NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 171 of 2022

IN THE MATTER OF:

1. Mr. Harendra Singh Khokhar,
S/o Sh. Charan Singh Khokhar,
R/o C-369, Yojna Vihar,
New Delhi – 110092
Email: cmd@srbpromoters.com

...Appellant

Versus

1. Indarprashta Buildtech Pvt. Ltd.
Having its registered office at:
59, Savita VIhar,
New Delhi – 11092,
Email: rochkbatra@gmail.com

...Respondent No. 1

Also at:
M-40, 2nd Floor,
Opposite Super Bazar,
Connaught Place, New Delhi - 110001

2. M/s. Anjani Realtors Pvt. Ltd.
Through Interim Resolution Professional,
Mr. Amit Talwar, 37/2, West Patel Nagar,
New Delhi – 110008.
Email: amittalwarcs@gmail.com

...Respondent No. 2

For Appellant: Mr. Abhijeet Sinha, Mr. Alok K. Aggarwal, Ms. Anushruti, Ms. Anushka Sharma, Advocates.

For Respondent: Mr. T.S. Ahuja, Ms. Sheena Sukhija and Mr. Yakchhandar Jain, Advocates.
Mr. S. P. Singh Chawla, Advocate with Mr. Amit Talwar, IRP for R-2.

J U D G E M E N T

Ashok Bhushan, J:

1. This Appeal by Suspended Director of the Corporate Debtor has been filed against the Order dated 12th January, 2022 passed by the National Company Law Tribunal, New Delhi, Court No-IV (hereinafter referred to as "The Adjudicating Authority) admitting Section 9 Application filed under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") by the Respondent-Operational Creditor.

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

- The Corporate Debtor owns free hold plot of land bearing Khasra No. 1008, 1009/1 & 1009/2. 1010, 1011 & 1012, at Village Maharauli, NH-24, District Ghaziabad (U.P.) total area admeasuring 6960 square meter. The Corporate Debtor represented to the Respondent No. 1 that they desire to get develop a Group Housing Project in the said land and they expressed their desire to obtain necessary infrastructure and man power to construct and market flats/units etc.
- The Operational Creditor and the Corporate Debtor decided to enter into a 'Development Agreement' for the purposes of carrying out the project on the land owned by the Corporate Debtor. An Email dated 03.10.2016 was sent on behalf of the Operational Creditor to the Corporate Debtor addressed to Mr. Paramjit Gandhi forwarding the copy of the proposed development agreement dated 01.10.2016 requesting to give their consent to the development agreement to go ahead. Mr. Paramjit Gandhi immediately replied the email on

03.10.2016 stating that they will not sign till they receive substantial amount credited with them.

- The Operational Creditor had made payment of Rs. 3 Crores to the Corporate Debtor and for payment of Rs. 3 Crores, two cheques of Rs. 1 Crore each was handed over in favour of the Corporate Debtor to Mr. Paramjit Gandhi which were duly accepted and encashed by the Corporate Debtor. In addition, sum of Rs. 1 Crore was transferred through the Bank Transfer to the Corporate Debtor by RTGS. Total amount paid by Operational Creditor was thus Rs. 3 Crores. For the remaining amount, Four Half Yearly Post-Dated Cheques of Rs. 5.15 Crores each were given to Mr. Paramjit Gandhi on 06.10.2016 along with the signed agreement. Corporate Debtor did not sign the Development Agreement. Mr. Paramjit Gandhi sent an Email on 25.10.2016 to Mr. Pavan Gaur-Operational Creditor suggesting certain terms of the payment. There was correspondence between the parties between 01.11.2016 to 24.04.2017 however the Term Sheet was not signed, further payment of Rs. 2 Crores was demanded. On 01st April, 2017, a new Term Sheet was sent by the Operational Creditor to the Corporate Debtor. A payment of Rs. 1 Crore was made and another Rs. 1 Crore was to be made by Operational Creditor at the time of signing of the term sheet on 28th April, 2017. An amount of Rs. 1 Crore was transferred on 05th April, 2017 but since signature of term sheet was not made by the Corporate Debtor further payment of Rs. 1 Crore was not made.

