

# **Nikhil Mehta And Sons vs Amr Infrastructure Ltd on 21 July, 2017**

1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 07 of 2017

(arising out of Order dated 23RD January, 2017 passed by NCLT, New Delhi Bench in C.P No (ISB)-03(PB)/2017)

IN THE MATTER OF:

Nikhil Mehta and Sons

.Appellants

Vs

AMR Infrastructure Ltd.

.Respondent

Present: For Appellant: - Mr. Varun Kathuria, Advocate

For Respondent: - Mr. Ajay Verma, Advocate

## **JUDGEMENT**

SUDHANSU JYOTI MUKHOPADHAYA, This appeal has been preferred by appellants against order dated 23rd January 2017 passed by 'Adjudicating Authority (National Company Law Tribunal), Principal bench, New Delhi whereby and whereunder the 'Adjudicating Authority' held that appellants are not 'Financial Creditor' as defined under section 5(7) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code'). The adjudicatory authority further held that as many winding up petitions are pending before the Hon'ble Delhi High Court against the 'Corporate Debtor' and Financial Liquidator has been appointed, the application preferred by appellants for triggering insolvency process by invoking Section 7 of the 'I & B Code read with Rule-4 and Rule-9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016 (hereinafter referred to as 'Adjudicating Authority' Rules 2016) is not maintainable.

2. The case of the appellants and the submission as made by learned counsel for the appellants are as follows: -

The appellants reached different agreements! Memorandum of Understanding with respondent M/ s AMR Infrastructures Limited (hereinafter referred to as 'Corporate Debtor') for purchase of three units being a residential flat, shop and office space in the projects, Kessel-I Valley, One Mall and One Home which were being developed by and promoted by 'Corporate Debtor'.

3. The one of the unit was purchased by the Appellant(s) under the 'Committed Return Plan' as per which if the Appellant(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 appellant(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 is handed over to the buyer/ purchaser. In the said projects the appellants also had an option to choose the construction/ time linked payment plan as per which they were required to pay a certain percentage of the sale consideration amount at various stages of construction of the project.

4. The Respondent started paying the committed returns to the Appellant(s) as per the MOU, but stopped paying the committed returns to the Appellant(s) from April, 2014, for the unit of the Appellants No.3 and 4, and from January, 2014, for the units of the remaining Appellants, unilaterally and without assigning any reason. The Appellants contacted the Respondent on various occasions demanding the release/ payment for their monthly committed returns but to no avail.

5. Having no other option, the Appellants had jointly filed an Application U/s 7 of the Insolvency and Bankruptcy Code, 2016, before the Adjudicating Authority on 16.01.2017 which was dismissed vide order dated 23.01.2017, which is why the present Appeal has been filed.

6. It is the case of the Appellants that the concept and plan of payment of Committed Returns/Assured Returns by the builders/real estate developers such as the Respondent, is a method adopted by them to mobilise funds/raise finance from the general public/ open market at much lower rates than what is normally made available to them by banking and other financial institutions without having the obligation to offer security or any collateral and without there being any regulatory body to supervise and oversee such a transaction thereby making the Appellants the "Financial Creditors" of the Respondent as defined U/s 5 (8)(f) of the I & B Code.

7. It is for this reason that the Respondent had offered to pay a fixed monthly amount to the Appellants as Committed Returns /Assured Returns if the Appellants were willing to pay a substantial portion of the entire consideration amount upfront to them at the time of booking their units, as the Respondent was getting easy access to the funds of the Appellants without having to offer/pledge any collateral /security in return. It is pertinent to mention here that there were no other contingencies/conditions/criteria which were to be fulfilled /met by the Appellants in order to get the monthly committed returns and therefore, the agreement/ Memorandum of Understanding and transaction between the Appellants and the Respondent were not a simple real-estate transaction. The Appellants have also placed on record the order dated 19.12.2014 passed by SEBI in the matter of M/ s MVL Limited wherein it has held that such transactions where the developer offers to pay assured returns to the buyers "are not pure real estate transactions, rather they satisfy

all the ingredients of a Collective Investment Scheme as defined under Section 11AA of the SEBI Act," and has made other observations as well stating that the developer was engaged in "fund mobilization activity" by offering assured returns. Copy of the SEBI Order is at pages 451 to 473 of the Appeal.

