

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH,
NEW DELHI**

Company Petition no. (IB)- 16 (PB) / 2017

**Under Section 7 of the Insolvency and Bankruptcy Code,
2016**

In the matter of:

Anil Mahindroo & Anr.Applicant

Versus

Earth Iconic Infrastructures (P) Ltd.Respondent

Judgment Delivered on: 20.04.2018

CORAM:

**CHIEF JUSTICE (Rtd.) M.M. KUMAR, Hon'ble President
S. K. MOHAPATRA, Hon'ble Member (T)**

For Applicant: Mr. Neeraj Gupta, Advocate

For Respondent: Mr. Jeol & Mr. Tapan Kumar Jha, Advocates



ORDER

S. K. MOHAPATRA, MEMBER

1. Both 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 Earth Iconic Infrastructures (P) Limited, referred to as the corporate debtor.
2. The present application filed on 22nd February 2017 was earlier dismissed on 08.03.2017 as not maintainable relying on the decision of the bench in the matter of Nikhil Mehta & Sons (C.P. No. (ISB)-03 (PB)/2017) decided on 23.01.2017 mainly on the ground that neither the applicants come within the purview of 'financial creditors' nor the claimed amount could be regarded as 'financial debt'.

3. In appeal the aforesaid judgement dated 8th March 2017 was set-aside by the Hon'ble NCLAT vide order dated 02.08.2017 in Company Appeal (AT) (Insolvency) No. 74/2017. The matter was remitted back with the direction to the adjudicating authority 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 should be given seven days' time to complete the application as per proviso to Section 7 of the 'I & B Code'.
4. Subsequently respondent corporate debtor filed reply on 19 January 2018 and rejoinder was filed by applicant on 27 February 2018. On completion of the pleadings the arguments were heard on 14 March 2018 and the matter was fixed for orders.
5. The precise case of the applicants is that they had booked one studio apartment /flat admeasuring 520 Sq. ft. in one of the projects namely "Earth Titanium Studios" of the respondent company, situated at TZ-06, Techzone, Greater Noida, Uttar Pradesh vide MOU cum allotment



letter dated 14.05.2014. The Respondent Company allotted one flat reference no. ETTS-1959 on the First Floor of the project to the applicants at a sale consideration of ₹ 20,80,000/- plus service tax, as applicable. The MOU contains an express promise made on behalf of the respondent company for a guaranteed return on the investment and has been styled as 'commitment amount' till the actual possession of the flat is delivered. On the date of signing of the MOU part payment of sale consideration along with service tax was paid and respondent company had undertaken to make payment of the 'commitment amount' of ₹ 13,000/- per month w.e.f. May, 2014. The 'commitment amount' was agreed to be increased to ₹ 17,160/- per month on payment of the next instalment in November 2014 and thereafter upon payment of last instalment in May 2015 the payable 'commitment amount' was agreed to be further increased to ₹ 21,320/- per month. It is submitted that the applicants have paid the entire sale consideration, the details of which have been stated in the application. As per the MOU the possession of the unit/flat was to be handed over by the respondent company to the

applicants by September 2016. It is submitted that the respondent company paid the commitment amount to the applicants till February 2016 but has started neglecting in making payments of the 'commitment amount' from March 2016 onwards. It is alleged that neither the possession of the flat was given nor the agreed and guaranteed 'commitment amount' was paid after February 2016.

6. Respondent in its reply has taken an objection that there has been an agreed arbitration clause in the MOU and therefore in the presence of a categorical arbitration clause, the matter has to be referred to arbitration. Hon'ble Supreme Court in the case of *Innovative industries Ltd. v. ICICI Bank*, reported in 2017 SCC online SC 1025 while observing that the Insolvency and Bankruptcy Code 2016 is a complete Code in itself and that Maharashtra Act cannot stand in the way of Corporate Insolvency Resolution Process under the Code, at para 56 has held that, "*The non-obstante clause in the widest term possible is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code*". There is thus no iota of doubt that the provisions of

the Code will prevail over the all other Acts including Arbitration and Conciliation Act, 1996 unless otherwise expressly adopted. Accordingly, the arbitration clause contained in the MOU cannot create any bar for initiation of Corporate Insolvency Resolution Process under Section 7 of the Code. Had there been such an intention then parliament could have expressly provided as has been done in the case of Operational creditors under Section 8(2) read with Section 9 of the Code. Thus, in cases under section 9 it could be a valid defence. Moreover, the overriding effect has been given to the provisions of Section 238 of the Code.

