NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO. (ISB)-03(PB)/2017
CA NO.

CORAM: **PRESENT: CHIEF JUSTICE M. M.KUMAR**
Hon'ble President

SH. R.VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF PRINCIPAL BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 23.01.2017

NAME OF THE COMPANY: Nikhil Mehta & Sons (HUF) & ors
Vs
M/s AMR Infrastructures Ltd.

SECTION OF THE COMPANIES ACT: U/s 7 of Insolvency And Bankruancy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE

Mr. Varun Kathuria, Advocate

ORDER

1. This is an application filed by four applicants for triggering insolvency process by invoking Section (7) of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC') read with Rule-4 and Rule-9 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'IBR'). The application is directed against M/s. AMR Infrastructure Limited. The details of Applicants as disclosed in the application is as follows: Applicant No.1 is a HUF with Shri Nikhil Mehta as its Karta, Applicant No.2 is the wife of Shri Nikhil Mehta who himself is Applicant No.3. Applicant No.4 is Mrs. Praveen Mehta, mother of Applicant No.3. The application has been filed through Power of Attorney holder Shri Suresh Mehta, who is father of Applicant 3 and husband of Applicant No.4. He is also resident of Greater Kailash-I, New Delhi.

2. It is appropriate to mention that all the Applicants claim themselves to be the ''Financial Creditors' within the meaning of the term used in Section-7 of 'IBC'. In order to put the controversy in its proper perspective few facts may first be noticed. In accordance with the averments made in the application, the first three Applicants are resident of United States of America and the Applicant No.4, mother of Applicant No.3 resides in Delhi. Respondent viz. M/s. AMR Infrastructure is a Registered Company having its Head Office in Delhi. It is in the real estate business of constructing, promoting and developing commercial and residential properties, office spaces etc. A true typed copy of its Memorandum of Association has been placed on record (Annexure-A).

3. Applicants No.3 and 4 booked two Office spaces measuring 1000 sq.ft. in their respective names under the project known as "Kessel-I – Valley" and executed Memorandum of Understanding dated 12.07.2007. It is alleged that the Memorandum of Understanding was lost by the Respondent with a mala fide intention and some ulterior motive. In its place, a new Memorandum of Understanding was sent to the petitioners for signature which had terms and conditions different than the one originally agreed between the parties. As a consequence, the applicants refused to sign the new Memorandum of Understanding and demanded refund of the amount paid by them to the Respondent. The applicants then substituted their booking in the project called "I-Mall" which had shops and other commercial units. It required further investment to purchase a unit in the "I-Mall" project. Accordingly, a fresh Memorandum of Understanding dated 17.10.2012 was executed and unit No.E-06 measuring about 1101 sq.ft. was allotted to the applicant in the project 'I-Mall'. The total price of the unit was Rs.39,57,400/- and a sum of Rs.39,21,300/- was paid by the applicants to Respondent on 17.10.2012 at the time of execution of the Memorandum of Understanding. The balance amount of Rs.36,100/- was to be paid by the applicants 3 & 4 at the time of possession of the aforesaid unit. According to the terms of Memorandum of Understanding, the Respondents were required to build and deliver possession of the unit within two years from the date of execution of the MOU. The

Memorandum of Understanding, however, stipulated payment of Rs.82,214/- per month as its "Assured Returns" with effect from 30.10.2012 till the possession of the unit was delivered to the applicant.

4. Likewise applicants No.2 and 3 also booked a shop bearing No.E-47 in the "I-Mall" project measuring 1453.432 sq.ft. super area for a total consideration of Rs.46,67,402/-. An amount of Rs.36,50,000/- was paid by them at the time of booking. The remaining amount of Rs.10,17,402/- was to be paid by them at the time of taking possession. A Memorandum of Understanding dated 12.04.2008 was executed between the parties with various terms and conditions of the Sale/Allotment. The Respondent were to complete the construction by December 2009. The stipulation in the MOU required the Respondent to pay the applicants No. 2 and 3, a sum of Rs.99,600/- each month as an amount of "Assured Returns" with effect from April 2008 till the possession of shop was delivered to them. It appears that the applicants had agreed for payment of Assured Returns from January 2009 and in return Respondent committed itself to make the payment of Assured Returns for the period of 9 months to applicants 2 and 3 in future returns or adjust the total amount at the time of possession. It is pleaded by the Respondent that from January 2009 till March 2010, the Respondent continued making payment to the applicants 2 and 3 for an amount of Rs.88,315/-, whereas it was actually supposed to pay an amount Rs.99,600/-. However, the mistake was rectified and the Respondent started paying to the applicants the agreed amount from April 2010. It was further agreed by the Respondent to pay the difference of amount of Rs.19,875/- in the near future.

5. Applicant No.1 also booked a fully-furnished residential flat measuring 550 sq.ft. on the 4th Floor for a consideration amount of Rs.7,24,000/-. A sum of Rs.5,80,000/- was paid by the Applicant No.1 to the Respondent at the time of booking and the remaining amount of Rs.1,44,000/- was to be paid at the time of delivery of possession which included Club charges, EFC charges, EEC charges and IFMS charges. A Memorandum of Understanding was executed between the parties on 20.08.2009 with detailed terms and conditions. According to the terms of the MOU, construction of the fully-furnished flat was to be completed on or before

July 2011. Before the offer of possession, a sum of Rs.12,000/- as Assured Returns each month was required to be made with effect from August 2009.

