

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) No. 07 of 2016

(arising out of order dated 4th July, 2016 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition (T) 10/8/2015 dated 4th July, 2016)

M/s. Unitech Limited

... Appellant

Vs.

**Registrar of Companies, Delhi
and Haryana & Ors.**

... Respondents

Present: For Appellants:- S/Shri Amrendra Sharan, Senior Advocate with Saurabh Kalia, Gaurav Jain and Ms Aishwarya Mishra, Advocates

For Respondents:- S/Shri Satvik Varma, Ninad Dogra, Lalltaksh Joshi and Vipul Ganda, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the appellant, M/s. Unitech Limited (hereinafter referred to as 'company' for short), a company registered under the Companies Act, 1956 (now Companies Act, 2013), against order dated 4th July, 2016 passed by the National Company Law Tribunal (hereinafter referred to as 'Tribunal' for short), New Delhi Bench at New Delhi by which the Tribunal observed that the company would not be in a position to repay the dues to the depositors even if further time is extended and for having defaulted in complying with the earlier order dated 11th March 2016 passed by the then Company Law Board (hereinafter referred to as 'C.L.B' for short), dismissed the Company Petition (T) 10/8/2015, leaving it open to the depositors to pursue their remedies as per law. The Registrar of Companies, NCT of Delhi & Haryana (hereinafter referred to as 'Registrar of Companies' for short) has been suggested to take action against the company under Sub-Section (3) of Section 74 of the Companies Act, 2013 (hereinafter referred to as 'Act, 2013' for short).

2. Before discussing the case of the appellant, it is necessary to notice the provisions of law and the background due to which the company had to move the Company Petition before the then C.L.B.

3. Chapter-V of the Act, 2013 came into force from 1st April 2014.

4. Sub-Section (1) of Section 73 of the Act, 2013 does not prohibit acceptance of deposits from public. It only regulates acceptance of deposits in accordance with provision made under Chapter-V.

5. Sub-Section (1) of Section 74 of the Act, 2013 mandates a company to repay the deposits, etc., accepted before the commencement of the Companies Act, 2013, within a specified time or the time allowed by Tribunal, failure of which attracts punishment as reproduced below:-

“74. Repayment of deposits, etc., accepted before commencement of this Act.—(1) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall— (a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and (b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.

(2) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

(3) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both.”

6. Section 75 of the Act, 2013 deals with damages for fraud where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified in Sub-Section (1) of Section 74 or such further time as may be allowed by the Tribunal under sub-section (2) of that section which reads as follows:-

“ 75. Damages for fraud.—(1) Where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified in sub-section (1) of that section or such further time as may be allowed by the Tribunal under sub-section (2) of that section, and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in subsection (3) of that section and liability under section 447, be

personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.

(2) Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon.”

7. Section 76 allows certain companies to accept deposits from public complying the requirements under sub-section (2) of Section 73 and such rules, as the Central Government may prescribe, in consultation with the Reserve Bank of India. Therefore, there is no bar to accept deposits from public by a public limited company, even after the commencement of Act, 2013.

8. Admittedly, the appellant failed to repay the principal amount with interest, to the depositors within the period as prescribed under clause (b) of sub-section (1) 74 of the Act, 2013, i.e., within one year from the date of commencement of the Companies Act, 2013 i.e., by 1st April 2015 or the day the deposits matured, whichever is earlier.

9. It is not in dispute that even those deposits which matured in the year 2012, 2013 or 2014, majority of them along with principal and interest were not paid by 1st April, 2015.

10. For the reason aforesaid, the company filed an application under sub-Section (2) of 74 in Form 7 before the C.L.B, New Delhi, enclosing therein their break up of deposits outstanding, deposits overdue for payment for two years or more, cash flow statement, anticipated turnover and net profit etc. At paragraph 3 of Form 7, the total amount of deposit on the date of application with principal and interest outstanding for payment in respect of which extension of time had been sought for was shown at Rs.592.76 crores. In fact, no interest as is payable has been shown therein. Break-up of outstanding deposits overdue for payment for more than two years were shown at paragraph 4 and 5.

11. The relevant portion of the petition is quoted as under:-

“ 3. Total amount of deposits on the date of the application (principal and interest) separately, outstanding for payment in respect of which extension of time has been sought:

Principal amount	:	Rs. 592.76 crores
Interest amount	:	Nil

Interest amount on outstanding deposits are being paid regularly. Therefore, there is no overdue interest as on the date of this application.

