2020. Aggrieved by the said order, this Appeal has been filed by the Suspended Director of the Corporate Debtor.

3. Shri Arun Kathpalia, learned Counsel appearing for the Appellant challenging the impugned order submits:

- (i) All remedies under the MoU available to Respondent are time barred. As per the Second Party (Respondent No.1), the Corporate Debtor was required to launch the scheme within 180 days and since the scheme has not been launched within 180 days, the cause of action arose to Second Party after the expiry of the 180 days. The Application under Section 7 filed after seven years from the occurrence of the breach is clearly barred by time. The period of contract was only for a period of 36 months and all obligations were to be performed by the Corporate Debtor within 36 months and in any event after expiry of 36 months from the date of MoU on which date the cause of action arose to Respondent No.1 to take remedies under Section 7, whereas the Application filed on 06.11.2020 is barred by time.
- (ii) That the transaction under the MoU dated 25.01.2013 pertains to sale and purchase of real estate by Respondent No.1, who was a speculative investor with motive of profit, hence the transaction is not in the nature of 'financial debt' within the meaning of Section 5(8) of the Code. Respondent No.1 has sued the Corporate Debtor not on the basis of agreement but on breach of agreement, which is a claim for damages and not a 'financial debt'. There being no adjudication of any default, no amounts are due and payable to Respondent No.1.

4. Shri Ramji Srinivasan, learned Senior Counsel appearing for Respondent No.1, refuting the submissions of Counsel for the Appellant submits that MoU dated 25.01.2013 was for sale and purchase of real estate property, hence, it is a financial transaction within the meaning of Section 5(8) of the Code. It is submitted that time was never the essence under the MoU dated 25.01.2013 entered between the parties. Under Clause-11, in case of any breach of any commitments by Corporate Debtor the entire transaction under the MoU became voidable at the options of Respondent No.1 and on exercising the option by Respondent No.1 on 07.03.2020, the Corporate Debtor was obliged to refund the entire amount along with interest @ 12% and liquidated damages of 24%. The amount of Rs.1,26,00,000/- have been admittedly received by the Corporate Debtor under the MoU dated 25.01.2013. The learned Senior Counsel for the Respondent relied on Clauses-9, 10 and 11 of the MoU to contend that breach having been committed by Corporate Debtor, it was open for Respondent No.1 to exercise option to void the transaction, which was actually done on 07.03.2020 by written communication and Application under Section 7 was filed on 06.11.2020 is not barred by time. Learned Senior Counsel for the Respondent submits that with regard to sale of immovable property between the parties, even if sale is not effected within the stipulated period, there shall be no presumption as to time being essence of the contract. The Corporate Debtor by its conduct has waived its right for time being an essence under the MoU. Non-delivery of units to Respondent No.1 by the Corporate Debtor is a continuous default

committed by the Corporate Debtor, which entitles Respondent No.1 to file Application under Section 7 in November, 2020. The learned Senior Counsel for Respondent in support of his submission has relied on various judgments of Hon'ble Supreme Court lying down the position regarding as to when the time is essence of any contract, which judgments shall be considered while considering the submissions in detail.

5. The Interim Resolution Professional ("**IRP**") appeared in person and has shown her concern regarding fees and expenses. It is submitted that she has issued publication in the newspaper and incurred other expenses.

6. We have considered the submission of learned Counsel for the parties and have perused the record.

7. From the submission of learned Counsel for the parties and the pleadings on record, following are the questions, which arises for consideration in this Appeal:

- (i) Whether the Application filed by Respondent No.1 on 06.11.2020 on the ground that Corporate Debtor has committed breach of terms and conditions of the MoU, hence liable to refund the amount with liquidated damages was filed within the period of limitation as prescribed under Article 137 of the Limitation Act, 1963?
- (ii) Whether exercising the option to void the MoU dated 25.01.2013 on 07.03.2020 can be said to be in exercise of option by the Second Party as per MoU dated 25.01.2013, in accordance with law?

