

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-02(PB)/2017

IN THE MATTER OF:

Nikhil Mehta & Sons (HUF) & Ors.Applicants
v.
M/s. AMR Infrastructures LimitedRespondent

SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 10.05.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

SHRI S.K. MOHAPATRA
Hon'ble Member (T)

PRESENTS:

For Applicant : Mr. Varun Kathuria, Advocate

For Respondent: Mr. Shankar Kumar Jha, Advocate

For Intervener : Mr. Siddharth Banthia, Advocate

M.M. KUMAR, PRESIDENT

JUDGMENT

All the applicants, claiming to be the financial creditors have filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of

the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with prayer to trigger Corporate Insolvency Resolution Process in respect of respondent company M/s AMR Infrastructures Limited, referred to as the corporate debtor.

2. The present application filed on 16th January 2017 was earlier dismissed on 23.01.2017 as not maintainable mainly on the ground that neither the applicants were covered by definition of expression 'financial creditors' nor the claimed amount could be regarded as 'financial debt'.

3. In appeal the aforesaid judgement dated 23rd January 2017 was set-aside by the Hon'ble NCLAT vide order dated 21.07.2017 in Company Appeal (AT) Insolvency) No. 07/2017 holding that those who have commitment to pay 'assured return', interest, etc. were covered by the expression 'financial creditor'. The matter was remitted back with the direction to the adjudicating authority-NCLT to admit the application preferred by the appellants and pass appropriate order, if the application under Section 7 of the 'I & B Code' is otherwise complete and in case it is found to be not



complete, the appellants were to be given seven days' time to complete the same as per proviso to Section 7 of the 'I & B Code'.

4. Subsequently both the parties through their respective counsels appeared before this Tribunal. On 20.12.2017 one last opportunity was granted to the Respondent for filing of reply within ten days and rejoinder, if any, by the applicants within five days thereafter. Vide order dated 12.01.2018 further two weeks' time was granted to the Respondent for filing of reply. Despite various opportunities reply was not filed by the Respondent. Therefore, vide order 16.02.2018 matter was listed for arguments. The arguments were heard on 09th March 2018 wherein learned counsel for the respondent sought three days' time for filing written submissions.

5. The precise case of the applicants is that they have entered into different agreements/Memorandum of Understanding with respondent M/s AMR Infrastructures Limited (for brevity 'the Corporate Debtor) for purchase of three units being a residential flat, shop and office space in the projects, Kessel-I Valley, I Mall and I Homes which were being developed by and promoted by 'the Corporate Debtor'. One of the unit was purchased by the



Applicant(s) under the 'Committed Return Plan'. According to the terms the Applicant(s) were to pay a substantial portion of the total sale consideration upfront at the time of Execution of the MOU, and the Respondent undertook to pay a particular amount to the buyer/purchaser (The applicant(s) in this case) each month, as Committed Returns/Assured Returns from the date of execution of the MOU till the time the actual physical possession of the unit was to be handed over to the buyer/ purchaser. In the said projects the applicants also had an option to choose the construction and time-linked payment plan. According to the terms they were required to pay a certain percentage of the sale consideration amount at various stages of construction of the project. The Respondent started paying the 'Committed Returns' to the Applicant(s) as per the MOU, but stopped the same from April, 2014, in respect of the unit of the Applicants No.3 and 4, and from January, 3 2014, in respect of the units of the remaining Applicants, unilaterally and without assigning any reason. The Applicants contacted the Respondent on various occasions demanding the release of payment for their monthly 'Committed returns' but of no avail.



6. The relevant clause with regard to 'Committed Return' of one of the aforesaid Memorandum of Understanding dated 12th April 2008 (Annexure-II) reached between the applicant(s) and the Respondent-Corporate Debtor would thus read as under:-

“Since the Investor has paid most of the consideration as on 19.03.2008, the Developer is ready to pay the monthly committed return to the Investor but the Investor does not require the monthly return till December, 2008 i.e. for the 9 month. So the DEVELOPER hereby undertakes to make a consolidated payment of Rs. 99,600/- (Rupees Ninety Nine Thousand Six Hundred only) less TDS as applicable every calendar month to the INVESTOR as a committed return w.e.f. January 2009 up to the date of handing over of possession to the INVESTOR.”

