

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPLE BENCH, NEW DELHI**

**Company Appeal (AT) (Ins.) No. 835 of 2021**

[Arising out of Order dated 09.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-VI) in IB-3081/(ND)/2019]

**IN THE MATTER OF:**

**Sh. Siddhartha Shankar Dey**

S/o Shri Satyendra Nath Dey  
# 4, Sonali Sarani, Ananda Nagar,  
Guwahati-781005  
Assam, India  
Phone No. 94353-31301

**....Appellant**

**Versus**

**Emerald Tourist Home Pvt. Ltd.**

Having its registered Office at 322,  
Ansal Chamber II,  
Bhikaji Cama Place, New Delhi-110066.

**....Respondent**

**Present:**

**Appellant: Mr. Mani Bhushan Sinha, Advocate.**

**Respondents: None**

**J U D G M E N T**  
**(18<sup>th</sup> August, 2023)**

**[Anant Bijay Singh (J)]**

1. The instant appeal has been preferred by the Appellant (Financial Creditor)- 'Sh. Siddhartha Shankar Dey', who is aggrieved and dissatisfied by the order dated 09.06.2021, passed by National Company Law Tribunal, New Delhi, Bench-VI in IB-3081/(ND)/2019, filed under Section 61 of the

Insolvency and Bankruptcy Code, 2016, whereby Adjudicating Authority has dismissed the Company Petition.

**2.** The brief facts giving rise to the instant Appeal are as follows:

- i. The Appellant/Financial Creditor (FC) is an Individual and the investor in the project of the Respondent/ Corporate Debtor (CD) herein for the property of Respondent/ Corporate Debtor based at Haridwar, Uttarakhand.
- ii. The Respondent/Corporate Debtor is a builder and promoter "Emerald Tourist Home Private Limited" is a Private incorporated on 08 June 2012. It is classified as Non-govt. company and is registered at Registrar of Companies, Delhi.
- iii. The Respondent/ corporate debtor is involved in Hotels; camping sites and other provision of short stay accommodation [Restaurant facilities operated in connection with the provision of lodging remain classified in this group.
- iv. That the Respondent/Corporate Debtor sent an SMS to the Appellant/FC regarding its new project launching on his mobile number and upon receipt of the SMS, the Appellant/FC immediately called back to the same number and thereafter the Appellant/FC got further information regarding the projects for the investment required by him provided by the Respondent/CD.
- v. On the receipt of the details the FC visited the website of the Respondent/ CD as given by the Respondent/CD to Appellant/FC.

- vi. That the Appellant/FC upon finding the good and lucrative option of the investment opportunity, decided to invest in the project of the Respondent/ CD offered by the Respondent/CD to the Appellant/FC with the name and style "Emerald Rivera" based at Haridwar, Uttarakhand.
- vii. That the CD upon finding the interest of FC in investing in the said project had fixed up an appointment with the Appellant/FC and also visited Guwahati to meet the Appellant/FC and the meeting was fixed at his chamber at Guwahati High Court on 7.11.2012.
- viii. During the meeting the Respondent/CD offered the two way investment to the Appellant/FC in the same project, one on the pretext of the "Guaranteed Return Plan" and another by "proposed allotment" of the booked Flat.
- ix. That Respondent/CD and Appellant/FC finalized the deal of one 350 Sq Ft flat in the said project and finalized the consideration amount of Rs.8,75,000/- @ Rs 2500 per Sq Ft along with PLC of Rs 8750 @ Rs. 2500/- per sq ft with total consideration of Rs 9,45,000/-.
- x. The Respondent/ CD after taking the booking amount of Rs 50,000/- and told the Appellant/FC to visit its registered office for the signing of the documents/ MOU.
- xi. Thereafter on 04.12.2012 the Appellant/FC visited the registered office at Delhi of Respondent/ CD and paid the balance Rs. 37,500/- as the booking amount and Respondent/ CD also issued the Booking acknowledgement No 842 dated 04.12.2012 as confirmation of booking

and also issued the receipt No-019 dated 05.12.2012 of amount Rs 87,500/-.

