IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II
Company Petition (IB) No. 2040/ND/2019

In the matter of :

India Bulls Distributions Services Ltd
M-62 & 63, First Floor,
Connaught Place
New Delhi 110 084

............Operational Creditor

VERSUS

Apex Dream Homes Pvt. Ltd
S-672, School Block, Shakarpur,
Delhi 110 092

.............Corporate Debtor

SECTION: 9 of IBC, 2016

ORDER DELIVERED ON: 1/12/2021

CORAM :

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)
Sh. L.N. Gupta, Hon'ble Member (Technical)

PRESENT: -

Mr. Shailender Kumar, Adv. for Operational Creditor
Mr. Mrinal Harsh Vardhan Adv. for Corporate Debtor

ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL

The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule,2016 by the Applicant/ operational creditor, i.e. "**India Bulls Distributions Services Ltd** through its authorized representative, **Mr. Narender Kumar"** for initiation of Corporate Insolvency Resolution Process against the Respondent/

Corporate Debtor Company **"Apex Dream Homes Pvt. Ltd. having its registered office at S-672, School Block, Shakarpur, Delhi 110 092".**

2. The Applicant is *inter alia* engaged in the business of various kind of services

3. It is contended by the petitioner that the corporate debtor is a private limited company incorporated under the Companies Act, 1956. It is further contended that the corporate debtor vide agreement dated 20.02.2017, appointed the applicant as marketing representative. It is further contended that as per the clause 6 of the agreement dated 20.02.2017, the corporate debtor has agreed for the payment of marketing fee/brokerage to operational creditor/ILPL.

4. It is further contended that the operational creditor has sold certain flats/units in the project "Apex Athena" and an amount of Rs. 72,23,358/- alongwith interest @18 per cent per annum is due and payable since 26.03.2018.

5. It is further contended that the Operational Creditor has raised the invoices and made repeated requests for the payment of the said amount. It is further contended that when the Corporate Debtor has failed to pay the said amount then the Applicant had sent a demand notice under Section 8 of the IBC, 2016, which was duly served upon the registered office of the Corporate Debtor. The demand notice and the tracking report of the notice served is annexed as Annexure-A at pages 153-156.

6. It is further contended that the CD has not raised any dispute or replied to the demand notice then the present application has been filed for initiation of CIRP against the Corporate Debtor and the petition is within time.

7. The CD after receipt of notice has appeared and filed the reply.

8. It is contended by the Corporate Debtor that the present petition is not maintainable as there is a dispute between the parties.

9. The Corporate Debtor in para 3 of the reply has referred to the terms and conditions of the agreement. A scanned of the relevant para of the agreement is reproduced below:-

It is important to mention that amongst the terms and conditions as agreed between the parties the Applicant and the Respondent specifically agreed on the following terms:

"5. The Developer shall fix the rate at which the Unit(s) is/are to be sold in the Project. The Developer has fixed the "Cost Price" and the "Basic Selling Price" at the time of signing of this Agreement as specified in ***Annexure-A****. It is also agreed between the parties that Consultant shall also be entitled to advise the Developer to increase the Basic Selling Price. The consultant shall be at liberty to procure bookings at a price lower than the prevailing basic selling price subject to prior approval of Developer however, the Developer shall not be entitled to sell any Unit(s) in the project below the prevailing basic selling price and Developer shall give such confirmation from email id simranjeet@live.com and/or ceo@apexindia.in. The identified customer(s) who book the Unit(s) in the Project shall make payment as per the Payment Plan is/are annexed hereto as* ***Annexure-B.***

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 commission/brokerage in the event of such customer(s) bookings the Unit(s) which is specified in Annexure-C, being the difference between the Cost Price and the Basic Selling Price of each Unit booked for a customer by the Consultant in the Project (**"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*

3.

service tax on the aforesaid Brokerage shall be levied separately & the Brokerage shall be subject to TDS, as applicable from time to time.

*7. The Consultant shall endeavor to offer to book one hundred ten (110) Unit(s) in the Project and more specifically detailed in **Annexure-E ("Inventory")**, within a period of six (6) months from the date of execution of this Agreement. It is further undertaken by the Developer that it shall not sell any Unit(s) in the Project till the* *aforesaid period from the date of execution of this Agreement, either directly or indirectly, except though the Consultant. It is agreed by the Consultant that it shall endeavor to identify such customers who book 25 units in quarter, however in the event the Consultant is not able to identify such customers who do not book 20 Units in a quarter then the Developer will be entitle to terminate the agreement by giving 7 days' notice to the Consultant.*

8. The Consultant shall be at liberty to swap the Inventory detailed in Annexure-E with other Unit(s) available in the different towers/wings/buildings in the Project; subject to availability and prior intimation to the Developer. It is specifically agreed between the parties that the Developer shall confirm the swapping of the Unit(s) as stated above, by sending a confirmation email from the designated email address simranjeet@live.com and/or ceo@apexindia.in. The parties agree that pursuant to receipt of the aforesaid confirmation by the consultant from the Developer, Annexure-E shall be deemed to have been amended accordingly.