- Operational Creditor had begun construction of site with effect from 16.10.2016 and incurred certain expenses. When the Corporate Debtor did not sign the Term Sheet, by letter dated 26.12.2017 Corporate Debtor was asked to refund amount of Rs. 5 Crores which included Rs. 1 Crore spent by the Operational Creditor. Detailed Progress Report was claimed to be sent by Operational Creditor to Mr. Paramjit Gandhi on 04th August, 2017, 06th September, 2017 and 01st October, 2017.
- A Demand Notice under Section 8 of the Code was issued by the Operational Creditor on 13th April, 2018 claiming an amount of Rs. 05 Crores with interest. Demand Notice was served on Corporate Debtor. Section 9 Application was filed by the Operational Creditor in the month of May, 2018. Notice was issued to the Corporate Debtor. Reply to the Section 9 Application was filed by the Corporate Debtor. Corporate Debtor came with the case that Mr. Paramjit Gandhi was acting as an agent of Operational Creditor who informed that Operational Creditor is ready to pay amount of Rs. 23.60 Crore for taking over the Corporate Debtor, in confirmation of said negotiation, amount of Rs. 3 Crore was paid. It was pleaded that in result of the payment of Rs. 3 Crores an agreement to sell dated 19th April, 2017 was signed between the parties. In pursuance of signing of the Agreement four post-dated cheques of Rs. 5.15 Crores was handed over. On 04th July, 2017, Cheque of Rs. 5.15 Crores was deposited in the Bank which was dishonored. It was pleaded that Section 8 Notice was never served. Legal Notice dated 17.05.2018 has been issued to

the Operational Creditor to fulfill its part of the Agreement dated 19th April, 2017. A Replication was filed by the Operational Creditor pleading that all correspondence was done by Mr. Paramjit Gandhi who was 50 percent shareholder in the Corporate Debtor and another 50 percent was held by the brother of Mr. Paramjit Gandhi, Shri Gagan Deep Gandhi. The Operational Creditor pleaded that amount of Rs. 4 Crores has been extorted by the Corporate Debtor.

- Agreement dated 19th April, 2017 was not admitted. It was further pleaded that there does not exist any agreement dated 25th April, 2017 which is a tampered document.
- The Adjudicating Authority after hearing the parties by Impugned Order dated 12th January, 2022 has admitted Section 9 Application. The Adjudicating Authority held that the claim of the Operational Creditor-Applicant relates to services to be provided by Applicant to the Corporate Debtor and it comes under the purview of the claims arising out of provision of goods and services hence it is an 'Operational Debt'. Aggrieved by the said Order dated 12th January, 2022, this Appeal has been filed.

3. Mr. Abhijeet Sinha, Learned Counsel for the Appellant challenging the Impugned Order dated 12th January, 2022 submitted that the Adjudicating Authority had not adverted to the only signed term sheet dated 25th April, 2017 a perusal of which shall indicate that the payment of Rs. 3 Crore by Operational Creditor was made towards taking over the Corporate Debtor's Company for an amount of Rs. 23.60 Crores hence the same cannot be said to be an Operational Debt entitling the Operational Creditor to file Section 9

Application. It is submitted that the transaction between the parties for taking over the Company is not a transaction which can be said to be any Operational Debt. It is submitted that no debt is due and payable, the Operational Creditor has not complied its obligation under the term sheet dated 25th April, 2017, the amount stands forfeited. There were no services involved which is apparent from term sheet dated 25th April, 2017. The transaction involved and investment by Operational Creditor to Development Agreement dated 01.10.2016 relied by the Operational Creditor was an unsigned document. Mr. Paramjit Gandhi was not authorized to communicate on behalf of the Corporate Debtor since he ceased to be director of the Corporate Debtor with effect from 22nd April, 2016.

