

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1268 of 2022

[Arising out of the order dated 22.08.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi in Company Petition No. (IB)-1498(PB)/2019]

IN THE MATTER OF:

**Clicbrics Technologies Pvt. Ltd.
(Formerly known as Redbrics Ites India Pvt. Ltd.
Unit No.321-322, 3rd Floor,
JMD Megapolis, Sector-48,
Sohna Road, Gurgaon, HR-122018**

...Appellant

Versus

**Ansal Housing Ltd.
(Formerly known as Ansal Housing & Construction Limited)
606, 6th Floor, Indra Prakash 1,
Barakhamba Road, New Delhi – 110001**

...Respondent

Present:

For Appellant: Mr. Vinod Kr. Chaurasia, Advocate

For Respondent: Mr. Vikas Tiwari, Mr. Kumar Deepraj, Advocates, Mr. Anchit, AR.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('IBC' in short) by the Appellant arises out of the order dated 22.08.2022 (hereinafter referred as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Special Bench, New Delhi) in CP(IB) No.1498(PB)/2019. By the impugned order, the Adjudicating Authority dismissed Company Appeal (AT)(Insolvency) No. 1268 of 2022

the application filed by Operational Creditor (the present Appellant) under Section 9 of the IBC seeking initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) against Corporate Debtor-M/s. Ansal Housing Limited (the present Respondent). Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

2. The brief facts of the case necessary to notice for deciding the appeal are as follows: -

- The Respondent/Corporate Debtor was in the business of real estate selling plots and apartments. For this purpose, it entered into a Memorandum of Understanding (**'MoU'** in short), with the Appellant/Operational Creditor engaging them as the exclusive real estate agent for brokering the sale/purchase of units of the residential project - Ansal Town, Meerut for the period 10.07.2018 to 31.12.2018.
- The Operational Creditor raised invoices from time to time for real estate brokering commission. However, the Corporate Debtor stopped making payments for invoices raised by the Operational Creditor w.e.f. 10.10.2018.
- The Operational Creditor sent a Demand Notice under Section 8 of IBC on 27.03.2019 claiming an amount of Rs.14,70,943.90 only.
- The Corporate Debtor sent a reply to the Demand Notice on 09.04.2019 stating that the demands/claims made by the Operational Creditor are illegal and unreasonable since there is no operational debt and that the demand notice was therefore not maintainable.
- On non-receipt of any further payment from the Corporate Debtor post-service of the demand notice, a Section 9 IBC application was filed before the Adjudicating Authority by the Operational Creditor for initiation of CIRP

against the Corporate Debtor. The Corporate Debtor filed its reply to the Section 9 application on 29.08.2019.

- The Adjudicating Authority held in the impugned order that the Operational Creditor had approached the Adjudicating Authority with a mala-fide intention and not for genuine resolution having shown unwillingness to accept the amounts which the Corporate Debtor had endeavoured to pay towards the outstanding dues. The Adjudicating Authority therefore dismissed the Section 9 application filed by the Appellant
- Aggrieved by the impugned order, the present appeal has been preferred by the Operational Creditor.

3. Challenging the impugned order, the Learned Counsel for the Appellant has vehemently contended that the outstanding brokering commission due from the Corporate Debtor is Rs. 14,70,943.90 since 10.10.2018 and hence a demand notice was served for this unpaid amount. It was further stated that in their reply affidavit filed before the Adjudicating Authority by the Respondent, a liability of Rs.4,64,852.80 and another amount of Rs.6,35,978.98 aggregating to Rs.11,00,831.78 as operational debt due and payable had been acknowledged by them. This amount being above the prescribed minimum threshold limit for default as laid down under the Section 4 of IBC, it was a fit case for admission of insolvency petition.

