

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 937 of 2019

[Arising out of Order dated 17th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Bench III, New Delhi in IB-1562/(ND)/2018]

IN THE MATTER OF:

M/s Ansal Properties & Infrastructure Ltd.

....Appellant

Vs

M/s MGF Developments Ltd.

....Respondent

Present:

Appellant - Ms. Purti Marwah Gupta, Ms. Shruti Munjal, Advocates.

**Respondent - Mr. Darpan Wadhwa, Sr. Advocate with Mr. Abhijeet Sinha,
Mr. Akhil Sachar, Ms. Hem Nalini, Advocates.**

J U D G M E N T

[11th February, 2020]

JARAT KUMAR JAIN, J.

The Appellant – ‘Ansal Properties & Infrastructure Ltd.’ filed this appeal against the order passed by Adjudicating Authority (National Company Law Tribunal) Bench III, New Delhi on 17.07.2019 thereby dismissed the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in brief I&B Code, 2016).

2. The brief facts of case are that the appellant - ‘Ansal Properties & Infrastructure Ltd.’ and respondent entered into a Memorandum of Agreement

dated 08.07.2004 whereby they decided to jointly bid for tender, pending to property development at Netaji Subhash Place (Wazirpur) Metro Station, Delhi. Both the parties agreed that they will contribute in the ratio of 50-50 and shall be entitled the same ratio of share i.e. 50-50 in the generated revenues. The Concession Agreement dated 02.09.2004 was executed between Delhi Metro Rail Corporation (in brief DMRC), Appellant and Respondent for leasing the land to the Appellant and the Respondent at Netaji Subhash Place Metro Station Delhi for a period of 12 years to develop and sub-let the shops/ available space to the third party. As per agreement dated 22.06.2005 an escrow account in the name of Respondent opened and Respondent had to manage the revenue and transfer 50% of shares from the generated revenues to the Appellant.

3. The Appellant provided services to the Respondent by carrying out construction and development with the property. As per the agreement Respondent made payment to the Appellant till 09.12.2016, thereafter, Respondent failed to make any further payment to the Appellant. Despite receipt of legal notices, the Respondent failed to discharge its admitted liability towards the Appellant. The Appellant sent the demand notices dated 24.08.2018 under Section 8 of the I&B Code to Respondent. The Respondent sent its reply dated 12.09.2018 to the said demand notice and raised frivolous dispute, for the first time in order to evade from its admitted liability. Thereafter, the Appellant preferred the application under Section 9 before the Adjudicating Authority, Delhi.

4. Respondent opposes the application on the various grounds that the Appellant has not provided any service or goods to Respondent. Therefore, there is no relationship as Operational Creditor and Corporate Debtor. There was pre-existing dispute with DMRC which is substantiated by the letter dated 20.08.2018, this letter was received before the issuance of demand notice dated 24.08.2018 issued by the Appellant. It is also stated that the petition is barred by limitation as filed beyond statutory period of 3 years.

5. After considering the submissions of the parties, the Adjudicating Authority held that the Appellant has failed to establish the relationship between Appellant and Respondent as 'Operational Creditor' and 'Corporate Debtor', there is no operational debt as defined under Section 5 (21) of I&B Code, 2016. Apart from this there is a pre-existing dispute, hence, dismissed the petition as not maintainable.

6. Being aggrieved with this order, Appellant has filed this appeal.

7. Learned counsel for the appellant submits that the Adjudicating Authority failed to appreciate that the Appellant provides its services to the Respondent by carrying out construction and development at the property and it was only therefore the Respondent offered the shops in the property for lease/license. The Appellant has provided services to the Respondent, therefore, the Appellant is liable to get 50% of the revenue generated. The Respondent has admitted dues to the tune of Rs. 3,81,19,346.84 towards the appellant. However, he has raised

false and frivolous dispute in order to escape its liability to pay rightful dues to the appellant.

8. On the other hand learned counsel for the Respondent supported the Impugned order and submits that Appellant and Respondent have entered into an agreement dated 08.07.2004, whereby both the parties decided to jointly bid for tender pertaining to property development at Netaji Subhash Place, Metro Station, Delhi and pursuant to this agreement Appellant and Respondent together entered into Concession Agreement dated 02.09.2004 with DMRC. The appellant has not provided any services to the Respondent, hence, the Adjudicating Authority has rightly held that there is no relationship between Appellant and Respondent as 'Operational Creditor' and 'Corporate Debtor'.

