

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 905 of 2022

(Arising out of Order dated 25.07.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench Court-III in IA-2427/2022 in IB-11(ND)/2022)

IN THE MATTER OF:

SLB Welfare Association
Through its President – Dr. Akanksha Aggarwal
GH-06B, Sector – CHI-V,
2nd Milestone, Greater Noida,
Uttar Pradesh-201310. Appellant

Vs

1. M/s PSA IMPEX Private Limited,
Through its IRP – Mr. Prabhat Ranjan Singh
A-118, Pocket-6,
Mayur Vihar, Phase-III,
New Delhi-110096.
2. M/s Rudra Buildwell Constructions Pvt. Ltd.,
Through its Owner-Shri Raj Kumar
314, F/F Pocket-6,
Mayur Vihar, Phase-III,
New Delhi-110096. Respondents

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Shantanu Singh, Mr. Ravi Sehgal, Mr. Aditya Shukla, Ms. Divya Narayanan, Advocates

For Respondent: Mr. Saurabh Jain, Advocate for Impleader (SLAB Home Buyer's Welfare Association)

Mr. Abhishek Anand, Mr. Nipun Gautam, Mr. Pathik Chaudhury, Advocates for R-1

Mr. Gaurav Mitra, CS Gaurav Joshi, Mr. Atul Bhatia, Advocates for R-2

Mr. Prabhjot Ranjan Singh for RP

With

Company Appeal (AT) (Insolvency) No.642 of 2022

(Arising out of Order dated 18.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No.III) in Company Petition No. IB-11/ND/2022)

IN THE MATTER OF:

SLB Welfare Association
Through its President – Dr. Akanksha Aggarwal
GH-06B, Sector – CHI-V,
2nd Milestone, Greater Noida,
Uttar Pradesh-201310.

.... Appellant

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.... Respondents

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Mr. Abhishek Anand, Mr. Nipun Gautam, Mr. Pathik Chaudhury, Advocates for R-1

Mr. Gaurav Mitra, CS Gaurav Joshi, Mr. Atul Bhatia, Advocates for R-2

Mr. Prabhjot Ranjan Singh for RP

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) have been filed by the same Appellant, challenges orders dated 18.04.2022 and 25.07.2022 passed the National Company Law Tribunal, New Delhi Bench, Court No.III in C.P. IB-

11(ND)/2022. Both the Appeal(s) have been heard and are being decided by this common judgment.

2. Brief facts of the case necessary to be noticed for deciding these Appeal(s) are:

- (i) M/s PSA IMPEX Private Limited, the Corporate Debtor launched a House Building Project in the year 2012 to be completed within 36 months. The Appellant Registered Society of the Homebuyers and Allottees of Project Sampada Livia Apartments was formed on 29.11.2018 Registration of Certificate was also obtained.
- (ii) There being delay in completion of the Project, Homebuyers of the Project approached the Real Estate Regulatory Authority (hereinafter referred as “**RERA**”) under Real Estate (Regulation and Development) Act, 2016 by filing a complaint. RERA conducted an inspection of the Project site on 18.02.2019 and found that only 10% of the work has been started and from March 2016 work was abandoned. The erstwhile Promoter was lodged in jail since 04.01.2019. An email dated 04.08.2019 was sent by the Corporate Debtor addressing buyers that the Corporate Debtor has handed over the Project to M/s. Rudra Buildwell Constructions Pvt. Ltd. and has also transferred all the shares for expeditious completion of the Project.

- (iii) The RERA passed an order on 30.09.2019 after issuing a Show Cause Notice to the Corporate Debtor, cancelling the registration of the Project. The order contemplated further proceeding for completion of the remaining construction work. The RERA issued a public notice on 07.12.2019 calling upon Association of Allottees to submit a viable proposal for completion of the remaining development work of the Project. The Appellant SLB Welfare Association submitted a proposal to complete the balance development work with detailed Project Report for revival of the Project. The Project was evaluated by the Project Advisory & Monitoring Committee constituted under the Chairmanship of Hon'ble Member of U.P. RERA. A letter dated 26.06.2020 was issued by the Secretary of RERA to the Corporate Debtor for handing over the site of the Sampada Livia Project to the Appellant for completing the remaining construction and development work within three days. The possession of the Project site was handed over to the Appellant on 29.06.2020.
- (iv) Challenging the order dated 30.09.2019 passed by the RERA, an Appeal was filed before the U.P. Real Estate Appellate Tribunal by the Corporate Debtor through its authorised signatory (Shri Raj Kumar). The Appellate Authority vide its order dated 20.10.2020 dismissed the Appeal filed by the Corporate Debtor, upholding the order dated 30.09.2019 of the