- xii. That the Appellant/FC then signed the Buyer Seller Agreement/MOU and also given the required documents to the Respondent/CD and also paid him cumulative amount of Rs 3,75,000/- (Three Lakhs Seventy Five Thousand Only) through Cheque no 053753 & 071002 dated 24.12.2012 of Axis Bank and SBI Bank respectively and CD issued the acknowledgement Slip no-048 dated 14.01.2013. The True Copy of the Payment Acknowledgement Slip no 48 dated 14.01.2013 issued by the Respondent/CD is at Page 45 of the appeal paper book as Annexure A-5.
- xiii. Thereafter the Appellant/FC also paid the Respondent/CD the balance required amount of Rs 4.00 Lakhs in cash and Respondent/CD issued the Acknowledgment Slip no 049 dated 14.01.2013 with a Condition that rest 10% of the payments will be paid on possession of the Flat. The True Copy of the Payment Acknowledgement Slip no-49 dated 14.01.2013 issued by the Respondent/ CD is at Page 46 of the appeal paper book as Annexure A-6.
- xiv. In terms of the agreement cum Memorandum of Understanding between the parties and despite payments of the said amount the required fund is not delivered to the appellant thereafter the appellant preferred application under Section 7 of IBC, 2016 before the NCLT, New Delhi, Bench VI bearing no. IB-3081/(ND)/2019, the Adjudicating Authority after hearing the parties dismissed the Section 7 application on the

ground that the date of default i.e. 22.12.2014 which is much beyond the period of three years, so that, the application is time barred and thereafter dismissed the Section 7 application.

**3.** Counsel for the Appellant in the memo of appeal and also in the written submissions filed on behalf of the appellant and also during course of the arguments while assailing the Impugned Order submitted as follows:

- i. The FC/Appellant and CD/Respondent executed an Agreement termed as MOU (Memorandum of Understanding). The one of the clause no 3 of the agreement cum Memorandum of Understanding ref. no ETH/ER/DL/04/12/2012-2013 confirms that Rs 15750/- Quarterly commitment amount to be paid to Investor /Financial Creditor, Appellant herein after 90% of the investment amount is received by the Respondent/Corporate Debtor from the FC/Appellant w.e.f March 2013 till September 2014 or till the possession is not handed whichever is later.
- ii. That means if the possession of the property is not handed over to the appellant then the limitation is continuing, as the assured investment amount was defaulted by the CD/Respondent as the FC/Appellant has not received any amount against the same assured return guaranteed by the CD/Respondent. And more so the CD/Respondent has not handed over the possession of the Flat also.
- iii. The MOU is not a builder buyer agreement and it does not convey any right, interest in any property of the project till the allotment/possession

offer is not made and in the present case the CD/Respondent has not even paid the assured and guaranteed amount also.

- iv. The CD/Respondent upon finding the interest of FC/Appellant in investing in the said project had fixed up an appointment with the FC/Appellant and visited at Guwahati on 7.11.2012 at his chamber and finalized the deal of investment wherein the CD/Respondent secured the investment by assuring a collateral of one 350 Sq Ft flat in the said project and finalized the consideration amount of Rs 8,75,000/- @ Rs 2500 per Sq Ft along with PLC of Rs 8750 @Rs 2500/- per sq ft with total consideration of Rs 9,45,000/- also taken the Advance booking amount of Rs 50,000/. Thereafter on 04.12.2012 the FC/Appellant visited the Delhi office of CD/Respondent and paid the balance Rs 37500/- as the booking amount and CD/Respondent issued the Booking acknowledgement No 842 dated 04.12.2012 as confirmation of booking and also issued the receipt No 019 dated 05.12.2012 of amount Rs 87,500/- and later the CD/Respondent started pressurizing the FC/Appellant in lieu of the Flats are getting booked at faster pace and if he want to get secured booking he would have to pay the complete payment at earliest and accordingly the FC/Appellant visited Haridwar and signed the MOU and given the required documents to the CD/Respondent and also paid him cumulative amount of Rs 3,75,000/- (Three Lakhs Seventy Five Thousand Only) through Cheque no 053753 & 071002 dated 24.12.2012 of Axis Bank and SBI Bank respectively and

CD/Respondent issued the acknowledgement Slip no 048 dated 14.01.2013, the FC/Appellant again paid the CD/Respondent Rs 4.00 Lakhs in cash and also taken the Acknowledgment Slip no 049 dated 14.01.2013 with a condition that rest of the payments (10% of the total amount) will be paid on possession.

- v. That as per the MOU, the corporate debtor guaranteed Rs 15,750/- quarterly commitment amount against the investment amount by FC till September 2014 or till the offer of possession is made, whichever is later and by virtue of that MOU, the Financial Creditor became entitled for the defaults amount till the date of initiation of the Section 7 application under Insolvency & Bankruptcy Code 2016.
- vi. That upon realizing the delays and default of the CD, the FC sent the legal notice dated 25.11.2014 which was delivered on 28.11.2014 but the CD has not replied back that Legal notice then on 16<sup>th</sup> November 2016 the FC has filed the Complaint "Case no 3016 of 2016" in the District Court of Kamrup (Metro) at Guwahati under Section 420, 406, 417, 34 of Indian Penal Code 1860. The Learned Court of Shri Sarfraz Nawaz Judicial Magistrate First Class, Kamrup (Metro) at Guwahati has issued "Warrant of Arrest" against Mr Suresh Saini and Mr Rajesh Saini the directors of the CD, who are yet to be arrested by the Police.
- vii. The agreement as termed as MOU on guaranteed return plan with commitment amount to be paid back to the FC and the FC is not an "allottee" but an "intended allottee" as there were no allotment or builder