- (iii) Whether a transaction entered between the parties under the MoU dated 25.01.2013 is a transaction within the meaning of Section 5(8) of the Code, so as to hold the transaction as a financial transaction?
- (iv) Whether transaction under MoU pertained to sale and purchase of the real estate property with motive of profit is in the nature of 'financial debt' within the meaning of Section 5(8) of the Code?
- (v) Whether the Application filed under Section 7 by Respondent No.1 is for the claim of damage under the MoU and not for the claim of any financial debt?

8. Before we proceed to consider the rival submission of the parties, it is relevant to notice certain Clauses of MoU dated 25.01.2013, which are the basis of the claim of Respondent No.1 in Section 7 Application. The MoU entered into between the parties stated that First Party (Elixir Buildcon Pvt. Ltd.) has agreed to sell and Second Party (Deepak Gupta, Respondent No.1) has agreed to purchase flats comprising total super built up area of about 30,000 Sq. Ft. The terms and conditions as laid down in the MoU. Clause-1 of the MoU reads:

“1. That both the parties have agreed that the First party shall sell and the second party shall purchase about 21 flats/ unit situated in different towers of aforesaid project “ELIXIR WINDZ”, comprising of total super built up area of about 30,000 Sq. ft at the agreed rate of Basic Sale Price,

of Rs.2,800/- per Sq. Ft. in Construction Link Plan based on the progress of construction and list of other charges and payment plan are mentioned in Schedule "B".

9. Clause-2 notices that the Second Party agreed to pay on the day of execution of the MoU and the First Party has agreed to accept an amount equal to 15% of the Basic Sale Price, that is, Rs.1,26,00,000/- as per three cheques as mentioned. Clause-2, Clause-4 and Clause-5 contain conditions that Second Party shall have exclusive right to revise the Basic Sale Price as well as other charges in respect of their acquired area and any profit earned shall belong to Second Party. Clauses-9, 10 and 11 on which both the parties placed reliance are as follows:

"9. That this agreement shall continue for the stipulated period of 36 months from the date of signing of this MOU, or till the possession of all the flats/ units as provided in schedule "B" to the Second Party as the case may be, or till transfer/ assignment of the entire super built up area/ flats in favour of nominee of the second party, whichever is earlier.

10. That the parties herein have agreed that if the first party fails to launch the scheme within 180 days from the date of signing of this agreement as assured by it to the second party, the First party shall be liable for default and breach of this MoU and as such the provisions of clause 11 of this agreement shall be attracted without any exceptions and reservations.

11. *That the parties herein agree that if the assurances or promises or any other relevant information about or in respect of the aforesaid land or the proposes project or flats, given by or on behalf of the First Party to the second party, is found to be false or otherwise wrong or the First Party breaches any of the commitments made under this agreement, the entire transaction, shall be voidable at the option of the second party and if the second party exercises such option, the First party shall refund entire amount paid by the second party till the date of exercise of such option, along with the interest at the rate of 12% per annum, within a period of 15 days from the date of exercise of such option. In addition thereto, the First Party shall also indemnify/ compensate to the second party with an amount equal to interest @ 24% on the amount paid, which shall be considered as a liquidated damage for making false assurances and promises or providing false information or for breach of the terms of this agreement, as the case may be. The parties further agree that this clause is the essence of the MoU and therefore provisions of this clause is mandatory and non derogable and cannot be amended and supplemented except in the exceptional cases and with mutual consent of the parties.”*

10. The email dated 07.03.2020, which is the basis for filing Section 7 Application by Respondent No.1 stated following in last three paragraph:

“That as per the clause 10 of the said agreement it was agreed that in case First Party i.e. you fails to launch the scheme within 180 days from the signing of the agreement as assured to Second party i.e. me then you shall be liable for the default and breach of the said MoU and provisions and clause 11 of the agreement shall be attracted without exceptions and reservations. However, in the Clause 11 of the said MoU you had also agreed and indemnified to refund the entire amount along with interest and compensate me with 24% interest.

