

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH

COMPANY APPEAL (AT)(INSOLVENCY) NO.511 OF 2020

IN THE MATTER OF:

M/s RK Associates & Hoteliers Pvt Ltd

Regd. Office at A-25, Hospital Road,

Jangpura-A, New Delhi-110014

Through its Director Shri Sharan Bihari Agarwal

Email: sbagrawal65@gamil. Com

Phone No. 011-47100200

Fax No. 011-24373621

Address of Legal Representative: NA

...Appellant

Vs.

BW Businessworld Media Pvt Ltd

Through its Managing Director

Regd. Office at J-6/55, Upper Ground Floor,

Rajouri Garden, New Delhi-110027

U22190DL2013PTC259734

Also at:

2nd Floor, Express Building,

9-10, Bahadur Shah Zafar Marg,

New Delhi – 110002

Email: ankit@businessworld.in

... Respondent

Present:-

For Appellant: - Mr Gagan Gupta, Advocate

For Respondent: -Mr. Petal Chandhok, Ms Rupali, Mr Sudhanshu
Pandey, Advocates

J U D G M E N T

Jarat Kumar Jain. J:

The Appellant M/s RK Associates & Hoteliers Pvt. Ltd. filed this Appeal against the impugned order passed by the Adjudicating Authority (National Company Law Tribunal) Bench (Court No. II), New Delhi on 20.02.2020 thereby dismissed the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (In Brief I&B Code).

2. Brief facts of this case are that in June, 2018 IRCTC Ltd. issued a tender document/corrigendum for publishing and distribution of the Board magazine for Indian Railways-Rail Bandhu. On 18.06.2018 the Operational Creditor (Appellant) and Corporate Debtor (Respondent) entered into a Memorandum of Understanding (MOU) for working together on the projects in Indian Railways. The purpose of the MOU was to cooperate for jointly qualifying, developing, bidding, executing and operating the projects in publication, printing and media. Both the parties envisaged execution of further document (Shareholder's agreement dated 06.12.2018) to form a Joint Venture Special Purpose Company as a bidding consortium with participation of both the parties with interest in the ratio of 50:50. The Corporate Debtor (Respondent) participated in the IRCTC tender and on 14/16.08.2018. IRCTC issued a Letter of Award for publishing and distribution of "On board magazine for Indian Railways-Rail Bandhu" in favour of the Corporate Debtor.

3. As per the Letter of Award, the Corporate Debtor was required to submit performance guarantee to IRCTC Ltd. For the same the Operational Creditor (Appellant) on 27.09.2018 transferred total amount of Rs. 72,09,975/- to the Corporate Debtor (Respondent) into tranches Rs.

31,37,500/- as its share towards performance guarantee and Rs. 40,72,475/- as share towards first instalment for the first year revenue share. On 29.09.2018 the Operational Creditor (Appellant) transferred further amount of Rs. 50 Lakhs to the Corporate Debtor by way of NEFT transfer. On 12.03.2019 IRCTC Ltd. terminated the contract awarded to the Corporate Debtor (Respondent) and encashed the performance guarantee and further inform that the liquidated damages shall be intimated in due course. Thus, for fault of the Corporate Debtor (Respondent) the amount of Rs. 1,22,09,975/- immediately felt due to the Operational Creditor (Appellant) w.e.f 12.03.2019 with interest @ 18% per annum. The dues remain unpaid, therefore, the Operational Creditor (Appellant) had sent a demand notice dated 31.05.2019 under Section 8 of the I&B Code. The Corporate Debtor (Respondent) had replied to the demand notice vide its letter dated 14.06.2019. The Contract was terminated by the IRCTC Ltd. due to breaches and defaults by the Corporate Debtor (Respondent). Thereafter, the Operational Creditor (Appellant) filed an Application before the Adjudicating Authority for initiating the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor (Respondent) under Section 9 of the I&B Code for the Operational Debt.

4. The Corporate Debtor (Respondent) has resisted the Application on the ground that there is a pre-existing dispute between the parties and arbitration proceedings is pending between the Corporate Debtor (Respondent) and IRCTC Ltd.