4. Break-up of "Deposits outstanding" in the following manner:-

(Amount in Rupees)

(a)	Deposits due for payment but not paid on the date of application:	1,419,501,000
(b)	Deposits due, but not claimed on the date of application:	204,476,000
(c)	Deposits not yet due for repayment on the date of application:	4,303,610,000

5. Break-up of deposits overdue for payment for two years and more; for one year and more but less than two years; for six months and more but less than one year; for three months and more but less than six months; and for less than three months.

Break up of deposit overdue for payment	Total payment due	
	Count	Amount (in Rs)
2 years and more (unclaimed)	349	18,267,000
1 year and more but less than 2 years (unclaimed)	708	46,580,000
6 months and more but less than 1 year	7658	743,108,000
3 months and more but less than 6 months	4410	545,491,000
Less than 3 months	2691	270,531,000

12. The then C.L.B, by its order dated 14th May, 2015 in CP (T) No. 10/8/2015 observed as follows:-

“7. On seeing innumerable complaints coming from various depositors complaining that this company has not even cleared the deposits already matured, which the company ought to repay to the depositors as agreed by the company, therefore, I hereby hold that the company failed to clear the cases of matured fixed deposits and has not made any serious efforts in clearing the deposits already matured long before, leave alone of the other pre-matured deposits lying with the company against which several complaints come to the applicant company and various Government Authorities. It could be evident from the application that the company is not likely to clear the dues as mandated by the statute.”

13. The C.L.B while observed that the company was making genuine efforts to clear the dues, granted certain time. An Hardship Committee was also constituted to ensure payment.

14. The case was subsequently taken up on 22nd June 2015, 30th June, 2015; 3rd July, 2015; 15th July, 2015; 4th September, 2015; 14th September, 2015; 6th January, 2016; 8th February, 2016; 15th February, 2016; 24th February, 2016 and 11th March, 2016 but all the time, the case was adjourned on one or other ground taken by the appellant and further time was sought for to pay back the amount. Thereafter, though about 2 years passed the dues of depositors were not cleared.

15. On 4th July, 2016 the case was listed before the National Company Law Tribunal (hereinafter referred to as Tribunal). The erstwhile Member (Judicial) of the C.L.B, became Member of the Tribunal w.e.f. 1st June 2016 heard the case. Taking into consideration the fact that Rs.30 crores, which was ordered by C.L.B to be paid within a stipulated time, had not been paid, the Tribunal refused to grant further time and passed the impugned order on 4th July, 2016 requesting the Registrar of Companies to take steps under sub-Section (3) of Section 74 of the Act, 2013.

16. The appellant thereafter, filed this appeal on 22nd August, 2016 but no specific plea has been taken to assail the impugned order passed by the Tribunal. No ground has been shown as to why the appellant failed to repay even the matured amount to its depositors. No genuine interest was shown to generate money and to repay the dues of depositors in compliance with Sub-Section (1) read with Sub-Section (2) of Section 74 of the Act, 2013.

17. On the direction of this Appellate Tribunal dated 20th October, 2016 an affidavit was filed by the appellant undertaking to pay the amount. Taking into consideration the undertaking given by the appellant, on 3rd November, 2016, this Appellate Tribunal passed the following Order:

“ ORDER

An affidavit has been filed on behalf of the appellant in terms of earlier order dated 20.10.2016, passed by this Appellate Tribunal. The said affidavit has been sworn by Mr Ajay Chandra, Managing Director of the appellant company. Relevant paragraphs of which reads as follows:

“ 5. The brief description of 6 (six) unencumbered land parcels to be sold and provided as security exclusively for repayment of deposits is as follows:

State	Land details	Area (acres)
Kerala	Village Kizhakkambalam, Taluk Kunnathunadu, Ernakulam District	38.26
Kerala	Village and Taluk Kunnathunadu, Ernakulam District	26.95
Kerala	Village Kakkanad, Taluk Kanayannur, Ernakulam District	14.61
Andhra Pradesh	Village Mankhal, Maheshwaram Mandal, Ranga Reddy District	24.50
Tamilnadu	Village Kolathur, Chingleput Taluk, Kancheepuram District	24.34
Maharashtra	Village Kelus, Mayane Khawne, District Sindhu Durg	106.00

The details of the aforesaid land parcels are set out in a schedule annexed hereto as “ Annexure-A”. The total expected value of the aforementioned land parcels is Rs.800 crores (approx) which is much higher than the total liability of the appellant company towards the depositors. The appellant company shall use the amount so received from the sale of these properties “exclusively” for the repayment of deposits to the depositors as and when the properties are sold and sale proceeds are received.

