

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 74 of 2017

IN THE MATTER OF:

Anil Mahindroo & Anr

...Appellants

Vs.

Earth Iconic Infrastructure (P) Ltd.

...Respondent

Present: For Appellants: - Mr. Vikas Tiwari and Mr. Neeraj Kr. Gupta, Advocates

ORDER

02.08.2017 The appellants, who claimed to be 'Financial Creditor' filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code) for initiation of insolvency process in respect of the Respondent- 'Corporate Debtor'.

2. Ld. Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi by impugned order dated 8th March, 2017 dismissed the application with the following observations:

"27. Brief facts of the case necessary for disposal of the instant petition are that a MOU, allotment letter was executed between the applicants and Respondent Company. They were allotted one flat reference No. ETTS 1959 on the first floor in the project Earth Titanium Studios developed by Respondent Company at Greater

Noida, UP. The MOU contains an express promise made on behalf of the Respondent Company for guaranteed a returned on the investment and has been styled as 'commitment amount' till the actual possession is delivered. The total sale consideration for the flat was Rs. 20,80,000 plus taxes. The possession of the flat was to be delivered in September 2016. On the date of signing of the MOU part payment of sale consideration alongwith service tax was paid and Respondent Company had undertaken to make payment of commitment of amount of Rs. 20,000/- per month and it was to increase with the payment of the next instalment. The last instalment of the sale consideration was payable in May 2015. Eventually the applicants have paid the entire agreed sale consideration plus taxes. The Respondent Company paid the commitment amount to the applicants till February 2016 and has stopped paying the same subsequently.

28. The facts of the instant case are akin to those of a decided case in material particulars namely Nikhil Mehta & Sons (HUF) & Ors. V. M/s AMR Infrastructures Ltd. [C.P.No. (ISB)-03(PB)/2017] decided on 23.1.2017 by this Bench. The aforesaid petition was also filed under section 7 of the Code. After hearing learned counsel for the applicants we have expressed the view

that applicants could not be regarded as Financial Creditors within the meaning of section 5(7) & (8) of the Code nor their advance payment for purchase of the flat could be regarded as a 'Financial Debt' merely because there is a stipulation in the MOU with regard to payment of assured return. In view thereof we adopt the same reasons which have been given in the case of Nikhil Mehta (supra). A copy of the aforesaid order in the Nikhil Mehta and sons' case may be added by the office which shall constitute as a part of this order as well."

3. While dismissing the application, Ld. Adjudicating Authority observed that any observation made in the said order shall not be construed as an expression of opinion on the merit of the controversy as the Ld. Adjudicating Authority had refrained from entertaining the application at the initial stage.

4. Ld. Counsel for the appellant brought to our notice the decision of this Appellate Tribunal in "*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*" dated 21st July, 2017 passed in Company Appeal (AT) (Insol.) No. 07 of 2017. It is submitted that the original judgment passed by Ld. Adjudicating Authority in "*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*" has been referred in the impugned order dated 8th March, 2017, which has been ordered to be communicated to the appellant along with copy of the impugned order.

5. The aforesaid order passed by Ld. Adjudicating Authority in '*Nikhil Mehta & Sons*' was challenged before this Appellate Tribunal. In '*Nikhil Mehta & Sons v. AMR Infrastructure Ltd*', considering the agreement/Memorandum of Understanding relating to purchase of shops and flats, this Appellate Tribunal, held as follows: -

"20. From the aforesaid agreement/Memorandum of Understanding it is clear that appellants are "investors" and has chosen "committed return plan". The respondent in their turn agreed upon to pay monthly committed return to investors. Thus, the amount due to the appellants come within the meaning of 'debt' as defined in Section 3(11) of the 'I & B Code' which reads as follows: -

"(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

23. From the 'Annual Return' of the Respondent and Form-16A, we find that the 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their commercial purpose treating at par with 'loan' in their return. Thereby, the amount invested by appellants come within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of I & B Code, 2016 subject to satisfaction as to whether such disbursement against the

consideration is for time value of money, as discussed in the subsequent paragraphs.

