

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 219
Company Appeal-302/252/ND/2023
CA-64/2024

IN THE MATTER OF:

(Under Section: 252(3) Companies Act, 2013)

**Creditors/Homebuyers of Earth Towne
Infrastructure Private Limited**

(Through AR Mr. Satyabrata Mitra)

Plot No. GH-04, Sector-1 Greater Noida (West)
Gautam Buddh Nagar, UP

... Appellant

Versus

**Registrar of Companies,
NCT of Delhi & Haryana**

04th Floor, 61, IFCI Tower,
Nehru Place, New Delhi-110019

... Respondent No. 1

Income Tax Department

Office of the Deputy Commissioner of Income Tax,
High Court Cell, Block-I Room No. 428-429,
Lawyer's Chamber, Delhi High Court
New Delhi – 110003

... Respondent No. 2

AND IN THE MATTER OF CA No. 64/2024:

(Under Rule 11 of NCLT Rules, 2016)

**Creditors/Homebuyers of Earth Towne
Infrastructure Private Limited**

(Through AR Mr. Satyabrata Mitra)

Plot No. GH-04, Sector-1 Greater Noida (West)
Gautam Buddh Nagar, UP

... Applicant

Versus

**Registrar of Companies,
NCT of Delhi & Haryana**

04th Floor, 61, IFCI Tower,
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... Respondent No. 1

Income Tax Department

Office of the Deputy Commissioner of Income Tax,
High Court Cell, Block-I Room No. 428-429,
Lawyer's Chamber, Delhi High Court
New Delhi – 110003

... Respondent No. 2

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Appellant : Adv. Raghav Dembla, Adv. Shaurya Shyam

For the RoC : Ms. Lata Prajapati, Company Prosecutor on behalf of RoC

For the IT Dept. : Mr. Kunal Sharma, Sr. St. Counsel, Ms. Zehra Khan, Jr. St. Counsel, Adv. Anaunta Shankar

For the SIDBI : Mr. Himanshu Upadhyaya, Mr. Deepak Joshi

[DAY ONE OF FULL HYBRID HEARING]

ORDER

CA-64/2024: The captioned application could be allowed in terms of the order dated 13.03.2024, thus the same has been incorrectly reflected as pending in the cause list.

Appeal-302/252/ND/2023: It is the case of the Appellant i.e. Creditors/Home Buyers of Earth Towne Infrastructure Private Limited that the Corporate Debtor has its liability towards them as the Appellant had collectively disbursed to it an amount of Rs. 28,64,48,786/- only.

2. The salient plea espoused on behalf of the Appellant is that, since the CD defaulted to allot flats/dwelling units to the Appellants, they instituted CP(IB)-196/ND/2023 for ordering commencement of CIRP in respect of the CD, but there could be a semblance in the proceedings that the application filed under Section 7(2) of IBC, 2016 may not lie against a company which stands struck off from the Register of Companies, thus in order to seek revival of the CD, to meet its liability towards the creditor, including the process of

putting it back to its feet. The restoration of the CD to the Register of Companies is essential.

3. Mr. Sumesh Dhawan, Ld. Counsel appearing for the Appellant submitted that the failure to furnish Annual Return is not always a justifiable ground for striking off the name of the company from Register of Companies. To buttress the plea he relied upon the judgment of this Tribunal in **Neotech Engineers Private Limited vs. Registrar of Companies, Uttar Pradesh** [2021 SCC OnLine NCLT 399]. The plea espoused in the appeal reads thus:

“ii FAILURE TO FURNISH ANNUAL RETURNS NOT A JUSTIFIABLE GROUND FOR STRIKING OFF THE NAME FROM ROC.

That it is pertinent to mention herein the judgment rendered by Hon’ble NCLT in the matter of Neotech Engineers Private Limited versus Registrar of Companies, Uttar Pradesh [2021 SCC OnLine NCLT 399] wherein it was held that failure to furnish annual returns is not a justifiable ground for striking off the name from RoC.