4. In support of their contention that the operational debt had become due and payable, it is further submitted that the Corporate Debtor in their application filed before the Adjudicating Authority in CA-2774(PB)/2019 had made a submission to take on record a cheque of Rs.4,32,668.74 drawn by them in favour

of the Operational Creditor towards outstanding payment. It is further submitted by the Learned Counsel for Appellant that the Operational Creditor had filed an IA No.4187/2021 in CP No. (IB)-1498(PB)/2019 on 01.02.2022 and the Corporate Debtor had submitted during the arguments in the said matter that they had issued another cheque amounting Rs. 8,40,073/-. The Learned Counsel for the Appellant strongly contended that since the Corporate Debtor have themselves admitted that two separate cheques aggregating Rs. 12,72,741.74 was drawn by them in favour of the Operational Creditor towards settlement of outstanding dues clearly substantiates admission of debt. Further submitting that the Appellant is a registered MSME, the Appellant has claimed entitlement of interest @ 13% per annum and that the total outstanding amount including interest due is Rs.27,70,574/- only as on 16.09.2022.

5. The Appellant further submitted that they had changed their name from Redbricks ITES India Pvt. Ltd. to Clicbricks Technologies Pvt. Ltd. w.e.f. 12.10.2021 and that the certificate of incorporation was issue by the Registrar of Companies. The registered office had also changed from Delhi to Gurgaon, Haryana and the MCA master data has also been updated accordingly.

6. Learned Counsel for the Appellant also adverted attention to the judgment of the Hon'ble Supreme Court in ***Vidarbha Industries Power Limited v. Axis Bank Limited (2022) 8 SCC 352*** wherein it has been held that if dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same and if it does not, CIRP must be commenced. It has therefore been submitted that the Adjudicating Authority committed an error in dismissing the Section 9 application without even making a preliminary enquiry into the documents filed

before it to establish that services had been offered as a real estate agent by the Appellant and the Corporate Debtor had not only admitted their debt liability but also admitted that they actually offered to make payments for the same without raising any disputes. It was emphatically asserted that there is no evidence of any dispute raised before the issue of demand notice.

7. The Learned Counsel for the Respondent refuting the submissions made by the Appellant stated that the Corporate Debtor in the reply to the demand notice dated 27.03.2019 had categorically informed the Operational Creditor that they were not entitled to the brokerage as demanded in the bills raised for multiple reasons. In some cases, the allottees had cancelled their bookings and sought refunds. Further in some cases, brokerage has been demanded even when the Operational Creditor was not entitled to any brokerage. It was pointed out that the Appellant was entitled to 100% brokerage only when the allottee had paid 35% of the sale value. In many cases, bills were raised prematurely since the requisite percentage of sale value had not been received from the allottees. It has also been pointed out that the Operational Creditor had raised a demand of full commission from the Corporate Debtor though it had given discounts to the allottees which was adjustable against brokerage commission. Further it was articulated in the reply notice that the MoU had already expired on 31.12.2018 whereas the invoices raised were for bookings made subsequent to 31.12.2018. It was submitted that mere issue of invoices did not make the demand payable to the Operational Creditor. It was therefore contended that the demand notice under Section 8 of IBC was not maintainable and the demands raised therein by the Operational Creditor are illegitimate and had already been disputed.

8. Further submitting that attempts were made to send two cheques to the Operational Creditor but acceptance of first cheque was refused by the Operational Creditor while second set of cheques got returned by the Postal Department with the remarks that the Operational Creditor had left the address. It has been contended therefore that the Corporate Debtor was ready and willing to pay the legitimate amount to the Operational Creditor but the Operational Creditor was not ready to accept the same as it wanted to extort money and intimidate the Corporate Debtor. The Respondent has therefore claimed that the Appellant by its conduct and admission has made the entire process of IBC as a substitute to debt recovery which is against the spirit of IBC. Adding further that the Appellant has been coercing the Corporate Debtor to succumb to its demand, even though it is not in default, it has been contended by the Learned Counsel for the Respondent that the reason for filing the Section 8 application by the Operational Creditor was for an ulterior motive other than the resolution of insolvency. Since the provisions of IBC have been fraudulently invoked with malicious intent, it was stated that the Section 9 application filed by the Operational Creditor has been correctly dismissed by the Adjudicating Authority.

9. We have duly considered the arguments and submissions advanced by the Learned Counsel for the parties and perused the records carefully.

