

National Company Law Appellate Tribunal, New Delhi
Principal Bench

COMPANY APPEAL (AT) (INSOLVENCY) No. 1020 of 2019

(Arising out of Order dated 17th September, 2019 passed by National Company Law Tribunal, New Delhi Bench, CP(IB) No.- 1075/ND/2019).

IN THE MATTER OF:

Ankit Goyat
F-17/21, Rohini Sector-8
Avantika, New Delhi 110085

...Appellant

Versus

1. Sunita Agarwal
D-1009, S/F, New Friends Colony,
New Delhi – 110065.

**...Respondent No. 1/
Financial Creditor**

2. Antriksh Infratech Pvt. Ltd.
Through Interim Resolution Professional (IRP)
Mr. Yogesh Kumar Gupta
C-17B, Lower Ground, Kalkaji,
New Delhi – 110019.

...Respondent No. 2

Appellant:	None.
Respondents:	Mr. Chandra Shekhar Yadav, Advocate for R-1. Mr. Vinod Chaurasia, Advocate for R-2/IRP. Ms. Gitanshi Arora, Advocate for R-2.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this *Company Appeal (AT) (Insolvency) No. 1020 of 2019* is to the Order dated 17.09.2019 passed by the Learned Adjudicating Authority, (National Company Law Tribunal, New Delhi Bench) in CP(IB) No. 1075/ND/2019. By the Impugned Order, the Adjudicating Authority has allowed the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘the **Code**’) and

Moratorium was imposed under Section 14 of the Code. The Respondent Company 'M/s. Antriksh Infratech Pvt. Ltd.' (hereinafter referred to as the **'Corporate Debtor'**) was proceeded Ex-Parte.

2. In the Impugned Order, the Adjudicating Authority has observed as follows:

"9. As none appeared on behalf of Corporate Debtor during the proceedings, the Corporate Debtor was proceeded ex-parte vide order dated 30.08.2019 of this Bench.

10. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (amendment) Ordinance, 2018 with effect from 6th June, 2018. In view of the revised definition at Clause 8(f), any amount raised from an allottee under a real estate project is deemed to be an amount having the commercial effect of a borrowing and thus, is covered by the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has been amended to specifically include dues of home buyers i.e. Real Estate (Residential). The amendment also recognizes home buyers as "Financial Creditor". Accordingly, the home buyers can initiate Corporate Insolvency Resolution Process against defaulting builder or developer, as "Financial Creditor" in terms of Explanation to Section 5 (8) (f) of the Code with effect from 06.06.2018.

11. Therefore, petitioner being a financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the Code against the respondent Corporate Debtor in case of default in repayment of financial debt.

12. As per the material placed on record, it is confirmed that the applicant – financial creditor had disbursed the money to the respondent – Corporate Debtor as consideration for purchase of a residential apartment. Though, a considerably long period has lapsed, even the principal amount has not been repaid by the Corporate Debtor as per the Memorandum of Understanding. It is, therefore, evident that the Corporate Debtor has committed default in repayment of the outstanding financial debt

which exceeds the statutory limit of rupees One Lakh. Thus, the application warrants admission as it is complete in all respects.”

3. **Submissions of the Learned Counsel for the Appellant/‘Corporate Debtor’:**

- Learned Counsel appearing for the ‘Corporate Debtor’ strenuously argued that the Impugned Order was passed Ex-Parte. No ‘Affidavit of Service’ was filed by the first Respondent as on 10.05.2019, their clerk filed an Affidavit on 14.05.2019 stating that the ‘Service of Affidavit’ was by hand and email on 07.05.2019. Thereafter on 15.05.2019, the ‘Corporate Debtor’ was proceeded Ex-Parte noting that though the *‘report does not bear the stamp/seal of the ‘Corporate Debtor’, the email annexed to the ‘Affidavit of Service’ shows that the ‘Corporate Debtor’ has been served’*. It is denied that any such email was received by the ‘Corporate Debtor’ and the service was not affected at all and therefore, the Adjudicating Authority has erred in not enforcing its earlier Order dated 02.05.2019.
- The Respondent is a speculative investor and has triggered the code with malicious intentions. Learned Counsel placed reliance on the ratio of the Hon’ble Supreme Court in **‘Pioneer Urban Land and Infrastructure Ltd.’ Vs. ‘Union of India’ (2019) 8 SCC 416** wherein the Hon’ble Supreme Court has observed that the Real Estate Developer can point out that the Insolvency Resolution Process under the Code has been invoked fraudulently, with malicious intent or any other purpose other than the Resolution.