5. After hearing the parties, Learned Adjudicating Authority dismissed the Application on the ground that the debt in question is arising out of the

payment made by the Operational Creditor as its share for submission of performance guarantee to the IRCTC Ltd. and for business proposition, it cannot be treated as Operational Debt under Section 5(21) of the I&B Code.

6. Being Aggrieved with this order, the Appellant has filed this Appeal.

7. Learned Counsel for the Appellant submitted that the definition of the claim is very wide and includes both a right to payment and also a right to remedy for breach of contract giving rise to payment even if such right is not reduced to Judgment. There is no dispute between the parties with respect to services provided and no dispute was raised by the Respondent prior to the notice under Section 8 of the I&B Code. A perusal of clause 9(ii) (d) and clause 12(ii) of the MOU would reveal that the amount paid by the Appellant to the Respondent become an Operational Debt, immediately after termination of the contract of the Respondent by IRCTC Ltd. The Adjudicating Authority presumed that the entire amount of Rs. 1,22,09,975/- was paid by the Appellant to the Respondent as its share of performance guarantee submitted to IRCTC Ltd., actually only Rs. 72,09,975/- was paid towards performance guarantee and remaining Rs. 50 lakhs was paid for various expenses that the Respondent would incur for the execution of the project. In any case entire amount was paid in relation to services provided by the Appellant to the Respondent. Hence, the claim is Operational Debt under Section 5(21) of the I&B Code. The Corporate Debtor has defaulted in payment. No Joint Venture was formed between the parties and the Appellant was accommodated as a sub-contractor. Thus, the Operational Debt is due and Respondent committed default is proved.

However, Ld. Adjudicating Authority erroneously dismissed the Application. Therefore, impugned order is liable to be set aside.

8. *Per Contra* Learned Counsel for the Respondent supported the impugned order and has drawn our attention towards the terms and conditions of the MOU and Shareholders agreement dated 06.12.2018 and submits that this is a case of Joint Venture. The Appellant and Respondent are partner and they have invested 50:50 and entitled for the profit for the same proportion. The Respondent was awarded a contract for publication and distribution of the board magazine for IRCTC Rail Bandhu. The Appellant remitted an amount of Rs. 72,09,975/- towards 50% share of the performance guarantee that was submitted with IRCTC Ltd. Thereafter, the Appellant further remitted an amount of Rs. 50 lakhs towards their share of various expenses that would be incurred for the execution of the project. As per the agreement between the parties, the Respondent has to publish the magazine and the Appellant has to distribute the magazine. However, the Appellant has failed to perform their part. which is evident from the termination letter dated 12.03.2019. The Appellant has not supplied any goods or provided services to the Respondent. Thus, there is no relationship between them as Operational Creditor and Corporate Debtor. The Impugned order does not require any interference by this Appellate Tribunal and the Appeal is liable to be dismissed.

9. After hearing learned counsel for the parties, we have gone through the record.

10. The Appellant and Respondent enter into MOU dated 18.06.2018, which is as under: -



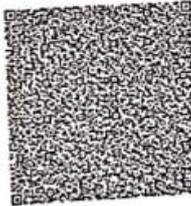
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Certificate No.
 Certificate Issued Date
 Account Reference
 Unique Doc. Reference
 Purchased by
 Description of Document
 Property Description
 Consideration Price (Rs.)
 First Party
 Second Party
 Stamp Duty Paid By
 Stamp Duty Amount (Rs.)

Annexure A-3
 INDIA NON JUDICIAL
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 Government of National Capital Territory of Delhi

e-Stamp

IN-DL39663176584059Q
 : 19-Jun-2018 10:35 AM
 : IMPACC (IV) d1917103/DELHI/DL-DLH
 : SUBIN-DL91710383315091713985Q
 : R K ASSOCIATES AND HOTELIERS PVT LTD
 : Article 5 General Agreement
 : Not Applicable
 : 0
 : (Zero)
 : R K ASSOCIATES AND HOTELIERS PVT LTD
 : Not Applicable
 : R K ASSOCIATES AND HOTELIERS PVT LTD
 : 100
 : (One Hundred only)



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Memorandum of Understanding

This Memorandum of Understanding (hereinafter referred to as "MoU") is made and entered into this 18th day of June 2018, at New Delhi, India.