RERA. Challenging the order dated 20.10.2020 a Second Appeal No.121 of 2020 was filed by the Corporate Debtor through its authorised signatory Shri Raj Kumar in the High Court of Judicate at Allahabad, which Appeal was also dismissed by the High Court vide its judgment dated 09.03.2021. Aggrieved again by the order dated 09.03.2021, the Corporate Debtor through its authorised signatory Shri Raj Kumar filed a Special Leave Petition on 14.12.2021, which is still pending in the Hon'ble Supreme Court in defect.

- (v) M/s. Rudra Buildwell Constructions Pvt. Ltd. claiming to be an Operational Creditor filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") being IB-461(ND)/2021, which Application was withdrawn on the submission of the Counsel for the Operational Creditor that Application is hit by Section 10A of the Code. The Adjudicating Authority vide order dated 29.11.2021 permitted the Operational Creditor to withdraw the Application, which Application was dismissed as withdrawn.
- (vi) Within a week from the withdrawal of the aforesaid Application, a notice under Section 8 of the Code was issued by the Operational Creditor M/s. Rudra Buildwell Constructions Pvt. Ltd. dated 06.12.2021 to the Corporate Debtor demanding payment of an unpaid operational debt of

Rs.5,39,60,674/- including interest. The date of default mentioned in the Application was 31.03.2020.

- (vii) The Application came for consideration before the Adjudicating Authority on 12.01.2022. The Adjudicating Authority being *prima facie* of the view that date of default being 31.03.2020, the Application is hit by Section 10A, permitted the Counsel for the Operational Creditor to file an additional affidavit within two weeks. An additional affidavit was filed by the Operational Creditor. Thereafter, notice was issued to the Corporate Debtor. The Corporate Debtor neither filed any reply to Section 9 Application nor appeared before the Adjudicating Authority. The Adjudicating Authority proceeded *ex-parte* on 22.03.2022 against the Corporate Debtor. The Adjudicating Authority heard the Counsel for the Operational Creditor and vide order dated 18.04.2022 admitted Section 9 Application and appointed Mr. Prabhat Ranjan Singh as Interim Resolution Professional (“**IRP**”).
- (viii) The Company Appeal (AT) (Insolvency) No.642 of 2020 was filed by the Appellant challenging the order dated 18.04.2022. In the said Appeal, this Tribunal issued notice on 06.06.2022 and granted two weeks’ time to file reply.
- (ix) The IRP filed an IA No.2427 of 2022 under Section 60, sub-section (5) read with Section 18(f) of the Code and Rule 11 of the NCLT Rules, 2016, seeking a direction against the

Appellant to handover the control of the Project site to the IRP. In the IA No.2427 of 2022, notices were issued by the Adjudicating Authority and a common reply was filed to the IA No.2427 of 2022 and IA No.2345 of 2022, in which reply, Appellant gave all details regarding proceedings before RERA. It was stated that Project has been transferred to the Appellant by order of the RERA dated 26.06.2020, which has also been approved by the State Government. It was also pleaded that Operational Creditor has approached the Adjudicating Authority with unclean hands and has suppressed material facts.

- (x) The Adjudicating Authority heard the parties on IA No.2427 of 2022 and IA No.2345 of 2022 and by an order dated 25.07.2022 allowed the IA no.2427 of 2022 and directed the Appellant to handover peaceful possession and custody of the project in question to the IRP within two weeks. IA no.2345 was also allowed directing the appointment of Mr. Akarsh Kashyap as Authorised Representative of Financial Creditor of the Corporate Debtor.
- (xi) Aggrieved by the order dated 25.07.2022 Company Appeal (AT) (Insolvency) No.905 of 2022 is filed by the Appellant.