24. Learned Adjudicating Authority has rightly highlighted the opening word of the definition clause which indicate that a 'financial debt' is a debt along with interest which is **disbursed against the consideration for the time value of money** and may include any of the events enumerated in sub-clause (a) to (i). Therefore, it is to be seen whether the amount paid by the appellants to the Corporate Debtor, fulfil the other condition of "disbursement against consideration of time value and money", to come within the definition of "Financial Creditor" having satisfied that the Corporate Debtor raised the amount through a transaction of sale and purchase of agreement having commercial effect of a borrowing (Section 5(8)(f)).

25. The agreement shows that the respondent agreed to complete the construction of shopping mall on or before December 2009, in all respects. and was required to complete and handover the shop in the shopping mall before the said date. It is not the case of the respondent that the construction was stopped or delayed on account of factors beyond the control of the respondent, as stipulated in the later part of the Memorandum of Understanding. It was agreed upon by the respondent that since the appellants have paid most of the

amount the respondent was ready to pay "monthly committed returns" to the appellants. However, as the appellants were not required the monthly return till December 2008 i.e. for 9 months so the Respondent-Corporate Debtor undertook to make a consolidated payment of Rs. 99,600/- less TDS. For every calendar month the Corporate Debtor was liable to pay committee return w.e.f. January 2009 till the date of handing over of the possession to the appellants. Therefore, it is clear that the amount disbursed by the appellants was "against the consideration of the time value of the money" and "the Respondent-Corporate Debtor raised the amount by way of sale - purchase agreement, having a commercial effect of borrowing." This is also clear from annual returns filed by Respondent and not disputed by the Respondent-Corporate Debtor in their annual returns, wherein the amount so raised/borrowed has been shown as 'commitment charges' under the head "Financial cost". The financial cost includes "Interest of loans" and other charges. Therefore, the 'commitment charge', which include interest on loan, shown against the head "Financial cost" having accepted by the Corporate Debtor in their annual return, we hold that the appellants have successfully proved that they are 'financial Creditor' within the meaning of Section 5(7) of the 'I & B Code'.

26. *Learned Adjudicating Authority while rightly interpreted the provisions of law to understand the meaning of expression 'financial creditor' at paragraph 12 of the impugned judgement as quoted above, but failed to appreciate the nature of transactions in the present case and wrongly came to a conclusion "that it is a pure and simple agreement of sale and purchase of a piece of property and has not acquired the status of a financial debt as the transaction does not have consideration for the time value of money".*

6. The judgment passed by Ld. Adjudicating Authority in the case of "*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*" was set aside and matter has been remitted back to the Ld. Adjudicating Authority for admission.

7. Notice was issued on respondents both by Speed-post and e-mail. In spite of service of notice both by Speed-post and e-mail, the Respondent-Corporate Debtor refused to appear.

8. From the agreement/Memorandum of Understanding dated 14th May, 2014, we find that the said agreement relates to the allotment of apartment admeasuring 520 sq. ft., therein the following terms and conditions of payment (commitment amount) has been stipulated and agreed between the parties: -

"The Company hereby undertakes to make a fixed payment of Rs. 13,000/- (Rupees Thirteen Thousand only (hereinafter referred to as the 'Commitment

Amount') every calendar month to the Allottee(s) w.e.f. May - 2014 till the date of First PDC, which the Allottee(s) duly accepts. After realization of the abovementioned First PDC dated 1.11.14 on its due date, the Company assures the Allottees(s) that the Commitment amount shall be Rs. 11,160/- and will be effective from the date of realization of the first PDC till the date of realization of the Second PDC as mentioned in this MOU. Further, subject to realization of the Second PDC on its due date, the Commitment Amount shall be of Rs. 21,320/- with immediate effect of its realization till the date of offer of possession. The Company hereby clarifies that the monthly Commitment Amount in all the situations stated above is subject to the timely payment of all the instalments as per the plan opted by the Allottee(s). The Company shall stop the payment of commitment Amount, where any of the abovementioned PDC's gets bounced on account of any reason whatsoever, and/or in case of non-payment of the balance amount on due date (as mentioned in this MOU) by the Allottee(s). The Flexi Payment Plan of the Allottee(s) shall change into Construction Linked payment Plan (CLP) without any notice to the Allottee(s) and after the change of payment plan into CLP, commitment Amount will not be paid by the Company to

the Allottees(s). Further, the Allottee(s) is also liable to return to the Company 50% of the Commitment Amount already paid to the Allottee(s). If in any case Commitment Amount is not returned, Company may adjust the same by reducing the area allotted to the Allottee(s) or recover the amount with interest at any time as the Company deems fit and appropriate. The Allottee(s) knows and understands that Commitment Amount is applicable only in the case of Down Payment Plan and Flexi Payment Plan.”

