

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 96 of 2024

(Arising out of Order dated 05.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Court-VI, New Delhi in IA/5400/2023, IA 4121/2023, IA 4122/2023, IA 4312/2023 in IB-682/PB/2021)

IN THE MATTER OF:

M/s Mist Direct Sales Pvt. Ltd.
Through its Authorized Signatory
Having Registered Office at:
I A, Kanchanjunga Building,
18 Barakhamba Road, New Delhi- 110001 ... Appellant
Vs

1. Mr. Nitin Batra
S/o Sh. MM Batra HRC Professional Hub,
WZ- I 02, Vaibhav Khand,
Indirapuram, Ghaziabad, UP- 201010
2. Mr. Gaurav Bharadwaj Batra
S/o Late Sh. B.N. Bhardwaj
Flat No. CM 3/305 Supertech Capetown,
Sector 74, Noida.
3. Col. Gulshan Juneja
EA- 1/37 (G.F.)
Inderpuri, New Delhi- 110012. ... Respondents

Present:

For Appellant: Ms. Sonal Alagh, Mr. Harsh Mishra, Mr. Vijay Agarwal, Mr. N.P.S Chawla, Mr. Sujoy Datta, Mr. Surekh Kant Baxy, Ms. Mahima Shekhawat, Mr. Jaspeet Singh, Advocates.

For Respondent: Mr. Sahil Sethi, Mr. Samriddh Bindal, Mr. Vikash Kumar, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 05.01.2024 passed by National Company Law Tribunal, Court VI, New Delhi, by which

order IA No.5400/2023 and other IAs filed by the Appellant in IB-682/PB/2021 were rejected.

2. The Appellant was Respondent No.3 in Section 7 Application filed by Respondents-Home Buyers. This is second round of Appeal filed by the Corporate Debtor to resist Section 7 Application filed by homebuyers/allottees to initiate Corporate Insolvency Resolution Process against the Corporate Debtor. The brief facts of the case and sequence of events giving rise to this Appeal need to be noticed first:

- (i) The Appellant entered into a Collaboration Agreement on 27.07.2017 with another Company Anand Infoedge to develop land measuring 100,980 sq. mtrs bearing Plot No.1, Sector 143, Noida. The real estate project could not be completed within the stipulate time, an Application under Section 7 was filed by Nitin Batra and other 143 allottees/ Applicants representing 115 units in the project on 11.10.2021. The Appellant herein was impleaded as Respondent No.3 in Section 7 Application.
- (ii) The Appellant raised objection to the maintainability of Section 7 Application on the ground that threshold limit of 100 allottees for filing of Section 7 Application is not fulfilled in the Application, hence, the Application deserves to be rejected. The Adjudicating Authority by order dated 21.10.2022 rejected the objection raised by the Appellant and held that Section 7 Application is maintainable as it fulfils the threshold limit

prescribed under Section 7. The Appellant filed an Appeal being Company Appeal (AT) (Insolvency) No. 1478 of 2022 challenging the order dated 21.10.2022. This Appellate Tribunal vide its judgment and order dated 17.11.2023 dismissed the Appeal filed by the Appellant and upheld the order dated 21.10.2022. Against the judgment of this Tribunal dated 17.11.2023 dismissing the Appeal of the Appellant, the Appellant filed Civil Appeal before the Hon'ble Supreme Court, which too was dismissed by Hon'ble Supreme Court in December 2023, which order was also placed before the Adjudicating Authority.

- (iii) The Appellant filed IA No.4121 of 2023 praying for initiating proceeding under Section 340 r/w Section 195(1)(b) CrPC against the Financial Creditor on the ground that Financial Creditors have filed false, fabricated and forged documents and affidavits before the Adjudicating Authority. Another IA No.4122 of 2023 was filed praying that Application under Section 7 filed by the Financial Creditors be dismissed and proceedings under Section 340 r/w Section 195(1)(b) CrPC be initiated and reference be made to High Court under Section 15(2) of the Contempt of Court Act, Another IA No.4312 of 2023 was filed seeking direction to impose a penalty on Financial Creditors under Section 65 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”).

The Appellant filed a consolidated Application being IA No.5400 of 2023, praying for dismissal of Section 7 Application and to initiate proceedings under Section 340 r/w Section 195(1)(b) of CrPC and seeking direction to impose penalty under Section 65. In the Applications filed by Appellant, a joint reply was filed by Respondent Nos.1 to 3, who were the Authorised Representatives of Applicants, which reply was filed in IA No.5400 of 2023.