3. When the Appeal was taken up on 03.08.2022 by this Tribunal, a statement was made by learned Counsel for the IRP that no further step shall be taken by Friday. By subsequent order dated 05.08.2022, the order

of the Adjudicating Authority dated 25.07.2022 was stayed by this Tribunal.

4. We have heard Shri Abhijeet Sinha, learned Counsel for the Appellant, Shri Gaurav Mitra, learned Counsel for Respondent No.2 - M/s. Rudra Buildwell Constructions Pvt. Ltd., Shri Abhishek Anand, learned Counsel appeared for Corporate Debtor and Shri Saurabh Jain, learned Counsel has been heard for SLAB Home Buyer's Welfare Association, who was permitted to intervene in the Appeal(s). We have also heard learned Counsel appearing for the IRP.

5. The learned Counsel for the Appellant submits that insolvency proceedings were fraudulently initiated by the Operational Creditor in collusion with the Corporate Debtor. It is submitted that both the Corporate Debtor and Operational Creditor are controlled by the same person, i.e., Shri Raj Kumar and both entities are one and the same. Initiation of Corporate Insolvency Resolution Process ("**CIRP**") by Operational Creditor was not for any purpose of insolvency resolution, but was with an object to defeat the rights of the Appellant. It is submitted that Application under Section 9 was not a genuine Application. The invoices filed in support of Section 9 Application were all cooked-up invoices manufactured for the purpose of the case. The entire transaction forming basis of Section 9 Application pertains to the period August 2019 to 31.5.2021, during which period Shri Raj Kumar, Chairman of the Operational Creditor had already joined the Board of Director of the Corporate Debtor and owned 99.75% shares of the Corporate Debtor. The

Project having been de-registered by order dated 30.09.2019 and the Project having been handed over to the Appellant vide order dated 26.06.2020, there was no occasion for Corporate Debtor entering into any transaction with the Operational Creditor and all claims by the Operational Creditor of supplying material and security were fictitious and non-existent. The Operational Creditor has not filed any GST invoices along with Section 9 Application. The proforma invoices filed do not mention any invoices number and GST number and are self-prepared documents. It is mandatory to mention GST number and also the GST amount in the invoices as required by law. The Operational Creditor has also not filed E-way bills in support of Section 9 Application. The proforma invoices have been prepared much after the date of alleged supply, which is also impermissible. The Operational Creditor has approached the Adjudicating Authority with unclean hands and suppressed material facts. Section 9 Application did not mention that an earlier Application filed under Section 9 had been dismissed as withdrawn. The Operational Creditor also failed to disclose the material fact that rights in Project were transferred to the Appellant as per direction of the RERA dated 06.06.2020 and 26.06.2020. The contentions raised by SLAB Welfare Association supporting the CIRP are malafide and the SLAB has been setup by the Corporate Debtor and M/s. Rudra Buildwell Constructions Pvt. Ltd. The SLAB never submitted any proposal in pursuance of notice published by the RERA inviting proposals from allottees. It is submitted that Appellant has made several constructions and is carrying out the Project site with development work.

It is submitted that present is a case where Section 9 Application has been filed fraudulently and maliciously, which deserves to be dismissed with heavy penalty under Section 65 of the Code. Shri Sinha further submits that rights of the Project vests in the Appellant by virtue of order passed by RERA and by virtue of Section 14(1) Explanation, there is no conflict with the order passed by the RERA and those of proceedings under IBC. The order passed by RERA handing over Project to the Appellant is an order by sectoral regulator and cannot be suspended or terminated on the grounds of insolvency. It is further submitted that according to averments made in Section 9 Application, the date of default being 31.03.2020, the Application was clearly hit by Section 10A and the mere fact that the acknowledgement was issued by the Corporate Debtor on 03.06.2021 shall not give any cause of action to the Operational Creditor to file Section 9 Application. The reasoning given by the Adjudicating Authority for rejecting argument based on Section 10A is untenable.

