

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT)(Insolvency) 86 of 2018

IN THE MATTER OF:

Mr. Atul Mittal

...Appellant

Vs

Khushal Infratech Private Limited & Anr.

....Respondents

Present:

**For Appellant: Mr. Rajiv Shankar Dwivedi, Md. Ziauddin Ahmad
and Ms. Aarti Dwivedi, Advocates**

**For Respondents: Mr. Ashok Jung, Advocate for Respondent No. 1
Mr. Devinder Arora, RP**

O R D E R

01.05.2018 This appeal has been preferred by Mr. Atul Mittal, Director of APS Buildtech Pvt. Ltd. ('Corporate Debtor') against an order dated 09.02.2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi in (IB) 19(ND) 2018 whereby and whereunder the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") preferred by Respondent- Khushal Infratech Pvt. Ltd has been admitted. Order of 'Moratorium' has been passed and 'Interim Resolution Professional' has been appointed.

2. Learned Counsel appearing on behalf of the Appellant submits that the 1st Respondent does not come within the meaning of 'Financial Creditor' in terms of Section 5(7) and Section 5(8) of the I & B Code. He placed reliance on the part of

the agreement for sale of flat reached between 'Corporate Debtor' and the 1st Respondent as noticed by the Adjudicating Authority and reads as follows:

..

“AND WHEREAS the Second Party is desirous of booking/holding 02 No. of flats in the said Project under flexi payment plan of the First Party for a lock in period of one year with an option to either to exit from the Project with assured return of 27% after the expiry of the lock in period from the date of execution of this MOU or to sell the said flats prior to expiry of the one year period (directly) in the market or to continue and retain the same till completion of the project after making the balance payment under the flexi plan.

AND WHEREAS the Parties agree that in the event the Second Party chooses the option of assured return, then in that even the second party has to inform one month in advance to the first party in writing of its decision to continue or not to continue with the booking/holding of the said flats and thereafter the first party would return the deposit within next one month along with an assured return amount calculated @ 2.25% monthly till the date of actual return.”

..

3. It is submitted that in terms of the said agreement, the Second Party was required to opt for 'assured return' and in that event Second Party (1st Respondent herein) was required to inform within a month in advance in writing to the 'Corporate Debtor' that he intended to continue booking/holding of the said flat. It is submitted that no record was brought to the notice of the Adjudicating Authority to show that the 1st Respondent opted for 'assured return' within one month and thereby the agreement was not given effect in its letter

and spirit. Without discussing the aforesaid issue and on mere presumption the 1st Respondent has been treated as 'Financial Creditor'.

4. It is further submitted that the total amount as was due to the 1st Respondent – flat buyer has already been paid back.

5. Learned Counsel appearing on behalf of the 1st Respondent- flat buyer accepts that the total amount has been paid back by the Appellant. The terms of settlement have been brought on record. Learned Counsel for the 1st Respondent also failed to show that the 1st Respondent had informed one month in advance from the date of the agreement, to the 'Corporate Debtor' that he intended to continue with the booking/holding of the flat in question.

6. In view of the fact that the 1st Respondent has failed to prove that he comes within the meaning of 'Financial Creditor' of the 'Corporate Debtor', the order passed by the Adjudicating Authority cannot be upheld. For the reasons aforesaid, we set aside the impugned order dated 09.02.2018 passed by the Adjudicating Authority in (IB) 19(ND) 2018. The 1st Respondent having paid the total dues, we direct the Adjudicating Authority to close the proceeding.

7. In effect, order(s) passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order(s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the 'Interim Resolution Professional, including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. The 'Corporate

Debtor' Company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect., The appeal is allowed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

Akc/unk