Between

RK Associates and Hoteliers Private Ltd., a Company incorporated under the Companies Act, 1956, having its corporate office at A-25, Hospital Road, Jangpura-A, New Delhi 110014

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Statutory Alert:

1. The authenticity of this Stamp Certificate should be verified at "www.stichestamp.com". Any discrepancy in the details on this Certificate and as available on the website renders it invalid.
2. The onus of checking the legitimacy is on the users of the certificate.
3. In case of any discrepancy please inform the Competent Authority.

R.K. Associates & Hoteliers Private Ltd.

Anurag Batra

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(hereinafter referred to as "RKAHPL"), represented by Mr. S. B. Agrawal s/o Late Shri R S Agrawal r/o 53, Friends Colony (East) New Delhi 110065, acting as authorized representative of RKAHPL (which expression shall unless it be repugnant to the context or meaning thereof shall be deemed to mean and include its representatives, successors- in- business and permitted assigns) of the FIRST PART.

AND

BW Businessworld Media Private Limited, a Company incorporated under the Companies Act, 1956, having its corporate office at 9-10, Bahadur Shah Zafar Marg, New Delhi 110002 (hereinafter referred to as "BW") represented by Mr. Anurag Batra, s/o Jagdish Lal Batra r/o House No 373, Sector 7, Urban Estate, Gurgaon, Haryana-122001 acting as authorized representative of BW which expression shall unless it be repugnant to the context or meaning thereof shall be deemed to mean and include its representatives, successors- in- business and permitted assigns) of the OTHER PART.

RKAHPL and BW hereinafter are individually referred to as the "Party" or collectively as the "Parties".

Whereas,

- A. BW has interest in Publication, Printing and Media and also in taking up similar projects for Indian Railways, Government of India, State Government, PSUs and Corporate Sector.
- B. RKAHPL is engaged comprehensively inter alia in multiple businesses pertaining to railways in India namely Travel & Tourism, Railway Hospitality, Media & Advertisement, Multi-cuisine Food Plaza on railway Stations since last over 67 years.
- C. Parties are now desirous of working together on these projects in Railways under the terms and conditions of this MoU ("Proposed Collaboration").

In light of the above, the Parties hereby agree:

1. Purpose and Scope of Collaboration

- (i) MoU is intended to establish the key terms and principles of the Proposed Collaboration and reflect the mutual understanding of the Parties in this regard.
- (ii) In accordance with the terms and principles set forth in this MOU the Parties wish to cooperate for the purpose of evaluating the possibility of jointly, qualifying, developing, bidding and, if successful, executing and / or operating the projects in Publication, Printing and Media herein after referred as "Projects / Project"
- (iii) To that end, the Parties agree that they shall continue the Proposed Collaboration in order to (i) evaluate, negotiate and execute any additional agreements that may be required; (ii) qualify for bidding in accordance with any Request for Proposal ("RFP") and/or Request for Qualification ("RFQ") and/or Expression of Interest ("Eoi")

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released by the client ("Railway Authorities") for any of the Projects; (iii) jointly submit a bid for any of the Projects ("Joint Bid") on the designated bid submission date ("Bid Submission"); (iv) for the Projects, where Joint Bid is not stipulated by the client, allow either of the Parties, fulfilling the qualification criteria to submit bid as a single entity, and if awarded, accommodate other Party/ Parties as sub-contractor(s); and (v) if awarded any of the Projects, execute their respective obligations, in accordance with the terms and provisions of this MoU and any subsequent agreements.

(iv) The Parties shall mutually render to one another all reasonable assistance with respect to the development of the Projects, including coordinating their actions for the respective tasks, providing reasonable advance notice of impending tasks, document submissions or information requirements and providing information to the other Party within a reasonable time period.