6. Shri Gaurav Mitra, learned Counsel appearing for Respondent No.2-M/s. Rudra Buildwell Constructions Pvt. Ltd., opposing the submission of learned Counsel for the Appellant contends that Application under Section 9 was for genuine debt. The Operational Creditor has supplied materials, security services and plant machinery for which proforma invoices and gate passes have been filed. It is submitted that proforma invoices are issued at the time of work being carried out and thereafter while raising final invoices, GST payments are made. Non-mention of GST number and amount is inconsequential. The Sainik Security Bureau has given

acknowledgement for receipt of amount of Rs.28,23,000/- from the Operational Creditor relating to security services provided from April 2019 to June 2021 at the site of Corporate Debtor, which are supported by Bank transactions, proforma invoices. Regarding materials supplied and gate passes invoices have been filed along with Section 9 Application, which prove the genuine debt claimed by the Operational Creditor. Ledger of M/s PSA IMPEX Private Limited as maintained by M/s. Rudra Buildwell Constructions Pvt. Ltd. has also been filed, which mentions closing balance of Rs.3,41,22,413/-. It is submitted that Appellant has no locus to challenge the order admitting Section 9 Application. The transfer of shareholding by the Corporate Debtor in favour of Mr. Raj Kumar has not been recognized by the High Court in its judgment dated 09.03.2021 it has been held that without obtaining prior approval, the transfer of shares are vitiated and non-est. Hence, there is no question of Operational Creditor having any shareholding under the law. The provisions of IBC shall override the provisions of RERA and order passed by RERA, handing over Project to the Appellant cannot come in the way of initiation of CIRP, nor there is any flaw in the Adjudicating Authority directing the Appellant to handover the Project in favour of the Respondent.

7. The learned Counsel appearing for SLAB Welfare Association, opposing the submission of learned Counsel for the Appellant contends that Appellant cannot engage itself in the construction of the Project or to manage the Project. The buyers in the Appellant Association are losing trust and confidence. The Appellant's Association has neither competence

nor finances to complete the construction. The order of Adjudicating Authority directing the Appellant to handover the Project to IRP is justified. Many buyers are now interested in refund and do not want the flats any more. The learned Counsel for SLAB Welfare Association supports the submission of learned Counsel for M/s. Rudra Buildwell Constructions Pvt. Ltd.

8. We have considered the submission of learned Counsel for the parties and have perused the records.

9. The learned Counsel for the Appellant has laid much emphasis on a submission that proceedings under Section 9 have been initiated by Operational Creditor fraudulently and in collusion with Corporate Debtor. For appreciating such submission, we need to notice the sequence of the events and various proceedings undertaken with regard to Project in question.

10. While noticing the facts of the case, we have noticed that Project was announced in 2012 and it was to be completed within 36 months and when there was inordinate delay in completion of the Project, the complaints were filed before the RERA by the Homebuyers. On complaints filed by the Homebuyers, Show Cause Notice was issued by the RERA to the Corporate Debtor on 08.03.2019. After receipt of the complaints, inspection was got conducted by the RERA. In the inspection, Officials of the RERA found that no construction work was going on and also only 10% structural work was completed. In compliance of the order passed by RERA, the Chief Executive Officer, Greater Noida Authority got conducted audit of the