8. It is the case of the Appellants that various winding up petitions have been filed and are pending against the Respondent for non-payment of the assured returns to various buyers wherein the Respondent has admitted liability and has offered to settle the claims but has not yet been able to do so. Therefore, since the provision of the Winding up under the Companies Act, stands substituted by the Insolvency and Bankruptcy Code, 2016, then the Appellants should be entitled to relief under the I & B Code itself.

9. It is the case of the Appellants that they are undoubtedly "creditors" of the Respondent as defined under the I & B Code, to whom an admitted and quantified "debt" is owed by the Respondent and who have a valid "claim" against the Respondent as has been defined under the I & B Code and therefore, the Adjudicating Authority should have heard and allowed the claim/ application of the Appellants holding them to be "Financial Creditors" as defined under the I & B Code.

10. Further case of the Appellants is that as per the latest balance sheet of the respondent, the amount which is to be paid to the Appellants by the Respondent as Committed Returns/Assured Returns is shown as "Commitment Charges"

under the header of "Financial Costs". The Respondents has not filed any reply to the said claim of the Appellants despite of being given an opportunity to do so by this Appellate Tribunal. The said balance sheet is at pages 34-63 of the paper book dated 17.04.2017 of the Appellants and the relevant entry is at page 60 of the said paper book.

11. According to Appellants they are the "Financial Creditors" of the Respondent, and the Respondent was deducting TDS on the amount which it was paying to the Appellants as Committed Returns/Assured Returns under Section 194(A) of the Income Tax Act, which is applicable to deduction of TDS on the amount which is paid to some as "Interest, other than Interest on Securities". This therefore, makes it clear that the payment made by the Respondent to the Appellants in the form of Committed Returns/Assured Returns is nothing but a payment of "interest" to the Appellants by the Respondent thereby making the amount paid by the Appellants to the Respondent at the time of booking of their unit a Loan given by the Appellants to the Respondent for constructing the project. In support of the above claim the Appellants have placed on records, their Form 16A and 26AS which are at pages 5-33 of their paper book dated 17.-04.2017, filed before this Appellate Tribunal.

12. The Respondent-Corporate Debtor has appeared but not filed any affidavit denying the averments made by appellants or the enclosures attached with the appeal.

13. The petition for condonation of delay of seven days in preferring the appeal under Section 61(2) of the 'I & B Code' has been filed. Taking into consideration the grounds taken therein particularly that number of petitions were wrongly mentioned in the original impugned judgement and on hearing the parties the delay of seven days in preferring the appeal is condoned.

14. The question arises for consideration in this appeal are: -

i) Whether the appellants who reached with agreements/ Memorandum of Understandings with respondent for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the respondent come within the meaning of 'Financial Creditor' as defined under the provisions of sub-section (5) of Section 7 of the I & B code and

ii) Whether an application for triggering insolvency process under Section 7 of 'I & B code' is maintainable where winding up petitions have been initiated and pending before Hon'ble High Court against the 'Corporate Debtor'.

15. To determine the first question it is desirable to notice and refer provisions of Section 5(7) and 5(8) and Section 7 of the 'I & B code', which are set out below: -

'5. In this Part, unless the context otherwise requires, - (7) 'financial creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) 'financial debt' means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes--

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(J) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.-- For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed. (3) The financial creditor shall, along with the application furnish-- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (h) the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board.

(3) The financial creditor shall, along with the application furnish--

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-

section (3).

(5) Where the Adjudicating Authority is satisfied that--

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding. is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (li) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate--

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be"

16. From a bare perusal of Section 7, it is patent that the insolvency process can be triggered by a 'Financial Creditor' or jointly against the 'Corporate Debtor' when default or debt has occurred.

17. The first question arises for consideration is as to who is a 'Financial Creditor'. Learned Adjudicating Authority, for determination of the aforesaid issue ii examined the definition provided in Section 5 (7) and 5(8) and in the impugned judgement rightly observed:-

"12. A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor' the requirements of expression financial debt' have to be satisfied which is defined in Section 5(8) of the IBC The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore the first essential requirement of financial debt has to be met viz, that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period

of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law- Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section-5 (8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return- to the financier. (See Twcman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Barisal)."