9. The Developer specifically agrees that as a security towards the *payment of the Brokerage payable to the Consultant, the Developer shall initially furnish/provide five (5) undated cheque(s) not above INR 10,00,000/- each as security towards Brokerage earned by the*

Scanne

4.

Consultant. It is specifically agreed between the parties that the Consultant shall primality raise an invoice on the Developer in respect of Brokerage due and payable to the Consultant on the booking(s) procured by it and the Developer shall within 15 days of receipt of the invoice from the Consultant shall make payment of the amount mentioned in the aforesaid invoice to the Consultant. The Developer unequivocally agrees and undertakes that in the event the Developer failure to make payment of the amount as mentioned above i.e. within 15 days of receipt of the invoice from the Consultant then the Consultant shall be entitled to get the aforesaid cheque(s) en-cashed for not more than to the amount due and payable by the developer. The

Developer unequivocally agrees, assures, represents and undertakes that it shall keep the said sufficient balance in the bank account to ensure encashment of the said cheque towards discharge of its obligation of payment of Brokerage to the Consultant.

10. It is contended that in terms of clause 7 of the agreement, the applicant was under obligation to book 25 units in a quarter, however, the applicant in breach of the agreement did not endeavour to book 25 units of quarters and failed to comply with the terms and conditions of the agreement in its spirit.

11. It is further contended that invoices annexed alongwith the application are inconsistent to the details mentioned in Annexure-3. It is further contended that in terms of clause 8 of the agreement, the Applicant was to switch the inventory but same was subject to availability and prior intimation to the respondent.

12. It is further contended that as a security towards the payment of brokerage, the respondent had issued 5 undated cheques of Rs. 10,00,000/-.

13. It is further contended that in terms of the agreement, the brokerage shall become due and payable to the applicant by the respondent as soon as the applicant procures a booking and the payment schedule to the respondent is given in Annexure-D of the agreement. The scanned copy of Annexure C and D are reproduced below:-

ANNEXURE-C

Commission payable to Consultant

The Consultant shall be entitled to Brokerage/Commission which shall be the difference between the Cost Price and the Basic Selling Price of each Unit booked for a customer by the Consultant in the Project exclusive of the Service Tax payable under the law prevailing at that time. The Consultant shall derive the sole benefit of an upward revision in the Basic Selling Price.

ANNEXURE D

Payout Schedule

Sale Consideration* received by Developer from the Buyer	Pay-out of Brokerage to the Consultant
On receipt of 10% or part thereof of the sale consideration from the Buyer	25% or part thereof
On receipt of next 10 % or part thereof of the sale consideration from the Buyer	25% or part thereof
On receipt of next 10 % or part thereof of the sale consideration from the Buyer	25% or part thereof
On receipt of next 10 % or part thereof of the sale consideration from the Buyer	Balance 25% or part thereof

*Sale Consideration means and includes: BSP + PLC

For Indiabulls Distribution Services Ltd.

14. It is further contended that no demand notice was ever served by the applicant; therefore, the applicant has failed to comply with the mandatory provision of Section 8 of the IBC, 2016.

15. It is further contended that since there is a dispute with regard to the claim raised by the Operational Creditor, therefore, in view of Mobilox Innovations (P) Ltd. Vs. Kirusa Software (P) Ltd. (2018) 1 SCC 353, once the notice of dispute has been received the petition filed under Section 9 is not maintainable.

16. The applicant has filed a rejoinder to the reply filed by the Corporate Debtor and it is contended that the tracking report enclosed with the application shows that the notice under Section 8 of IBC was duly delivered upon the respondent.

17. It is further contended that the respondent in its reply has failed to demonstrate specific dispute and there is no document to prove that this dispute/disputes was/were raised prior to the issuance of the demand notice.

18. It is further contended that in terms of clause 9 of the agreement, the Corporate Debtor was under an obligation to make payment of the amount mentioned in the invoice raised within 15 days from the receipt of the invoice by the Operational Creditor. It is further contended that the Corporate Debtor has not raised any dispute on the invoices raised by the Operational Creditor at any time, prior to the instant proceedings having been initiated by the Operational Creditor despite the fact that Operational Creditor had duly issued the demand notice under Section 8 of the IBC, 2016. It is further contended that the decision upon which the respondent has placed reliance (referred to supra) is not applicable because prior to the initiation of instant proceedings, no dispute was raised.