(v) For purpose of jointly developing and Bid Submission for a Project, the Parties acknowledge and agree that additional agreements will be negotiated and executed, based upon the terms and conditions set forth in this MoU, including but not limited to: (i) prior to the Bid Submission, a consortium agreement in accordance with the requirement of the tender document; and (ii) an internal term sheet / agreement describing the basis of undertaking the work in the Project (herein after "Project Documents").

(vi) The Parties agree that the additional agreements shall include, but not limited to financial mechanisms (such as factoring, positive cash flow scenarios, supplier payments conditions, bond fronting/surety bond counter-guarantee) in order to obtain a more competitive bid for the Project.

(vii) The Parties shall agree prior to submission the deviations and assumptions from the terms of the Tender and the risk management approach, for the Proposal, in its case, and an equitable/ fair assignment of staff positions, based on the roles assumed by each party.

2. Good Faith Negotiations

Upon the signature of this MoU, the Parties shall negotiate and work together in good faith and use their best efforts to complete the tasks and agreements necessary to allow the Parties to analyse the Projects and eventually prepare the Bid/ Joint Bid.

3. Exclusivity

In consideration of the mutual undertakings set forth in this MoU, parties undertake that, Project Documents, shall provide for exclusivity on case to case basis for each Project such that neither Party shall, directly:

- (i) commence or continue any negotiations with any third party in relation to the Project;
- (ii) seek, encourage or respond to any approach that might lead to negotiations with a



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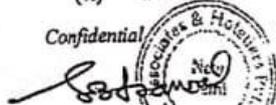
- third party relating to the Project; or
- (iii) submit a competing proposal for the Project in its own name or in conjunction with third parties.

For the avoidance of doubt, "third party" does not include affiliate, associate and parent or group companies of each Party. Each Party shall also ensure that its employees, agents and advisers comply with the undertakings in this clause.

4. The Bidding Consortium

- (i) RKAHPL / BW shall offer to the other party all future proposals related to Railways to jointly develop the Projects and the other party shall confirm their participation within 60 (sixty) days in writing, in the event the other party fails to confirm its participation within stipulated timelines of 60 (sixty) days for whatsoever reason then either party shall be free to participate in a manner of its choice at its sole discretion.
- (ii) For the purpose of developing and jointly bidding the Projects, RKAHPL and BW (together, the "Bidding Consortium Members") shall form a JV Special Purpose Company (the "Bidding Consortium") in which each Party's participation interest shall be 50:50.
- (iii) In a Project, where joint venture (JV) / consortium is not stipulated / allowed by a client, the Party meeting RfQ / RfP conditions shall be allowed to bid as a single entity, provided that on award of the Project to such Party, the other Party shall be accommodated as sub-contractor in a mutually agreed structure such that the economic interest of both Parties are fulfilled in the ratio of 50:50 in a manner as if they have bid jointly in a Bidding Consortium.
- (iv) Pursuant to sub-clause (iii) above, if any Party do not want to participate in the bidding of a Project due to any reason ("Non Eligible Party") and is still willing to participate as a sub-contractor in the Project then the Party if awarded with the Project in capacity as a lead member, shall consider such request from the Non Eligible Party and shall create/ provide a suitable mechanism for the participation of the Non Eligible Party in the Project on mutually agreed terms subject to the terms and conditions agreed between Parties and compliant to various Project Tender requirements.
- (v) BW, in general, will be the Lead Member for the purposes of executing / developing and bidding the Projects and RKAHPL shall be responsible for overall management of the Project(s) and, in particular, for undertaking the preliminary technical, financial and tax analysis. BW and RKAHPL shall undertake the initial approach to prospective tenders to facilitate and manage financial closure needed for the Project.
- (vi) The division of the scope of responsibilities will be further elaborated in specific

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RK Associates (India) Pvt. Ltd.
Subsidiary

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Consortium Agreement(s)/ Internal documents.