Relevant para/ extract of the judgment is being reproduced herein:

¶12. *“The Appellant has been able to satisfy this bench that it has certain assets which necessitate and justify the restoration of its name in the Register of Companies. A step as stringent as what has been taken at least requires an opportunity to the appellant to take remedial measures. Merely to disallow restoration on grounds of its failure to file annual returns would neither be just nor equitable. As per several decisions of various courts it should only be an exceptional circumstance that court should refuse restoration where the company has been struck off for its failure to file annual return as that would be excessive or inappropriate penalty for that oversight.”*

4. It is also the plea of the Appellant that striking off of a company can only be ordered on the admission by the company that it could become defunct. Such plea espoused in the appeal reads thus:-

“iii STRIKING OFF OF A COMPANY CAN ONLY BE DONE ON COMPANIES OWN ADMISSION THAT IT IS DEFUNCT

Another landmark judgment delivered was in the case of Basanti Cotton Mills Private Limited vs. The RoC, West Bengal [C.P. No. 432 of 2010] by Hon’ble High Court at Calcutta. Relevant para is reproduced belowunder:-

*“I would add that, on reading sub sections (1), (2), (3) and (5) of Section 560, it does seem to me that a company can only be defunct, if it does not reply to the notice or says in reply that it does not carry on any business or is not in operation. If it asserts to the contrary, it cannot be struck off at all. **Hence striking off is on the admission by the Company that it is defunct.** The same principle applies in the application of Section 3 (3), (4) and (5) of the Act. It necessarily follows that if there is any dispute regarding the paid up capital or whether the Company does business, it cannot be declared defunct.”*

5. As can be seen from the provisions of Section 250 of the Companies Act, 2013 where a company stands struck off under Section 248 of the Act, it shall on and from the date mentioned in the notice under sub-section (5) of Section 248 cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except from the purpose of discharging the liability or obligations of the company. The Section reads thus:-

“250. Effect of company notified as dissolved.—*Where a company stands dissolved under section 248, it shall on and from the*

date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.”

6. In the present case, as has been mentioned in the appeal, the company has liability to discharge. The averments made in this regard in the appeal reads thus:-

“3) FACTS OF THE GIVEN CASE:-

.....

d) *It is stated that a registered lease deed dated 01.09.2010 was executed in favour of the ETIPL in respect of Plot No. GH-04, Sector-01, area situated in Greater Noida Industrial Development Area District, Gautam Budh Nagar admeasuring 73942.00 sq. meter. [hereinafter referred to as the “**Subject Property**”]. Copy of the Lease Deed dated 01.09.2010 has been annexed herewith and marked as **ANNEXURE – 4***

e) *It is stated that after execution of the Lease Deed dated 01.09.2010, a Development Agreement dated 09.09.2010 was entered into between the ETIPL and EIL, whereunder EIL was to develop the subject Land and thereof the development rights were given to EIL. The Development Agreement also stipulated that the ETIPL shall remain the lease right holder of the Subject Land and EIL shall only have the permission to enter into the Subject Land only for carrying out the development/construction activities, as a Licensee. The area sharing ratio between ETIPL and EIL was 18% and 82% respectively. That on an Application made by the ETIPL, GNIDA had sanctioned Building Plan for construction on the Subject Land. Copy of the*

*Development Agreement dated 09.09.2010 is annexed herewith and marked as **ANNEXURE – 5***

- f) That as per the contractual agreement the land is being developed by EIL was Group Housing Project under the project name i.e., “Earth Towne”.*
- g) It is stated that EIL was to develop, as per the Development Agreements, on land owned by the ETIPL the Projects namely – Earth Towne Project. That the building permissions were obtained by the Lessees for the aforesaid parcel of land for construction of the Projects advertised.*
- h) That sometime in 2015, the Appellants entered into Agreements with the ETIPL being the Landowner / Owner of Leasehold Rights and EIL being the Developer of the Subject Land owned by the ETIPL for the purpose of Allotment of Apartments in the Project being developed by EIL on the Land of the ETIPL. Copy of sample Agreements between the Appellants, the ETIPL and EIL have been annexed herewith and marked **ANNEXURE – 6***
- i) Furthermore, the various Homebuyers / Allottees including the Appellants herein booked the residential flats in the aforesaid Project and paid substantial amounts towards the said allotment. It is pertinent to note here that certain amounts were also directly received by the ETIPL from some of the Allottees and certain amounts were received by EIL and were subsequently transferred to the ETIPL by EIL.*
- j) It is stated that the Appellants herein have collectively disbursed an amount of INR 28,64,48,786 /- (Rupees Twenty-Eight Crores and Sixty Four Lakhs and Forty Eight Thousand Seven Hundred Eighty Six Only) in favour of EIL which was ultimately transferred by EIL to the ETIPL in*