19. We have heard the Ld. Counsels appearing for the parties. Ld. Counsel appearing for the parties raised all the facts which they have stated in their petition, reply and rejoinder. Therefore, it is needless to repeat the same.

20. On perusal of the averments made in the petition, reply and rejoinder, we observe that it is an admitted fact that both the parties had entered into an agreement dated 20.02.2017 and the applicant/OC was appointed by the Corporate Debtor as Marketing Representative. We also observe that in pursuance of that agreement, the applicant had sold certain flats in the project "Apex Athena" and raised the invoices. But the amount of Rs. 72,23,353/- has not been paid by the Corporate Debtor.

21. The contention of the respondent is that there is a dispute in respect of terms and conditions of the agreement entered between the parties. We notice that though the respondent in its reply has raised some dispute but failed to show any document or correspondence that prior to issuance of demand notice or institution of this proceeding, the respondent had raised the dispute. We further notice that the respondent had also contended that no demand notice was ever delivered to the Corporate Debtor.

22. At this juncture, we would like to refer to the tracking report placed at page 164 of the paper book, which shows that the demand notice issued under Section 8 IBC, 2016 was duly delivered to the registered office of the Corporate Debtor. A scanned copy of the postal receipt and tracking report is reproduced below:-

APEX DREAM HOMES P. LTD.

भारतीय डाक

ED285970465IN IVR:6966ED285970465

SP DISTRICT COURTS SO NORTH DELHI (110054)

India Post

Counter No:4,17/07/2019,12:35

To:M/S APEX DREM,SHAKARPUR

PIN:110092, Laxmi Nagar SO East Delhi

From:SUMITKAUSHAL,CH NO 228 W W TH

Wt:454gms

Amt:0.00PS:45.00Tax:5.40

(Track on www.indiapost.gov.in)

(Dial 1800 266 6868)

भारतीय डाक

ED285970417IN IVR:6966ED28597041[illegible]

SP DISTRICT COURTS SO NORTH DELHI (110054)

India Post

Counter No:4,17/07/2019,12:35

To:M/S APEX DREA,GHAZIABAD

PIN:201010, IESahibabad SO

From:SUMITKAUSHAL,CH NO 228 W W TH

Wt:454gms

Amt:0.00PS:45.00Tax:5.40

(Track on www.indiapost.gov.in)

(Dial 1800 266 6868)

TRUE COPY

Indiabulls Distribution Services Limited

Authorized Representative

* Consignment Number

ED285926053IN

Track More

ooked At	Booked On	Destination Pincode	Tariff	Article Type	Delivery Location	Delivered On
District Courts SO North Delhi	17/07/2019 12:51:48	110092	45.00	Speed Post	Laxmi Nagar SO East Delhi	19/07/2019 18:49:57

Event Details For : ED285926053IN

Current Status : Item Delivery Confirmed

Date	Time	Office	Event
19/07/2019	18:49:57	Laxmi Nagar SO East Delhi	Item Delivery Confirmed
19/07/2019	11:25:21	Laxmi Nagar SO East Delhi	Out for Delivery
19/07/2019	09:11:41	Laxmi Nagar SO East Delhi	Item Received
17/07/2019	18:12:02	District Courts SO North Delhi	Item Dispatched
17/07/2019	17:09:27	District Courts SO North Delhi	Item Bagged
17/07/2019	12:51:48	District Courts SO North Delhi	Item Booked

More Information >>

Booked At	Booked On	Destination Pincode	Tariff	Article Type	Delivered At	Delivered On

Event Details For : ED285926053IN

Current Status :

Date	Time	Office	Event
18/07/2019	02:10:26	Delhi NSH	Item Received
18/07/2019	00:50:51	Delhi NSH	Item Received

23. On perusal of the documents, it is seen that on 17.07.2019, the demand notice was sent to the registered address having Pin Code 110 092 of the CD and the said demand notice was delivered on 17.07.2019. Therefore, we find, no force in the contention raised on behalf of the Ld. counsel appearing for the Corporate Debtor that no demand notice was ever delivered to the CD.