18. However, while examining the nature of transactions of the present case the learned Adjudicating Authority came to a conclusion that the appellants do not come within the meaning of 'Financial Creditor', as in the case in hand "Assured Returns" is associated with the delivery of possession of the properties and has got nothing to do with the requirement of Section 5(8), the time value of money which is mercifully missing in the transaction in hand, with following observations:-

"When we examine the nature of transactions in the present case, we find that it is a pure and simple agreement of sale or purchase of apiece of property.

The agreement to sell a flat or office space etc. Merely because some "assured amount" of return has been promised and it stands breached, such a transaction would not acquire the status of a financial debt' as the transaction does not have consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling requirements of the expression 'Financial Debt'.

Essentially in the case in hand Assured Returns' is associated with the delivery of possession of the aforementioned properties and has got nothing to do with the requirement of sub-section(8) of section 5. It is the consideration for the time value of money which is mercifully missing in the transaction in hand. The classical transaction which would cover the definition of financial debts is illustrated in sub-clause (a) of sub-section (8) of Section-5 i.e. the money borrowed against the payment of interest. Learned Counsel of Applicants has not been able to show from any material on record or otherwise that it is a financial transaction in which a debt has been disbursed against the consideration for the time value of money and he being the Financial Creditor is entitled to trigger the insolvency process against the Respondent in accordance with Section 7 of the IBC."

From the provisions of Law and discussion as made and quoted above, we find that following essential criteria's to be fulfilled for a Creditor to come within the meaning of 'Financial Creditor':-

- (i) A person to whom a 'Financial debt' is owed and includes a person whom such debt has been legally assigned or transferred to
- (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub-section (8) of Section 5.

19. To determine the question whether appellants came within the meaning of 'Financial Creditor', it is desirable to notice the relevant clause of one of the Memorandum of Understanding dated 12th April 2008 reached between the appellants and the Respondent-Corporate Debtor, relevant portion of which is quoted below:-

"AND whereas the Developer has represented that it shall complete the construction of the Shopping Mall on or before December 2009, in all respects and shall render the shopping mall ready for occupation & possession by the said date unless the construction is stopped or delayed on account of factors beyond the control of Developer, as stipulated in the later part of this memorandum of Understanding."

AND WHEREAS the Investor is interested in booking of Shop No. E-47 measuring 1453.432 sq. ft. For a total consideration amount of Rs. 46,67,402/- (rupees Forty Six Lacs Sixty Seven Thousand four Hundred Two Only). The Investor acknowledge that the Developer has readily provided all information & clarifications as required by them but that they has not unduly relied upon and is not influenced by any architect's plans, advertisements representations, warranties, statements or estimates of any nature whatsoever whether written or oral made by the Developer. N "Cheque of Rs.2 7,00,000/-payable on Punjab National Bank vide Cheque No. 462365 dated 19.03.2008.

Cheque of Rs. 9,00,000/-payable Punjab National Bank vide Cheque No.462350 dated 19.03.2008.



The receipt of which is acknowledged by the Developer and the Developer hereby discharge the Investor of all the Payments under this MOU except the amount of Rs. 10,17,402/- which is payable at the time of possession. 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.

The Investor has given the first leasing rights to the Developer and Developer hereby assures the investor that they will assist the Investor in leasing out the shop as per general market trends and practices prevailing till time of possession. The developer further assures the investor that if they are not able to lease the unit till possession they will pay the amount of Rs. 1,10,000/-per month w.e.f. dated of possession till unit is first leased out."

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 Cf & 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;"

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

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 Nature of Date of Status of paid/credi Payment  
payment/credit Booking ted (dd/mm/yyyy) () 41,107.00 194A-Interest 30/04/2011  
MATCHED other than Interest on Securities 41,107.00 194A-Interest 30/05/2011  
MATCHED other than Interest on Securities 41,107.00 194A-Interest 30/06/2011  
MATCHED other than Interest on Securities Summary of Tax Deducted at Source in  
respect of deductee Quarter Receipt Numbers Amount of tax Amount of of original

deducted in tax quarterly respect of the deposited/re statements of deductee mitted  
in TDS under sub- ( ) respect of section (3) of deductee section 200 ( ) Qi BHRXHRAC  
12,333.00 12,333.00

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 judgement 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'.

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

(Balvinder Singh)  
Member (Technical)

(Justice S.J. Mukhopadhaya)  
Chairperson

NEW DELHI  
21st July, 2017  
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