

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (INS) No.96 of 2019

[Arising out of Order dated 11th December, 2018 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in CP (I&B) 2489/NCLT/MB/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Pranami Trading Pvt Ltd.
24-B, Ground Floor,
Morarka House,
Carmichael Road,
Near Jaslok Hospital,
Peddar Road,
Mumbai – 400 026

Financial Creditor

Appellant

Versus

Kieon Developers
Pvt. Ltd.
Shop No.2,
Mathura of New
Evershine,
Co-operative Housing
Society,
Evershine Nagar,
Malad (West),
Mumbai 400 064

Corporate Debtor

Respondent

For Appellant:

Mr. Darpan Wadhwa, Senior Advocate with Mr. Kush Chaturvedi, Mr. Suraj Iyer and Ms. Priyashree Sharma, Advocates

For Respondents:

Mr. Anjum Parvez, Advocate

J U D G E M E N T**A.I.S. Cheema, J. :**

1. The Appellant had filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (I&B – in short) before the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench [A.A – in short]) against the Respondent – Kieon Developers Private Limited which came to be rejected on the ground of limitation.

2. The Appellant, in short, claims that it had booked a flat with the Respondent on 16th May, 2012 and paid an amount of Rs.60 Lakhs and the allotment letter was issued to the Appellant. Subsequently, on 16.07.2012, an MOU (Annexure – D - Page – 42) was executed between the Appellant and Respondent and both the parties cancelled the booking on terms and conditions as laid down in the MOU. The Respondent agreed to pay the Appellant the amount of Rs.60 Lakhs within 18 months from the date of receipt of the booking amount, i.e. on or before 15th November, 2013. In addition, Respondent agreed to pay Rs.8,10,000/- every six months to the Appellant till entire booking amount was duly paid. Other conditions were also incorporated. According to the Appellant, in furtherance to the MOU and undertaking, the Respondent paid Rs.3,24,000/- each on 16.11.2012 and 15.05.2013. Even Respondent had issued some cheques for refund of the amount but on 6th January, 2014, wrote letter to the Appellant that the cheques are to be replaced. When the Appellant presented two

cheques, the same bounced. The Appellant claimed that no interest had been paid on the booking amount, i.e. the principal amount of Rs.60 Lakhs after 15th May, 2013 and the principal amount had also not been repaid. The Appellant wanted to invoke second condition of the MOU with regard to the allotment of the flat but Respondent did not comply and created third party rights which led to the Appellant filing L.C. Suit No.954 of 2014 in City Civil Court at Dindoshi, Mumbai. In the written statement dated 21st July, 2017, Respondent claimed that it was a pure loan transaction and accepted that the Respondent had received the money. The Appellant claims that on 16.07.2018, it filed Section 7 proceeding before the Adjudicating Authority but it was wrongly dismissed on the ground of limitation.

3. The Impugned Order shows that the Adjudicating Authority took into consideration the Application filed under Section 7 and the Affidavit filed by the Corporate Debtor claiming that the amount concerned was barred by limitation. The date of default was stated to be 21.07.2017 which was date of the written statement in the Suit. The Adjudicating Authority observed that written statement filed in the Suit did not amount to acknowledgement of the debt and could not reset the limitation. Consequently, the Application was rejected.

4. In the Appeal before us, the Appellant has canvassed its case as mentioned above and the Respondent – Corporate Debtor has (in Affidavit in Reply filed) reiterated the contentions as were raised before

the Adjudicating Authority and insisted that considering the dates of the MOU and the amount concerned, debt was barred by limitation and thus, the Adjudicating Authority rightly rejected the Application under Section 7. Although when we reserved this matter for Judgement, we had permitted the parties to file written submissions not more than 3 pages, the parties have not filed written submissions. We have still taken into consideration the oral arguments, the rival cases and the arguments which have been put by the parties in the record available.

5. Admittedly, the Appellant had paid Rs.60 Lakhs and allotment letter was issued on 16th May, 2012. The Memorandum of Understanding (Annexure – D) shows that the parties mutually agreed to cancel the booking on the “terms and conditions arrived at between the two parties” as mentioned in the documents. The terms 1 to 3 were as follows:-

- “1. In consideration of the Party of the First Part agreeing to cancel its booking of the said flat in the said building, the Party of the Second Part shall pay to the Party of the First Part, the entire booking amount of Rs.60,00,000/- within a period of 18 months from the date of receipt of the booking amount i.e. on or before 15th November 2013. In addition to the booking amount, the Party of the First Part shall pay Rs.8,10,000/- every six months on the Party of the Second Part till the entire booking amount has not been repaid.
2. The Party of the First Part hereby agrees and undertakes not to sell, allot or in any other manner dispose of the said flat in the said building to any third party, or create any third party interest in the said flat, till the

entire booking amount plus the six monthly payment as per clause 1 herein is not paid to the Party of the First Part.

3. It is clarified that in case of the failure of the Party of the First Part to refund the booking amount on or before 15th November 2013, the allotment of the said flat to the Party of the Second Part shall stand confirmed and the Party of the Second Part may make the balance payment as per the allotment letter and register the same in his or his nominee's favour. It is further clarified that the Party of the First Part shall not ask for any sums of moneys as transfer for registering the document in the name of the nominee of the Party of the First Part."

It appears that the Appellant received some amounts which now Appellant classifies as towards the "interest" component and thereafter, neither the principal nor interest, which was recurring, was paid and the Appellant invoked the third para of the Terms and Conditions. The Appellant –Plaintiff filed Suit (Annexure – F) seeking Decree of the flat and in the written statement dated 21.07.2017 (Annexure G – Page 73), the Respondent – Defendant accepted that the respondent had received consideration amount from the Plaintiff as per the statement and claimed that it was a loan transaction.

6. Section 238A of the I&B Code reads as under:-

“238A. Limitation.—The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be”

Thus, the provisions of the Limitation Act shall apply “as far as may be”. Although the Adjudicating Authority has observed that admission in the written statement will not amount to acknowledgement, we need not deliberate to settle that issue looking to the Term – 1 of the MOU which we have reproduced above. In the transaction, the term clearly shows liability of Rs.8,10,000/- getting created every 6 months for the Respondent to pay the Appellant “till the entire booking amount has not been repaid”. When the entire booking amount has not been paid, this component keeps getting attracted and liability invoked and when Section 7 Application was filed, the amount due and outstanding was clearly more than Rs.1 Lakh and thus, in our view, the Application under Section 7 could not have been rejected as time barred. There was a debt which was due and the default was of more than Rs.1 Lakh and therefore, it was sufficient to trigger Section 7 proceeding.

7. Neither the parties nor the Impugned Order shows that there was any other defect in the Section 7 Application which had been moved so as to say that the Application was not complete. In that view of the matter, the Application filed before NCLT deserves to be admitted.

8. For reasons mentioned, the Appeal is allowed. We remit back the matter to the Adjudicating Authority. On receiving copy of the present Order, the Adjudicating Authority is directed to immediately admit the

Section 7 proceeding filed by the Appellant and pass further consequential directions and orders as per law, after notice to the Corporate Debtor, so as to enable the Corporate Debtor to settle the claim.

No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

New Delhi

11.06.2019

rs/sk