6. That it is submitted that the Appellant will speed-up the process of sale of aforesaid land parcels and accordingly undertakes to do the following:

- i. Give newspaper advertisements, within 10 days’ time, inviting bids/expression of interest for sale of the aforesaid land parcels setting out in detail, inter alia, the description of the properties, the date of opening of bids, the last date for submission of bids, the date of announcement of successful bidder and payment terms for successful bidders;
- ii. Deposit the entire proceeds from sale of the aforesaid land parcels into a designated bank account bearing No. 011010102000026309 opened with IDBI Bank Limited in the name of Unitech Ltd-FD repayment account in compliance with the order dated 7.9.2016 passed by Hon’ble National Company Law Tribunal in C.P. No. 124 (ND) 2016;

- iii. Not to utilize the proceeds credited into the aforesaid bank account for any purpose other than for repayment of deposits;

7. That besides the deposit of aforesaid amounts in the said bank account, the Appellant further undertakes to deposit following amounts, as soon as they are received but within a period of 7 days of receipt thereof, in the aforesaid designated bank account.

- a) Any sum out of Rs.872.80 crores (approx.) to be received from Telengana State Industrial Infrastructure Corporation Limited, wholly-owned undertaking of the Government of Telangana.
- b) Any sum out of Rs.965 crores (approx.) to be received from Andhra Pradesh Industrial Infrastructure Corporation Limited, wholly-owned undertaking of the Government of Andhra Pradesh.
- c) Any sum out of Rs.106.58 crores (approx.) to be received from Public Works Department (B&R), Haryana.

The details of all the above sums to be received by the company are already provided in affidavit dated 19.10.2016.

In addition to the above amounts, the appellant company is expecting to receive a sum of Rs.90 crores (approx.) towards refund of excess income tax and the entire sum shall be deposited and utilized by the appellant company for repayment of the outstanding deposits.

8. That as per the general market practice prevailing in the real estate market, the following activities are involved in sale of any land parcels:

- i. Determination of estimated sale price of the land;
- ii. Issuance of newspaper advertisements inviting bids/expression of interest from the prospective buyers;
- iii. Receipt of bids from the prospective buyers and identification of the highest bidder;
- iv. Due diligence of the land by the prospective buyer
- v. Drafting, negotiation and execution of legal documentation for sale of land by the appellant company; and
- vi. Receipt of consideration amount from the prospective buyer by the appellant company and closure of the sale transaction.

9. That the appellant further undertakes that as soon as the amount is received after the sale of the above mentioned land parcels and the amount from the Government authorities, the appellant shall disburse the amount to the depositors in lieu of the repayment that has to be made to them as per the date of maturity. Furthermore, it is pertinent to state that all the amount shall be paid to the depositors with penal interest as per Rule 17 of the Companies (Acceptance of Deposits) Rule, 2014.

10. That it is further submitted that the appellant has every intention to repay the depositors but has not been able to do so because of its financial condition as recorded in the order dated

15.7.2015 of the Hon'ble Company Law Board based on the report of the independent chartered accountant firm appointed by the Hon'ble Company Law Board. Despite having a liquidity crisis, the appellant is making consistent efforts to repay the outstanding deposits and since 1.4.2014, it has settled deposits to the extent of Rs.118.65 crore.

11. Hence, in view of the above, the present affidavit by the appellant may be considered, as any adverse action at this state will severely affect not only the appellant, its more than 6 lakh shareholders, 50000 customers, 1100 direct employees and thousands of labourers working at its project sites, etc. but also the interest of the depositors being unsecured creditors and hence the same would be prejudicial and detrimental to the interest of public at large."

2. Taking into consideration the relevant facts and circumstances of the case, including the intention of the company to pay back the amount to the depositors with interest and penal interest, if any, and the proposal as given and recorded above, we allow the appellant to proceed in terms of their statement made in their affidavit, as quoted in the preceding paragraphs.