project, where Report was submitted that diversion of Rs.47 crores was made by the Promoter, out of funds received from the allottees. Before the RERA, the Promoter in explanation has stated that they have managed to get association of M/s. Rudra Buildwell Constructions Pvt. Ltd., who is going to get the Project complete. A finding was recorded by RERA in its order dated 30.09.2019 that funds deposited by the allottees were used elsewhere and forgery has been found to be committed by the Promoters. RERA vide its order dated 30.09.2019 has cancelled the registration of the Project. Against the order passed by RERA dated 30.09.2019, an Appeal was filed by the Corporate Debtor through its Authorised Signatory. The Authorised Signatory, who filed the Appeal is none else than Mr. Raj Kumar, through whom Section 9 Application was filed by the Operational Creditor. After dismissal of the Appeal by the RERA Appellate Authority, Second Appeal was filed in the High Court by Corporate Debtor through Mr. Raj Kumar. The Memo of Parties of Second Appeal is describing the Appellant is "*Psa Impex Private Ltd. Thru Authorised Signatory Raj Kumar*". The Corporate Debtor itself has sent an email to all Homebuyers on 04.08.2019, which has been filed at Annexure A-19 to Company Appeal (AT) (Insolvency) No.905 of 2022, where the Corporate Debtor has informed the buyers that Corporate Debtor has handed over the Company to Mr. Raj Kumar, who is Director of M/s. Rudra Buildwell Constructions Pvt. Ltd. and transferred all the shares. In the Second Appeal before High Court, the Promoter has categorically pleaded that owner of M/s. Rudra Buildwell Constructions Pvt. Ltd. had taken on Board as Director of M/s PSA IMPEX

Private Limited and 99.75% shares has been transferred to him. We may notice in this context paragraph 6 of the judgment of High Court dated 09.03.2021 dismissing the Second Appeal filed by Corporate Debtor Shri Raj Kumar, which is to the following effect:

“... The Promoter submitted its reply to the letter dated 17.05.2019 on 20.05.2019, saying that the owner of M/s Rudra Build Well Sri Raj Kumar had been taken on board as Director of M/s PSA Impex Pvt. Ltd. and 99.75% shares had been transferred to him.”

Further, in paragraph 16, following has been noted by the High Court:

16. In the reply dated 06.05.2019, it was informed that all the shares/ assets and liabilities of the Promoter had been transferred to the new builder that is M/s. Rudra Build Well Constructions Pvt. Ltd. and the new Promoter had contacted the architect to update the plan of the Project as per the Green Building Norms and to get it registered under “GRIHA” or “IGBC”. A revised construction schedule for each of the towers has been given by the new promoter.”

11. The aforesaid facts clearly indicate that the Promoter case throughout was that entire Project was handed over to Mr. Raj Kumar, the owner of M/s. Rudra Buildwell Constructions Pvt. Ltd., who has taken over the Project. It is relevant to notice that order dated 30.09.2019 passed by RERA cancelling the registration, was challenged by the Corporate Debtor through Mr. Raj Kumar, the Authorised Representative both before U.P.

Real Estate Appellate Tribunal and in Second Appeal before the High Court was by Mr. Raj Kumar. It is, thus, Raj Kumar who is contesting and challenging the proceedings of RERA before the U.P. Real Estate Appellate Tribunal and the High Court. The orders passed by RERA for handing over Project to the Appellant was also challenged by the Corporate Debtor and the Corporate Debtor failed to assail the order passed by the RERA by which registration was cancelled and Project was handed over to the Appellant. Mr. Raj Kumar, the owner of M/s. Rudra Buildwell Constructions Pvt. Ltd. filed Section 9 Application claiming unpaid debt.

12. The facts of the present case make it amply clear that object of filing Section 9 Application by the Operational Creditor was not for resolution of insolvency of Corporate Debtor, but was an attempt to stop the implementation of RERA order and to take back the Project from the Appellant. Mr. Raj Kumar, the Director of M/s. Rudra Buildwell Constructions Pvt. Ltd. has been challenging the orders passed by the RERA in First Appeal and Second Appeal on behalf of the Corporate Debtor. The Operational Creditor, thus, Mr. Raj Kumar, who has filed Section 9 Application as Director of M/s. Rudra Buildwell Constructions Pvt. Ltd. has clearly identified himself with the Corporate Debtor and was espousing the cause of the Corporate Debtor by challenging the order of the RERA. The object for enactment of the IBC Code is to re-organisation and insolvency resolution of the Corporate Persons. Section 9 Application filed by M/s. Rudra Buildwell Constructions Pvt. Ltd. through Shri Raj Kumar was not for purposes of any insolvency resolution of the Corporate Debtor, rather

was to frustrate the implementation of orders passed by RERA and to take back the Project from the Appellant, who has lawfully entrusted the Project for completing the unfinished work. The learned Counsel for the Appellant has relied on the provisions of Section 65 of the Code, which is to the following effect:

“65. Fraudulent or malicious initiation of proceedings. -

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon a such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person,

the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.”