lieu the Units/ Apartments in its Project. Copy of the Computation Sheet indicating the total amount disbursed by the Appellants has been annexed herewith and marked as **ANNEXURE – 7**

- k) That the payments made by the Applicants in lieu of their Allotments to EIL were ultimately received by the ETIPL by way of transfer of funds from EIL to the Corporate and the same is duly reflected in the Financial Statements of EIL. Copy of the Balance Sheets of EIL as available on the Website of Ministry of Corporate Affairs has been attached herewith and marked as **ANNEXURE – 8**
- l) That the ETIPL had undertaken to give the possession of the allotted units / apartments to the Homebuyers / Allottees including the Applicants herein by “**June 2016**” in terms of the Builder Buyer Agreements but in complete disregard of the same, the ETIPL failed to give possession of the Units to the Appellants.
- m) That EIL stopped all works at the Project Site in the year 2016 and even the ETIPL failed to put any effort to restart / continue the construction work at project site and to the utter shock and dismay of the Applicant, it rather abandoned the project.
- n) Subsequently, the Appellants formed an Association of Homebuyers and approached the development authorities such as GNIDA, courts/ tribunals and RERA Authority with their grievances but to no avail.
- o) It is pertinent to mention herein that ETIPL being the Landowner and a proper party to the Bueyrs’ Agreements has failed to complete the project despite receiving even upto about 85% of the payment from the Appellants as is mentioned herein above. The Appellants have invested

their hard-earned money to purchase the Residential Units in the Project of ETIPL.”

7. In the reply filed on behalf of the RoC, no serious objection to the prayer for restoration of the company to Register of Companies made in the appeal has been raised. Rather the RoC has conceded that the appeal may be allowed. The relevant excerpt of the reply filed by RoC reads thus:-

8. To ensure the compliance of principle of natural justice, in terms of the order dated 13.03.2024, we directed that the notice regarding filing of the present appeal be served upon the company i.e. Earth Towne Infrastructure Private Limited as also upon its director by all modes. The order dated 13.03.2024 reads thus:-

“Issue notice to Earth Towne Infrastructure Private Limited as also to its ex-directors returnable on 21.03.2024. The Applicant undertakes to serve notice upon the Earth Towne Infrastructure Private Limited as also to its ex-director through all modes viz. registered post, speed post, courier service, e-mail and dasti. Affidavit of service be filed within one week. Reply, if any, may be filed within one week from the date of receipt of the notice. List the matter on 21.03.2024.”

9. An affidavit of service of notice upon the concerned company and its ex-directors was filed on behalf of the Appellant on 19.03.2024. The text of the affidavit reads thus:-

*“9. That thereafter, the Counsel for the Appellant vide Email dated 18.03.2024 served a complete soft copy of the captioned Appeal pending adjudication before this Hon'ble Tribunal upon the Company and its Directors on all available Email ID(s), however, all the Email(s) bounced back in the mailbox of the Counsel for the Appellant due to the reason **‘THE ADDRESS COULDN'T BE FOUND OR IS UNABLE TO RECEIVE EMAIL’**. Copy of the Email*