10. The only point for our consideration is whether payment of brokerage commission had been triggered in the present case giving rise to an operational debt and, if so, whether a default has been committed in respect of payment of such operational debt and whether the debt was mired in disputes prior to issue of demand notice. This examination would be in line with the well settled test

that has been laid down in Para 34 of **Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353** as to how the Adjudicating Authority has to examine an Application under Section 9. Para 34 is to the effect:

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

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

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

11. Examining the facts of the present case, we find that it is an undisputed fact that an MoU dated 09.07.2018 appointing the Operational Creditor as exclusive real estate agent for brokering the sale/purchase of units at the Ansal Town, Meerut residential project from 10.07.2018 till 31.12.2018 was entered into

by the Corporate Debtor as placed on record at pages 69-70 of Appeal Paper Book ('APB' in short). We also notice that the Adjudicating Authority in the impugned order has taken note of the submission made by the Corporate Debtor acknowledging services having been provided by the Operational Creditor as exclusive real estate agent for which service the Operational Creditor raised certain invoices. It has been also noted at para 4 (ix) of the impugned order by the Adjudicating Authority that the Corporate Debtor had admitted that an amount of Rs.4,32,668.74 was due and payable to the Operational Creditor as on the date of filing their reply to the Section 9 application.

12. More significantly, the Corporate Debtor has also admitted in para 4 of their application under Rule 11 of NCLT Rules, 2016 filed before the Adjudicating Authority in CA-2774(PB)/2019 that the Operational Creditor was entitled for receiving payment of Rs.4,32,668.74 only and that for making payment of the said amount, a cheque dated 14.11.2019 was despatched to the Operational Creditor. The same is placed on record at page 213 of APB and the relevant excerpts are as extracted below:-

"That as per the terms, against all the bookings for which the Applicant raised the invoices and are annexed with the petition, the Applicant was entitled for payment of an amount of Rs.4,32,668.74/- (Rupees Four Lacs Thirty Two Thousand Six Hundred Sixty Eight and Seventy Four paisa only) which was duly paid by the Respondent to the Applicant vide cheque bearing number 065006 dated 14.11.2019 drawn on Punjab National Bank, New Rajinder Nagar, New delhi – 110 060 in favour of the Applicant i.e. 'Redbricks ITeS India Pvt. Ltd.'"

(Emphasis supplied)

13. We also note that the Adjudicating Authority has taken on record in the impugned order at para 4(xi) that the Corporate Debtor has further admitted that on receiving further sale proceeds from the real estate allottees, the Operational Creditor had become entitled for payment of Rs.8,40,073/-. The Corporate Debtor has admitted before the Adjudicating Authority that he had attempted to send both the cheque amounts to both the registered office as well as the Corporate Office of the Operational Creditor but both the cheques were returned undelivered with the postal remarks 'Left'. This acknowledgement of liability of Rs 4,32,668.74 and Rs.8,40,073/- is further corroborated by the written submissions filed by the Corporate Debtor on 09.05.2022 before the Adjudicating Authority as appearing at page 246 of the APB which is to the effect:-

"7. As on date of filing of the Reply, when allottees made certain payment to the Respondent, which made the Applicant also entitled for its commission, the Respondent immediately handed over a cheque of Rs.4,32,668.74, which was due & payable on the said date, however the applicant, whose intention is only to coerce the Respondent, denied taking the same. The same is also recorded in the Order dated 11.12.2019.

8. In Sept. 2021, when the Applicant became entitled for Rs.8,40,073, after the Respondent getting received sale proceeds from the allottees, the Respondent again attempted to send the cheque of Rs.8,40,073 to the Applicant's registered office as well as corporate office, but both the cheques were returned with postal remarks 'Left'. It was then, when the Respondent inquired from the MCA website, it was found that there is no company in existence in the name of the Applicant."

(Emphasis supplied)

14. We therefore come to the inescapable conclusion that there is a clear admittance of operational debt which was due and payable on the part of the Corporate Debtor and that the operational debt was beyond the threshold limit of Rs.1 lakh. Further, it is pertinent to add here that the Corporate Debtor has admitted that not only was the Operational Creditor entitled to receive payment, but the payment claimed was made in terms of the MoU and invoices were annexed with the claim. It is also unequivocally clear that even on the date of filing of reply to the Section 9 application by the Corporate Debtor, by their own admission, the operational debt which had become due and payable remained unpaid. Therefore the logical corollary is that default had been committed qua the operational debt owed to the Operational Creditor.