That time and again I have been requesting you to refund and return the amount but you have also managed to get away on one pretext or the other. That you have always tricked me with some excuse of the other and kept giving false commitments to refund and till date have not returned a single penny. That such false, assurances, allurements and fake commitments are nothing but your deliberate and dishonest intentions since inception to commit fraud/ cheating with me and you have caused wrongful loss to me and wrongful gain to yourself to the tune of Rs.1.83 crores (Rupees One Crore Eight Three Lacs Only) approximately in all as stated herein above.

You are requested to kindly refund/ return my and my family members hard earned money along with agreed rate of interest and future compensation as agreed by you which was entrusted to you on your false commitments and assurances to deliver the Flat/ units in the above stated project within 7 days of receipt of this legal notice cum communication.”

11. The case of Respondent No.1 is that as contemplated, option to void the transaction was exercised by Respondent No.1 on 07.03.2020 and

thereafter in 15 days when amount was not refunded, the cause of action arose to Respondent No.1 to file Section 7 Application. As noted above, Application under Section 7 was filed claiming principal amount of Rs.1,26,00,000/- and interest @ 12% liquidated damages @ 24%, amounting to Rs.9,65,97,937/-.

12. Reply was filed by the Corporate Debtor to Section 7 Application and under the preliminary objection in paragraph-B, a plea that Application is barred by time was specifically taken, which is to the following effect:

“B. It is respectfully submitted by the Corporate Debtor that the present application filed by the Financial Creditor, which relates to a Memorandum of Understanding dated 25.01.2013, is time-barred and is liable to be dismissed upfront. The Financial Creditor is basing its claim on a purported non-performance of certain obligations on the part of the Corporate Debtor, which the Corporate Debtor, as alleged by the Financial Creditor, was required to perform within 180 days from the date of the said MOU i.e., 25.01.2013. It has been more than 7 (seven) years since then. All remedies of the Financial Creditor in relation to the said MOU are barred by the Limitation Act, 1963.

13. The reply contained other pleas, including that the transaction is not the a ‘financial debt’. It was also pleaded that Corporate Debtor has fulfilled all the obligations under Clause 10 of MOU dated 25.01.2013 and has launched the scheme within 180 days of signing of the MOU. In the reply, evidence to support the contention has been filed as Annexure A-1 to

Annexure A-22. The Financial Creditor (Respondent No.1 herein) filed a rejoinder to the reply of the Corporate Debtor. In the rejoinder, it is pleaded that MOU dated 25.01.2013 is not time barred and the Petition filed by the Financial Creditor is within time in terms of the provisions of Clauses 9 and 10. Other pleadings made by the Corporate Debtor were denied in the rejoinder.

14. The Adjudicating Authority after considering the submission of the parties has admitted the Section 7 Application. On the question of Application being barred by time, Adjudicating Authority took the view that limitation, if any, shall apply within a period of three years from the date of exercise of option by Second Party, that is, with effect from 22.03.2021. In paragraph 13, 14, and 15 the Adjudicating Authority made the following observations:

“13. As per clause 10 both the parties agreed that if the first party fails to launch the scheme within 180 days from the signing of this Agreement as assured by it to the second party, the 1st party shall be liable for default and breach of this MOU and as such provisions of clause 11 of the Agreement shall be attracted. Further clause 11 states that if the 1st party breaches any of the commitments made under this agreement, the entire transaction shall be voidable at the option of the Second party and if the second party exercises its option, the 1st party shall refund the entire amount along with interest @ 12% per annum and compensation for the liquidated damages @ 24%

per annum. The 2nd Party has further preferred to exercise its option w.e.f. 22.03.2022.