7. Vide diary No. 787 dated 13.02.2018 Mr. Vikram Bajaj has been proposed to act as an Interim Resolution Professional. He has filed his written communication as per the requirement of Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. He has declared that no disciplinary



proceedings are pending against him in Insolvency and Bankruptcy Board of India or Indian Institute of Insolvency Professionals of ICAI. In addition, further necessary disclosure has been made by Mr. Vikram Bajaj as per the requirement of the IBBI Regulations.

8. The Corporate Debtor filed short reply to the instant application by asserting that the execution of the aforesaid project got delayed due to various external factors/array of reasons namely depression in real estate sector, litigation started by farmers against the Noida Authority at Allahabad High Court in respect of allotment of land to the Respondent wherein a stay order regarding the development to be carried out on land was passed by Hon'ble Allahabad High Court, dispute arose with the contractor appointed by the Respondent at the site for carrying out development work which resulted in initiation of litigation in which also a stay was granted for not appointing any further contractor.

9. The Corporate Debtor further asserted that because of delay caused in completion of project due to the aforesaid reasons various litigations were started by various customers including initiation of proceedings before Consumer Courts, Arbitration



proceedings, cheque bouncing charges, criminal complaints etc. various FIR's were also registered against the Respondent company.

10. The Corporate Debtor further asserted that it is making consistent efforts to resolve the issues/grievances pertaining to the dispute so that the matter can be settled amicably between the parties. Moreover, the Respondent Company with the help of Strategic Investor who is interested in investing in the project, wishes to complete the construction work/pending work within given time frame so that the project could be completed and delivered on time to the buyers.

11. The Corporate Debtor further asserted that few winding up petitions against Respondent Company have also pending before Hon'ble Delhi High Court. In those petitions Hon'ble High Court of Delhi also permitted the Respondent to furnish a concrete proposal before the Hon'ble Court for consideration and said petitions are still pending. Those petitions have not been admitted nor any provisional liquidator has been appointed.

12. The Corporate Debtor has submitted that for finalisation of joint proposal with various customers the matter is also pending



before Delhi High Court Mediation Centre, New Delhi. After several rounds of discussions held with various investors a proposal to safeguard the interest of the investors in development of the project has been made. The provision for payment of assured return has also been considered. Pursuant to the said proposal mediation process before Delhi High Court Mediation Centre has been initiated and same is in progress on daily basis between the parties. Till date around 200 investors have approached and has agreed to give consent to the aforesaid proposal. More than 80 of such mutual understandings with investors have been reduced into writing before Delhi High Court Mediation Centre. The mediation process is still in progress and more and more investors are approaching on day to day basis.

13. The Corporate Debtor has also submitted that it has assets valued at much more than the amount required for completion of project and resolve the grievance of all its customers. It is just because of depression in real estate sector that the Respondent Company is unable to liquidate other assets of the company and invest the money in present project.



14. It is pertinent to refer here that in the Company Appeal (AT) (Insolvency) No. 07/2017 Hon'ble NCLAT vide a detailed order dated 21st July 2017 it has been clearly held that the amount invested by the applicants are covered within the meaning of expression 'financial debt' as defined in Section 5(8) (f) of the Code and the meaning of expression 'financial creditors' as defined in Section 5(7) of the Code. The relevant portion of the order passed by the Appellate Tribunal is reproduced below.

"21. The appellants have enclosed the annual return of Respondent-Corporate Debtor dated 31st March 2014. Therein the amount deposited by 'investors' including the appellants as has been shown as committed return while giving the 'financial cost' / at par with interest on loans, as shown below:-

"27 FINANCIAL COSTS

<i>Interest on Loans</i>	<i>39,83,980.89.00</i>	<i>9,33,359.01.00</i>
<i>Leasing Charges</i>	<i>5,93,29,559.00</i>	<i>1,96,67,593.00</i>
<i>Interest & Penalties for non-compliance</i>	<i>55,85,518.00</i>	<i>59,75,659.05</i>
<i>Commitment charges</i>	<i>15,30,91,296.00</i>	<i>32,32,97,199.00</i>
<i>Processing Fee</i>	<i>7,49,449.00</i>	
<i>Bank Charges</i>	<i>7,76,690.19</i>	<i>4,71,313.03</i>
	<hr/>	<hr/>
	<i>23,35,16,293.00</i>	<i>35,03,45,123.09</i>