9. It is further submitted that in identical facts, this Tribunal in the case of Company Appeal (AT) (Ins.) No. 515 of 2019 – M/s Sree Sankeshwara Foundation and Investments v/s M/s Dugar Housing Ltd. decided on 25.11.2019 held that the Appellant along with Respondent had executed joint development agreement for construction of structure and allotment to allottees, both of them being parties to a joint venture project. Therefore, the Appellant cannot claim to be 'Operational Creditor' as it does not relating to supply of goods and services rendered by the Appellant in such situation the appeal be dismissed.

10. Having considered the submissions for learned counsel for the parties we have gone through the record.

11. Appellant and Respondent entered into Memorandum of Agreement dated 08.07.2004, we would like to reproduce the relevant portion of the agreement which is as under:-

“AND WHEREAS the First Party alongwith Second Party have decided to put the tender for the above-mentioned site as a consortium to bid jointly for the project. The percentage of the consortium member shall be as follows:

- | | |
|---|------------|
| <i>a) MGF Developments Ltd.,</i> | <i>50%</i> |
| <i>b) Ansal Properties & Industries Ltd.,</i> | <i>50%</i> |

NOW THESE PRESENTS WITNESS and it is hereby agreed declare and covenanted and recorded by and between the parties as under:

- 1) THAT M/s MGF Developments Ltd. is nominated as a lead member in the consortium and is authorized to represent and put the tender for development of DMRC site.*
- 2) THAT the First Party is a Real Estate Developer and is having vast experience in developing Shopping Malls, Family entertainment centre, commercial buildings etc., “and is having requisite expertise in Developing large projects and as such will be the lead member in the consortium.*
- 3) THAT the Second Party is also a Real Estate Developer having developed various commercial properties and having holdings of various sites for future developments of projects. The Second Party will act as a member of the Consortium.*
- 4) THAT the parties hereto have agreed and undertaken to perform their part of this agreement with due diligence and mutual cooperation keeping in view the interest of each other and execute and to do all other acts, deeds, matters and things whatsoever as*

may be necessary for implementing or giving effects to the terms of this agreement.

5) THAT this memorandum of Agreement shall always be deemed to be subject to the usual force majeure clause.

IN WITNESS WHEREOF the parties hereto have executed this Memorandum of Agreement at the day, month and year first mentioned here.”

12. After this agreement the Appellant and Respondent jointly entered into a Concession Agreement with DMRC dated 02.09.2004. In this joint agreement the Appellant and Respondent collectively referred to as “Concessionaire” and in this agreement both the parties are jointly bound by the terms and conditions of this Concession Agreement.

13. There is nothing in these agreements that the Appellant has to provide services to Respondent by carrying out construction and development at the property whereas this is a joint venture of the Appellant and Respondent. We have also seen that in the application under Section 9 of the I&B Code, it is nowhere mentioned that the Appellant has provided services or goods to the Respondent. The Adjudicating Authority has rightly held that there is no relationship between the Appellant and Respondent as ‘Operational Creditor’ and ‘Corporate Debtor’. There is no existence of an operational debt as defined under Section 5 (21) of I&B code, 2016.

14. In similar facts this Appellate Tribunal in the case of *M/s Sree Sankeshwara Foundation and Investments (supra)* held that:

“The Appellant along with Respondent (‘Corporate Debtor’) had executed Joint Development Agreement in the year 2012 for construction of structure and allotment to allottees. Both of them being parties to a joint venture project, we hold that the Appellant cannot claim to be ‘Operational Creditor’ as it does not relate to supply of goods nor service rendered by the Appellant. If joint venture under any service to the allottees and for that to pay service tax it does not mean that the parties of the joint venture will render service to each other.”

15. With the above discussion we are of the view that Adjudicating Authority has rightly rejected the application under Section 9 of the I&B code, as not maintainable.

Accordingly, the Appeal is dismissed. However, no order as to cost.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

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