- The Allottee had entered into a Memorandum of Understanding (MoU) investing an amount of Rs. 25 Lakhs for a period of 24 months for an assured return of 25% per annum at the end of 24 months or at the issuance of final LTC by the Competent Authority.
- Clauses 2(f) and (g) provided for the buy-back option under the MoU that at the end of 24 Months or the issuance of the final LTC by the Competent Authority, whichever is earlier, the Applicant shall exercise the option of either selling the units or can choose to retain the same. In the event of the Applicant choosing to retain the apartment, there will be no obligation on the part of the Company to return the investment alongwith the assured return.
- A Settlement Agreement was entered into between both the parties on 24.11.2018 and the Respondent's son Mr. Gaurav Agarwal accepted post dated cheques amounting to Rs. 25 Lakhs.
- Vide Order dated 19.11.2019, this Tribunal had sought a response from the Allottee as to whether she would accept the amount invested by her as the 'Corporate Debtor' was ready to settle with a Demand Draft dated 27.09.2019. It is submitted by the Learned Counsel that even as on today they are ready to return the principal amount as per the terms of the Settlement Agreement.

4. **Submissions of the Learned Counsel appearing for the first Respondent/'Financial Creditor':**

- It is submitted that the MoU dated 28.02.2015 was executed between the 'Financial Creditor' and the 'Corporate Debtor' wherein it was agreed that a payment of Rs. 25 Lakhs would be made, one unit would

be earmarked for the 'Financial Creditor', a return of 25% per annum at the end of 24 months or the issuance of the final LTC by the Competent Authority would made till 07.07.2017.

- Despite several reminders, the 'Corporate Debtor' did not return the amount of Rs. 25 Lakhs, which was paid towards part consideration of the said flat, alongwith assured return of 25% per annum.
- The 'Financial Creditor' issued a Demand Notice on 01.02.2019 through Speed Post and email demanding a sum of Rs. 47,31,164.38/- which is inclusive of the principal and the interest amounts. The Notice returned with a postal endorsement 'the Addressee refuses to accept', but the email did not bounce back.
- The 'Financial Creditor' filed an Application under Section 7, the advance copy of which was also sent through courier to the 'Corporate Debtor'. Subsequently, the Adjudicating Authority issued a Notice on 02.05.2019 to the 'Corporate Debtor' with a direction to file 'Affidavit of Service' and the case was re-notified on 10.05.2019. In compliance of the Order, a complete Paper Book was served on the 'Corporate Debtor' by hand on 07.05.2019. The person receiving the Petition did not put a stamp of the Company. The service was also affected through email on 07.05.2019. The case was adjourned to 15.05.2019 and the Adjudicating Authority based on the fact that an email was also sent and none appeared for the 'Corporate Debtor' proceeded Ex-Parte.
- The email ID given by the 'Corporate Debtor' in the Master Data was used to intimate the 'Corporate Debtor' regarding this Petition.

- It is denied that any Settlement Agreement was entered into between the Respondent's son and it is contended that there is no person named "Raghav Agarwal" involved in the said transaction.
- The first Respondent is an Allottee and is a 'Financial Creditor' and non-compliance of the terms of the MoU is termed as non-payment of debt which has become due and therefore a default has occurred and the Adjudicating Authority was right in admitting the Section 7 Application.

5. **Status Report by the Interim Resolution Professional:**

- The IRP Mr. Yogesh Kumar Gupta filed a Status Report stating that the project launched by the 'Corporate Debtor' in the year 2015 did not take off and only a few buyers numbering 35 paid the booking amount. The 'Corporate Debtor' has offered three options to its buyers:-
 - (i) to refund the amount paid by them
 - (ii) to shift to some other ongoing project of the Antriksh group
 - (iii) to remain invested in the project to reap the profit of the increased rate whenever the project takes off.
- It is also stated by the IRP that there is no progress at the proposed site as the land is yet to be allotted by the Government to the 'Corporate Debtor'.

Assessment:

6. At the outset, we address ourselves to the issue of 'Service of Notice' on the 'Corporate Debtor'. It is seen from the record that prior to filing of the Section 7 Application, a Demand Notice dated 01.02.2019 was issued by the

first Respondent by Speed Post and vide email. A perusal of the envelope filed before us (page 54 and 55 of the Reply) establishes that the envelope returned with the postal endorsement '*the Addressee refuses to accept*'. The email ID is the same address reflected in the Master Data and therefore the bald denial by the Learned Counsel for the 'Corporate Debtor' that this email was never received, is untenable. We also perused the Affidavit filed by the clerk Mr. Praveen Kumar stating that the Notice was affected by both Speed Post and email. Having regard to the fact that the email dated 07.05.2019 is the same email ID given in the Master Data, and the failure of the 'Corporate Debtor' to appear before the Adjudicating Authority we do not see any grounds in the contention of the Learned Counsel appearing for the 'Corporate Debtor' that there was no Company seal and stamp on the Notice delivered by hand and therefore Notice was not properly effected. We also observed that the Demand Notice issued prior to filing of the Section 7 Application had returned with the postal endorsement '*refused to accept*'.