14. *Therefore, default has arisen from the above mentioned date. Accordingly the limitation if any, shall apply within a period of 3 years from the date of exercise of option by the 2nd party. A default within the purview of Sec.3 (12) has occurred on 22.03.2020 when the CD failed to discharge debt owed to the Applicant herein within 15 days from 07.03.2020 (i.e. within 15 days from the date of exercise of option by the Applicant of holding the entire transaction in terms of clause 11 of MOU.*
15. *That there has been breach of terms under the MOU is evident as till date no allotment letter or transfer letter has been issued to the second party (Applicant) by the Corporate Debtor.”*

15. After having noted the submission of learned Counsel for the parties and terms and conditions of the MoU, we now proceed to consider the questions as noted above.

Question Nos.(i) and (ii)

16. The first question to be considered is as to whether the Application under Section 7 filed by Respondent No.1 is barred by time. The MoU is dated 25.01.2013 and Clause-10, breach of which is being alleged by Respondent No.1 contemplated that if the First Party fails to launch the scheme within 180 days from the date of signing of this agreement, the First Party shall be liable for default and breach of this MoU as per provisions of Clause 11. Clause 9 as extracted above, stipulated period of

agreement as 36 months from the date of signing of MoU, or till possession of all the flats/ units as provided in Schedule “B” to the Second Party as the case may be, or till transfer/ assignment of the entire super built up area/ flats in favour of the nominees of the Second Party, **whichever is earlier**. Thus, the maximum period for which the agreement was to continue was 36 months. In event there is breach of Clause 10, that is, 180 days, if the First Party has not launched the scheme, the cause of action become available to the Second Party. Further, the entire period of agreement being 36 months at maximum, when a breach is committed by Corporate Debtor of compliance of terms and conditions of the MoU, that is, handing over possession of flats/ units or transfer / assignment of the entire super built up area/ flats within 36 months, the cause arose to Second Party, that is, Respondent to sue for its breach.

17. Now we notice submission of Respondent, as is reflected in Application under Section 7 that Respondent having exercised the option on 07.03.2020, the cause of action arose after 15 days when the entire amount with interest is not refunded.

18. Section 55 of the Contract Act, 1872 is to the following effect.

“55. Effect of failure to perform at fixed time, in contract in which time is essential.—*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the*

promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—*If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.*

Effect of acceptance of performance at time other than that agreed upon.—*If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."*

19. Section 55, first part clearly contemplates that when a party to a contract promises to do a certain thing before a specified time, fails to do so, the contract or so much of it as has not been performed, becomes voidable at the option of promisee. When the First Party, that is, the Corporate Debtor failed to launch the scheme within 180 days and further failed to give possession of flats/ units within 36 months, the contract, i.e. MoU 25.01.2013 became voidable at the option of Second Party, that is, Respondent No.1. In the facts of the present case, as per the case of Respondent No.1, the Corporate Debtor failed to launch the scheme within 180 days and further failed to give possession of flats and units within a

period of 36 months, the contract became voidable and option to void the contract was exercised by Respondent No.1 on 07.03.2020.

20. Now we look into the Article 137 of the Limitation Act, which provides for limitation for filing of any application. It is well settled that Article 137 of the Limitation Act will be applicable with regard to Application under Section 7 of the Code. Article 137 is as follows:

<i>Description of application</i>	<i>Period of limitation</i>	<i>When the right to apply accrues.</i>
137. Any other application for which no period of limitation is provided elsewhere in this division	Three years	When the right to apply accrues.

21. As per the terms and conditions of the contract, the right to sue on the basis of MoU dated 25.01.2013 arose to the Second Party after 180 days from the date of MoU, when the Corporate Debtor failed to launch the scheme as per the case of Respondent No.1 and further after 36 months when possession of the flats/ units was not given to the Second Party.

22. Whether Respondent No.1 is entitled to exercise right of option as given in Clause-11 at any time at its free will, is another question to be answered. Right to exercise of option arose to the Second Party after 180 days and also after 36 months when period of contract came to an end. By not exercising the option when right to exercise of option arose, the Second Party cannot stop running of period of limitation on the pretext that it exercised its option only on 07.03.2020. The exercise of option after seven

years from entering into the MoU and filing of the Application after seven years from the date when right to exercise of option arose, is unsustainable.