15. The Learned Counsel for the Respondent stoutly contended that in the reply to the demand notice, it was pointed out that brokerage has been demanded even when the Operational Creditor was not entitled to any brokerage. It was asserted that getting payment from allottees was a necessary pre-requisite for becoming entitled to brokerage commission. In several cases, bills were raised prematurely though the requisite percentage of sale value had not been received from the allottees. Hence, it was argued that this is a case of pre-mature initiation of IBC proceedings and reliance has been placed on the judgment of Hon'ble Supreme Court in the matter of ***K. Kishan vs. Vijay Nirman Company Pvt. Ltd. (2018) 17 SCC 662*** wherein the use of IBC either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures was deprecated.

16. It is, however, the case of the Operational Creditor that the brokerage calculations were made on the basis of information received from the Corporate Debtor about the proportion of payments having been received by them from the homebuyers and that the same were attached with all invoices. It was also pointed out that no papers evidencing refunds to home-buyers pursuant to the cancellation were attached to the reply to the demand notice except two home booking cancellation letters. It has also been contended by the Appellant that the Corporate Debtor had not shared any information of the cancellation of bookings with them. The Respondent without substantiating whether any such information was shared with the Operational Creditor, has however, contended that the Operational Creditor always had the liberty to seek this information either by visiting the office of the Corporate Debtor or by seeking the information through written communication.

17. Be that as it may, we notice that no material has been placed on record to establish that these invoices were disputed by the Corporate Debtor prior to demand notice. Further, we notice that the Corporate Debtor has not controverted the outstanding liability. Instead they have admitted the outstanding liability before the Adjudicating Authority in their written submissions on the Section 9 application which is already noted at para 13 supra. The contents of the written submission also makes it unambiguously clear that since the Respondent had already received the payment from the allottees, the Operational Creditor was entitled for its commission. That the Corporate Debtor having already admitted their liability is also adequately substantiated from the factum of two cheques drawn in favour of the Operational Creditor. This is sufficient proof in itself that an operational debt was actually in existence and that such debt was not disputed

prior to demand notice and that a default had been committed by the Corporate Debtor. At this stage we must add that the judgment of the Hon'ble Supreme Court in the **Vidarbha case supra** which has been relied upon by the Appellant is squarely applicable in the present case wherein it has been observed:

“79. As observed above, the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same. If it does not, CIRP must be commenced.”

18. We, therefore, find force in the contention of the Appellant that the Adjudicating Authority has committed gross error in ignoring the fact that the Corporate Debtor has admitted its liability to pay the Appellant for services rendered as a real estate agent. There is also substance in the argument that the Corporate Debtor have themselves admitted that the invoices were in terms of the MoU and issued after the Corporate Debtor had confirmed that consideration amount from the allottees had been received. That being so, we are of the considered view, that the claims of operational debt cannot be viewed to be premature and hence the ratio of **K. Kishan supra** is inapplicable given the present set of facts.

19. This now brings us to examine the tenability of the findings as recorded by the Adjudicating Authority wherein the Section 9 petition has been dismissed on the following grounds: -

“It is seen that the Corporate Debtor has already issued two cheques of Rs. 4,32,668.74/ — (Rupees Four Lacs Thirty—Two Thousand Six Hundred Sixty-Eight and Seventy-Four Paise only) and Rs. 8,40,073/- (Rupees Eight Lacs Forty Thousand Seventy-Three only) summing up to an amount of Rs. 12,72,741.74/- (Rupees Twelve Lacs Seventy-Two Thousand Seven Hundred Forty-One and Seventy-Four paise only) in favor of the Operational Creditor. However, the Operational Creditor denied acceptance of the first cheque whereas the second cheque could not be delivered.

Even during the arguments, the Operational Creditor did not indicate any willingness to accept this amount.

It appears that the Operational Creditor has approached this Adjudicating Authority with a malafide intention and not for genuine resolution.”