9. The appellants have enclosed the Balance Sheet of the Respondent Company as on 31st March, 2015 wherein against the ‘current liabilities’, apart from ‘short term borrowings’, the following liabilities have been shown: -

4.	Current liabilities			
	(a) Short term Borrowings	6	670,368	
	(b) Trade Payables	7	5,225,389	140,372,795
	(c) Other current liabilities	8	1,748,474,195	867,749,891
	(d) Short-term provisions	9	370,641	49,501
	Total:		<u>1,754,740,593</u>	<u>1,008,172,187</u>
			1,764,825,748	1,018,244,845

10. In the end of the said Balance Sheet, against the Note 8 “other current liabilities” have been shown as quoted hereunder:

Particulars	As at 31 March 2015 Rs.	As at 31 March 2014 Rs.
(a) Other payables		
(i) Statutory Remittance Duties & Taxes)	5,783,392	5,548,820
(ii) Others		
(a) Advance from Customer	1,729,554,149	860,069,589
(b) Retention	227,042	31,274
(c) Book Overdraft	8,138,140	
(d) Expenses Payable	4,771,472	2,100,208
Total:	1,748,474,195	867,749,891

*Represents advances adjustable against sale consideration of shops/plots/office/flats net of debtors adjustable against sale consideration of shops/plots/flats etc. and are generally not refundable. It also includes amount credited toward commitment charges paid/payable.

*The amount of Rs. 1,35,09,464 (PVR Rs. 17,80,000) was being directly deposited into the bank account of the company, which are not identifiable by the company.”

11. In the present case, the Respondent has not taken any plea that the appellants failed to pay the balance amount on due date or any of the cheque has been bounced on account of any reasons. The respondent has also not denied the allegation that the ‘commitment amount” as mentioned in the agreement/Memorandum of Understanding has not been paid month to month and there is a default.

12. From the agreement/Memorandum of Understanding, we find that the appellants are also “investors” and have chosen “committed return plan” like “*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*”. Thereby we hold that the amount as is due to the appellants, come within the meaning of “debt” as defined in Section 3(11) of the I & B Code’.

13. The Balance Sheet has been enclosed by the appellants, wherein the amount deposited by ‘persons’, including the appellants as shown also

suggest that the Respondent 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their 'commercial purpose' treating the amount at par with 'loan' in their return. Thereby, the amount invested by appellants come within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of I & B Code, 2016, subject to satisfaction as to whether such disbursement against the consideration is for time value of money.

14. "Disbursed against the consideration for the time value of money", as mentioned in the opening line of Section 5 has been rightly highlighted and considered by the Ld. Adjudicating Authority in "*Nikhil Mehta and Sons v. AMR Infrastructure Ltd*", but the Appellate Tribunal while agreed with such findings but disagreed with the other part of findings in the said case.

15. In the present case, we find that no case has been made out by the respondent that the construction was stopped or delayed on account of factors beyond its control. It has also not been disputed that the respondent failed to pay monthly committed returns which was to be paid month to month till the completion of the project/ apartment. Thereby we find and hold that the appellants in this case have also successfully proved that the money disbursed by them is against the consideration for the time value of money and for all purpose, they come within the meaning of 'Financial Creditor' as defined in Section 5(7) of the I & B Code'.

16. For the reasons aforesaid, we set aside the impugned judgment dated 8th March, 2017 passed by the Ld. Adjudicating Authority in C.P.No.

(IB)-16(PB)/2017 and remit the matter to Adjudicating Authority to admit the application preferred by appellants and pass appropriate order, if the application under Section 7 of the 'I & B Code' is otherwise complete. In case it is found to be not complete, the appellants should be given seven days' time to complete the application as per proviso to Section 7 of the 'I & B Code'.

17. The appeal is allowed with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Mr. Balvinder Singh)
Member(Technical)

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