

NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

C.P. (IB)/393(PB)/2019

C.A./1421(PB)/2020

IN THE MATTER OF

Mrs. Gurmeet Kaur Gill

...Applicant/OC

W/o Mr. Surinder Pal Singh Gill,
R/o 32, Housing Society
South Extension, Part I
New Delhi- 110049

VERSUS

Raheja Developers Limited

...Respondent/CD

Registered Office at:

406, 4th Floor Rectangle One,
D-4, District Centre, Saket, New Delhi-110017

**U/S 9 of IBC, 2016 r/w Rule 6 of INSOLVENCY AND BANKRUPTCY
(Application to Adjudicating Authority) RULES, 2016**

Order Pronounced on: 12.05.2023

CORAM:

CHIEF JUSTICE (Retd.) RAMALINGAM SUDHAKAR

HON'BLE PRESIDENT

MR. AVINASH K. SRIVASTAVA

HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant/OC : Mr. Sunil Fernandes, Mr. Nitish K. Sharma, Ms. Nandini Aishwarya, Ms. Diksha Dadu, Advs.

**For the Respondent/
Corporate Debtor** : Mr. Ramji Srinivasan, Sr. Adv., Mr. Gaurav Mitra, Ms. Manmeet Kaur, Ms. Suditi Batra, Mr. Abhishek Rana, Advs.,



ORDER

PER SH. AVINASH K. SRIVASTAVA, HON'BLE MEMBER, TECHNICAL

1. This is an Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code), r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (Adjudicating Authority Rules), for initiating the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor viz., **M/s Raheja Developers Limited, Corporate Debtor, hereinafter referred as 'CD'** for due amount of Rs. **1,51,70,000/-** (Rupees one Crore, Fifty One Lac, Seventy Thousand Only/-) as on **30.09.2018** which was payable by CD as part consideration under MOU dated **07.10.2016**.
2. Another Application No. **1421(PB)/2020** has been filed by the Applicant under Rule 11 of the NCLT Rules, 2016 seeking relisting of the captioned matter i.e. **393(PB)/2019**. The Application (**393/2019**) was last listed for hearing on **06.01.2020**

whereby this Adjudicating Authority directed the Registry to not list the matter and granted liberty to the petitioner/applicant to mention the same as and when the Hon'ble NCLAT passes the final judgment in **Comp Appeal (AT) (Insolvency) No. 864/2019**. Hon'ble NCLAT has passed a judgment dated **22.01.2020** wherein it had allowed the appeal setting aside the insolvency admission order against the Corporate Debtor (**Raheja Developers**) annexed as **Annexure A** in the aforesaid application.

3. Thereafter, **CP/393(PB)/2019** has been listed many times on pervious occasions. Accordingly, **CA-1421(PB)/2020** is Disposed of as **INFRUCTUOUS**.
4. The CD was incorporated on **27.11.1990** under the Companies Act, 1956 (now Companies Act, 2013). Its CIN is **U45400DL1990PLC042200**. It is a real estate developer company engaged in development and construction of integrated residential/commercial plotted colonies/group housing apartments etc. The authorized and paid up share capital of the CD is Rs. 100,00,00,000.00 and Rs. 46,08,40,000.00/- respectively.

BRIEF FACTS SUBMITTED BY THE APPLICANT ARE AS FOLLOWS:

5. Applicant along with three land owners (Collectively known as Land Owners) executed a **Collaboration Agreement** dated **13.08.2012** with Corporate Debtor (as Developer) which was further amended by **Supplementary Collaboration Agreement** dated **25.06.2013** (collectively known as "collaboration agreements" for the development of certain land measuring 24.1563 acres land (Total Land) in which applicant and the other Land owners have an undivided share. Out of total land, CD obtained a license for 12.48675 acres (Licensed Land) of Land from the Directorate of Town and Country Planning (DTCP) for the development of a residential group Housing Project known as "**Raheja Vanya**". Balanced land measuring 11.6695 acres remained unlicensed.
6. A revised understanding through MOU dated **07.10.2016** was entered into

between the parties wherein Applicant along with other land owners agreed to permit the CD to construct, develop, maintain, and sell the Land Owners' share subject to other terms and conditions of MOU. In terms of MOU, Applicant along with other Land Owners agreed to provide the following:

- i.** Licensed Land to the CD with the exclusive right to develop and construct;
 - ii.** Exclusive and Absolute right to CD to sell the units and another saleable area of the project;
 - iii.** Conveying and Transferring the title and interest in the project;
 - iv.** Granted exclusive Irrevocable Rights w.r.t. the project's development;
7. In consideration of the abovementioned, the CD agreed to develop the project with their own cost and to pay certain amounts to the Land Owners on account of various heads as agreed under the MOU including "Revenue sharing" as per clause 5.2 of the MOU. Clause 5.2 is extracted below:

5.2. **Revenue Sharing:** In addition of Collaboration Deposit paid under Collaboration Agreements and deposits in terms of Clause 5.1.1 and Clause 5.1.2 of this Agreement, it is hereby agreed and understood by the Parties that the Receivables arising / accruing from the Project shall be shared between the Parties in the following proportion:

5.2.1. The Land Owners shall be entitled to 30% (thirty percent) of Receivables with respect to the Land Owners Share. Due to the fact that the Project is being developed over the entire Licensed Land which covers both the Land Owners Share and the Developer Share including the TDR from the Unlicensed Land, and the entire Receivables are to be pooled together in the Designated Bank Account (*defined below*), therefore, the Land Owners revenue share ("LOs Revenue Share") shall be calculated on the basis of the following formula:

A = 30% of the Receivables with respect to Land Owners Share of the Licensed Land having FAR of 7,45,781 sq. ft. @ FAR of 1.75

B = 10,87,845 sq. ft. on the basis of total FAR of the Project including TDR loaded @ 2 FAR as contemplated herein above in Clause 3.8

LOs Revenue Share (Percentage) = (A/B)*100

The Parties agree and acknowledge that the LOs Revenue Share may vary basis the (a) actual TDR loaded on the Project and/or (b) availment of Additional FAR in terms of Clause 3.6 herein.

2.2. The Developer shall be entitled to the balance 70% (seventy percent) of the Receivables with respect to the Land Owners Share and 100% (one hundred percent) of the Receivables with respect to the Developer Share ("Developer Revenue Share").

Note: TDR stands for: Transferrable Development Rights

8. The Applicant along with three other Land Owners further entered into an Agreement dated **25.10.2016** annexed as **Annexure P/4** with one Mr Navin M Raheja son of Late Shri M.N. Raheja (as "Personal Guarantor"), Raheja SEZs Limited (as "Mortgagor 1") and Enkay Buildwell Private Limited (as "Mortgagor 2"). The Developer, Personal Guarantor, Mortgagor I, and Mortgagor 2 are collectively known as the "**Raheja Group**". In the agreement dated 25.10.2016, the parties agreed that since the Project was given as cross collateral for other projects' loans, therefore to ensure the payment of Land Owners' entitlement under MOU, the Developer, and the Raheja Group agreed to provide security/mortgage/hypothecation, etc. on second charge basis on the Mortgaged Properties, Receivables, etc. subject to other terms and conditions of Agreement. In terms of the MOU and the Agreement, the Applicant along with three other Land Owners are entitled to payments towards Total Land purchase with development rights by the Corporate Debtor. As per the MOU the Operational Creditors along with 3 other Land Owners are entitled to 23.5