22. Form 16-A shows the TDS deducted from the interest earned by the appellant Nikhil Mehta under Section 194-A of the Income



Tax Act 1961. Therein summary of payment including amount credited has been shown as follows:-

Summary of Payment			
Amount paid/credited (₹)	Nature of Payment	Date of payment/credited (dd/mm/yyyy)	Status of Booking
41,107.00	194A-Interest other than Interest on Securities	30/04/2011	MATCHED
41,107.00	194A-Interest other than Interest on Securities	30/05/2011	MATCHED
41,107.00	194A-Interest other than Interest on Securities	30/06/2011	MATCHED
Summary of Tax Deducted at Source in respect of deductee			
Quarter	Receipt Numbers of original quarterly statements of TDS under sub-section (3) of section 200	Amount of tax deducted in respect of the deductee (₹)	Amount of Tax deposited/remitted in respect of deductee (₹)

Q1	BHRXHRAC	12,333.00	12,333.00
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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".*

27. *For the reasons aforesaid, we set aside the impugned judgment dated 23rd January, 2017 passed by the Learned Adjudicating Authority in C.P. No. (ISB)-03(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'." (emphasis given).*



15. It is seen that in the aforesaid judgment Hon'ble NCLAT has given a clear finding that the applicants are covered by the expression 'financial creditor'.

16. While remitting the matter it was directed by Hon'ble Appellate Tribunal that the Adjudicating Authority has only to see if the application under Section 7 is otherwise complete. It is accordingly, seen that the present application has been duly filed in requisite Form 1 in terms of Section 7 of the Code read with Rule 4 of the Rules along with information and documents as required in support of the claim as well as to prove the default.

17. Under sub-section 5 (a) of Section 7 of the code, the application filed by the applicant financial creditor has to be admitted on satisfaction that;

1. *Default has occurred.*
2. *Application is complete, and*
3. *No disciplinary proceeding against the proposed IRP is pending.*

18. In the case in hand there is no dispute that the respondent company has committed default in repayment of the guaranteed

committed amount. Hon'ble NCLAT has already held that the amount invested by applicants come within the meaning of financial debt as defined in Section 5(8)(f) and that the applicants are financial creditors. We are also satisfied that the instant application of the financial creditors is complete and there is no disciplinary proceeding pending against the proposed IRP.

19. As a sequel to the above discussion, this petition is admitted and Mr. Vikram Bajaj, Flat No. 12, Vasudha Apartment, Plot-41, Sector 9, Rohini, Delhi - 110085, Registration No. IBBI/IPA-002/IP-N00003/2016-2017/10003 is appointed as an Interim Resolution Professional.

20. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately make public announcement with regard to admission of this application under Section 7 of the Code. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:



- “(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

21. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These



would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

22. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation by the ex-management or its ex-directors the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional



shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

23. It is appropriate to mention that this matter was referred to Three Members' Bench as winding up petitions under Section 433(e) of the Companies Act, 1956 were pending adjudication before Hon'ble Delhi High Court. The view taken by the Three Members' Bench in its order dated 16.02.2018 is based on a judgment of the learned Appellate Tribunal rendered in the cases of **M/s. Unigreen Global Private Limited v. Punjab National Bank & Ors.**, Company Appeal (AT) (Insolvency) No. 81 of 2017 decided on 01.12.2017 as well as in the case of **Forech India Private Limited v. Edelweiss Assets Reconstruction Company Ltd. & Anr.**, Company Appeal (AT) (Insolvency) No. 202 of 2017 decided on 23.11.2017. It has now been settled that the bar to institute proceeding under Section 11 of the Code would be attracted only if a winding up petition is admitted and a Provisional Liquidator is appointed. There is no petition so far admitted nor any Provisional Liquidator has been appointed. Therefore, bar

created by Section 11 of the Code according to the judgments ***M/s. Unigreen Global Private Limited (supra) & Forech India Private Limited (supra)*** and Three Member's Bench judgment rendered in a case of ***Union Bank of India v. Era Infra Engineering Limited***, (IB)-190(PB)/2017 decided on 16.02.2018 would not be attracted.

