

NIKHIL MEHTA AND SONS V. AMR INFRASTRUCTURE LTD.
C.A. (I.B.) No. 543/KB/2017 arising out of C.P. (I.B.)/170/KB/2017

IBC intelligence

Ratio – Essential criteria's to be fulfilled for a Creditor to come within the meaning of 'Financial Creditor'

FACTS OF THE CASE:

Applicants purchased certain offices spaces and a residential flat from the Respondent Company choosing the option of **assured returns** till the delivery of possession is made.

MOU for every transaction was executed and part payment was made by the Applicants to the Respondent. The balance amount was to be paid at the time of delivery of possession.

Till the time of completion of projects and delivery of possession, the Respondent made payment of the amount decided as the assured return for some time and then made defaults in those payments.

The applicants claimed themselves as 'financial creditors' of the Respondent Company and so, filed an application for triggering the insolvency proceedings invoking Section 7 of IBC read with Rule 4 and Rule 9(1) Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

ISSUE:

- i. Whether the Applicant after having entered into MOU with such an arrangement shall be treated as the Financial Creditor of the Company as

defined under the provisions of sub-section (5) of Section 7 of the I & B code and?

- ii. Whether an application for triggering insolvency process under Section 7 of 'I & B code' is maintainable where winding up petitions have been initiated and pending before Hon'ble High Court against the 'Corporate Debtor'?

In NCLT:

The tribunal questioned the applicants as to how they were financial creditors under the meaning given in Section 5(7) of the code and how the amount due to them was financial debt under Section 5(8) of the code.

The bench took into consideration the opening words of the definition clause that state that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money.

While examining the transactions in the present case, the learned bench came to the conclusion that appellants do not come within meaning of '**financial creditor**' as '**assured returns**' is associated with delivery of possession of property and has got nothing to do with requirement mentioned in section

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5(8) of the code, the time value of money which is missing in the present transaction.

The nature of the present transaction is same as a simple agreement of sale or purchase.

The bench dismissed the appeal stating that the applicants couldn't prove themselves as financial creditors and assured returns as financial debt.

Also, that there are various insolvency petitions already pending under companies act in the high court so they cannot start an insolvency proceedings against respondent under IBC.

The bench stated that the observations made are not opinion on merits of the controversy as they have refrained from entertaining the application at initial stage where respondent did not appear. Therefore, the rights of applicant before any other forum shall not be prejudiced based on dismissal of this application.

In NCLAT:

The NCLAT while dealing with the facts and pleas, made following observations:

1. Assured returns by real estate developers is a method of raising or mobilising funds from open market or general public at a lower rate of interest without any security and any regulatory body. So, the transaction makes the appellant a financial creditor.

2. The amount due as assured returned is mentioned in the current balance sheet of the respondent as Financial Cost and also, the respondent deducts the amount of TDS on the return amount under section 194A of Income Tax Act that talks about interest other than interest on securities. This makes the payment of assured return the payment of interest which is also mentioned in form 16A and form 26AS of the appellants.

3. The appellants are investors and have chosen committed return plan. The respondent in their turn agreed upon to pay monthly committed return to the investors. Thus, the amount due to the appellants comes within the meaning of 'debt' as defined in Section 3(11) of the Code.

Ratio – On Financial Creditor, it was categorically held that:

“...we find that following essential criteria's to be fulfilled for a Creditor to come within the meaning of 'Financial Creditor':-

(i) A person to whom a 'Financial debt' is owed and includes a person whom such debt has been legally assigned or transferred to

(ii) The debt along with interest, if any, is disbursed

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against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub-section (8) of Section 5.

The NCLAT favored the appellants and said that the appellants were financial creditors as the amount of assured return was the amount of interest on loan that is taken by the real estate developers which clear from the annual returns of the respondent as the assured returns or the commitment returns are under the head financial cost that include interest on loan.

Ratio - On maintainability of application under I & B Code, it was held as under:

“It is the case of the Appellants that various winding up petitions have been filed and are pending against the Respondent for non-payment of the assured returns to various buyers wherein the Respondent has admitted liability and has offered to settle the claims but has not yet been able to do so. Therefore, since the provision of the Winding up under the Companies Act, stands substituted by the Insolvency and Bankruptcy Code, 2016, then the Appellants should be entitled to relief under the I & B Code itself.”