buyer agreement with the Corporate Debtor and hence that was only the investment opportunity given by the CD to FC by way of offering assured and guaranteed return plan with the Commitment amount of Rs 15750/ quarterly to be paid to FC by CD between March 2013 to September 2014 by way of MOU. The CD failed to release even single instalment despite all efforts. Therefore the FC also filed 2 Computation in Appeal also, First for the Investment amount and other computation is for the Commitment amount which has been defaulted by the CD.

- viii. The FC submits that the since the clause 3 of the MOU clearly states that there is commitment amount to be paid to Investor /Financial Creditor after 90% of the payment received by the Corporate Debtor till March, 2013 and total of Rs 15750/- payments will be paid to the Financial Creditor quarterly w.e.f. March 2013 till September 2014 or till the possession is not offered whichever is later, in this context it is submitted that its continuing case of action and been covered under section 18 of the Limitation Act, so the present application is also not bared by the Limitation.
- ix. In the matter of Samruddhi Co-operative Housing Society Ltd. V/s Mumbai Mahalaxmi Construction Pvt Ltd in Civil Appeal No 4000/2019, Hon'ble Supreme Court has laid down the principle of continuing wrong leading to the fresh limitation with emphasis on CWT v. Suresh Seth (1981-2 SCC-790) a two-judge Bench of this Court dealt with the question of continuing wrong. In M Siddiq vs Suresh Das (2020) 1 SCC 1. A



continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement.

- x. In the matter Sunil Krishna Ghosh and Ors v/s Calcutta Improvement Trust in Suit no 156 of 1999 decided by Hon'ble High Court of Calcutta

*“17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of way, obstruction to the right of a person to the unobstructed flow of water, refusal by a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability, as the case may be, de die in diem.”*

**4.** Based on the submissions, counsel for the appellant has submitted that the impugned order cannot be sustained, sought for setting aside the aforesaid order and the appeal to be allowed.

**5.** From the perusal of the records it appears that the instant appeal was preferred on 28.07.2021. On 15.02.2022, after hearing counsel for the appellant notices were directed to be issued on Sole Respondent by both modes and matter was directed to be listed on 06.04.2022. Sole Respondent has failed to appear on 31.10.2022. On 06.01.2023, Ld. Counsel for the Appellant has submitted that substituted services of notice under Order 5 Rule 20 of the CPC

by publishing notice under the local newspaper has taken on Sole Respondent and then the matter was listed on 13.03.2023. Despite publication of notice in two newspapers the sole respondent has failed to appear under order dated 13.03.2023 and the matter was directed to proceed against sole respondent ex-parte and thereafter the matter was heard and on 04.08.2023 the Judgment was reserved.

**6.** After hearing counsel for the parties and from the perusal of the records it appears that Ld. Adjudicating Authority has dismissed the application under Section 7 IBC, Code, 2016 filed by the appellant on the ground that the date of default i.e. 22.12.2014 had occurred about three years prior to the date of filing of application i.e. 21.11.2019, thus, the present application is time barred.

**7.** Although counsel for the appellant in his written submissions has relied on two Judgments in “*Samruddhi Co-operative Housing Society Ltd vs. Mumbai Mahalaxmi Construction Pvt. Ltd, (2022) SCC OnLine SC 35*” and “*Sunil Krishna Ghosh & Ors. Vs. Calcutta Improvement Trust, AIR 2001 Cal 199*”, but both the Judgments are not applicable in the facts of the present case. As much as from the perusal of Section 7 IBC application preferred by the appellant/FC before the Adjudicating Authority, copy of which has been annexed as Annexure-A-10 (Page 54-79) of the appeal paper book, at Page 67 Column 2 amount claimed to be in default and date on which the default occurred, the amount claimed has been mentioned but date of default has not been mentioned.

**8.** The Adjudicating Authority in the impugned order after hearing the parties have come to the conclusion that the date of default is 22.12.2014 and the application under Section 7 of IBC was preferred on 21.11.2019 which is beyond period of three years, so the application is barred by limitation.

**9.** We have no occasion to differ with the aforesaid finding of the Adjudicating Authority and we affirm the finding. We do not find any merit in the appeal. Hence, the appeal is hereby dismissed.

**10.** The Office of the Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-VI) forthwith.

**[Justice Anant Bijay Singh]  
Member (Judicial)**

**[Dr. Alok Srivastava]  
Member (Technical)**

**Principal Bench,  
New Delhi**

*sa*