dated 18.03.2024 has been annexed herewith and marked as **ANNEXURE -2.**

10. Thereafter, a complete physical set of the captioned Appeal along with all Order(s) passed by this Hon'ble Tribunal in the captioned Appeal was served upon the Registered Address of the Company as per the MCA Master Data Records on 15.03.2024, however, the same could not be delivered due to the reason '**RECEIVER SHIFTED FROM GIVEN ADDRESS**'. Copy of the Speed Post Receipt along with the Tracking Report has been annexed herewith and marked as **ANNEXURE - 3 (Colly).**
11. At this juncture, it would be trite to mention that the creditors had filed the captioned Appeal in compliance of the Order dated 31.10.2023 passed by the Hon'ble Adjudicating Authority, New Delhi, Bench IV in Company Petition (IB) 196 of 2023 ("**Section 7 Petition**") filed by the Appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 seeking the initiation of Corporate Insolvency Resolution Process of the Company. Copy of the Order dated 31.10.2024 has been annexed herewith and marked as **ANNEXURE-4**
12. Pertinently, even at the stage of service in the proceedings of the Section 7 Petition, the Counsel for the Appellants had duly served on all available Email ID(s) of the Company and its Directors, however, all Email(s) had bounced back, while, the hard copy of the Section 7 Petition could not be delivered upon the Registered Address of the Company due the reason '**RECEIVER SHIFTED FROM GIVEN ADDRESS**'.
13. That the Appellant had also served Notice of the Section 7 Petition upon the Company by way of substituted service i.e., newspaper publication, however, despite the same, the Company failed to enter appearance before the Hon'ble Adjudicating Authority in the proceedings of the Section 7 Petition. Copy of the Affidavit of Service dated 16.05.2023 filed by the Appellant in the Section 7

*Petition has been annexed herewith and marked as **ANNEXURE – 5***

14. *That pursuant to the repeated failure of the Company to enter appearance in the proceedings of the Section 7 Petition, the Hon'ble Adjudicating Authority vide its Order dated 19.07.2023 was pleased to set the Company as ex-parte and proceeded with the final hearing of the Section 7 Petition and reserved its Order(s) vide Order dated 21.08.2023. Copy of the Order(s) passed by the Hon'ble Adjudicating Authority in the Section 7 Petition have been annexed herewith marked as **ANNEXURE - 6 (Colly)**.*

15. *That since February 2017, all the Directors / Key Managerial Persons of the Company were in judicial custody and now absconding from the judicial authorities, hence, fail to enter appearance in any proceedings which may concern the Company before any courts of law. It is pertinent to mention that Promoters/ Directors of the Company and other related/group companies are not traceable and the orders being passed by the courts/tribunals against these companies are ex-parte. Hence, it is humbly prayed before this Hon'ble Tribunal that the captioned may be allowed and the name of the Company may be restored in the Register of Companies so as to enable the Hon'ble Adjudicating Authority to proceed with the Section 7 Petition filed by the Appellants.”*

10. Since the Directors of the concerned company (ibid) are in jail/judicial custody, there is no appearance on their behalf. In any case the company is an independent juristic person and in terms of the provisions of Section 250 of the Companies Act, 2013, despite its name being struck off from the Register of Companies, a company is liable to meet its liabilities and in the present case the Homebuyers who paid subscription for allotment of dwelling units to the company (ibid) are unable to pursue the application filed under

Section 7 of IBC, 2016 on account of the company being struck off from the
CA-64/2024 in Company Appeal-302/252/ND/2023
Creditors/Homebuyers of Earth Towne Infrastructure Pvt. Ltd. vs. RoC & Anr.

Register of Companies. In the facts and circumstances, it would be just and proper to restore the Earth Towne Infrastructure Private Limited to Register of Companies.

11. Ms. Anauntta Shankar, the proxy counsel for the arguing counsel for Jurisdictional Assessment Officer (ITO) submitted that she has no instruction to take any stand qua the appeal.

12. As it may, no prejudice would be caused to the Income-Tax Authority by restoration of the name of company in the Register of Companies, thus the stand of the Jurisdictional Assessment Officer (ITO) may not be of much relevance qua the fate of the present appeal.

13. In view of the aforementioned, the appeal is allowed and the name of Earth Towne Infrastructure Private Limited is directed to be restored to the Register of Companies. The ramification would be as if the name of the said company was never striked off from the register of companies. **The appeal stands disposed of. No cost.**

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Upasana/Ruchita