% of the amounts received from the customers of the Project and such amount is to be paid in the manner provided in the MOU and Agreement and the same should be disbursed by the Corporate Debtor to the Applicant as and when received by the Corporate Debtor. Applicant further submitted that the lenders of the CD, L & T Financial Services (LTFS) issued an email dated 24.10.2018 to the landowners' representative. It is the submission of the applicant that it was informed to the landowners (including applicant as one amongst landowners) for the first time that total collection in the project till September 2017 was Rs. 71.3 crores, out of which the landowners share of 23.5% was Rs. 16.7 crores. The tabulation is as under:

| PARTICULARS | AMOUNT (in INR) |
|--------------------------------|------------------------|
| Collection till September 2017 | 71.3 |
| Landowners' Share @ 23.5% | 16.7 |
| Paid by CD | 3.9 |
| Paid by LTFS in October 2018 | 0.7 |
| Balance landowners share | 12.1 |
| Before October 2018 | 3.0 |
| Balance Landowners share | 9.1 |

9. Applicant submitted in its application that on previous occasions also when a certain amount became payable by the Corporate Debtor to the Land Owners including the Applicant, the parties arrived at a settlement to make the payment in installments.

10. Applicant through its counsel served a Demand Notice dated **7.12.2018** annexed as **Annexure 9 (colly)** for which the CD replied vide its reply dated **18.12.2018** annexed as **Annexure 10**. Applicant further submitted that land and construction over the land is the main component for development of any real estate project by a real estate company. The Licensed Land and development right over the land are directly related to the units/product which are being developed, marketed and sold by the Corporate Debtor being a real estate company for their commercial operation/production. Moreover, the real estate companies generally treat land and Building over there as stock in trade in their books. Therefore, the Land Owners of the Licensed Land are Operational Creditors.
11. Applicant submitted that the amount claimed to be in default is Rs. **1,51,70,000/-** due as on **30.09.2018**. A chart detailing the computation in terms of the MOU and the Agreement is annexed as **Annexure P/11**. Applicant submitted a list of documents on page number 29 of its application in order to prove the existence of operational debt and the amount of default.

REPLY FILED BY CORPORATE DEBTOR IS AS FOLLOWS:

12. CD in its reply denied all the averments made by the Applicant. CD further submits that the present application under Section 9 of the IBC is not maintainable. It is the submission of the CD that the debt claimed by the Applicant does not fall within the purview of 'operational debt'. It is the contention of the CD that no goods or services as stated by alleged operational creditor were supplied/ rendered to the CD. Further, CD raised the existence of various disputes with respect to land, disputes which are pending in appropriate courts.
13. Sh. Ramji Srinivasan, Sr. counsel for the CD argued that the Applicant along with other land owners executed a Collaboration Agreement dated **13.08.2012** with the CD for development of a residential group housing colony over the land. Further, as per Clause 2.4 the Agreement, the parties were to make the payment of external

development charges and infrastructure development charges as per their respective shares. Ld. Counsel for the CD drawn our attention towards few pages of the agreements annexed with this application. Relevant portion is extracted below:

"COLLABORATION AGREEMENT

This Collaboration Agreement (the "Agreement") is executed at Gurgaon on this 13th day of August, 2012, by and amongst

- 1. Mrs. Gurmeet Gill, w/o Mr. Surinder Pal Singh, aged 63 years and residing at 32 Housing Society, South Extension Part 1, NDSE1, New Delhi.*
- 2. Mrs. Jesleen Papneja, d/o Mr. Surinder Pal Singh, aged 36 years and residing at, Y-15, Hauz Khas, New Delhi-110016*
- 3. Mrs. Ajit Kaur Gill, w/o Mr. Jagtar Singh, aged 57 years and residing at 6 Paines Lane, Pinner, Middlesex, HA5 3DQ, United Kingdom and at 32 Housing Society, South Extension Part 1, NDSE1, New Delhi.*
- 4. Mr. Mohinder Pal Singh Gill, s/o Mr. Pritpal Singh Gill, aged 63 years and residing at 18 Belvide Gardens, Codsall, South Staffordshire, WV8 1 AN, United Kingdom and at 32 Housing Society, South Extension Part 1, NDSE1, New Delhi.*

(hereinafter jointly referred to as the "Land Owners" which expression shall unless Repugnant to the context hereof shall be deemed to mean and include his/her legal heirs, administrators, legal representatives, successors-in-interest and nominees), party of the First Part..

..
.."