5. The Project Company

(i) If so required by the Tender Document and if so agreed unanimously by the Parties as soon as reasonably practicable following the date of being designated preferred bidder under the RFP, RKAHPL and BW shall incorporate a special purpose vehicle (SPV) for the sole purpose of undertaking the financing and execution of the Project ("Project Company").

(ii) The Shareholding of the Project Company shall also be 50:50.

(iii) If so required, once the Project Company is finally incorporated, the Bidding Consortium Members shall enter into a shareholders agreement to give effect to the understanding agreed between the Parties under this MoU ("Definitive Agreement"). The Parties shall discuss and agree on the form of the Project Company and the terms of the Project Company's shareholders agreement, such decision is to take into account the Members' intent to minimize their shareholder tax liability together with the anticipated requirements of the contemplated financing parties, as well as any regulatory restrictions or requirements that may be imposed in the RFP.

(iv) Board composition in the Project Company shall be in proportion to the shareholding of each party. However, if any Party gets eventually diluted to 10% or below shareholding then that Party shall have no representation in the board of the Project Company.

(v) The Parties, both directly or via subsidiaries/affiliates acceptable to the lenders and in accordance with the requirement of the RFP / RFQ, shall fund their portion of equity and provide their portion of any bonds, securities or letters of credit required by the client or by Lenders in accordance with their Shareholding in the Project Company. In the event any party is not able to subscribe to its share of the equity within a period of 45 days from the date of the notice of equity induction, then the other party shall have the right to subscribe to such equity of the other party and the other party shareholding in the Project/Project Company shall get automatically diluted proportionately.

(vi) If any shareholder proposes to sell its shareholding in the Project Company to a third party then the shareholder proposing to sell such shares shall provide a right of first refusal ("ROFR") to the other shareholder on the same terms and conditions as it proposes to sell it to the third party. Detailed mechanism of such ROFR and of TAG along and DRAG along rights shall be mutually discussed and agreed by the Parties in the Definitive Agreement.

(vii) If the Project does not reach Financial Closure, the Parties acknowledge and agree that (i) none of them will neither receive any compensation nor reimbursement of their Internal or External Costs; and that (ii) there shall be no

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R.K. Associates & Hoteliers Private Ltd.

Director

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further liability among the Parties, except as otherwise provided in this MoU or in any other written agreement between the Parties.

6. Internal Expenses

Each of the Parties shall be solely responsible for their own internal costs and expenses, including staff costs and travel, in respect of the rendering of their respective services under this MoU. In the event of being awarded the Project and financial closure being achieved, the Internal Expenses shall be documented, recorded and substantiated and shall form part of the total Project costs if duly approved by the Board of Directors of the SPV, to be funded under the finance agreements.

7. External Expenses

All costs and expenses due arising in connection with services provided by mutually appointed third parties in relation with the Project that are previously agreed in writing by the Parties shall be shared among the Parties, in accordance with their Participation Interest in the related matter at each stage. The External Expenses shall be documented and substantiated prior to financial closure and shall form part of the total Project costs to be funded by the finance agreements. Such External Expenses shall be accounted on a pro-rata basis and be treated in accordance with their Shareholding and be drawn as disbursement under the finance agreements. No External Expenses shall be reimbursed to any of the Parties if the Project does not reach financial closure for any reason or if the External Expenses so incurred are not accepted by the Lenders or by the client.

8. Technology

Technology transfer, if any, from either party to the respective Project shall be free of cost, and all up gradation and/or new technology shall be made available to the Project Company without charging any royalty or license fee. In case of an early exit by the Technology providing party from the Project, the technology and upgradation, if any shall continue to be made available to the Project on same terms and conditions.

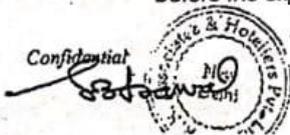
9. Term and Termination

(i) This MoU is signed for the purpose of enabling Proposed Collaboration in multiple Projects and therefore initially shall have a term of Three (3) Years and extendable as per mutual concern of both the parties from the date of its execution signature ("Term"). Consecutive extensions of this MoU may be mutually agreed in writing between the Parties.