- (iv) The Adjudicating Authority heard the parties on the Applications and by the impugned order dated 05.01.2024, rejected the IAs filed by the Appellant. Aggrieved by which order, this Appeal has been filed.

3. We have learned Counsel for the parties and have perused the records.

4. The learned Counsel for the Appellant challenging impugned order, contends that affidavits filed by six Applicants were forged affidavits and these six Applicants, who were the residents of Australia, never came to sworn the affidavits and affidavits were shown to have sworn at Gautam Buddh Nagar, UP. There is no entry in the Register of Nortary of the aforesaid affidavits. It is submitted that affidavits were filed in support of Section 7 Application claiming that those six Applicants, authorised Respondent Nos.1, 2 and 3 to prosecute the Application on their behalf. It is further submitted that all the affidavits are shown to have been sworn on 25.08.2021 whereas, Application under Section 7 was filed much after

in October 2021. There were no corresponding entries by the Nortary in the Register when the affidavits were sworn. It is further submitted that one of the Applicant Shri Ajay Khajuria, who is Application No.106 has given a declaration that he has not signed the affidavit, which was filed before the Adjudicating Authority, since there is visible difference in his signature. The learned Counsel for the Appellant submits that the aforesaid material information were not before the Appellant earlier and it came to its knowledge subsequently. Hence, the Applications were filed. Fraud or forgery vitiated the entire proceedings and Adjudicating Authority committed error in refusing to direct for investigation under Section 340 CrPC.

5. The learned Counsel for the Respondent refuting the submissions of the Appellant submits that there was no deficiency in the Application filed under Section 7 and the requirement of law is that Application has to be endorsed by 100 allottees. Affidavits, which is claimed by Appellant to be forged were the affidavits authorizing Respondent Nos.1, 2 and 3 to prosecute the Application. The allegations made in the IAs are that they have not sworn affidavits, but none of them denied their authorization. Further, fresh additional affidavits were filed before the Adjudicating Authority by the aforesaid six Applicants reiterating their averments. Hence, there was no ground for directing enquiry under Section 340 CrPC. It is further submitted that insofar as swearing of the affidavits prior to filing of the Application is concerned, there is no defect in the Application. The mere fact that Application was subsequent to swearing of the affidavit

does not in any manner make it deficient. In so far as affidavit of Shri Ajay Khajuria is concerned, it is submitted that Ajay Khajuria was Applicant No.106, who subsequently filed an Application to withdraw his claim on the ground that he has settled with the Appellant. At the time of filing of withdrawal Application, no averment was made that he has not sworn the affidavit and after withdrawing from Section 7 Application, he is now siding with the Appellant and making allegation. It is submitted that the Appellant is adopting dilatory tactics to delay the disposal of Section 7 Application, which is pending for last more than two years. The Appellant has challenged the maintainability of Section 7 Application up to the Hon'ble Supreme Court unsuccessfully and filing of these IAs are nothing but an attempt to delay the disposal of Section 7 Application.

6. We have considered the submissions of the learned Counsel for the parties and have perused the record.

7. From the facts as noticed above, it is clear that Section 7 Application was filed by 143 Applicants on 11.10.2021. The Appellant was impleaded as Respondent No.3 in Section 7 Application, who opposed the maintainability of the Application on the ground that threshold limit as required under Section 7 of the Code is not fulfilled and the Application is not made by 100 valid allottees. The said objection raised by the Appellant was rejected by the Adjudicating Authority vide its order dated 21.10.2022, against which order Company Appeal (AT) (Insolvency) No.1478 of 2022 was filed by the Appellant, which was decided by this Tribunal on 17.11.2023. In the Appeal, one of the issues framed was whether Section

7 Application filed by the allottees fulfils the threshold as prescribed under the IBC. Paragraph-9 of the judgment noticed the issues framed in the Appeal, which are as follows:

“9. Three main questions which arise for consideration in this Appeal are:-

- (i) Whether the joint application under Section 7 against ‘Anand Infoedge Pvt. Ltd.’, ‘Mist Avenue’ and ‘Mist Direct’ is maintainable? Three Respondents- Appellants herein being separate corporate entities.*
- (ii) Whether Section 7 Application filed by the allottees fulfils the threshold as prescribed under the IBC?*
- (iii) Whether while scrutinizing the claims of each applicants of joint application filed under Section 7, it has to be established that the financial debt exist against each applicant in which default has been committed and the claim of the applicants is not barred by limitation and applicants fulfil all eligibility of valid allottee who is entitled to file Section 7 application?”*