13. The sequence of the events and the various proceedings taken with regard to Project in question by the Homebuyers as well as by the Corporate

Debtor, indicate that CIRP initiated by the Operational Creditor by filing Section 9 Application was for purposes other than for the resolution of insolvency, which we have noted above. When we further notice several other facts pertaining to Section 9 Application, our conclusion is re-emphasized that Section 9 Application was for purposes other than the insolvency resolution process. Following are the further facts, which lend support to our above conclusion:

- (i) When we look into the invoices which are basis of Section 9 Application, it is clear that the invoices, which have been filed are only proforma invoices, claimed to be prepared on one day, i.e. 31.03.2020 bears the date of 31.03.2020 and contains the particulars of various materials supplied from 25.08.2019 to 19.01.2020. Proforma invoices are prepared in one day. The proforma invoices do not contain any GST number. The Central GST Act, 2017 requires to issue tax invoices with description of quantity, value of goods and tax charged thereon. The Rules framed under Central GST Act also require mentioning of particulars of name and address and goods and services tax identification number of the supplier and the invoices are required to be issued within a period of 30 days of supply of service. Similar are the provisions of UP GST Act. The invoices are not claimed to have been issued within one month from the date of supply of goods, material or services and also not mentions the GST number or amount of tax,

which proves the contention of the Appellant that they have been prepared for the purposes of the case.

- (ii) The ledgers of Corporate Debtor maintained by M/s. Rudra Buildwell Constructions Pvt. Ltd. indicate that ledgers are not prepared in an ordinary course of business. At page 389 of Vol.III of Company Appeal (AT) (Insolvency) No. 905 of 2022, a ledger has been filed by the Operational Creditor. The ledger does not bear any date as to when it was prepared. It is useful to extract the ledger, which is to the following effect:

Rudra Buildwell Constructions Pvt. Ltd. Regd Office: 314, Pocket D, Mayur Vihar Phase-II, Delhi-110091 CIN NO: U45400DL201PTC209162 Ledgers of M/s PSA Impex Private Limited				
S. No.	Date	Particulars	Qty	Amount
1	31/12/2019	Cement in Bags	1143	341600
2	14/01/2020	Core Sand in cft	10050	452250
3	10/01/2020	Rori in cft	7000	336000
4	13/12/2019	Flyash Bricks	309111	1483733
5	11/03/2020	Labour Expenses		2675000
6	31/05/2020	Security Services		2823000
7	31/10/2020	Salaries		998000
8	31/05/2021	Legal		2117330
9	11/06/2019	Plant & Machinery and Scaffolding		20000000
10	26/11/2020	Loan		2610000

The entries in the ledger are not in normal course of business and the same are in haphazard manner. Entries of 2021 have been made even before entries of 2019 and 2020. The ledgers appear to be prepared on any date subsequent to 31.04.2021 on one day and cannot be said to be in ordinary course of business.

(iii) It is further relevant to notice that RERA has made inspection of the site on February 2019 and at that time of inspection, no work was found to be going on and it was noticed that for last two years the work has stopped. The Project was handed over to the Appellant on 29.06.2019. In the Section 9 Application the Operational Creditor has claimed the amount from August 2019 to May 2021. When work of the Corporate Debtor was found stopped in February 2019 and the complaints were filed before RERA that no work is being undertaken since 2018 and thereafter inspection was conducted, we are inclined to accept the submission of the Appellant that neither any material was supplied by the Operational Creditor to the Corporate Debtor nor any work was undertaken by the Corporate Debtor during the period, when it is claimed that materials were supplied and services were provided. Inspection Report dated 21.02.2019 have been brought on record, which is at Annexure A-16 in Company Appeal (AT) (Insolvency) No.905 of 2022. It is useful to extract the conclusion of Inspection Report, which is to the following effect:

“Conclusion

As per the inspection, Site has been shut since a long time and there was only one watchman present at the gate. Though the site office was available, it seems to be closed from many days (Mostly Years). The construction work was started and then left in the midst of the work, it seems to

be only 10-15% of the construction works has been started. A tower was raised and basic foundation work has been started for other towers which were put at halt. We also found that no promoter/ builder nor the site representatives were available at site.