7. The respondent has also raised an objection that the debt in question is disputed and that the liability is not admitted. In this regard it can be held that in an application under Section 7 of the Code, it is no matter that the debt is disputed so long as the debt is due and payable. Admittedly there has been no payment of the 'commitment amount' after February 2016 giving rise to a clear default. The Code requires the adjudicating authority only to ascertain and record satisfaction in a summary adjudication as to the

occurrence of default before admitting the application filed under Section 7 of the Code.

8. Another objection raised by the respondent is that winding up proceedings are pending before the Hon'ble High Court of Delhi against the main holding company having the same promoters and the Hon'ble High Court is already seized of the matter. The respondent however has not placed any court orders in this regard. In any case it is now well settled that mere pendency of winding up petition without the admission and appointment of official liquidator it would not be a bar to initiate corporate insolvency resolution process in that regard reliance may be placed on the judgement of 3-members Bench rendered in the case of *Union Bank of India v. Era Infra Engineering Ltd*, IB 190 of 2017. Be that as it may, there is no dispute that the main holding company and the present respondent company are distinct and separate legal entities. Therefore even if winding-up proceedings against the main holding company is pending, there is no bar to initiate Corporate Insolvency Resolution Process against the respondent company, which is a distinct and separate legal entity.

Accordingly the objection on this count cannot also stand in the way of proceedings under the Code.

9. The main objection of the respondent is that the applicants cannot be termed as financial creditors within the meaning of Section 5 (7) and (8) of the Code nor their advance payment for the purchase of the flat could be regarded as financial debt.

10. It is pertinent to refer here that in the Company Appeal (AT) (Insolvency) No. 74/2017 Hon'ble NCLAT vide a reasoned order dated 2nd August 2017 has clearly held that the amount invested by the applicants come within the meaning of financial debt as defined in Section 5(8) (f) of the Code and that the applicants come within the meaning of 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.

“8. From the agreement/ Memorandum of Understanding dated 14th May, 2014, we find that the said agreement relates to the allotment of apartment .admeasuring 520 sq. ft., therein the following terms

and conditions of payment (commitment amount) has been stipulated and agreed between the parties: -

"The Company hereby undertakes to make a fixed payment of Rs. 13,000/- (Rupees Thirteen Thousand only (hereinafter referred to as the 'Commitment -8- Amount') every calendar month to the Allottee(s) w.e.f. May - 2014 till the date of First PDC, which the Allottee(s) duly accepts. After realization of the above mentioned First PDC dated 1.11.14 on its due date, the Company assures the Allottees(s) that the Commitment amount shall be Rs. 11,160/- and will be effective from the date of realization of the first PDC till the date of realization of the Second PDC as mentioned in this MOU. Further, subject to realization of the Second PDC on its due date, the Commitment Amount shall be of Rs. 21,320/- with immediate effect of its realization till the date of offer of possession. The Company hereby clarifies that the monthly Commitment Amount in all the situations stated above is subject to the timely payment of all the instalments as per the plan opted by the Allottee(s). The Company shall stop the payment of

commitment Amount, where any of the abovementioned PDC's gets bounced on account of any reason whatsoever, and/or in case of non-payment of the balance amount on due date (as mentioned in this MOU) by the Allottee(s). The Flexi Payment Plan of the Allottee(s) shall change into Construction Linked payment Plan (CLP) without any notice to the Allottee(s) and after the change of payment plan into CLP, commitment Amount will not be paid by the Company to -9- the Allottees(s). Further, the Allottee(s) is also liable to return to the Company 50% of the Commitment Amount already paid to the Allottee(s). If in any case Commitment Amount is not returned, Company may adjust the same by reducing the area allotted to the Allottee(s) or recover the amount with interest at any time as the Company deems fit and appropriate. The Allottee(s) knows and understands that Commitment Amount is applicable only in the case of Down Payment Plan and Flexi Payment Plan."