SUPPLEMENTARY COLLABORATION AGREEMENT

This Supplementary Collaboration Agreement ("Agreement") is executed at Gurgaon on this 25th day of June, 2013

BETWEEN

- 1. Mrs. Gurmeet Gill, w/o Mr. Surinder Pal Singh, aged 64 years and residing at 32 Housing Society, South Extension Part 1, NDSE1, New Delhi.*

2. Mrs. Jesleen Papneja, d/o Mr. Surinder Pal Singh, aged 37 years and residing...

..
..”

14. Counsel for the CD further submits that parties are in joint collaboration. The licenses are in name of the Land owners. To substantiate this argument, CD cited **para G and H @ page number 75** of this Application. Relevant extract is reproduced below:

“G. The Parties acknowledge that, in terms of the Collaboration Agreements, the Developer had certain rights for development over part Licensed Land and the Land Owners had rights on the remaining Licensed Land, however, based on the revised understanding arrived between the Parties, the Land Owners have agreed to permit the Developer to construct, develop, maintain and sell the Land Owners Share on the terms contained herein. And in terms of the mutual agreement among the Parties and as per the rights and obligations of the Parties under Collaboration Agreements the Land Owners have agreed to transfer and convey the Unlicensed Land in favour of the Developer in terms of this Agreement, for no additional consideration to be payable by the Developer, however, any taxes, stamp duty, registration charges and all other charges payable for the transfer of the Unlicensed Land in favour of the Developer shall be solely borne by the Developer and shall keep indemnified the Land Owners in this regard.

H. The Parties are desirous of developing a residential group housing project on the entire Licensed Land ("Project") in compliance with the license no. 64 of 2013 dated July 20, 2013 and license no. 12 of 2014 dated August 01, 2014 (collectively. "Licenses") issued by DTCP. The Developer is free to utilise the transferrable development rights ("TDR") with respect to the Unlicensed Land or any part thereof, in the said Project or at any other location/project site as it may deem fit. The Developer shall also be free to sell the FSI of Developer Share. Subject to DTCP's notifying the TDR policy, Developer agrees and undertakes to utilize and load an approximately of 1,35,980 square feet of TDR (calculated at FAR @2) and the same shall form part of the Project. In pursuance of the above, the Land Owners are desirous of granting to the Developer the development, marketing and sale rights of the entire Licensed Land including but not limited to the right to develop and transfer of completed structures of the Project, as may be deemed appropriate by the Developer, which shall, pursuant to this Agreement, vest entirely and absolutely with the Developer in accordance with the terms hereof ("Project Development"). The Developer has agreed to act as the developer of the Licensed Land on the terms and rights contained herein at a consideration mentioned in this Agreement and the Developer is desirous to acquire the Project Development with the benefit of the

abovementioned Licenses with respect to the Licensed Land and project approvals and all other rights incidental and ancillary thereto and certain other rights in connection therewith at such consideration. The Parties hereby agree and acknowledge that this Agreement and all the aforesaid Collaboration Agreements executed between the Parties and General Power of Attorneys dated 13th August, 2012 and 25th June, 2013 issued by the Land Owners in favour of the Developer shall stand amended by this Agreement. ..

..
..

15. CD further submits that as per **para 5.5 of MOU at page number 85** of the application, first charge on receivables is '*pass through charges*' and not the payment to landowners. Para 5.5 of the Collaboration agreement is extracted below:

"5.5 Designated bank accounts: It is agreed between the Parties that all Receivables arising out of the Project on the Licensed Land shall be deposited in a bank account that shall be opened by the Developer in accordance with applicable laws and rules "Designated Bank Account"), All Receivables, including the Pass Through shall be deposited in the Designated Bank Account in accordance with the provisions of Real Estate (Regulation and Development) Act, 2016 and as per the Charges, terms of the loan agreement that may be executed with the lender for the Project The monthly statement of the Designated Bank Account shall be shared with the nominee of the Land Owners on or before 7th day of each calendar month and/or as and when demanded by the Land Owners.