23. Section 55 of the Contract Act as noticed above, statutorily empowers the promisee to void an agreement, which has become voidable on account of failure of party to perform its promise.

24. When we read all Clauses of agreement of MoU, the agreement itself clearly contemplate that it was to continue for only 36 months from the date of signing of MoU. Thus, it was open for the Second Party to exercise its option for voiding the agreement after 180 days of signing the agreement, if scheme was not launched or in any event, after expiry of 36 months period from the date of signing of agreement when possession of flats/ units was not given to Respondent No.1. It is not in the sweet will of Respondent No.1 to exercise option after expiry of 6½ years from violation of Clause-10, which arose after 180 days of the signing of the agreement, that is, when the scheme was not launched. We are of the view that Clauses-9, 10 and 11 have to be read together and the exercise of the option by the Second Party has to be either after 180 days from the signing of the agreement or immediately after three years when the period of contract came to an end. In the Application under Section 7, the date on which default occurred is mentioned as 22.03.2020, which cannot be said to be correct, since the date of default as per the averments of Respondent No.1 itself occurred after 180 days of signing of the agreement, when Corporate Debtor failed to launch the scheme. In any event, the exercise of option by Respondent No.1 ought to have been immediately after expiry of 36 months

when the terms and conditions of contract was not fulfilled within 36 months as contemplated in Clause-9 of the MoU. The cause of action arose to Respondent No.1 to sue for the breach of contract on 25.07.2013 after expiry of 180 days and further immediately after expiry of 36 months, that is on 25.01.2016. After the enforcement of the Code, the cases for which limitation has long expired cannot be revived for the purposes of an Application under Section 7 as has been laid by the Hon'ble Supreme Court in ***B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633***. The exercise of option by Respondent No.1 on 07.03.2020, after the expiry of more than six years, when the cause of action arose under Clause-10, and after expiry of more than 3 years when cause of action arose to the Corporate Debtor to sue for breach of terms and conditions as contemplated under Clause-9 read with Clause-11, the Application was clearly barred by time on 06.11.2020, when the same was filed.

25. We may also notice the judgments of the Hon'ble Supreme Court relied by learned Counsel for Respondent No.1 in this regard. The submission of learned Senior Counsel for Respondent No.1 is that the contract pertained to sale and purchase of immovable property and time was never the essence of the contract. The learned Senior Counsel for the Respondent has placed reliance on judgment of the Hon'ble Supreme Court reported in ***(1979) 2 SCC 70 – Hind Construction Contractors v. State of Maharashtra***. In the above case, the Hon'ble Supreme Court had occasion to consider a construction contract awarded by State of

Maharashtra to construct a aqueduct across the Alandi River at Mile 2 of the Nasic Left Bank Canal to a contractor. The contract was rescinded by the State, which action was challenged by filing a suit. In the above case, Hon'ble Supreme Court has laid down that question whether or not the time was the essence of the contract would essentially is a question of the intention of the parties to be gathered from the terms of the contract. In paragraph 7 of the judgment following has been laid down:

“7. The first question that arises for our consideration, therefore, is whether time was of the essence of the contract that was executed between the parties on July 12, 1955 (Ex. 34). It cannot be disputed that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract....”

Further in paragraph 8, the Hon'ble Supreme Court laid down following:

“8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains

unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on Lamprell v. Billericay Union [(1849) 3 Exch 283, 308] , Webb v. Hughes [(1870) LR 10 Eq 281] and Charles Rickards Ltd. v. Oppenheim [(1950) 1 KB 616 : (1950) 1 All ER 420 (CA)] .”

26. Another judgment relied by learned Senior Counsel for the Respondent is **Govind Prasad Chaturvedi v. Hari Dutt Shastri, (1977) 2 SCC 539**. In the above case, the Hon’ble Supreme Court had occasion to consider provisions of the Specific Relief Act, 1963 in reference to contract for sale of immovable property. In paragraph 5 and 6 following has been laid down:

“5.It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. (Vide Gomathinavagam Pillai v. Pallaniswami Nadar [AIR 1967 SC 868 : (1967) 1 SCR 227, 233]). It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption

that in a contract of sale of land stipulation as to time is not the essence of the contract.