6. After the execution of various Memorandum of Understandings, the Respondent started paying the monthly "Assured Returns" to the applicants although erratically. It is alleged that the cheques issued by the Respondent was dishonoured for the reasons, inter alia, of insufficient funds. The last cheque issued for Assured Returns credited in the account of the Applicant No.1, Applicant No.2 and 3 for their respective unit was on 11.01.2014 in respect of the month of December 2013. In respect of the Applicant No.3 and 4, it was credited in their account on 26.07.2014. It was actually for the month of March 2014. Thereafter no cheque for the Assured monthly Return has been issued by the Respondent despite repeated requests. None of the project of any of the Applicant has been completed by offering possession. It is alleged that many other like the applicants have been duped to invest their hard-earned money in many projects belonging to the Respondent. It is alleged that a number of persons have initiated winding up proceedings against the Respondent Company which are pending in the High Court of Delhi, and are listed for 28.03.2017. A true copy of Order dated 30.05.2016 passed by the Hon'ble High Court Delhi has been placed on record (Annexure-B).

7. The Applicant issued 3 legal notices on 13.12.2016 under section 433(e) and 434 of the Companies Act, 1956 demanding different amounts being the amount of monthly "Assured Returns" due as per terms of MOUs and payable to the Applicant No.1, Applicant No.2 and 3; and Applicant No.3 and 4 respectively for their three units. It is asserted that the aforesaid amount is an admitted debt by Respondent. According to the Applicants, the Respondent is unable to meet its liability as is evident from the non-payment of dues. Therefore the instant application has been filed for triggering the corporate insolvency resolution process under Section 7 of the Act.

8. The matter came up for hearing on 19.1.2017 and we posted the same for hearing today because no one had put in appearance on behalf of the Respondent. Learned Counsel for the Applicants have shown us the tracking report which reveal that a copy of the application was delivered to the Respondent on 17.01.2017.

9. We have heard learned counsel at some length. We confronted learned counsel for the Applicants with a query as to how the Applicants would be covered by the expression 'Financial Creditor' and the expression 'Financial Debt' within the meaning of the term used in Section 7 and Section 5 (7) & (8) of the IBC. According to the learned counsel, the default in payment of the amount of "Assured Returns" payable by the Respondent would be sufficient to satisfy the requirement of Section 7 read with Section 5 (7) and (8) of the IBC.

10. In order to find out as to whether the Applicant answers the description of "Financial Creditor" and "Financial Debt" in terms of the aforesaid provision of the Act, it would be profitable to read the provisions of Sections 5 (7) & (8) and Section 7 of IBC which are set out below:

> "5. Definitions: In this Part, unless the context otherwise requires,-
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> 7. "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debts has been legally assigned or transferred to;
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> 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-
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> (a) money borrowed against the payment of interest;
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> (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent ;
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> (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;*

(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 or any of the items referred to in sub-clauses (a) to (h) of this clause;

7. Initiation of corporate insolvency resolution process by financial creditor – (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;

(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

11. From a bare perusal of Section 7 of the IBC, it is patent that the insolvency process can be triggered by a "Financial Creditor" individually or jointly against a corporate debtor when default has occurred. The first question arises for consideration is as to who is a 'Financial Creditor'. In order to ascertain the meaning of that expression we have to examine its definition as provided by Section 5 which is applicable to Part II. We have already extracted the provisions of Sections 5 (7) and 5 (8) of the IBC which are relevant to the issue raised. Section 5 (7) of IBC defines the expression "Financial Creditor" and Section 5 (8) of IBC defines the expression "Financial debt" which has been used in Section 5 (7) of IBC.

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 financer 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 financer. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansal) 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 a piece 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'.

13. 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.

14. Even otherwise the present petition would not be maintainable as many winding up petitions have been filed before Hon'ble Delhi High Court being Company Petition No.477 of 2014, Company Petition Nos. 689,691,692,693, 694, 695, 700, and 722 of 2015 along with CP No.238 and 244 of 2016. Even the Official Liquidator has been appointed as a provisional liquidator although the matter is presently pending before the Appellate Bench with interim directions.

15. As a sequel to the above discussions, we are unable to persuade ourselves to accept that the applicants are covered by the expression "Financial Creditor" in term. The arrears of "assured returns" would also not be covered by the expression 'financial debt'. Therefore the applicants do not answer the description of Section 7 read with Section 5(7) & 5(8) of IBC. The application is accordingly dismissed. The remedy of the Applicant may lie elsewhere.

16. We make it clear before parting that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy as we have refrained from entertaining the application at the initial stage itself when the Respondents have not entered appearance and are not present before us. Therefore the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.

S/D

(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

S/D

(R. VARADHARAJAN)
MEMBER (JUDICIAL)