4. Learned Counsel appearing for the Respondent refuting the submissions of Learned Counsel for the Appellant submits that amount of Rs. 3 Crores was paid to the Corporate Debtor by the Operational Creditor in furtherance of proposed development agreement to be entered between the parties. The Development Agreement dated 01.10.2016 was sent to the Corporate Debtor through Mr. Paramjit Gandhi which was not signed and later email was received that unless substantial amount is not paid, agreement shall not be signed. No agreement dated 19th April, 2017 or 25th April, 2017 were signed between the parties. The Operational Creditor has written Email and letter dated 04th August, 2017 and 06th September, 2017 for signing a term sheet which was not done. The Corporate Debtor at no point of time prior to filing Section 9 Application communicated that they have signed term sheet dated 25th April, 2017. On account of non-signing of Agreement, the Operational Creditor was compelled to send notice dated 26th

December, 2017 for refund of the amount paid. It came to the notice that the Corporate Debtor has already sold 20 flats to the third party namely Navjyoti Associates Private Limited by registered sale deed executed in the year 2014. It is submitted that the Adjudicating Authority has rightly admitted the Application under Section 9 of the Code.

5. We have considered the submissions of Learned Counsel for the parties and have perused the record.

6. We need to first notice the nature of transactions between the parties to find out as to whether the Corporate Debtor owed any Operational Debt.

7. The Draft Development Agreement dated 01.10.2016 is the first document which was forwarded on behalf of the Operational Creditor to the Corporate Debtor for approval and to further go ahead with the construction. The Development Agreement dated 01.10.2016 is referred as "Development Agreement". In the development agreement, paragraph 7 refers to "Mode of Payment" of Rs. 3 Crores and further residual payment through four half yearly post-dated cheques of Rs. 5.15 Crores each. It is not disputed between the parties that as contemplated in Development Agreement dated 01.10.2016 amount of Rs. 3 Crores was paid and received by the Corporate Debtor. The Development Agreement dated 01.10.2016 was not signed rather email was sent by Mr. Paramjit Gandhi to whom the Development Agreement was forwarded stating that they will not sign any document till they receive substantial amount credited with them. The Email dated 03.10.2016 sent by Mr. Paramjit Gandhi is as follows:

> *"As I discussed we will not sign any documents till we receive substantial amount credited with us.*

Thereafter as desired we would give you authority letter to get the bank approval of the project.

We would be more than happy to help/support you but with full safety for us.

Thanks

Parmjit Gandhi
Sent from my iPhone"

8. There has been correspondence between the parties regarding signing of Agreement/Term-Sheet from 01.11.2016 to 24th April, 2017. Further payment which is Rs. 1 Crore was made by the Operational Creditor to the Corporate Debtor on 05th April, 2017 which is also an admitted fact thus total amount of Rs. 4 Crores has been paid by the Operational Creditor to the Corporate Debtor.