8. This Tribunal considered the Issue Nos.1, 2 and 3 and by detailed judgment held that Application is fully maintainable. In paragraphs 46 and 47, following was held:

“46. We thus are of the view that the Adjudicating Authority did not commit any error in returning the finding that threshold as required by Section 7(1), second proviso is fulfilled. In the present case, the Application under Section 7 is maintainable and objection that application is not maintainable on the ground that it does

not fulfil the threshold as provided under Section 7(1) Second Proviso has rightly been rejected.

47. *In view of the fore-going discussions, we are satisfied that no error has been committed by the Adjudicating Authority in holding that application under Section 7 filed by the Respondents allottees is maintainable. We thus do not find any grounds raised in these Appeals to interfere with the Impugned Order dated 21st October, 2022 passed by the Adjudicating Authority, in result, all the Appeals are dismissed.”*

9. Against the order passed by this Tribunal on 17.11.2023, an Appeal was filed in the Hon’ble Supreme Court, which Appeal came to be dismissed by Hon’ble Supreme Court by order dated December 2023. The order of Hon’ble Supreme Court has been quoted in paragraph 6 of the impugned order by the Adjudicating Authority, which is as follows:

“After the application under Section 7 is heard and disposed of on merits, should it become necessary to do so, the parties would be at liberty to take recourse to all appropriate proceedings in accordance with law. At that stage, should it become so necessary, this Court will enquire into both the merits and maintainability. However, we also clarify that the issue of maintainability shall stand concluded by the impugned order dated 17 November 2023 insofar as the National Company Law Tribunal and NCLAT is concerned.

Since the application under Section 7 is pending for over two years, we request the NCLT to take up the application at the earliest possible date and to endeavour an expeditious disposal within two months.”

10. The above facts indicate that Appellant has questioned the maintainability of Section 7 Application on the ground of threshold and contested the matter upto Hon'ble Supreme Court unsuccessfully. The IAs, which have been filed by the Appellant before the Adjudicating Authority in August 2023 and October 2023, are nothing but another attempt to resist Section 7 Application and delay the disposal. The Adjudicating Authority in the impugned order has made strong observation against the Appellant and has clearly found that intention of the Applicant is malafide to delay the adjudication of Section 7 Application. In paragraph 10 of the impugned order, following has been observed by the Adjudicating Authority:

“10. In light of the above, we find no merit in the present Application filed for dismissal of IB-682/PB/2021 which a Section 7 Application. The present Application appears to be misleading, filed only for the purpose of delaying the adjudication of IB682/PB/2021. The applicant has failed to appreciate that the intent behind classification of homebuyers as “Financial Creditor” by the legislature was to enable homebuyers to participate in the insolvency resolution process in a constructive and egalitarian manner. The Applicant is insisting on dismissal of the Section 7 Petition even after the same has been held maintainable by the Hon'ble NCLAT vide order dated 17.11.2023 and the Hon'ble Supreme Court vide order dated 11.12.2023 has held that the issue of maintainability shall stand concluded by the order dated 17.11.2023 insofar as the Adjudicating Authority and NCLAT are concerned. The malafide intention of the Applicant to delay the adjudication of the Section 7

Petition is also evident from the fact that the Applicant never raised this contention of affidavits being forged during the adjudication of maintainability of the Section 7 Petition neither before this Adjudicating Authority nor before the Hon'ble NCLAT."

11. We now proceed to notice the submissions advanced by learned Counsel for the Appellant, which were contained in the Applications. It has been stated before the Adjudicating Authority that the consolidated IA was filed by the Applicant being IA No.5400 of 2023, which contains all allegations and prayers made in the earlier Applications, which allegations were heard and decided. The prayers made in IA No.5400 of 2023 have been quoted in paragraph-1 of the impugned order, which are as follows:

"(a) Pass necessary orders and directions, thereby dismissing the present Company Petition filed under Section 7 of IBC by the Applicants/Financial Creditors on the ground of playing fraud on this Tribunal;
(b) Initiate proceeding u/s Section 340 r/w section 195(1)(b) CrPC and other provisions of law against the Applicants/Financial Creditors;
(c) Impose penalty u/s 65 of the IB Code 2016, on the Applicants/ Financial Creditors for initiating proceedings fraudulently and with malicious intent;
(d) Take the Information provided by the Respondent No.3 to this Tribunal on record, for making a reference to the Hon'ble High Court under Section 15 (2) of the Contempt of Court Act, 1972, for initiating criminal contempt proceedings against the Applicants/Financial Creditors;

(e) Pass necessary orders and directions thereby deciding the present Application as a preliminary issue;
(f) Pass necessary orders and directions, thereby deciding the present Application first, before proceeding with the main company petition as the same is in relation to administration of justice;
(g) Take such other actions and pass order as this Tribunal may deem fit and proper in the interest of justice.”

12. There are basically three grounds on which the impugned order is challenged. The first ground of challenge by the Appellant is that the affidavits filed by six Applicants were forged affidavits as they are resident of Australia and it is not shown that they have come to sworn the affidavit at Gautam Buddh Nagar, UP and the Notary has given a certificate that these affidavits were not entered into the Register. It is to be noted that the Application, which was filed by the Applicants was Application, which was signed by Respondent Nos.1, 2 and 3, the Authorised Representative of homebuyers/ allottees. Copy of the Application has been brought on record by the Appellant itself as Annexure A-2 to the Appeal, which indicate that Application was jointly filed by 143 Applicants, which Application was signed by only three allottees, who claimed to be representative/ power of attorney holder of the other Financial Creditors.

13. The three Respondents, who claimed to be Authorised Representatives of the homebuyers and who have signed the Application, have filed their joint affidavit in reply to IA No.5400 of 2023, where they

reiterated that they are the Authorised Representative of other Financial Creditors and the reply has been drafted on instructions of other Financial Creditors. It is also on the record that those six Applicants, who are claimed to be sworn false affidavit, have also filed subsequently another affidavit before the Adjudicating Authority on 24.08.2023. The said fact has been pleaded by the Appellant in List of Dates and events at 2nd Item at page-9, which is to the following effect:

“24.08.2023	6 applicants filed their fresh affidavits on 24.08.2023. Given the fact that our application u/s 340 Cr.P.C. was filed on 01.08.2023, the fresh affidavits were filed subsequently at a belated stage after filing of an application under sec 340 cannot said to be a curable defect but admission on part of the financial creditors that misleading affidavits were initially filed before NCLT were subsequently rectified by filing fresh affidavits.”
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14. When six Applicants against whom allegations were made that they have not sworn the affidavit, have filed a fresh affidavit dated 24.08.2023 reiterating that they have authorised Respondent Nos.1, 2 and 3 to represent them in the proceeding, we do not find any reason for taking any the proceeding any further by the Adjudicating Authority. The Adjudicating Authority has rightly taken the view that present is not a case where any investigation under Section 340 CrPC needs to be initiated. The Adjudicating Authority has relied on judgment of Hon’ble Supreme Court

in **Amarsang Nathaji v. Hardik Harshadbhai Patel & Ors.** in paragraph 8 of the impugned judgment, which is as follows:

“8. The Applicant has also alleged that false affidavits have been filed by the Respondents and that the affidavits are not notarized. The Applicant has also relied on Section 340, CrPC, 1973 and various judgements of High Courts and Supreme Court to support his contention that the Petition u/s 7, IBC, 2016 should be dismissed on account of such false affidavits. At this juncture, reliance is placed on the judgement of the Hon’ble Supreme Court in the matter of Amarsang Nathaji v. Hardik Harshadbhai Patel & Ors. [Civil Appeal No. 11120 of 2016] wherein it was held as follows:

“The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Indian Penal Code (45 of 1860) (hereinafter referred to as “the IPC”); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred in Section 340(1) of the CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution.”

15. The Hon'ble Supreme Court in the above case of **Amarsang Nathaji** has held that Court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred in Section 340(1) CrPC. The Adjudicating Authority has rightly not initiated proceeding under Section 340 of CrPC. In view of the facts of the present case, we see no error in decision of the Adjudicating Authority not to direct any action under Section 340(1) of the CrPC.