(ii) This MoU will be terminated if any of the following circumstances occurs:

- a) if the Parties mutually agree to terminate the MoU or if one of the Parties advises the other Party, that it does not wish to pursue with the Proposed Collaboration;
- b) If the Term of this MoU expires, unless extended by mutual agreement;
- c) If no Bid is done/ Consortium Agreement is executed by the Parties on or before the expiry of the Term;

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d) if any of the Parties does not comply with the requirements under the tender documents;

e) if any of the Parties is blacklisted by the client; or

f) if any Party is declared as insolvent or is convicted by a Court of competent jurisdiction.

10. Confidentiality

All information shared by either Party with the other Party/Parties shall be treated as confidential by the recipient Party/Parties and shall not be used other than for the purpose contemplated by this MoU. During the validity of this MoU, each of the Parties shall use the information provided by the other Party/parties under this MoU for the purpose of performing its obligations and none of the Parties shall, either directly or indirectly, disclose the information provided by the other Party/Parties to any outside party other than those who may be required to know such information for the purpose of performance of this MoU. The contents of this MoU itself are confidential information and shall not be disclosed by the Parties in any manner. Unless the Parties mutually agree otherwise to terminate and the obligation of confidentiality stipulated therein shall continue to be in force until one (1) year after the termination of the MoU.

The restriction in this Clause does not apply to any information which:

- a) at the time of disclosure is already in the public domain;
- b) subsequently comes into the public domain, other than through a breach of any duty of confidentiality by any Party;
- c) is already in the lawful possession of the Party receiving the information (or its authorised recipient);
- d) subsequently comes into the lawful possession of the Party receiving the information (or its authorised recipient) from a third party who is not in breach of any duty of confidentiality with regard to the information;
- e) is required to be disclosed by law, or by any stock exchange or governmental or regulatory authority having jurisdiction over the party required to disclose the information; or
- f) has been independently acquired by any Party otherwise than in the exercise of that Party's rights under this MoU or in the implementation of this MoU.

11. Non-Solicitation

Either Party will not, and shall procure that their respective Representatives will not, at any time now and for a period of {12} months from the date of this MoU:

- a) either on its own account or for any person, firm, company or organization, directly or indirectly, solicit or entice or attempt to solicit or entice away from other Party and its subsidiaries and related corporations any director, manager, officer or employee of any such company whether or not such person would commit any breach of any employment contract by reason of leaving the employment of the relevant company;

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R.K. Associates & Hoteliers Pvt. Ltd.
Sobansal

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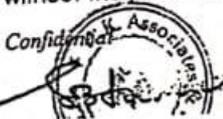
- b) directly or indirectly employ or otherwise engage any director, manager or officer of any member of the either Party who by reason of such employment, is or is likely to be in possession of any Confidential Information or trade secrets relating to any member of the Consortium;
- c) Notwithstanding anything contained hereinabove, Parties agree that either Party shall have liberty to engage, hire or employ any of the officers, employees, experts, consultants, etc. of other Party through publication of advertisement, inviting bid / tender or through third party sourcing.

12. Liability and Indemnity

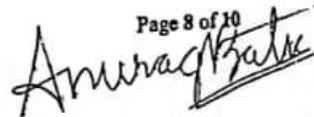
- (i) Except in case of proven bad faith, neither Party shall be liable towards the other party for any punitive, consequential, indirect damages or loss of profit, business, revenues or goodwill for any matter arising from this MoU unless if such breach is due to direct misrepresentation, fraud, gross negligence or wilful misconduct.
- (ii) The Parties agree that in the event of damages owed by the Parties to a third party, including without limitation the client, that is attributed to the default of a specific Party, any and all consequences of such default caused deliberately or due to negligence shall be borne by the defaulting Party (even in excess of its respective shareholding) and such defaulting Party shall fully indemnify and keep the other Party(ies) harmless from those consequences provided that the default is attributable to the defaulting Party; if the damages cannot be attributed to a specific Party, then each Party shall bear the amount of the claim according to level of its shareholding.
- (iii) Save as set out otherwise in this MoU, the Parties shall be liable in proportion to each Party's Shareholding in the Consortium in the event that the security is forfeited, called upon or drawn on; provided that if any security is forfeited, called upon or drawn by reason of the fault, negligence, wilful misconduct or breach of this MoU by a particular Party, such Party shall indemnify and hold harmless the other Party from and against all losses, damages, liabilities, costs and expenses arising out of or in conjunction with such forfeiture, call or drawing.
- (iv) Save as set out otherwise in this MoU no Party shall be liable to the other Party for any consequential loss or damage such as (but not limited to) loss of profit, loss of reputation, loss of revenue, loss of interest and under or in connection with this MoU or its termination.
- (v) If this MoU terminates or any Party withdraws or assigns or is excluded due to a default; the obligations under this Clause shall remain binding upon the Parties for obligations accrued until termination / withdrawal / assignment notwithstanding such termination; assignment or withdrawal.