9. Learned Counsel for the Appellant has much relied on Term-Sheet dated 25th April, 2017 which according to the Corporate Debtor is the only signed document on the record. The said Term-Sheet dated 25th April, 2017 has been brought on record by the Appellant as Annexure A-3 at page 102 of the Appeal Paper Book. The said Term-Sheet noticed that amount of Rs. 3 Crores has been received from Operational Creditor and further Rs. 1 Crore in April, 2017. On the basis of Term-Sheet dated 25th April, 2017, Learned Counsel for the Appellant submits that the amount of Rs. 23.60 Crores was amount for transfer of the Company in favour of the Operational Creditor which does not indicate any services. The Learned Counsel for the Respondent strenuously refuted the document dated 25th April, 2017 and submits that the said document is a fictitious document manufactured by the Appellant. The copy of the Application under Section 9 along with all the documents filed has been brought on record by the Appellant as Annexure A-6 (Colly), Volume-II of the Appeal Paper Book. Operational Creditor in the Application has categorically come with the case that in spite of Development Agreement forwarded to the Corporate Debtor in October, 2016, the Development Agreement was not signed. The Corporate Debtor was unwilling to go ahead with the Development Agreement hence notice dated 26.12.2017 was issued claiming refund. A reply has been filed to Section 9 Application by the Corporate Debtor which has also been noted by the Adjudicating Authority in the Impugned Order. The Copy of the Reply filed by the Corporate Debtor to Section 9 Application is on the record at Page 273 to 307 of the Appeal Paper Book to which Replication was also filed by the Operational Creditor. Reply by the Corporate Debtor to Section 9 Application has to be looked into to find out as to what was pleaded by the Corporate Debtor before the Adjudicating Authority. When we look into the Reply filed by the Corporate Debtor, in the Reply, the payment of Rs. 3 Crores have been admitted in paragraph 4. In paragraph 4, reference of Agreement dated 19th April, 2017 has been mentioned as signed between the Operational Creditor and the Corporate Debtor. Following is the extract of the pleading in the end of Paragraph 4 and 5:

> *"4.............As a result of the above made payments and negotiations an agreement dated 19/04/2017 was signed between the petitioner and the Respondent Company. A copy of the said agreement signed between the Petitioner and the Respondent Company is annexed herein as Annexure B.*

> *5. The Petitioner in compliance of the said Agreement dated 19.04.2017 handed over four postdated cheques of Rs. 5.15 Crores each dated 04.04.2017, 03.10.2017, 03.04.2018 and 03.10.2018. A copy of the postdated cheques is annexed herein as Annexure C."*

10. Reference of Legal Notice dated 17th May, 2018 has also been given in Reply and copy of the notice has also been annexed along with the Reply. In the Notice dated 17th May, 2018 given by one Mr. Rohit Gupta, Advocate on behalf of the Corporate Debtor, reference of Agreement to Sell dated 19th April, 2017 has been mentioned and payment of Rs. 3 Crores and issuance of four postdated cheques of Rs. 5.15 Crores each has been mentioned. It is useful to notice the paragraph 2,3,4 and 5 of the Legal Notice which is to the following effect:

> *"2. My clients serve you with this present legal notice with an intention to fulfill its part of obligation under the Agreement to sell at 19.04.2017 with you good self. It is further reminded to your goodself about the postdated cheques and request you to honor your commitment under the Agreement to Sell dated 19.04.2017.*
>
> *3. Without prejudice to my client's rights and contentions, you are hereby put to notice, under the Agreement to Sell dated 19.04.2017, your noncompliance of the same shall result in forfeiture of the advance amount handed over by your goodself to my client. Therefore, it is requested your goodself to*

> *honor your obligations under the Agreement to Sell dated 19.04.2017 with my clients.*
>
> *4. It is further put to a request on behalf of my clients to replace the dishonored cheque stated above and also honor your commitment for the other cheques provided to my client by you in terms of the Agreement to Sell dated 19.04.2017.*
>
> *5. You are hereby served with the present legal notice to comply with the said terms and conditions of the agreement to sell and on not doing the same you shall be liable for civil proceedings under the Indian Contract Act, 1872 and criminal proceedings under the Indian Penal Code, 1860."*

11. When we look into the pleadings including Legal Notice by the Corporate Debtor it is clear that what they claim to have entered between the parties is Agreement to Sell dated 19th April, 2017, there was no mention of the Term-Sheet dated 25th April, 2017 which according to the Appellant is the only document entered between the parties and filed along with the Appeal. The pleadings in the Reply of the Corporate Debtor which was the first defense set up by the Corporate Debtor in reply to Section 9 Application clearly relates to claim of the Appellant where signing of any Term-Sheet dated 25th April, 2017 between the parties is not even claimed. The Reply has been filed by the Corporate Debtor in June, 2018 and when there is no mention of any Term-Sheet dated 25th April, 2017 in the detailed Reply we are inclined to accept the submission of the Operational Creditor that Term-Sheet dated 25th April, 2017 is fabricated document by the Corporate

