

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 515 of 2019

IN THE MATTER OF:

**M/s. Sree Sankeshwara Foundation and
Investments**

....Appellant

Vs.

M/s. Dugar Housing Limited

....Respondent

Present:

**For Appellant: Mr. Krishnendu Dutta, Mr. Siddhant Buxy and
Mr. Shivankar Sharma, Advocates.**

For Respondent: None.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- 'M/s. Sree Sankeshwara Foundation and Investments'- ('Operational Creditor') filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) for initiation of the 'Corporate Insolvency Resolution Process' against 'M/s. Dugar Housing Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, by impugned order dated 10th April, 2019 rejected the application on

the ground that the Appellant does not come within the meaning of 'Operational Creditor' and, therefore, cannot be treated as Creditor.

2. The Adjudicating Authority further noticed that the Appellant is one of the party to the Joint Development Agreement executed in the year 2012 and, therefore, cannot be held to be 'Operational Creditor'. Further held that the application is also barred by limitation.

3. Learned counsel for the Appellant submitted that the arrangement between the Appellant and the Respondent as per the Joint Development Agreement and various other agreements is:

- a) The Appellant would grant development rights in respect of the land and the Respondent would develop it. The Respondent would allot 42.5% of the developed portion to the Appellant, who would in return transfer 57.5% of the interest in the land to the developer.
- b) Later, instead of allocation of built up space, the Appellant exercised its option to take a share in the revenue/ sale proceeds of the apartments.

4. It was submitted that the aforesaid agreement was never given effect to and the Respondent admitted that a sum of Rs.2,64,19,557/- was due.

5. Reliance was also placed on Notification No.4/2018- Central Tax (Rate) dated 25th January, 2018 published by the Ministry of Finance (Department of Revenue), Government of India to suggest that *“supply of development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure”*, constitute service.

6. Having gone through the records and stand taken by the Appellant, we hold 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.

7. Therefore, we hold that the Appellant is not an ‘Operational Creditor’. The application under Section 9 at the instance of the Appellant was not maintainable and the same has been rightly rejected by the Adjudicating Authority.

The appeal is dismissed with aforesaid observations. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI
25th November, 2019

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