3. The appellant, its Managing Director and Directors and Members are directed to follow the following time-frame and sell the 6 (six) remaining unencumbered land parcels/immovable property detailed in paragraph 5 of their counter affidavit, and keep the amount exclusively for repayment of deposits of the depositors under Section 74 (1) and (2) of the Companies Act, 2013:-

- i. Determine and estimate the sale price of the land within 3 (three) working days i.e., by 7th November, 2016;
- ii. Newspaper advertisements inviting bids/expression of interest from the prospective buyers be made within 10 (ten) days, giving details of description of the properties, date of opening of bids, last date of submission of the bids, date of announcement of successful bidder and payment terms for successful bidder i.e., advertisement to be issued by 18th November, 2016;
- iii. Three weeks time be allowed for submission of the bids, then 3 days thereof the bids be opened. Successful bidder be announced within 2 days thereof. The terms and conditions for payment by successful bidders be finalized within 1 (one) week from the date of announcement of successful bidder. That means, total 31 days. All these process should be completed by 19th December, 2016.

4. The entire proceeds from the sale of aforesaid land parcels should be deposited with the designated bank i.e., IDBI Bank Limited, bearing account no. 0110102000026309 in the name of Unitech Ltd-FD repayment account, in terms of order dated 7.9.2016, passed by National Company Law Tribunal in C.P. No. 124 (ND) 2016. Except payment to the depositors, no amount should be withdrawn from the said account for any other purpose without prior permission of the Appellate Tribunal.

5. Immediately on receipt of the sale proceeds, payment should be made to the depositors with interest and penal interest, if any under the Act/Rules in chronological order of maturity of the deposits. That means, the deposit

which has matured first (oldest matured deposit) should be paid back first to the depositors. Thereafter, the deposit which has matured be paid to the next depositor.

6. Insofar as the amount which the appellant is expected to receive from Telangana State Industrial Infrastructure Corporation Limited, Telangana (Rs.872.80 crores – approx); Andhra Pradesh Industrial Infrastructure Corporation Limited, Andhra Pradesh (Rs.965 crores – approx); Public Works Department (B&R), Haryana (Rs.106.58 crores – approx) and the amount that may be received towards refund of excess income tax (Rs.90 crores – approx), the appellant company will take up the matter with the aforesaid undertakings, State Government Departments and Central Government with a request to clear the admitted dues to ensure payment of statutory liability under Section 74 (1) of the Companies Act, 2013. It will be open to them to state that in case they fail to pay back the amount, they may be prosecuted under Section 74 (3) of the Companies Act, 2013. It will be further open to them to bring this order to the notice of the concerned undertakings, State Government and to the Central Government. It is expected that the aforesaid authorities will clear the admitted dues, if any, and ensure that the company do not fail to comply with their statutory duty under Section 74 (1) of the Companies Act, 2016.

In case of non-payment of dues, it will be open to the company to move before a court of jurisdiction for appropriate relief.

We may make it clear that the Appellate Tribunal has no jurisdiction to direct any of the undertakings, State Government and the Central Government to pay back the amount as claimed by the appellant and, therefore, the observation made above should not be taken as a direction of the Appellate Tribunal.

7. Any amount the appellant receives from the Telangana State Industrial Infrastructure Corporation Limited, Telangana, Andhra Pradesh Industrial Infrastructure Corporation Limited, Andhra Pradesh, Public Works Department (B&R), Haryana or the Income Tax Department, should be deposited in the bank account bearing account No. 0110102000026309, opened with IDBI Bank Limited in the name of Unitech Ltd-FD repayment account, in terms of earlier order dated 7.9.2016 passed by National Company Law Tribunal. The said amount should be also utilized to repay the amount to the depositors with interest and penal interest, if any, payable under the law. The aforesaid amount should not be drawn by the company or the Managing Director or any of its director or member for any purpose without prior permission of the Appellate Tribunal.

8. The account No. 0110102000026309, opened with IDBI Bank Limited in the name of Unitech Ltd-FD repayment account, having opened in compliance with the order dated 7.9.2016 passed by the National Company Law Tribunal in C.P. No. 124 (ND) 2016 for repayment of dues of the depositors, the said amount is freezed for any other purpose than repayment of dues of the depositor's deposits. This order is passed to ensure that no other authority/institution or court may direct the appellant to utilise the proceeds/amount deposited with the aforesaid bank for any other purpose.