7. Rule 38 of NCLT Rules, 2016, reads as follows:

"38. Service of Notices and Processes.- (1) Any notice or process to be issued by the Tribunal may be served by post or at the e-mail address as provided in the petition or application or in the reply;

(2) The notice or process if to be served physically may be served in any one of the following modes as may be directed by the Tribunal;-

(a) by hand delivery through a process server or respective authorized representative;

(b) by registered post or speed post with acknowledgement due; or

(c) service by the party himself.

(3) Where a notice issued by the Tribunal is served by the party himself by hand delivery, he shall file with the Registrar or such other person duly authorized by

the Registrar in this behalf, the acknowledgement together with an affidavit of service and in case of service by registered post or by speed post, file with the Registrar, or such Other person duly authorized by the Registrar in this behalf, an affidavit Of service of notice alongwith the proof of delivery,..."

8. To reiterate, we are of the considered view that 'Service of Notice' was effected in compliance of Rule 38 of NCLT Rules, 2016.

9. Now we address ourselves to the issue raised by the 'Corporate Debtor' that the Allottee is a speculative investor and falls within the ratio laid down by the Hon'ble Supreme Court in '**Pioneer Urban Land and Infrastructure Ltd.**' (**Supra**). Admittedly, both parties here entered into an MoU on 28.02.2015. Clauses 2 (a), (c) & (d) of the MoU are detailed as hereunder:-

"11. That Clause 2 (a), (c) and (d) of the MoU, reproduced below, clearly states that the payment of Rs. 25,00,000/- is for the purpose of investment and not for genuine purchase of the flat.

2 (a) The Applicant has agreed to invest a sum of Rs. 25,00,000/- (Rupees Twenty-Five Lacs only) in the Project for a period of 24 months or at the issuance of Final LTC by the competent authority (whichever is earlier) ("Investment") and has paid the said amount vide Chq. No. – 000055, issued From HDFC Bank, Dated: 08-07-2015.

2 (c) The Company has agreed to give return of 25% per annum at the end of 24 months or at the Issuance of Final LTC by the competent authority (whichever is earlier) from the date of receipt of (10% Booking Amount and Second Demand of 10%) Investment from the Applicant.

2 (d) That the minimum period of investment shall be 24 (twenty-four) months from the date of execution of this Agreement or till the issuance of Final LTC by the competent authority whichever is earlier. This agreement is executed from the given period

irrespective of the construction of the project starting early or later. The Investment period shall be extendable only as mentioned in these presents and upon mutual written consent.”

(Emphasis Supplied)

10. Clauses 2(f) & (g) specify the ‘buy-back option’ at the end of 24 months. These two clauses are relevant to ascertain whether the Allottee is a ‘speculative investor’:-

“Clause 2 (f) and (g) provide for the buy-back option under the MoU. That at the end of the 24 months period from the date of the MoU no option was exercised by the Respondent No. 1.

(f) The Applicant shall, at the end of 24 Months or the issuance of the final LTC by the Competent Authority, whichever is earlier, exercise in writing the option of either selling the Earmarked Units or can choose to retain the same.

(g) In the event if the Applicant, chooses to retain the apartment, then there will be no obligation on the part of the Company to return the investment along with the assured return and he will adhere to the payment plan given by the company.”

11. Whether the transaction between the Allottee and the ‘Corporate Debtor’ is clarified to be treated as ‘Financial Debt’ under Section 5(8) of the Code.

Relevant Provisions:

12. Section 5(7) of the Code defines a ‘Financial Creditor’:-

“(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;”

13. Section 5(8) of the Code defines the 'Financial Debt' in the following terms:-

“(8) “financial debt” means a debt along with 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 non-recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

1[Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(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;"

14. In this context, it would be relevant to discuss the meaning of the terms "disburse" and "time value of money" used in the principal of clause of Section 5(8) of the Code. The Hon'ble Supreme Court has interpreted the term 'Disbursal' in '**Pioneer Urban Land and Infrastructure Ltd.**'

(Supra):-

"70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:

1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.