20. It appears that the Adjudicating Authority has been utterly convinced on the one hand by the purportedly bonafide intention of the Corporate Debtor to make payments to the Operational Creditor and equally convinced of the malafide intention of the Operational Creditor, which by refusing to accept the cheque payment, was being inimical to the cause of genuine resolution.

21. Present is a case where the Adjudicating Authority could not have denied CIRP initiation as the outstanding liability to make payment of Rs.12,72,741.74

has been clearly admitted by the Corporate Debtor. That there has been a default in making the said payment is also evident from the fact that both the cheques were drawn by the Corporate Debtor on a date which was undisputedly subsequent to both the demand notice and reply to the demand notice. In other words, on the date of demand notice there was a clear case of default in payment of operational debt by the Corporate Debtor qua the Operational Creditor. We also reiterate the fact that we do not find any material on record which shows even a whisper of dispute or sliver of protestation having been raised with respect to the operational debt prior to the issue of demand notice. We also do not find any serious endeavor having been made by the Adjudicating Authority either in CA No. 2774(PB)/2019 or in the impugned order to understand the reasons as to why the Operational Creditor had returned the first cheque amounting to Rs.4,32,668.74/- except for taking on record this fact. In any case, the second cheque had admittedly not reached the Operational Creditor as was noted by the Postal Department. The Adjudicating Authority has also not recorded in the impugned order that the Respondent had presented any Demand Draft for the debt due and payable to the Appellant in their presence before the Adjudicating Authority. In such circumstances, putting a question mark by the Adjudicating Authority on the intentions of the Operational Creditor has been largely conjectural and lacks foundation.

22. The Learned Counsel for the Respondent has stated that the instant matter is covered by an order passed by this Tribunal in ***Praveen Kumar Mundra v. CIL Securities Ltd. in Company Appeal (AT) (Insolvency) No.89 of 2019***. In that case, the Respondent was ready with a Demand Draft before this Tribunal of the total claimed amount to offer to the Operational Creditor for acceptance. No such

ready offer of the full claimed amount was made in the present case either before the Adjudicating Authority or this Tribunal thereby making the facts of the case clearly distinguishable. In subscribing to the line of reasoning as propounded by the Corporate Debtor that the Operational Creditor by refusing to receive payment was using the IBC as a tool to coerce and intimidate the Corporate Debtor to succumb to his illegitimate demands, the Adjudicating Authority seems to have dropped the guard of exercise of circumspection. We strongly feel that allowing such facile grounds, based on unfounded surmise, to be used to knock down the admission of Section 9 is impermissible.

23. We also notice that Adjudicating Authority has relied on the judgment of the Hon'ble Apex Court in ***M/s S.S. Engineers v. Hindustan Petroleum Corporation Ltd., 2022 SCC OnLine SC 1385, Civil Appeal No. 4583 of 2022***, in that it is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an Operational Creditor. We are constrained to note that the Adjudicating Authority has hopelessly failed to appreciate the overall tenor and spirit of the principles of law as settled down in the judgment of ***S.S. Engineers supra*** wherein it has been clearly held that if the claim of an Operational Creditor is undisputed and the operational debt remains unpaid, CIRP must commence for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor.

24. To sum up, the operational debt which had admittedly become due and payable having not been disputed prior to issue of demand notice and not been discharged by the Corporate Debtor, this is a fit case for admission of CIRP.

Further seen upon the touchstone of law as laid down in ***Mobilox and S.S. Engineers supra***, the dismissal of the Section 9 petition by the Adjudicating Authority is perverse and illegal and liable to be set aside.

25. With the aforesaid discussion, we are of the considered view that the Adjudicating Authority has erroneously rejected the application under Section 9 of IBC. We therefore set aside the impugned order with the following directions:-

- (i) The Corporate Debtor will release payment of Rs.12,72,741.74 by way of Demand Draft in favour of the Operational Creditor being the admitted and undisputed operational debt.
- (ii) The above payment shall be released within 30 days from the date of uploading of this order failing which the Corporate Debtor would come under the rigours of CIRP on the expiry of said 30 days period.
- (iii) In case, the Operational Creditor refuses to accept the above sum as payment towards operational debt, the Section 9 petition shall become infructuous and deemed to have been dismissed.
- (iv) No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 05.04.2023

PKM