6. *Apart from the normal presumption that in the case of an agreement of sale of immovable property time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract. In the plaint the allegation was that the appellant has always been ready and willing to perform his part of the contract and he did all that he was bound to do under the agreement while the respondents committed breach of the contract. The respondents did not set up the plea that the time was of the essence of the contract. In para 32 of the written statement all that was stated was that the appellant did not perform his part of the contract within the stipulated time and that the contract thereafter did not subsist and the suit is consequently misconceived. The parties did not go to trial on the basis that time was of the essence of the contract for no issue was framed regarding time being the essence of the contract. Neither is there any discussion in the judgment of the trial court regarding this point. The trial court after considering the evidence came to the conclusion that appellant was always ready and willing to perform his part of the contract while the respondents were not. In the circumstances therefore the High Court was in error in setting as one of the points for determination whether time was of the essence of the contract. The High Court after referring to the agreement was of the view that the agreement was entered into*

between the parties during the course of a litigation between the appellant and the respondents and in pursuance of the agreement the parties were directed to withdraw their cases and were directed further not to take fresh legal steps during the period of two months within which the sale deed was to be executed. On taking into account the circumstances of the case and the conduct of the parties of serving on each other notices, counter notices and telegrams the High Court inferred an intention on the part of the parties to treat the time as of essence of the contract. We will refer to the terms of the contract and the correspondence between the parties in due course but at this stage it is sufficient to state that neither the terms of the agreement nor the correspondence would indicate that the parties treated time as of essence of the contract. In fact, according to the agreement the sale deed ought to have been executed by May 24, but it is the admitted case that both the parties consented to have the document registered on May 25. On the question whether the time is of the essence of the contract or not we are satisfied that the High Court was in error in allowing the respondents to raise this question in the absence of specific pleadings or issues raised before the trial court and when the case of time being the essence of the contract was not put forward by the respondents in the trial court. Apart from the absence of pleadings we do not find any basis for the plea of the respondents that the time was of the essence of the contract.”

27. To the same effect is another judgment of the Hon’ble Supreme Court reported in **(2006) 11 SCC 181 – McDermontt International Inc. v.**

Barun Standard Co. Ltd. The learned Senior Counsel for the Respondent has also relied on the judgment of the Hon'ble Supreme Court in **(2008) 4 SCC 464 – Balasaheb Dayandeo Naik v. Appasaheb Dattatraya Pawar**, wherein in paragraph 11, following has been laid down:

“11. It is clear that in the case of sale of immovable property, there is no presumption as to time being the essence of the contract.

8. ... even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract ...; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week, the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. [Ed. : Quoting from Hind Construction Contractors v. State of Maharashtra, (1979) 2 SCC 70, p. 77, para 8.]

In the case on hand, though the parties agreed that the sale deed is to be executed within six months, in the last paragraph they made it clear that in the event of failure to execute the sale deed, the earnest money will be forfeited. In such circumstances, the abovementioned clauses in the last three paragraphs of the agreement of sale would render ineffective the specific provision relating to the time being the essence of contract.”

28. From the law laid down by the Hon'ble Supreme Court as noted above it is clear that time is not the essence of contract with regard to sale of immovable property, unless there are special features and terms and conditions in the contract, which makes the time as essence of the contract. We in the present case, while considering the question for limitation for filing Section 7 Application, are not essentially concerned with the question as to whether the time is essence of the contract under the MoU dated 25.01.2013, rather we need to look into it for the purposes of commencement of the limitation period for filing Section 7 Application to find out as to when right to sue accrued to the Respondent on the breach of the terms and conditions of MoU by the Corporate Debtor. Whether, the right to sue, which accrued to Respondent No.1 can be kept under suspension, merely because the Respondent does not exercise option to void the contract when the right to sue actually accrued. As already held that when right to sue accrues for the breach of the contract, limitation under Section 137 of the Limitation Act begun to run and it cannot remain under suspension merely because Respondent did not exercise its option to void the contract. As noticed above, on breach of promise by a party, right to void the contract accrues to the promise statutorily. Further, the fact that Clause-11 confers right to Respondent No.1 to void the contract is in accordance with the right as statutorily recognized in Section 55 of the Contract Act first part. When Clause-11 synchronize with right given under section 55 of the Contract Act, first part, the time is treated to be essence of such contract because of which the right to exercise the option