13. Assignment

With the exception of their respective affiliates, parent and group companies which may also enter into this MoU for the purposes of strengthening the Project and or the benefit of the Parties, neither Party may assign any interest, benefit, right nor obligation under this MoU without the prior written consent of the other Party. In any event of authorized assignment,

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the assignee party shall perform its duties under this MoU and the assignor shall guarantee the performance of this MoU.

14. Applicable Law and Dispute resolution

- (i) This MoU shall be governed and construed in accordance with the laws of India and the courts New Delhi shall have exclusive jurisdiction in connection with any Dispute. Any claims, differences or disputes arising out of or in connection with this MOU or in connection with arrangements regarding the performance of this MOU shall be settled by an amicable effort on the part of the Parties affected within one (1) month. An attempt to arrive at a settlement shall be deemed to have failed as soon as one Party so notifies the other Party in writing after one month.
- (ii) In the event of failing to achieve an amicable solution, the dispute shall be finally resolved by arbitration under the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). Each Party shall appoint one arbitrator within 15 (fifteen) days of notice for arbitration served by either Party. The third presiding arbitrator shall be appointed by the two appointed arbitrators within a period of 15 (fifteen) days after their appointment. If for any reasons the arbitrators are not appointed then such arbitrator(s) shall be appointed in accordance with the Arbitration Act. The seat of arbitration shall be Delhi, India. The decision of the arbitrator shall be final and binding upon the Parties.

15. Counterparts

This MoU may be executed in any number of originals or counterparts, each in the like form and all of which when taken together shall constitute one and the same document, and any Party may execute this MoU by signing any one or more of such originals or counterparts. Facsimile/email transmission of an executed signature page of this MoU by a Party shall constitute due execution of this MoU by such Party. A facsimile/email copy of this MoU shall be sufficient evidence of the execution hereof.

16. No representation, partnership or agency

The Parties shall not be entitled to act or to make legally binding declarations on behalf of any other Party without its previous writing consent. Nothing in this MoU shall be deemed to constitute a joint venture, agency, partnership, interest grouping or any other kind of formal business grouping or entity between the Parties.

17. Severability

If for any reason whatever any provision of this MoU is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision.



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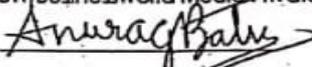
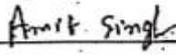
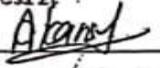
18. Notice

Any notice given hereunder shall be in writing and shall be hand delivered or sent by post or telefax or email with delivery notification to the address set out below and any notice shall be deemed to be given if hand delivered at the time of delivery, if sent by post at the date of mailing, if sent by email at the time of receipt of acknowledgement of delivery notification and if sent by telefax the date the machine confirmation of the transmission of the said telefax is received.

Name of Party : BW Businessworld Media Private Limited
 Address : 9-10, Bahadur Shah Zafar Marg, 2nd Floor, Express Building
 New Delhi - 110002
 Fax Number : 011-49395900
 Contact Person : Mr. Anurag Batra
 E-mail : anurag.batra@businessworld.in

Name of Party : R.K. Associates & Hoteliers Private Limited
 Address : A-25, Hospital Road, Jangpura-A, New Delhi 110014
 Fax Number : 011-47100222
 Contact Person : Shri Rajeev Mittal
 E-mail : rajeevmittal@comesum.com

In witness whereof, the Authorized Representatives of the parties hereto have executed this MoU on the day, month and year first above written.