Debtor-Appellant and cannot be relied on. It is further relevant to notice that Agreement to Sell dated 19th April, 2017 between the parties as referred to in the Reply as well as Legal Notice was neither part of the Reply nor has been brought on record in Appeal. The Respondent-Operational Creditor has filed Replication to the Reply submitted by the Corporate Debtor-Appellant where the Operational Creditor has categorically stated that neither there was any agreement dated 19th April, 2017 executed nor any Term-Sheet dated 25th April, 2019 has been executed. In paragraph 4, following has been stated:

> "<u>Reply to Preliminary Objections:</u>
>
> ……….
>
> *4…..However, the agreement dated 19.04.2017 has not been brought forward. Moreso, it does not exist and the agreement dated 25.04.2019 is nothing but another tampered document. It is also denied that the said Term Sheet Agreement 25.04.2017 is the only document which was executed between the Applicant and the Respondent. However, the Applicant with the malafide intention and ill motive has deliberately suppressed the original agreement. Contents of the pleadings filed by the creditor are reiterated here and reference be made to page 9 para 2 of the rejoinder and page 5 para 12 &13 of the application for placing additional documents."*

12. We thus do not find any merit in the submission of Learned Counsel for the Appellant based on the Term Sheet dated 25th April, 2017 to contend that the transaction between the parties was transaction for taking over the Company of Rs. 23.60 Crore. The first Development Agreement which was admittedly forwarded to Corporate Debtor was Development Agreement dated 01.10.2016 which subsequently could not be signed between the parties. The Development Agreement dated 01.10.2016 referred to the proposed payment of Rs. 3 Crores and the payment of Rs. 3 Crores as referred to in the Development Agreement was actually paid by the Operational Creditor and subsequently Rs. 1 Crore was paid on 05th April, 2017. The Proposed Development Agreement is genesis of the transaction between the parties. Clause (A), (B), (C), (D) and (E) of the Development Agreement is relevant to notice:

> *(A) Whereas the First Party absolutely owns and is in possession of a free hold plot of land bearing Khasra No. 1008, 1009/1 & 1009/2. 1010, 1011 & 1012, at Village Maharauli, NH-24, District Ghaziabad (U.P.) total area admeasuring 69.60 square meter, equivalent to 8324 square yard (approx) by virtue of Sale Deed No. 457 dated 18.01.2013 duly registered with the Sub-Registrar [V], Ghaziabad at Bahi No. 1, Jild No. 3252 (pages No. 1 to 247) and Sale Deed No. 603 dated 23.01.2013 at Book No. 1, Volume No. 3266 (page No. 263 to 290) at Ghaziabad (U.P.)*
>
> *(B) AND WHEREAS the FIRST PARTY has requested and assured that the Land Use of said plot as per the orders issued vide case No. 14/2008-09 (under section 14) of UPJV &BVA dated 04.02.2009 by the Court of Sub District Magistrate [First Class], District Ghaziabad [U.P.] and as per letter of Ghaziabad Development Authority (hereinafter referred to as "GDA") bearing no. 189/Master*

Plan/13 dated 06.12.2013 is Residential/Commercial copies of the aforesaid order/letter are as per Annexure-I and Annexure 2 respectively].

(C) AND WHEREAS THE FIRST PARTY is desirous to get developed a Group Housing Project upon the said plot.

(D) AND WHEREAS the SECOND PARTY has represented that they possess necessary infrastructure and manpower to construct and market the Residential Flat/Units/Apartments/Houses/Shops as proposed under this Agreement.