Looks like the site has been non-functional from a long time. Presently the boarding of the site office is named as "Alturo Residency" which seems that the name of the project has been changed but the registered project name in UP RERA is "Sampada Livia". As per the buyer/ complainant, the promoter/ builder were not responding to their calls/ emails regarding the project.

Note: Photographs of the respective project project (Project Sampada Livia) were attached below:"

- (iv) The Corporate Debtor before the RERA has categorically stated that it has handed over the Project to Mr. Raj Kumar, Director of M/s. Rudra Buildwell Constructions Pvt. Ltd. The claim under Section 9 for the period from January 2019 to May 2021, when no work was going on in February 2019, when inspection was conducted. It is difficult to believe that the Operational Creditor had supplied the materials and further when on 26.06.2020 the Project was handed over to the Appellant, there was no occasion to supply any materials to Corporate Debtor after the said period. In the email dated 04.08.2019, which was sent by the Corporate Debtor to the

Homebuyers, which also does not indicate that any work was done on the Project by the Corporate Debtor, so as to be able to utilize the materials supplied by the Operational Creditor during the relevant period. Rather, it was categorically stated that it has handed over the Project to Shri Raj Kumar, Director of M/s. Rudra Buildwell Constructions Pvt. Ltd., who plans to construct the towers. The materials on record clearly prove that no work was undertaken by the Corporate Debtor from January 2019 to 31st May, 2021, which is the relevant period, during which the Operational Creditor claims to have supplied the materials and services. The entire case of the Operational Creditor to supply materials, goods and services appears to be false and concocted only for the purpose of filing Section 9 Application.

We thus are satisfied that present is a case where penalty is liable to be imposed on the Operational Creditor under Section 65 of the Code.

14. We may also notice now the submission of learned Counsel for the Appellant with regard to bar of Section 10A. It is relevant to notice that Section 9 Application was filed earlier by the same Operational Creditor being IB No.461(ND)2021, which was dismissed as withdrawn by order dated 29.11.2021, which is to the following effect:

*“Counsel for the Operational Creditor is present.
However, there is no representation on behalf of the*

Corporate Debtor. Counsel for the Operational Creditor submits that in view of the default in the present case being on 31.03.2020, he wants to withdraw the present Petition as the same is hit by Section 10A of the IBC 2016. Permission as sought for is granted and the Petition is dismissed as withdrawn.”

15. After one week of the aforesaid withdrawal order, notice under Section 8 was issued on 06.12.2021 by the Operational Creditor to the Corporate Debtor. In the Notice, which is brought at page 291, it is mentioned that “*date of default is 31.03.2020*”. Section 9 Application filed was dated 24.12.2021, in Part-IV of which, following has been mentioned at Sl. No.2:

2	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	Rs.5,39,60,674/- (Rupees Five Crore Thirty Nine Lakh Sixty thousand Sixty Hundred Seventy four only) Date of default is 31.03.2020
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16. When Application under Section 9 mentions date of default 31.03.2020 and due to which date of default, the earlier Application was dismissed as withdrawn by the Operational Creditor, what was the reason for filing another Section 9 Application mentioning same date of default. The Adjudicating Authority considered the submission regarding bar of Section 10A and has given following reason for rejecting the submission in paragraphs 7 and 8, which is to the following effect:

“7. As per Form V, Part IV, the Corporate Debtor is liable to pay an outstanding sum of

Rs.5,39,60,674/- including interest 18% p.a. The date of default is 31.03.2020 as per Part IV. This Adjudicating Authority vide order dated 12.01.2022 sought clarification as to whether the present case is not hit by Section 10A of the IBC, 2016 and granted 2 weeks' time to the petitioner to file additional affidavit. The Petitioner filed an additional affidavit in compliance with the order dated 12.01.2022 and the relevant portion of the said affidavit is as follows:

“5. That respondent failed to make the payment of outstanding dues to the applicant. The respondent however responded vide letter dated 03.06.2021, wherein he acknowledged the outstanding debt and further stated its inability to repay the same in view of financial stress that respondent has been undergoing. A copy of letter dated 03.06.2021 received from the respondent is attached herewith as Annexure B.

