

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (INS) No. 178 of 2021
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
Arising out of the Impugned Order dated 18.06.2021 passed in
CP(IB) No. 394/7/HDB/2020 passed by the Adjudicating Authority, (National
Company Law Tribunal, Hyderabad Bench)

In the matter of:

M/S Emaar Hills Township Private Limited

Represented by its authorized signatory

Mr. S. Madhusudhana Rao

R/o: Boulder Hills Golf/Country Club,

Opp. ISB, Manikonda Village, Gachibowli,

Hyderabad-500 0032, Telangana State.

...Appellant

V

1.Mr. Srinivas Manthena

R/o. 6717 Aspen Hills Drive,

Moorpark, California 93021, USA.

...Respondent No.1

2.Mrs. Padmaja Manthena

W/o. Mr. Srinivas Manthena

R/o. 6717 Aspen Hills Drive,

Moorpark, California 93021, USA.

...Respondent No.2

Present:

For Appellant	:	Mr. Sajan Poovayya, Sr. Advocate For Mr. Sriram Mr. Abhishek Sharma Mr. Ravi Charan Ms. Ashly Cherian Mr. Kamendra Singh, Advocates
For Respondent No.1 and 2		Notice served on 04.09.2021 (yet no appearance).

JUDGEMENT
(VIRTUAL MODE)

JUSTICE M. VENUGOPAL

The Appellant/Corporate Debtor has preferred the instant Company Appeal(AT)(CH)(Ins) No.178/2021 as against the impugned order dated 18.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in **CP(IB) No. 394/7/HDB/2020**.

2. The Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) while passing the impugned order dated 18.06.2021 in CP(IB) No.394/7/HDB/2020 (filed by Respondent No.1 and 2/financial creditor) at paragraph 2 to 5 had observed the following and directed the Registry to club such applications together and place before this Bench for hearing.

“2. In view of the above, Amendment in procedure to file application under Section 7 of IBC by Allotee/Financial Creditor against the Corporate Debtor, the question before this Adjudicating Authority is whether the Application filed by single allottee under section 7 of IBC and pending for consideration of this Adjudicating Authority is to be rejected holding to be not maintainable or allottees in same project who has already filed such applications and pending for consideration are allowed to peruse their application joint?

3. On this aspect, we heard learned counsel for the Applicant/Financial Creditors and learned counsel for the Corporate Debtor.

4. Learned Counsel for the allottees/Financial Creditors brought to our notice of judgment of Hon’ble Supreme Court in case of Monish Kumar Vs Union of

India (CP No.26/2020), we have gone through the ruling Hon'ble Supreme Court explained proviso 3 in the following words:

“Now, the third proviso, thus, indeed, does not say that as on the date of filing of the application, the law was what is contained in the first and the second proviso. In that sense, it could be said that it was not retrospective. We have found that when invoking the unamended section 7 applications stood moved, they evinced creation of vested rights to continue with the proceeding. The applications were, no doubt, at the stage, prior to the admission under Section 7(5). It is at this stage that through the device of the third proviso, the parliament has applied the principle of first and second proviso of threshold requirements, in respect of pending application, which is made to appear as it would have operation in the future. Now here we must address an argument of the 3rd proviso going to mere procedure. The financial creditor covered by the 3rd proviso were clothed with a statutory right under section 7. This right was available to be exercised by an individual creditor, by himself or jointly with others. The imposition of a threshold requirement being a mandatory and irreducible minimum even, it is to be achieved as and after the date of the amendment, constitutes an intrusion into the substantive right of action vested in the individual creditor. The action of the creditor was not a completed transaction. As regards his conduct in the past viz, moving under section 7, it is incomplete but the action was commenced. But the law (the 3rd proviso) impairs the past action qua the future. We would find as follows. Imposing the threshold requirement under the 3rd proviso, it not a mere matter of procedure. It provided in the in the first and second proviso. We have already upheld the first and second proviso, which in fact, operates only in the future. In that sense, the Legislature has purported to equate persons who had not filed applications with persons like petitioners who had filed the applications under the unamended law.”

Thereafter, the Hon'ble Apex Court granted following reliefs:

“372. We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India.

- i. If any of the petitioners move applications in respect of the same default, we alleged in their applications, within a period of two months from today, also compliant with either the first or the second proviso under section 7(1), as the case may be then, they will be exempted from*

the requirement of payment of court fees, in the matter which we have detailed in the paragraph just herein before.

- ii. *Secondly, we direct the if applications are moved under section 7 by the petitioners, within a period of two months from today, in compliance with either of the provisos, as the case may be, and the application would be barred under Article 137 of the Limitation Act, on the default alleged in the applications, which were already filed, if the petitioner filed applications under section 5 of the Limitation Act, 1963, the period of time spent before the Adjudicating Authority, the Adjudicating authority shall allow the applications and the period, during which, the earlier applications filed by them, which is the subject matter of the third proviso, was pending before the Adjudicating Authority.*
- iii. *We make it clear that the time limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay caused by the applications pending before the Adjudicating Authority. In other words, it is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under section 5 of the Limitation Act, in regard to the period, during which, the applications were pending before the Adjudicating Authority, which were filed under the unamended section 7, as also thereafter.”*

5. In short upon going through the ruling of Hon'ble Supreme Court, we are of considered opinion that single allottee's application filed prior to amendment cannot be rejected. We further hold that the allottee's in same project against same corporate debtor are allow to pursue their applications jointly. We direct that all such applications shall be heard jointly.”

