

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

Company Appeal (AT) (Ins.) No. 1336 of 2019

IN THE MATTER OF:

SHREM RESIDENCY PRIVATE LIMITED

Having its Registered Office At:

1101, Viraj Towers, JN of Andheri Kurla Road,

W.E Highway Near Landmark Building,

Andheri (E), Mumbai – 400 069

...Appellant

Versus

SHRAMAN ESTATES PRIVATE LIMITED

Having its Registered Office At:

C-44 South Extension Part – 2,

New Delhi – 110049

...Respondent

Present:

For Appellant: Mr. Anand Chhibbar, Sr. Adv. with Mr. Pulkit Deora, Mr. Ayushmaan Bhutani, Mr. Deep Prabhu, Mr. Manju Nagrath and Aphune Keto, Advocates

For Respondent: Mr. P Nagesh, Sr. Adv. with Mr. Vishesh Issar and Mr. Akshay Sharma, Advocates

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 01.10.2019, passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-II), by which an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the Appellant 'Shrem Residency Private Limited' (Financial Creditor) against the Respondent 'Shraman Estates Private Limited' (Corporate Debtor) for initiation of

Corporate Insolvency Resolution Process (in short 'CIRP') of the Corporate Debtor has been dismissed.

2. As per the case of the Appellant, the Appellant entered into a collaboration agreement dated 31.08.2012 as a developer with M/s GRG Estates Pvt. Ltd. and Shraman Estates Pvt. Ltd. (Owners) to develop agriculture land admeasuring 21 acres at village Jhatikar and village Shikarpur both situated in District Najafgarh, New Delhi. This agreement was followed by an addendum agreement dated 31.12.2012. Both the parties executed a terms sheet dated 02.09.2012 inconsonance with the agreement dated 31.08.2012 and a revised term sheet dated 31.12.2012 concurrent with the addendum to the agreement. According to the Appellant, a sum of Rs. 8 Crores was paid to the Respondent in pursuance of the agreement dated 31.08.2012, as per which the parties had agreed that Rs. 2 Crores shall be treated as a non-refundable deposit, Rs. 2 Crores shall be treated as refundable deposit with interest @ 18% per annum payable monthly and the remaining sum of Rs. 4 Crores shall be treated as loan with interest @ 24% per annum payable monthly. However, by way of the addendum dated 31.12.2012, it was decided to treat the amount of Rs. 8 Crores as a non-refundable deposit of Rs. 1 Crores, refundable deposit of Rs. 1 Crores with interest @ 18% per annum payable monthly and Rs. 6 Crores towards loan with interest @ 24% per annum payable monthly. The Appellant has allegedly paid Rs. 3 Crores vide cheque no. 233452 dated 03.09.2012, Rs. 2 Crores vide cheque no. 233455 dated 03.10.2012 and Rs. 2 Crores vide cheque no. 864177 dated 07.01.2013, a total sum of Rs. 7

Crores out of which Rs. 6 Crores was towards loan and Rs. 1 Crores was refundable deposit. It is also alleged that the said cheques were drawn in the bank account bearing no. 00602560011718 maintained by the Appellant with HDFC Bank, Fort Nanik, Motwani Marg, Mumbai and was duly debited from its account on 04.09.2012, 03.10.2012 and 07.01.2013 and credited to the account of the Respondent. It is further alleged that as per the term sheet, Rs. 6 Crores was advanced as inter corporate deposit (ICD) for a period of 180 days with interest payable @ 24% per annum against security of the post dated cheques, mortgage over the property besides the guarantees. It was also decided to open an escrow account by virtue of escrow agreement which was executed on 04.08.2014.