24. While resisting the admission of the petition learned counsel for the Corporate Debtor has raised the argument that for finalization of joint proposal with various customers the matter is also pending before Hon'ble Delhi High Court, Mediation Centre, New Delhi wherein after several rounds of discussion held with various investors a proposal to complete the project has been formulated and mediation process is going on daily basis. We are afraid that we cannot accept the pending mediation process as a basis for rejecting the prayer for triggering the Corporate Insolvency Resolution Process in respect of the Corporate Debtor. There is no provision in the Code which might create such a bar. Accordingly, we reject the aforesaid objection.

25. Another argument raised by learned counsel is that the Corporate Debtor is making consistent efforts to resolve the

issues/grievances pertaining to the dispute so that the matter can be settled amicably between the parties. Moreover, the Respondent Company with the help of Strategic Investor who is interested in investing in the project, wishes to complete the construction work/pending work within given time frame so that the project can be delivered on time to the buyers.

The aforesaid argument also does not need to detain us because the said intention is based on ifs and buts. However, if the Corporate Debtor is confident about the investment from the strategic investor, if any, the same could be examined as well by the Committee of Creditors of the Corporate Debtor along with Interim Resolution Professional after admission the present petition.

26. During pendency of present petition various applications of similar nature for seeking similar relief i.e. C.A. No. 102(PB)/2018 to C.A. No. 109(PB)/2018, C.A. No. 111(PB)/2018 to C.A. No. 133(PB)/2018 under Rule 11 of the National Company Law Tribunal Rules, 2016 have been filed on behalf of various persons/allottees those have booked their apartments/flats etc. in the aforesaid project launched by the Corporate Debtor, for



intervention in the matter. In the aforesaid applications it is submitted by the applicants that on account of non-delivery of possession of the apartments/flats etc. as well as on account of non-payment of assured return for considerable time, various allottees have resorted to different legal recourse. Many allottees have approached this Tribunal under Section 213(b) of the Companies Act, 2013. Over 500 allottees have filed a criminal complaint under Section 409 r/w Section 415 and 120B of IPC before Economic Offence Wing, New Delhi which was registered at Crime No. 173/2015. A copy of FIR has been placed on record (Annexure-I). During the pendency of trial in the aforesaid FIR No. 173/2015 before Learned Chief Metropolitan Magistrate, Tis Hazari Court, Delhi, an offer of settlement was suggested on behalf of the Corporate Debtor-Respondent (including the ex-Director of the Respondent Company) and for consideration of the said offer, learned Court referred the matter before the Mediation Centre, High Court of Delhi by its order dated 23.12.2017. A copy of order dated 23.12.2017 has been placed on record [Annexure-II (Colly)].

27. In the aforesaid application it is also averred that as per the aforesaid direction, before the Mediator of Hon'ble High Court of



Delhi and out of Court, great rounds of negotiations took place between the interveners along with other allottees of project (including petitioners of C.P. No. 200(ND)/2017). As a consequence of said negotiations, a without prejudice draft terms of settlement have been offered on behalf of Respondent for consideration by all the allottees/interveners. A copy of draft terms of settlement has been placed on record (Annexure-III).

28. We have taken notice of the averments made in the interveners' applications and the order passed by Learned Chief Metropolitan Magistrate, Tis Hazari Court, New Delhi. At the outset it is pertinent to point out that the order dated 23.12.2017 [Annexure-II (colly)] shows that between the applicants/interveners and the Directors of the Respondent-Company, mediation process is going on. As we have already observed in preceding para that the pendency of the mediation process between the Directors of the Respondent-Company and the applicants/interveners would not cause any impediment with regard to initiation of Corporate Insolvency Resolution Process because under Section 7 of the Code the pendency of a mediation process is no bar to the admission of the petition and initiation of Corporate Insolvency Resolution



Process. Accordingly, we proceed to entertain the petition and leave the applicants/interveners to choose their remedy in accordance with law.

29. The Petition is thus admitted. All the aforesaid C.As. i.e. C.A. No. 102(PB)/2018 to C.A. No. 109(PB)/2018, C.A. No. 111(PB)/2018 to C.A. No. 133(PB)/2018 are disposed of in the above terms.

30. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than seven days from today.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

10.05.2018
Vineet