

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 187 of 2018

IN THE MATTER OF:

Rajendra Kumar Saxena

...Appellant

Vs

Earth Gracia Buildcon Pvt. Ltd.

....Respondent

Present:

For Appellant: Mr. Rakesh Kumar Singh, Advocate. Mr. Rajendra Kumar Saxena, Appellant in person.

For Respondent:

ORDER

11.09.2018: All the time whenever notice was issued on Respondent it returned unserved by the Postal Department in absence of the Respondent - 'M/s Earth Gracia Buildcon Private Limited'. After taking number of times attempts to serve notice and as the Respondent's office remained close, the Appellant was allowed to publish notice in two national newspapers, one English ('Times of India') and one Hindi ('Hindustan') which are published from Delhi circulated in NCR.

2. Learned counsel for the Appellant has filed proof of advertisement published in English newspaper 'Times of India' dated 3rd August, 2018 and in place of 'Hindustan' notice was published in Hindi newspaper 'Dainik Jagaran' dated 3rd August, 2018.

3. In spite of the service of notice, the Respondent has not appeared. In view of the two publications of notice, we treat the service complete on the Respondent.

4. The Appellant, an allottee of real estate project filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'I&B Code') before the Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi for initiation of Corporate Insolvency Resolution Process against 'M/s Earth Gracia Buildcon Private Limited' (Corporate Debtor). The Adjudicating Authority by impugned order dated 5th March, 2018 passed in Company Petition No. (IB)-448(PB)/2017 dismissed the application on the ground that disbursement made by the Appellant do not come within the meaning of 'financial debt'. Before the Adjudicating Authority, the Respondent appeared and took plea that in view of the arbitration clause, the matter was to be referred to arbitration and therefore the application under Section 7 preferred by the Appellant was not maintainable. The decision of this Appellate Tribunal in 'International Road Dynamics South Asia Pvt. Ltd. Vs. Reliance Infrastructure Ltd. in Company Appeal (AT) (Insolvency) No. 72 of 2017 was relied upon, which relates to an application under Section 9 of the I&B Code and does not relate to application under Section 7 of I&B Code.

5. Learned counsel appearing on behalf of the Appellant has brought to our notice the 'Terms and conditions forming part of the application for provisional allotment of a residential apartment in "Earth Gracia" (Plot No. GH-12A-1, Sector-1, Greater Noida, U.P.)'. The Appellant has also placed on record the receipts given by the Respondent which indicates that the 'project is situated at Greater Noida'. Receipts were issued between 16.04.2013 and 24.03.2014. The allotment letter from 'Earth Gracia Buildcon Pvt. Ltd.' shows that a residential unit/apartment in the proposed Group Housing Complex known as 'Earth Gracia' has been allotted in favour of the Appellant wherein provision of Assured return has also been shown.

6. This Appellate Tribunal in '*Nikhil Mehta & Sons*' Vs. '*AMR Infrastructure Ltd.*' in *Company Appeal (AT) (Insolvency) No. 07 of 2017* by its judgment dated *21st July, 2017* held the allottees of residential units as 'Financial Creditors'. By 'The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 No. 6 of 2018 dated 6th June, 2018 followed by the Act, in clause (8), in Sub-clause (f), of Section 5 an explanation has been inserted as per which 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. Thereby, after amendment of the Act, the allottees of real estate project have been treated as 'Financial Creditors'.

7. The present case is covered by the decision of this Appellate Tribunal in '*Nikhil Mehta & Sons*' Vs. '*AMR Infrastructure Ltd.*', as also in view of Section 5(8)(f) as amended since 6th June, 2018. Even if it is considered that the amendment of Act came into force after filing of application, the case of the Appellant being covered by decision of this Appellate Tribunal in '*Nikhil Mehta & Sons*' Vs. '*AMR Infrastructure Ltd.*' disposed of on *21st July, 2018*, the Adjudicating Authority should have admitted the application in absence of any defect. As the Adjudicating Authority has failed to notice the decision of this Appellate Tribunal in '*Nikhil Mehta & Sons*' Vs. '*AMR Infrastructure Ltd.*' and has also failed to consider the 'Terms and Conditions' of the 'Allotment Letter' including the provision of Assured Return and the fact that the Appellant has already paid Rs.13 Lakhs in favour of the Corporate Debtor which the Respondent has defaulted to pay. We have no option but to set aside the impugned order dated 5th March, 2018 passed by the Adjudicating Authority in *Company Petition No. (IB)-448(PB)/2017*. It is accordingly set aside.

8. Prayer of the Appellant is allowed. The Adjudicating Authority will now admit *Company Petition No. (IB)-448(PB)/2017*, pass order of moratorium and

appoint the Interim Resolution Professional as proposed by the Appellant if there is no enquiry pending against him. The Corporate Insolvency Resolution Process be initiated immediately against the Respondent- 'M/s Earth Gracia Buildcon Private Limited'.

9. The appeal is allowed with aforesaid observations. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

am/gc

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