3. The Appellant filed an application under Section 7 of the Code on 16.05.2019 in the prescribed form 1, in which it is averred that it had advanced a loan of Rs. 6 Crores to be repaid with interest and Rs. 1 Crores as refundable deposit which to be repaid with interest and since the said amount was not paid, therefore, the total amount in default, calculated as on 31.03.2019, in respect of the amount of loan was stated to be due of a sum of Rs. 20,59,45,641/- and Rs. 3,05,27,174/- towards the amount of Rs. 1 Crores which was advanced towards refundable deposit with interest. The date of default for each tranches of loan mentioned as 01.02.2014, 03.04.2014 and 01.02.2014 and the date of default for the refundable deposit as 31.01.2013.

4. The Appellant sent a notice on 05.09.2017 alleging that the Respondent has stopped making payment of interest on the principal loan amount which was followed by another notice dated 02.04.2019.

5. On the contrary, the case of the Respondent has been that the loan advanced by the Appellant is covered by the collaboration agreement. It is alleged that the amount of Rs. 1 Crores regarding refundable security deposit is not a financial debt as defined under Section 5(8) of the Code. The Adjudicating Authority dismissed the application, inter alia, on the ground that the Appellant has failed to establish the terms of advancing the money, the repayment of money and default by the Respondent. The finding so recorded in para 6 of the impugned order is also reproduced hereunder for a quick reference:-

“6. A perusal of the agreement dated 31.08.2012, the term sheet dated 02.09.2012 and the addendums dated 31.12.2012 to the agreement and the original term sheet and the escrow agreement dated 04.08.2014 shows that the documents which form a contract between the parties are the agreement, the original term sheet and the addendums only, as the escrow agreement being unexecuted by HDFC Bank, which is clearly stated to be one of the parties to the escrow agreement in the opening recitals of the escrow agreement, cannot be considered a valid contract.

7. A further analysis of the agreement, the original term sheet and the addendums show that the agreement and the term sheet contain completely different terms of repayment and both are still in force as neither has been terminated by either party. Further, even when the addendums were made, the changes were made in both the agreement and the term sheet at the same time, without any attempt to reconcile the extremely different terms of the two

different documents. This conduct goes against the Appellant's contentions, because the Applicant failed to reconcile the terms of the agreement with those of the term sheet even when it had a clear opportunity to do so. Thus, on one hand the Applicant claims that the term sheet should prevail and on the other hand the Applicant has furthered the contradiction between the agreement and the term sheet. Such doubtful and uncertain conduct on part of the Applicant does not inspire this Tribunal's confidence in the Applicant's contentions regarding the terms of the loan and repayment of the same. Hence, due to the Applicant's failure to clearly establish the terms of advancing the money, the repayment of the money and default by Respondent, the present application is dismissed with no costs."

6. Counsel for the Appellant has submitted that in order to maintain the application under Section 7 of the Code, the Applicant has to establish that there is debt and default. In this regard, it is submitted that both the term sheets of 02.09.2012 and 31.12.2012 categorically shows that the Appellant had advanced a loan of Rs. 6 Crores for a period of 180 days with interest @ 24% per annum which satisfies the requirement of Section 5(8) of the Code as the debt has been advanced with interest for the time value of money. It is further submitted that the amount advanced is secured by equitable mortgage dated 04.09.2012 and charge was notified in Form-A. It is further submitted that besides the equitable mortgage deed a joint and several guarantee cum indemnity was also executed in respect of the amount of loan. Counsel for the Appellant has then referred to an application i.e. I.A. No. 3147 of 2022 by which the board resolution dated 22.08.2012 of the Respondent by which they have decided to avail a loan of Rs. 6 Crores and the board resolution of the Appellant dated 21.08.2012 by which they