24. At this juncture, we would like to refer to the affidavit filed under Section 9 (3) (b) of the IBC which is at page 26 of the application. A scanned copy of the same is reproduced below:

26

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

I.B. /2019

In the matter of :

Indiabulls Distribution Services Limited ....Operational Creditor/Applicant

Versus

Apex dream Homes Private Limited ......Corporate Debtor

AFFIDAVIT

Affidavit u/s 9(3)(b) of Insolvency and Bankruptcy Code, 2016, of Narender Kumar S/o Ptamber lal aged about 52 years Authorized Officer Indiabulls Investment Advisors Limited having its office at M 62 & 63, First floor, Connaught place, New Delhi-110001. I, above named deponent do hereby solemnly affirm and declare as under:

1. That I am Authorized officer and well conversant with the facts and circumstances of the case and as such am fully competent to swear this affidavit.

2. That I have gone through the contents of the petition and hereby state and verify that the contents of the same are true and correct to the knowledge of the applicant and there is no reply to notice given by the Corporate Debtor relating to a dispute of the unpaid operational debt nor any payment was received. All the contents of the petition are true and correct to the best of my knowledge and have been drafted by my counsel under my instructions.

Notry Register No.

DEPONENT

Verification:

Verify at New Delhi on this day of 14 AUG 2019 August 2019, that the contents of the above affidavit are true and correct and nothing material has been concealed or suppressed therefrom and no part of it is false.

NOTARY PUBLIC
RAJESH NAYYAR
REGD. No. 8412
DELHI
GOVT. OF INDIA

DEPONENT

ATTESTED
Notary Public Delhi
14 AUG 2019

25. On perusal of the affidavit filed under Section 9 (3) (b) of the IBC, 2016, we observe that the Corporate Debtor had not sent any reply or raised any dispute as required under Section 8 (2) of IBC. Rather, the Corporate Debtor by filing the reply submits that the Corporate Debtor has never

received the demand notice, which is contrary to the tracking report annexed with the application. Hence, we are unable to accept the contention of the Corporate Debtor that no notice as required under Section 8 of IBC was ever delivered before filing this application.

26. So far as the contention of the Corporate Debtor that there are disputes between the parties in respect of the terms & conditions of the agreement is concerned, we notice that in the course of hearing, no document was produced by the Corporate Debtor or even enclosed alongwith the reply to show that any dispute was raised prior to delivery of the demand notice. Rather for the first time, when the Corporate Debtor has appeared in response to the summons then in the reply, the Corporate Debtor has raised some disputes and also referred to the decision of Hon'ble Supreme Court in the Mobilox. In our considered view, since the Corporate Debtor has failed to produce any document to show that the Corporate Debtor had ever raised any dispute prior to issuance of demand notice, hence, the decision upon which the Corporate Debtor has placed reliance will not help the Corporate Debtor rather it will help the petitioner.

27. In order to admit an application under Section 9, the Adjudicating Authority is required to consider the conditions referred to in **Section 9 (5) (i) & (ii)** and the relevant provision of Section 9 (5) is reproduced below:

> ***Section 9: Application for initiation of corporate insolvency resolution process by operational creditor***
>
> ***(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—***
>
> *(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*
> *(a) the application made under sub-section (2) is complete;*
> *(b) there is no 3[payment] of the unpaid operational debt;*
> *(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending4 against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been 3[payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending4 against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

28. When we consider the prayer of the applicant in terms of Section 9 (5), then it is seen that the application filed by the applicant is complete, there is no payment of unpaid operational debt or the invoices, notice for payment to the Corporate Debtor has been duly delivered by the Operational Creditor and no notice of dispute has been received by the Operational Creditor or there is no record of dispute. So far the 5th condition is concerned; the applicant has not proposed the name of the IRP rather he has prayed for appointment the Insolvency Professional. Therefore, we are of the considered

view the applicant has fulfilled all the criteria as required under Section 9 (5) (i) of the IBC. Hence, we have no option but to admit the application.

29. **Accordingly, we hereby ADMIT the petition**. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing of by the corporate debt or any of its assets or any legal right or beneficial interest therein;*
>
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
>
> *(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
>
> *Further:*
>
> *(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*
>
> *(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

30. The Operational Creditor has not proposed the name of any IRP. Accordingly, we appoint Mr. Kamlesh Kumar Gupta, an Insolvency Professional, Registration No. IBBI/IPA-001/IP-P01316/2018-2019/12071 email id: abomcx@yahoo.com, New Delhi, duly empanelled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

31. The Operational Creditor is directed to deposit a sum of Rs. Two lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

32. Copies of the order be sent to both the parties as well as to the IRP.

-Sd-
L.N. Gupta
(Member Technical)

-Sd-
Abni Ranjan Kumar Sinha
(Member Judicial)