for voiding the contract has been contemplated. In event the submission of Respondent No.1 is accepted that right to exercise option is on free will, he can exercise the same after decades irrespective of date when right to sue occurred, the law of limitation shall be of no meaning and right to sue will then depend on free will of a litigant, which cannot be the legislative intent. In the event beginning of limitation is to be computed from the date when right to option is exercised by Respondent No.1, the said option can be exercised even after 10 years or 20 years, which cannot be countenanced. We, thus, are satisfied that right to sue accrued to Respondent for breach of Clause-10 of the MoU dated 25.01.2013 on 25.07.2013, thereafter on 25.01.2016 and the application filed on 06.11.2020 is clearly barred by time. Question Nos.(i) and (i) are answered accordingly.

Question Nos.(iii), (iv) & (v)

29. We having found that Application filed by Respondent under Section 7 was barred by time, we see no further necessity to consider other grounds raised by the Appellant including the ground that transaction dated 25.01.2013 is not a financial transaction within the meaning of Section 5, sub-section (8) of the Code.

30. In this Appeal, we passed an interim order, restraining the constitution of CoC vide order dated 13.05.2022. Further on 03.06.2022, we passed the following order

“Learned counsel for the Appellant submits that Appellant is ready to deposit total principal amount with 12% interest as upto date within three days.

Subject to deposit of the aforesaid amount, no further steps shall be taken in the CIRP process. We make it clear that the IRP shall continue till the matter is finally decided and will ensure that the Corporate Debtor remains a going concern.

I.A. No. 1766 of 2022 stands disposed off.”

31. In pursuance of the order dated 03.06.2022, the Appellant has deposited FD of Rs.2,68,00,000/- drawn in favour of ‘Registrar National Company Law Appellate Tribunal’. We have noticed that there is no dispute regarding payment of an amount of Rs.1,26,00,000/- by Respondent No.1 to the Corporate Debtor on 25.01.2013. The Appellant has deposited the Bank Draft including the interest @ 12%. In the interest of justice, we are of the view that the amount deposited under orders of this Tribunal dated 03.06.2022, be refunded to Respondent No.1 to avoid further litigation between the parties. We order accordingly.

32. Now coming to the submission of IRP regarding her fees and expenses, it is to be noted that the impugned order was passed on 04.05.2022 and the Appeal was immediately filed on 09.05.2022 and this Tribunal passed an interim order on 13.05.2022 directing the IRP not to constitute the CoC. Subsequently, by another order dated 03.06.2022, a direction was issued not to take any further steps in the CIRP process. In the impugned order Adjudicating Authority has directed the Financial Creditor to deposit Rs.2,00,000/- with the IRP. In addition to amount directed by Adjudicating Authority of Rs.2,00,000/-, the IRP shall be entitled to actual expenses incurred by her in publication and other actual

expenses incurred by her. On submission of bill for actual expenses incurred by the IRP, Respondent No.1 (who filed Section 7 Application) shall make the payment of expenses within a period of two weeks.

33. In the result, the Appeal is allowed. The order dated 04.05.2022 passed by the Adjudicating Authority is set-aside. Application filed under Section 7 of the Code being Company Petition No.(IB)-05(ND)/2021 is dismissed. As directed above, the amount deposited under the orders of Court dated 03.06.2022, be returned to Respondent No.1 by the Registry within a week. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

9th September, 2022

Ashwani