71. In the present context, it is clear that the expression "disburse" would refer to the payment of installments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. **The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilizes the money..."**

(Emphasis in bold supplied)

15. This Tribunal in **‘Subha Sharma’ Vs. ‘Mansi Brar Fernandes & Ors.’ decided on 17.11.2020 in Company Appeal (AT) (Insolvency) No. 83 of 2020** while dealing with a similar issue has placed reliance on the ratio of **‘Pioneer Urban Land and Infrastructure Ltd.’ (Supra)** and also the Rules framed by Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016 and held that *‘once a prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in the reply that the Allottee is a defaulter and he can also point out that the Insolvency Resolution Process under the Code has been invoked fraudulently and with malicious intent’*. In **‘Subha Sharma’ (Supra)**, this Tribunal examined the terms of the MoU and observed that at the end of 12 months period, the ‘Corporate Debtor’ would buy-back the apartments and refund the amount paid together with premium and held that it was a ‘lucrative Agreement’ for the investor and therefore the Allottee is a ‘speculative investor’ and set aside the Admission Order of the Adjudicating Authority.

16. On an Appeal preferred by the Allottee, the Hon’ble Supreme Court in Civil Appeal No. 3826 of 2020 in **‘Mansi Brar Fernandes’ Vs. ‘Subha Sharma & Anr.’:-**

“5. While at this stage, we are not staying the operation of the order of the National Company Law Appellate Tribunal, which has reversed the order of the National Company Law Tribunal, admitting the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016, there shall be an ad-interim direction to the effect that the finding that the appellant is a speculative investor is confined to the facts of the present case and shall not be treated as a precedent in any other case for the present. Moreover,

the correctness of the decision of the NLCAT is in challenge in the present appeal.”

(Emphasis Supplied)

17. Hence, in the instant case, we need to see if the allottee has entered into any ‘lucrative Agreement’ based on the facts of this case. The clauses of the Agreement clearly stipulate that there is a buy-back Agreement, there is an assured return of 25% per annum at the end of 24 months or at the issuance of the final LTC by the Competent Authority (whichever is earlier). Right from the date of receipt of the booking amount from the Applicant, the word “investment” is consistently used. It is also stated that in consideration for the investment, the Company has agreed to earmark a unit in the project, give an assured return of 25% per annum and at the end of 24 months which is the minimum period of investment, it is also stated that the return assured would be given through the re-sale of apartment only. The 24 months period expired on 28.07.2017 and the Allottee issued a Notice on 01.02.2019 seeking the refund of the entire amount together with interest at 25% per annum, from 08.07.2015 till 31.01.2019 amounting to Rs. 47,31,164.38/-. The assured rate of interest offered at 25% per annum indicates that the Allottee had invested, seeking interest in the form of high assured returns. The Hon’ble Supreme Court in Para 50 of **‘Pioneer Urban Land and Infrastructure Ltd.’ (Supra)** has held as follows:-

“50.It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided Under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this

time provided by the promoter or real estate developer itself, on the basis of which, prima facie at least, a “default” relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this prima facie case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important to point out, in answer to the arguments made by the Petitioners, that Under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners’ contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death.”

(Emphasis Supplied)

18. We are of the considered view that the facts and circumstances peculiar to the attendant case indicate that the Allottee sought benefit from a ‘lucrative Agreement’ as he is ‘securing’ his money by way of this Agreement which gives him a lien over the flat. In Clauses 2(f) & (g) of the Agreement, the Home Buyer herein is given a choice to retain the apartment

or to sell the earmarked unit. In a regular Builder Buyer Agreement, the Home Buyer does not have this option of exercising his choice of taking or not taking the possession of the subject unit. In a normal Builder Buyer Agreement if the Buyer does not accept the possession, the EMD is forfeited. In this case, the Buyer gets his money plus 25% assured return even if he chooses not to retain the apartment. This Agreement is only a camouflage of actually financing the construction of the flat. Hence, we hold that the Home Buyer sought to benefit from this 'lucrative Agreement' and is squarely covered by the ratio of the Hon'ble Supreme Court in **'Pioneer Urban Land and Infrastructure Ltd.' (Supra)**. The I&B Proceedings is not a recovery proceeding and we place reliance on the ratio of the decision of this Tribunal in **'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.' Company Appeal (AT) (Insolvency) No. 82 of 2018** wherein it is observed that the IBC is not a recovery proceeding. In fact, the I&B Code prohibits and discourages recovery in several ways.

19. Though the Respondent has denied that the Respondent's son had entered into a Settlement Agreement with the 'Corporate Debtor' for return of the principal amount, we note that the Learned Counsel on instructions has submitted that they are ready to settle the matter and return the principal amount.

20. For all the aforementioned reasons, the Order of Admission under Section 7 is set aside. The 'Corporate Debtor' is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect. Keeping in view the peculiar facts of the attendant case, the IRP fees is to be borne by the 'Corporate Debtor'.

21. This Appeal is allowed and the Impugned Order is set aside however with the aforementioned directions.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
12th August, 2021

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