3. According to the Learned Counsel for the Appellant the impugned order dated 18.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) is contrary to the directions issued by the Hon'ble Supreme Court in the judgement in **Manish Kumar V Union of India & Anr (Writ**

Petition (c) No.26 of 2020). In this connection, the Learned Counsel for the Appellant adverts to the 2nd and 3rd Proviso of Section 7 of the (Amended) I&B Code which runs as under and submits that only when the threshold as provided under the 2nd Proviso to Section of the Code is satisfied, the allottees of Real Estate Project can maintain an application for initiation of CIRP against the Corporate Debtor.

“(i) minimum threshold of 10% or 100 allottees (whichever is less)

(ii) such allottees have filed their application for initiating CIRP against the corporate debtor “jointly” before the Adjudicating Authority.”

4. The Learned Counsel for the Appellant refers to 3rd Proviso to Section 7 of the Code which requires that in case of pending applications which have not been admitted by the Adjudicating Authority, the applications will have to be modified to conform to the minimum threshold within a period of one month i.e. by 28.1.2020, failing which such applications shall automatically deemed as withdrawn.

5. It is projected on the side of the Appellant that the Amendment Act mentions that if the Allottee/Creditor is unable to fulfil the threshold requirement and files such modified application (in terms of 3rd Proviso to Section 7) within a grace period of 30 days, the application filed by such Allottee/Creditor would be deemed withdrawn. In this regard, the Learned Counsel for the Appellant comes out with a plea that the allottees seeking to file/maintain an application under Section 7 of the Code are required to file the same jointly by complying with the ingredients mentioned thereto.

6. The Learned Counsel for the Appellant contends that the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“Adjudicating Authority Rules”) pertains to the filing of applications before the Adjudicating Authority and that an application under Section 7 of the Code is to be filed in Form I and it is relevant to mention that Form I seeks details of each financial creditor who is filing the application. Besides this on behalf of the Appellant the reference is made to Rule 4(4) of the Adjudicating Authority Rules which prescribes that in case an application is being made jointly by the financial creditor, they may nominate one among them to Act on their behalf. Thus the Adjudicating Authority Rules prescribes that with a view to maintain an application, it has to be filed “jointly” and one financial creditor shall act on behalf of other financial creditors. The Learned Counsel for the Appellant refers to the Judgement of the Hon’ble Supreme Court in *Manish Kumar Vs Union of India* (Writ Petition (c) No.26/2020 wherein at paragraph 372 it is mentioned as under:-

“372. We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India:”

7. According to the Learned Counsel for the Appellant, neither the Respondent nor other purported allottees of the Appellant had filed any application seeking modification of their affidavit as envisaged under the Amended Section 7 of the Code. But the two Allottees had filed affidavit in in CP (IB) No.682/7/HDB/2019 and CP(IB)No.683/7/HDB/2019, for clubbing all pending applications against the

Appellant filed before the Adjudicating Authority and that the said filing of an affidavit is contrary to the Amendment Act.

8. The Learned Counsel for the Appellant pointed out the decision of Hon'ble Supreme Court in **Manish Kumar case** wherein at paragraph 365 it is observed as under;

“365. As regards the compelled withdrawal under the third proviso of the pending applications is concerned, we hold as follows: Once the Legislature intended that the pending applications must be made compliant with the threshold requirement, consequences for not doing so had to be provided. Otherwise, it would have created complete uncertainty and the applicant would have been dealt with in a manifestly arbitrary manner. Providing for the consequence of withdrawal before admission, which we have explained, does not have the consequence of preventing the fresh filing, even in regard to the same default, after complying, no doubt, with the requirement of the first or the second proviso, cannot be dubbed as arbitrary.”

9. The Learned Counsel for the Appellant emphatically takes a stand that the ‘Adjudicating Authority’ have not been given any scope across the country to pass an order clubbing the pending applications as per decision of the Hon'ble Supreme Court in **Manish Kumar case** especially when they are not in compliance with 2nd proviso of Section 7 of the I&B Code.

10 It is the version of the Appellant that it was created as a ‘Special Purpose Vehicle’ after erstwhile Andhra Pradesh Industrial Infrastructure Corporation Ltd pursuant to a process of international bidding and evaluation accepted the proposal of and accorded approval to the Appellant/Emaar Properties PJSC, Dubai for development and construction of a township as a part of an integrated project, spanning over 285 acres of land at Manikonda Village, Rajendranagar Mandal, Ranga Reddy District, Andhra Pradesh and accorded approval through Government Orders to it, for the implementation and execution of the township as part of the Integrated Project.