9. The company will submit the details of repayment made in favour of one or other depositors with the Registrar of Companies. The Registrar of Companies in his turn will also ensure that the company submits the list of payment made in favour of the depositors within time. The company will intimate the details of amount received by sale of unencumbered land parcels and receipts of amount from the undertakings of State Governments

and Central Government to the Registrar of Companies to enable the Registrar to keep track of the matter.

10. Post the matter on 22 November, 2016 at 10.30 a.m. The appellant will submit an affidavit enclosing copy of advertisements, if any, issued in the meantime.

11. Until further orders, the operation of interim order dated 26.10.2016 passed by the Appellate Tribunal shall continue. The date of payment to the depositors under Section 74 (1) of the Companies Act, 2013 stands extended upto 31st December, 2016. “

18. Earlier when the matter was taken up an assurance was given on behalf of the appellant that it will pay back the amount. In view of such assurance, this Appellate Tribunal by order dated 20th September 2016 directed not to take any steps against the appellant pursuant to order dated 4th July 2016, passed by Tribunal in CP (T) No. 10/8/2015.

19. In spite of time granted, no further affidavit was filed by the appellant giving a specific date and undertaking to repay the amount to the depositors with interest, statutory interest and penal interest.

20. The Special Judge who is conducting the proceeding, pursuant to the impugned order dated 4th July 2016 passed by the Tribunal, raised the question of jurisdiction of Appellate Tribunal in requesting the Special Judge not to proceed with the matter. In the aforesaid background, the Appellate Tribunal by its order dated 26th October 2016 stayed the impugned order dated 4th July 2016 passed by the Tribunal and the date of re-payment was extended upto 31st December 2016.

21. Later on the case was taken up on different dates. During the course of hearing it was found that the company is not in a position to generate even Rupees 100 crores to pay back the amount. In fact, no steps was taken by the appellant to move before appropriate authority or a court of law to recover dues, if any, from different corporations, as were shown in the company's affidavit. Even one rupee has not been deposited in the Bank Account pursuant to the earlier orders passed by C.L.B and subsequent order dated 3rd November, 2016 passed by the Appellate Tribunal.

22. Therefore, it is clear that in spite of time granted to the appellant and for about three years, no amount has been deposited pursuant to the orders of the C.L.B or Tribunal or the Appellate Tribunal. Admittedly, the amount due for repayment to depositors is more than Rs. 500 crores. It is not in dispute that the deposits which were matured during the year 2011, 2012, 2013 and upto 31st March 2014 have not been repaid by appellant to the depositors.

23. Taking into consideration the aforesaid facts and the delaying tactics followed by appellant and its Directors and no specific effort has been taken by the company to pay back the dues of the depositors in terms of Sub-Section (1) of Section 74 read with Sub-Section (2) of Section 74 of the Act, 2013, and the Managing Director, Directors and Members of the company are not interested to generate any amount to pay back the dues of depositors and that three year period is going to complete on 31st March 2017, and there is no likelihood of depositing the defaulted amount as is due to depositors, this Appellate Tribunal is not inclined to grant any further time to the appellant.

24. For the reason aforesaid, the interim order of stay passed by this Appellate Tribunal is vacated. We find no ground to extend the period beyond 31st December 2016, as was allowed earlier.

25. The Registrar of Companies is directed to pursue the case under Sub-Section (3) of Section 74 of the Act, 2013 before the Special Judge. The Registrar of Companies will also request the Special Court to find out whether a case is made out for punishment under Section 75 of the Act, 2013 apart from sub-Section (3) of Section 74, if there is any evidence of fraud.

26. It is made clear that the Tribunal and the Appellate Tribunal having held that the company has failed to deposit the amount within the period prescribed under Sub-Section (1) and (2) of Section 74 of the Act, 2013, this Special Court is only required to decide the quantum of punishment as prescribed under Sub-Section (3) of Section 74 of the Act, 2013. It is open to the Registrar of Companies to lead evidence before the Special Judge to decide whether the alleged conduct of one or other accused amounts to fraud, for punishment under Section 75 of the Act, 2013.

27. The appeal stands disposed off with the aforesaid observation and directions. There shall be no order as to cost.

sd/-
(Mr. Balvinder Singh)
Member (Technical)

sd/-
(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
31st JANUARY, 2017