16. Secondly, insofar as prayer of the Appellant that proceeding under Section 65 be made and penalty be imposed on the Financial Creditors, it is relevant to quote Section 65, which is as follows:

“65. Fraudulent or malicious initiation of proceedings. -

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon a such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) If any person initiates the pre-packaged insolvency resolution process—

*(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency;
or
(b) with the intent to defraud any person,
the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.”*

17. Penalty under Section 65 of the Code can be imposed when there is fraudulent or malicious initiation of proceedings. In the present case, the Applicants who are allottees in real estate project have filed the Application to protect their rights and it is not disputed that they are allottees of the project, which is developed by the Appellant. There is no ground to hold that initiation of Section 7 proceedings by allottees was fraudulent or malicious. Hence, no error has been committed by the Adjudicating Authority in rejecting the prayer of the Appellant to impose the penalty under Section 65.

18. Now coming to the third ground of attack that one of the Applicant, i.e. Ajay Khajuria has given a certificate that he has not signed the affidavit, which was filed along with the Application. In the joint reply, which was filed by Respondent Nos.1, 2 and 3 to the IA No.5400 of 2023, the detailed facts regarding Ajay Khajuria has been stated. The Respondent Nos.1 to 3 have pleaded that Shri Khajuria had filed IA No.3755 of 2022, claiming that due to out of Court settlement of claims with the Corporate Debtor, Khajuria may be permitted to withdraw his claim. On which Application

an order was passed on 12.08.2022 in IA No.3755 of 2022, which is as follows:

*“The Applicant has submitted that during the pendency of the present matter the entire claim and outstanding debt of the Applicant against the Corporate Debtor have been settled, satisfied and extinguished by an out of Court settlement dated 21.03.2022 and thus as on date there exists no remaining or subsisting claim of the Applicant against the Corporate Debtor. **Therefore, the Applicant is desirous of withdrawing the claim filed against the Corporate Debtor under Section 7 of the Code. Accordingly, the Applicant has also submitted that he revokes the Authority granted to Mr. Nitin Batra, Col Gulshan Singh Joneja and Mr. Gaurav Bhardwaj.***

In view of the above, the Applicant Mr. Ajay Khajuria, is permitted to withdraw his claim in the Section 7 application.

19. It is relevant to notice that when Khajuria has withdrawn the claim, there was no such allegation made in the IA No.3755 of 2022 that he has not signed the affidavit. Khajuria has given the letter to Corporate Debtor that his signatures in the affidavit, which was filed along with the Application are dissimilar. Khajuria has not even filed an affidavit saying that he did not sign the affidavit, which was earlier filed. More so, when Khajuria has withdrawn his claim and he is no longer part of Section 7 Application, any certificate given by him to the Corporate Debtor, does not give any ground to the Appellant to challenge the proceeding. The

Adjudicating Authority thus, considered the said ground and rightly overruled the same.

20. The learned Counsel for the Appellant has also placed reliance on the judgment of Hon'ble Supreme Court in **Ajit Kr. Bhuyan and Ors. vs. Debajit Das and Ors – (2019) 15 SCC 275** stating that even if fraud is brought with delay, it cannot be ignored. He has relied on paragraph 28 of the judgment, which is as follows:

“28. That apart, there is one more reason for coming to the conclusion that the Division Bench of the High Court was in error in saving Respondent 1 on the premise that the writ petitions suffered from delay and laches. In fact, the Association had submitted a representation to the then Chief Minister. Going by the nature of allegations, the Chief Minister rightly acted thereupon and referred the matter to a committee which, after examining the matter, had also given its report stating that the promotion of Respondent 1 was against the Rules. This provides reasonable explanation for delay, if any.”

21. The present is not a case that the Applications filed by the Appellant are rejected by the Adjudicating Authority on the ground of delay, rather the Adjudicating Authority has entered into the allegations and found the allegations not sufficient to grant any relief. Hence, the judgment of the Hon'ble Supreme Court relied by the Appellant, does not help the Appellant in the present case.

22. In view of the foregoing discussions and conclusions, we are of the view that Adjudicating Authority did not commit any error in rejecting IAs

filed by the Appellant praying for various reliefs as extracted above. The Adjudicating Authority has rightly observed that the intention of the Appellant is malfe and objections are only to delay the adjudication of Section 7 Application. We do not find any error in the impugned order, as no ground is made out to interfere with the order, the appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

[Mr. Arun Baroka]
Member (Technical)

NEW DELHI

29th January, 2024

Ashwani