decided to advance a loan of Rs. 6 Crores has been placed on record. He has also placed on record the account statement of the HDFC bank in order to show the transaction of Rs. 7 Crores from the account of the Appellant and also the receipt of interest from the Respondent. He has further submitted that since the Respondent had stopped the servicing of interest after 03.03.2014, the default caused and the application under Section 7 was filed thereafter. He has also referred to the account statement of the Respondent in which the amount involved is shown as short term borrowings by the Respondent. The balance sheet as on 31.03.2016 has been referred to which is signed on 27.08.2016. Thus, it is submitted that all the aforesaid evidence collectively shows that the amount involved was advanced as loan with interest and since the service of the interest was stopped, therefore, the application under Section 7 was filed. It is further submitted that since the borrowings were acknowledged by the Respondent on 27.08.2016 in the balance sheet dated 31.03.2016 and the application had been filed on 16.05.2019, the same is within the period of three years. It is thus argued that the Adjudicating Authority has committed a patent error in dismissing the application despite the fact that the Appellant had been successful in establishing the debt as well as default which is a sine-quo-non for the purpose of admitting the application filed under Section 7 of the Code.

6. On the other hand, Counsel appearing on behalf of the Respondent has submitted that the term sheets, referred to by the Appellant cannot be looked into isolation and has to be read alongwith the collaboration

agreement which is the basic document. It is submitted that the term sheet etc flows from the collaboration agreement. It is further submitted that the Adjudicating Authority has rightly held that there is difference between the term sheet and the collaboration agreement and both are in force because the collaboration agreement still subsist and has not been terminated as yet, the Adjudicating Authority could not repose its confidence in it and has rightly recorded a finding that the Appellant has failed to establish the terms of advancing the money, its repayment and default, therefore, once the advancement of the loan and the default is not established, the application under Section 7 has rightly been dismissed. He has also argued that there is difference between two demand notices dated 05.09.2017 and 02.04.2019 because in the notice dated 05.09.2017 there is a reference of collaboration agreement whereas in the notice dated 02.04.2019 reference has been made to the term sheet and the guarantee etc.

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

8. There is no denial of the fact that the parties to the lis entered into an agreement dated 31.08.2012, as per which the Respondent as an owner asked the Appellant as a developer, to develop a piece of land in a residential area. The owner was to get Rs. 4 Crores in the form of a non-refundable deposit, 42% of the total sales from saleable area whereas the developer was to get 58% of the total sales from saleable areas. There is a clause of loan in the said agreement as per which the developer was to provide additional loan of Rs. 11 Crores to the owner which shall carry interest @24% per

annum. The owners have represented that the said loan shall be used for acquisition of additional land and decided to pay monthly interest failing which compounding interest of loan was to be adjusted by the developer through the escrow account till such time the entire interest is repaid/adjusted out of the owner share of revenue of the saleable areas. The escrow account was never opened because the owner failed to get the conversion of the land by obtaining necessary licence and had stopped the payment of interest accrued on the loan. The term sheets were also executed, evidencing the fact of advancement of loan, time period for repayment and rate of interest. The security was given by way of equitable mortgage and personal guarantees by the owner of the loan amount. The evidence is there on record of the transfer of the amount in question from the account of the developer to the account of the owner and also the payment of interest by the owner to the developer. It is also a fact on record that the owner stopped the payment of interest and as a matter of fact the amount advanced by the Appellant to the Respondent, used for the purpose of purchasing the land by the owner in its name and the project has not been started at all because the owner failed to take necessary licence for change of land use, triggered the application filed under Section 7 of the Code for resolution of the amount of Rs. 6 Crores advanced as a loan and Rs. 1 Crores as refundable security.

9. The aforesaid facts and circumstances, satisfies the definition of debt and default which is the only thing required for the purpose of maintaining the application under Section 7 of the Code.

10. Thus, in our considered opinion, the Adjudicating Authority has committed a patent error in misreading and misappreciating the evidence available on record while dismissing the application, filed by the Appellant for the initiation of CIRP of the Corporate Debtor/Respondent. The appeal is thus allowed and the impugned order is hereby set aside. No costs.

11. The Adjudicating Authority is directed to admit the application filed under Section 7 of the Code and proceed in accordance with law.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi

11th January, 2023

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