R.K. Associates & Hoteliers Private Limited  Authorised Signatory	BW Businessworld Media Private Limited  Authorised Signatory
[Witness 1]  NAME AMIT KUMAR SINGH	[Witness 2]  NAME Ankit Kumar

Confidential

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(True Copy)

R.K. Associates & Hoteliers Private Ltd


Director

(True Copy)

11. The MOU was intended to establish the Key terms and principals of collaboration and mutual understanding of the parties. As per the terms and conditions of the MOU, the Appellant and Respondent have mutually agreed that they wish to cooperate for the purpose of evaluating the possibility of jointly qualifying, developing, bidding and successful execution and operating the projects in publication, printing and media. It was also agreed between them that they jointly submit a bid for any of the projects but where joint bid is not stipulated by the client, allow either of the parties fulfilling the qualification criteria to submit bid as a single entity and if awarded accommodate other party as sub-contractor and if the awarded any of the projects, execute their respective obligation in accordance with the terms of the provisions of the MOU and any subsequent agreements.

12. Clause 5 of the MOU provides that if so require by the tender document and if so agreed unanimously by the parties as soon as reasonably practicable following the date of being designated preferred bidder under the RIP, RKHPL and BW shall incorporate a special purpose vehicle for the sole purpose of undertaking the financing and execution of the project (Project Company). The shareholding of the project company shall also be 50:50. In furtherance of the MOU on 06.12.2018 the Appellant entered into a Shareholder's agreement with the Respondent for the purposes of executing the project. On behalf of the Appellant Company, the agreement is signed by the Rajiv Mittal, however, the Appellant in Memo of Appeal explained that the Appellant has prepared and sent to the Respondent the drafted Shareholder's agreement but the draft agreement was never signed by the Director of the Appellant. It is to be seen that the

Appellant has not specifically denied that Rajiv Mittal has not signed the agreement on behalf of the Appellant Company. Counter Affidavit of Rajiv Mittal has also not been filed by the Appellant. Therefore, we are of the view that in pursuance of the Clause 5 of MOU Shareholder's agreement was executed by the parties. Clause 5 (ii) of the MOU provides that the shareholding of the project company shall be 50:50 and Clause 5 (vii) of MOU provides that if the project does not reach financial closure, the parties acknowledge and agree that none of them will neither receive any compensation nor reimbursement of their internal or external costs and that there shall be no further liability among the parties except as otherwise provided in the MOU or in any other agreement between the parties. As per the clause 12(iv) it is also agreed between the parties that in this MOU no party shall be liable to the other party for any consequential loss or damage, such as loss of profit, loss of reputation, loss of revenue, loss of interest and under or in connection with this MOU on its termination.

13. With the terms and conditions of the MOU it is clear that the project under taken by the parties is a Joint Venture and therefore, the Appellant has paid the 50% of performance guarantee though the contract was awarded to the Respondent. There is nothing in this MOU that the Appellant has to provide services to the Respondent. Even the Appellant is not able to demonstrate which type of services provided by them to the Respondent. In the Application under Section 9 of the I&B Code r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, it is nowhere mentioned that the Appellant has provided services or supplied goods to the Respondent. The Adjudicating Authority has rightly

held that the payment made towards performance guarantee or any such business proposition cannot be treated as Operational Debt under Section 5 (21) of the I&B Code. We are fully agree with findings of the Ld. Adjudicating Authority.

14. This Appellate Tribunal in the case of M/s Sree Sankeshwara Foundation and Investments Vs. M/s Dugar Housing Limited (CA (AT) (Ins) No. 515 of 2019) decided on 25.11.2019 held that:

“The Appellant alongwith 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 rendered 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 costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

New Delhi
12th February, 2021.
SC