9. *The appellants have enclosed the Balance Sheet of the Respondent Company as on 31st March, 2015*

wherein against the 'current liabilities', apart from 'short term borrowings', the following liabilities have been shown: -

4.	Current liabilities			
	(a) Short Term Borrowings	6	670,368	
	(b) Trade Payables	7	5,225,389	140,372,975
	(c) Other current liabilities	8	1,748,474,195	867,749,891
	(d) Short-term provisions	9	370,641	49,501
	Total:		<u>1,754,740,593</u>	<u>1,008,172,187</u>
			1,764,825,748	1,018,244,845

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

	Particulars	As at 31 March 2015 Rs.	As at 31 March 2014 Rs.
4.	Other payables		
	(i) Statutory Remittance Duties & Taxes	5,783,392	5,548,820
	(ii) Others		
	(a) Advance form Customer	1,729,554,149	860,069,589
	(b) Retention	227,042	31,274
	(c) Book Overdraft	8,138,140	
	(d) Expenses Payable	7,771,472	2,100,208
	Total	1,748,474,195	867,749,891

*Represents advances adjustable against sale consideration of shops/plots/office/flats net of debtors

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

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

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

12. *From the agreement/ Memorandum of Understanding, we find that the appellants are also "investors" and have chosen "committed return plan" like "Nikhil Mehta and Sons v. AMR Infrastructure Ltd".*

Thereby we hold that the amount as is due to the appellants, come within the meaning of "debt" as defined in Section 3(11) of the 'II & B Code'.

13. The Balance Sheet has been enclosed by the appellants, wherein the amount deposited by 'persons', including the appellants as shown also -11- suggest that the Respondent 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their 'commercial purpose' treating the amount at par with 'loan' in their return. Thereby, the amount invested by appellants come within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of I & B Code, 2016, subject to satisfaction as to whether such disbursement against the consideration is for time value of money.

14. "Disbursed against the consideration for the time value of money", as mentioned in the opening line of Section 5 has been rightly highlighted and considered by the Ld. Adjudicating Authority in "Nikhil Mehta and Sons v. AMR Infrastructure Ltd", but the Appellate

Tribunal while agreed with such findings but disagreed with the other part of findings in the said case.

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

16. For the reasons aforesaid, we set aside the impugned judgment dated 8th March, 2017 passed by the Ld. Adjudicating Authority in C.P. No. -12- (IB)-16(PB)/2017 and remit the matter to Adjudicating Authority to admit the application preferred by appellants and pass appropriate order, if the application

under Section 7 of the 'I & B Code' is otherwise complete. In case it is found to be not complete, the appellants should be given seven days' time to complete the application as per proviso to Section 7 of the 'I & B Code'." (emphasis given).

11. It is seen that in the aforesaid reasoned order Hon'ble NCLAT has given a clear finding that the applicants come within the meaning of 'financial creditor'. In that view of the matter the main objection of the respondent that the applicants are not financial creditors, has already been answered and has attained finality.
12. 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.
13. The applicant has proposed the name of Shri Yogesh Kumar Gupta, resident of C, 17-B, Basement Kalkaji, New

Delhi 110019, email id ykgupta64@yahoo.co.in as interim resolution professional. His registration number is IBBI/IPA-003/IP-N00078/2017-18/10701. A written communication dated 08.11.2017 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Shri Yogesh Kumar Gupta as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

14. 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.*

15. 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 come within the meaning of financial creditors as defined in Section 5(7) of the Code. 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.
16. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application filed by the financial creditors to initiate Corporate Insolvency Resolution Process against the respondent corporate debtor is admitted.
17. Shri Yogesh Kumar Gupta, resident of C, 17-B, Basement Kalkaji, New Delhi 110019, email id ykgupta64@yahoo.co.in having registration number IBBI/IPA-003/IP-N00078/2017-18/10701 is appointed as an Interim Resolution Professional.

18. In pursuance of Section 13 (2) of the Code we direct that public announcement shall be made by the Interim Resolution Professional immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' has been explained to imply 3 days by the explanation to Regulation 6(1) of the Insolvency and bankruptcy board of India (Insolvency Resolution Process for Corporate Person) Regulations 2016.
19. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d). Thus, the following prohibitions are imposed:

“(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.”*

20. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are

not to be terminated or suspended or interrupted during the moratorium period.

21. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the 'Code', Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its 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 day to day affairs of the 'Corporate Debtor'. In case there is any violation, 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

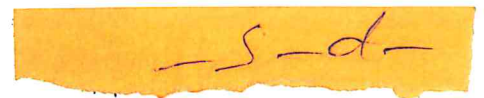


functions strictly in accordance with the provisions of the Code, Rules and Regulations.

22. The office is directed to communicate a copy of the order to the Financial Creditor and the Corporate Debtor at the earliest possible but not later than seven days from today.



(S. K. MOHAPATRA)
MEMBER (TECHNICAL)



(M.M. KUMAR)
PRESIDENT

20.04.2018