5.5.1. The Parties agree that the monies lying in the Designated Bank Account shall be distributed, utilized or withdrawn by the Developer

5.5.1.1. firstly towards Pass Through Charges;

5.5.1.2. secondly towards repayment of any loan interest thereon or satisfaction of any charge created on the Licensed Land;

5.5.1.3. thirdly towards creation of reserve for meeting the costs of six (6) months of construction;

5.5.1.4. fourthly towards the payment of LOS Revenue Share;

5.5.1.5. lastly, the balance, if any, shall be withdrawn by the Developer towards its own revenue share"

16. CD further submits that a Backup Security Agreement dated 25.10.2016 (Security Agreement) was executed between the parties. Clause 9.8 of the Security Agreement provides for a net amount of Rs. 130 crores payable to the Applicant as

minimum security which is inclusive of the amounts previously paid to the Applicants and the alleged debt of Rs. 9.10 crores in the present application.

17. CD further submits that Applicants began demanding Rs. 9.10 Cr. as share in contravention of Clause 5.5.1 of the MOU and jeopardized the development of the entire project. CD preferred an Arbitration Case No. 335/2018 under section 9 of the Arbitration and Conciliation Act. CD further submits that Applicant were aware of the pre-existing dispute and instead of filing their reply, a demand notice under section 8 of IBC was issued as an afterthought. Reply to the Demand Notice was issued by CD on 18.12.2018 annexed as **Annexure P-10**. Counsel for CD further argued that the Applicant objected to payment of Rs. 3 crore from Escrow as pass through charges which led to Demand Notice under Section 8. CD further submitted that the matter was also taken in arbitration by CD prior to the issue of demand notice. However, Section 9 application under the Arbitration and Conciliation Act was Dismissed in default. Appeal filed by the CD against the order is still pending.

18. CD further submits that the landowners cannot claim to be 'Operational Creditors' as it neither relates to the supply of goods nor services rendered. CD relied upon the judgment passed by Hon'ble NCLAT in **M/s Sree Sankeshwara Foundation and Investments vs. M/s Dugar Housing Limited Company Appeal (AT) (Insolvency) No. 515 of 2019**.

ANALYSIS AND FINDINGS:

19. We have heard the parties, perused the documents and pleadings of the parties. The issue at hand is that **Whether the dues to Land owners under collaboration agreements read with agreement dated 25.10.2016 taken collectively as a whole can be treated as 'Operational Debt' within the provisions of the IBC?** To understand it in a better way, we find it important to quote the relevant provisions of the Code. Section 5(21) of the IBC defines the term '**operational debt**' as:

“Operational debt ” means a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to Central Government, any State Government or any local authority”

20. On perusal of the definition of the operational debt, it is clear that the definition is comprehensive in nature and has to be understood within the four corners of this code. It means a ***‘claim in respect of the provision of goods and services’***. Latter part of the definition is not relevant in the facts and circumstances of the case. We will confine ourselves to the interpretation of the impugned agreements/MOU in terms of claims with respect to goods and services.

21. In the instant case at hand, it is very much clear that the Applicant along with other land owners obtained the license of the land from the competent authority and agreed with the Corporate Debtor for development of the Land with consideration as mentioned in **para number 6 and 7 @ page number 3 and 4 (ibid) respectively**. Collaboration (Development) agreements, MOU, and all the agreements on which applicant relied upon to make his claim are placed on record. For the sake of clarity, we are extracting the initials of agreements/MOU entered between the parties. **Page 36 of the application reads as follows:**

“COLLABORATION AGREEMENT

This Collaboration Agreement (the "Agreement") is executed at Gurgaon on this 13" day of August, 2012, by and amongst

1. Mrs. Gurmeet Gill, w/o Mr. Surinder Pal Singh, aged 63 years and residing at 32 Housing Society, South Extension Part 1, NDSE1, New Delhi.

..