(E) AND WHEREAS the FIRST PARTY and the SECOND PARTY have desired and agreed to enter into a joint venture Developments Agreements For Construction and Marketing of Residential Flats/Dwelling/Units/Flats/House/Apartments/Shops etc. Upon the said plot (hereinafter referred to as the "Spanish Heights" OR AS DESIRED BY THE 2nd PARTY on the terms and conditions as mutually agreed upon by and between the parties and recorded hereinafter:..."

13. Details of payment proposed by the Operational Creditor have been mentioned in Paragraph 7 which is to the following effect:

"7. It is agreed that the SECOND PARTY shall make an interest free refundable/adjustable security deposit of Rs. 23.60,00,000/- (Rupees Twenty Three Crore and sixty lac only) with the FIRST PARTY. The aforesaid amount of Rs. 23.60,00,000/- (Rupees

Twenty Three Crore and sixty lac only) shall be paid by the SECOND PARTY to the FIRST PARTY as under:

[i] An amount of Rs. 3,00,00,000/- (three Crore only) shall be paid by the SECOND PARTY to the FIRST PARTY upfront on the date of execution of this document. The receipt of which is hereby acknowledged by the FIRST PARTY. (DETAILS OF PAYMENT AS UNDER)

A. CHQ. NO 102055 RS. 1.00 CR DT. 04.10.2016 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI.

B. CHQ. NO 102056 RS. 1.00 CR DT. 08.10.2016 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI.

C. CHQ. NO 102057 RS. 1.00 CR DT. 11.10.2016 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI.

[ii] The residual amount of the Developer Agreement shall be paid by the SECOND PARTY to the FIRST PARTY through 4 Half yearly post-dated cheques of Rs. 5,15,00,000/- (Five Crore Fifteen Lac) each for the purpose of construction. In all cases the remaining amount of 20,60,00,000/- (Twenty Crore Sixty Lac) shall be paid before the time of issuing "Final Call Notice" by the Second Party to the Buyers/Allottee(s) for taking possession of the Flats/Housing Units developed by the SECOND PARTY. (DETAILS OF PAYMENT AS UNDER):

A. CHQ. NO 102058 RS. 5.15 CR DT. 04.04.2017 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI.

B. CHQ. NO 102059 RS. 5.15 CR DT. 03.10.2017 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI.

C. CHQ. NO 102060 RS. 5.15 CR DT. 03.04.2018 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI.

D. CHQ. NO 102061 RS. 5.15 CR DT. 03.10.2018 ON ALLAHABAD BANK SOUTH EXT. NEW DLEHI."

14. The payments as contemplated in paragraph 7 has been made by the Operational Creditor i.e. Rs. 3 Crores which was paid and four postdated cheques of Rs. 5.15 Crore each. Thus payment which was made by the Operational Creditor was in contemplation of Development Agreement dated 01.10.2016 which ultimately could not fructify since the Corporate Debtor refused to sign the Agreement. It is clear that the transaction which was made by the Operational Creditor was towards the joint venture development agreement between the parties under which the Operational Creditor offered to provide necessary infrastructure and man-power to construct and market the Residential Flats/Apartments as noted above.

15. When the Operational Creditor acted in pursuance of the Proposed Development Agreement between the parties, the amount paid by the Operational Creditor of Rs. 3 Crores plus Rs. 1 Crore was towards providing services by the Operational Creditor, the same is clearly an "Operational Debt". We do not find any substance in the submissions of Learned Counsel for the Appellant that Corporate Debtor did not owe any "Operational Debt". We thus reject the submissions of Learned Counsel for the Appellant that the Corporate Debtor did not owe any Operational Debt to the Operational Creditor. The submissions of Learned Counsel for the Appellant that Demand Notice issued under Section 8 of the Code was never served on the Appellant is also to be rejected. In the Application filed by the Operational

Creditor under Section 9 of the Code, Demand Notice and evidence of service were brought on record. We thus do not find any error in the Order dated 12.01.2022 of the Adjudicating Authority admitting Section 9 Application under the Code. There is no merit in the Appeal, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

NEW DELHI
02nd September, 2022
Basant