6. That date of default is 03.06.2021 i.e. the date on which the respondent explicitly expressed its inability to pay its outstanding dues on account of financial stress.

7. That pursuant to an inadvertent clerical error, the date of default mentioned as 31.03.2020 at Part IV of the application against “AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED at page no.17 be read as 03.06.2021.”

8. *We have perused the additional affidavit filed in compliance of order dated 12.01.2022 and we are convinced that the date of default in the present petition will be considered as 03.06.2021 instead of 31.03.2020. Hence, the present petition is not hit by Section 10A of IBC, 2016 and is maintainable.”*

17. The reason given by Adjudicating Authority for rejecting argument of Section 10A was based on alleged acknowledgement letter dated 03.06.2021 received from the Corporate Debtor. When the date of default given by Operational Creditor in Section 9 Application is 31.03.2020, the mere fact that acknowledgement has been given by Corporate Debtor on 03.06.2021 accepting the debt, shall not change the date of default. We, thus, do not agree with the reasons given by the Adjudicating Authority that since acknowledgement is 03.06.2021, the date of default will become 03.06.2021. The date of default and acknowledgement are two different events and date of default is not dependent on acknowledgement of debt. Hence, the Application filed under Section 9 was also liable to be rejected being hit by Section 10A, especially when on the same ground of date of default, i.e., 31.03.2020 earlier Application filed under Section 9 was dismissed as withdrawn one week before giving fresh Section 8 Notice. In Section 9 Application, which was filed by the Operational Creditor on 24.12.2021, there was not even mention of earlier proceedings initiated by Operational Creditor being IB-461(ND)/2021. As noted above, on 12.01.2022, the Adjudicating Authority itself formed an opinion that it has *prima facie* satisfied that Application is barred by Section 10A and

thereafter time was granted by the Adjudicating Authority to file additional affidavit. The additional affidavit gives only explanation of letter by the Corporate Debtor acknowledging the debt dated 03.06.2021. The letter dated 03.06.2021 was also before Adjudicating Authority, when order dated 29.11.2021 was passed dismissing the earlier Application, which was dismissed as withdrawn.

18. Now we come to Company Appeal (AT) (Insolvency) No.905 of 2022 by which, order dated 25.07.2022 has been challenged. Order dated 25.07.2022 is an order in consequence to initiation of CIRP by order dated 18.04.2022. We having come to the conclusion that initiation of CIRP by the Operational Creditor was done fraudulently with the purpose other than insolvency resolution, the initiation of proceeding by Operational Creditor deserves to be set aside with imposition of penalty under Section 65. The initiation of CIRP itself being vitiated in law, all subsequent orders passed in the proceedings have to be automatically set aside. We, thus, do not find any necessity to consider additional submission made by learned Counsel for the Appellant challenging order dated 25.07.2022.

19. The submission made by learned Counsel appearing for SLAB Home Buyer's Welfare Association are submission, which has been advanced to support order dated 25.07.2022 passed by Adjudicating Authority. We having found the very initiation of the CIRP vitiated in law, the order dated 25.07.2022 becomes unsustainable and cannot be supported by any of the submission made by learned Counsel for SLAB Home Buyer's Welfare Association.

20. In result, both Appeal(s) are allowed. The order dated 18.04.2022 is set aside and Company Petition No. IB-11/ND/2022 is dismissed as having been filed malifide for purposes other than resolution of insolvency of the Corporate Debtor.

21. A penalty of Rs.25,00,000/- (Rupees twenty-five lakhs) is imposed on Respondent No.2 - M/s. Rudra Buildwell Constructions Pvt. Ltd. through its owner Shri Raj Kumar to be paid within a period of one month by Bank Draft drawn in the name of "Pay and Accounts Officer, Ministry of Corporate Affairs". Consequently, the order dated 25.07.2022 is set aside.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

4th November, 2022

Ashwani