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Page 51 of the Application:

SUPPLEMENTARY COLLABORATION AGREEMENT

This Supplementary Collaboration Agreement ("Agreement") is executed at Gurgaon on this 25th day of June, 2013

BETWEEN

1. Mrs. Gurmeet Gill, w/o Mr. Surinder Pal Singh, aged 64 years and residing at 32 Housing Society, South Extension Part 1, NDSE1, New Delhi.

..
..

Page 75 para H of the Collaboration agreement:

The Parties are desirous of developing a residential group housing project on the entire Licensed Land ("Project") in compliance with the license no. 64 of 2013 dated July 20, 2013 and license no. 12 of 2014 dated August 01, 2014 (collectively. "Licenses") issued by DTCP. The Developer is free to utilise the transferrable development rights ("TDR") with respect to the Unlicensed Land or any part thereof, in the said Project or at any other location/project site as it may deem fit...

..

On perusal of these various agreements/MOU entered upon between parties and reading them taking as a whole it is evident that the nature of transactions involved in the case is a Joint Development Agreement wherein the Developer will develop the land and share the profit in the agreed ratio as per the term of agreements/MOU between the Applicant along with other land owners and itself (CD).

22. It has been reiterated in many cases both by this Adjudicating Authority as well as by Hon'ble NCLAT that Joint Development agreement are not within the ambit of Financial debt as defined in the code. Although the question of financial debt is not an issue in the case but if the similar kind of agreements are not in the ambit of financial debt, then, **Can this type of agreement and claims arising out of same be considered under the definition of 'Operational Debt'?** The Hon'ble Supreme Court in the matter of **Phoenix ARC Private Limited versus Spade**

financial Services Limited and Ors. (2021) 3 Supreme Court Cases 475 observed that:

“Further, IBC recognizes that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors.”

23.It has been submitted by the Applicant itself that :

“land and construction over the land is the main component for development of any real estate project by a real estate company. The Licensed Land and development right over there are directly related to the units/product which are being developed, marketed and sold by the Corporate Debtor being a real estate company for their commercial operation/production. Therefore, the Land Owners of the Licensed Land are Operational Creditors.”

Presumably, Applicant is suggesting that there is a direct nexus between the unit sold by the developer and the licensed land for which ownership belongs to applicant alongwith other land owners and so they come under the ambit of “Operational Creditor” as a person to whom operational debt is owed.

24.We think that the Applicants are attempting to give a very wide interpretation to Section 5(21) which cannot be the legislative intention. Reasonably, parties vide various agreements share a legal and binding relationship and have mutual financial obligations towards each other. But these transactions are not in the nature of ‘Operational Debt’. It is the Licensed Land and rights associated with it are in question. The development of the said land is within the Developer’s sphere and benefits accrued from that land is what the Applicant along with other landowners and developer will share amongst each other in a specified ratio.

25.This type of agreement cannot be considered under the ambit of “Operational debt” under Section 5(21) and “Operational Creditor ”under section 5(20) and thereby under Section 9 of the IBC, 2016. It may not be out of place to note that there may be variety of real estate development contracts under different names

which can be entered upon which may have a component in the nature of a loan. For example Collaboration Agreement, Joint Development Agreement, the purpose of which is the mutual binding legal relationship in exchange of consideration. These type of agreements cannot come under the purview of operational debt as understood under the Code. What has to be seen is the real intention between the parties.

26.For the aforementioned reasons, we are of the opinion that the said contract is in nature of joint development of project with sharing of profit in an agreed ratio amongst them. rather than a claim in respect of the provision of goods or services. In our opinion, the agreements cannot be read in isolation alone rather are to be seen collectively as a whole. The parties appear to have entered into an agreement with a different motive i.e. development of the project and sharing the proceeds therefrom. There is no case to be covered and admitted under section 9 of the code. Parties may pursue the matter to seek appropriate remedy as per law.

ORDER

27.We find no merit in this case for Admission under Section 9 as *“Operational Creditor”*. **CP(IB)/393(PB)/2019** is **DISMISSED**.

Copy be sent to the parties.

File be consigned to the record.

-sd/-

**RAMALINGAM SUDHAKAR
PRESIDENT**

-sd/-

**AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)**