11. The Learned Counsel for the Appellant points out that the Respondents and 64 other alleged Allottees had filed the ‘Applications’ for initiation of CIRP against the Appellant before the Adjudicating Authority without presenting correct factual position pertaining to the Project and without appreciating the relevant facts and events beyond the control of the Appellant.

12. It is brought to the Fore that the Insolvency and Bankruptcy Code (Amendment) Ordinance 2019 was promulgated by the Government of India on 28.12.2019 to amend the provisions of I&B Code. As a matter of fact, the Ordinance, among other things stated that an application under Section 7 of the Code for initiating CIRP against the Corporate Debtor shall be filed jointly by not less than 100 all such creditors (i.e. Home Buyers). Indeed, the Ordinance among other things mentions that an application under Section 7 of the code for initiating CIRP

against the Corporate Debtor shall be filed jointly by not less than 100 all such creditors (i.e. home buyers) or not less than 10% of the total number or such creditors (Home Buyers) whichever is less.

13. To be noted, that on 13.03.2020, the Ordinance was approved by the Parliament vide the enactment of Insolvency & Bankruptcy Code (Amendment) Act, 2020

14. Apart from that, the constitutional validity of the I&B Code (Amendment) Act, 2020 was upheld by the Hon'ble Supreme Court in the matter of ***Manish Kumar Vs Union of India and Another (Writ Petition (Civil) No.26/2020)***.

15. The Learned Counsel for the Appellant points out that on 04.03.2021 the Adjudicating Authority (National Company Law Tribunal, Special Bench, Court No.II, Hyderabad) had reserved the applications for orders in CP(IB)No.394/7/HDB and CP(IB)No.682/7/HDB/2020, one of the batch matters, on the issue of maintainability about clubbing of all matters to be considered and on 18.06.2021 had passed the 'impugned order', which is assailed before this Tribunal, in the instant Appeal.

16. It may not be out of place to this Tribunal to make a significant mention that Section 7(1) of the Code mandate that for financial creditors who are Allottees under a Real Estate Project, an application for initiating CIRP against the Corporate Debtor shall be filed jointly by not less than 100 of such allottees under the same Real Estate

Project or not less than 10% of the total number of such allottees under the same Real Estate Project whichever is less.

17. Further the ingredients to the 3rd Proviso of Section 7(1) of the Code requires that in respect of pending applications which has not been admitted by the Adjudicating Authority, the application will have to be modified to comply with the requirements of 1st or 2nd proviso within 30 days of commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

18. It cannot be burshed aside that an ‘application’ before the Adjudicating Authority is to be filed as per Section 7 of the Code coupled with Rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule 2016 as Form I. The Adjudicating Authority Rules postulate that with a view to maintain an application it has to be filed in a joint manner and one financial creditor shall act on behalf of other Finance Creditors. As such, the ‘Financial Creditors/Allottees’ seeking to maintain an application under Section 7 of the I&B Code is to file the said application jointly only after satisfying the requirements contemplated under Section 7 of the Code.

19. In the instant case on hand, para 5 of the impugned order dated 18.06.2021 in CP(IB)394/7/HDB/2020 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) does not contain any direction being issued to the Respondents and other purported allottees to amend their application as laid down under Section of the code. Without there being a direction issued to

the concerned financial creditor/allottees to amend their applications as per Section 7 of the Code, the directions issued by the Adjudicating Authority to its Registry as in the impugned order to club such applications together and place before it for hearing cannot be countenanced in the eyes of law especially in the teeth of the Hon'ble Supreme Court of India Judgement in the case of ***Manish Kumar Vs Union of India (Writ Petition (Civil) No.26/2020)***.

20. Added further, it is to be pointed out that in the present case, Respondent or other alleged Allottees have not filed any application praying for modification of their petitions as adumbrated as per Section 7 of the I&B Code. In fact only two allottees viz. Mr Sunder K Sundaresan (in CP (IB) No.682/7/HDB of 2019) and Mr P.V. Rao had filed their affidavit (in CP (IB) No.683/7/HDB of 2019) for clubbing of all petitions against the Appellant. This Tribunal points out that filing of affidavit is impermissible by virtue of the Amendment Act.

21. Be that as it may, in the light of the detailed foregoing discussions and this Tribunal taking into consideration inter conceptus of the facts of the present case, in an integral manner and keeping in mind the dictum laid down by the Hon'ble Supreme Court in the case of ***Manish Kumar Vs Union of India*** comes to a resultant conclusion that the impugned order dated 18.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) suffers from legal infirmities in the eyes of law and the same is set aside by this Tribunal to secure the ends of justice. Resultantly the Appeal succeeds. In fine the Appeal is

allowed. No costs. The impugned order dated 18.06.2021 passed by the Adjudicating Authority is set aside and the matter is remitted back to the Adjudicating Authority for passing de novo orders on the issue of maintainability pertaining to clubbing of all matters in the teeth of the Hon'ble Supreme Court judgment and in accordance with Law, of course, after providing due opportunities to both parties to raise all factual and legal pleas, if they so desire/advised.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

15.11.2021

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