

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1047 of 2019

IN THE MATTER OF:

Monica Ramesh Shah

...Appellant

Versus

AI Fara'A Properties Pvt. Ltd.

...Respondent

For Appellant: Shri Nikhil Mathur, Advocate

**For Respondent: Shri Tapan Sangal and Shri Ranjan Grover,
Advocates**

ORDER

20.11.2019 This Appeal is for admission (after Notice). Although the learned Counsel for the Appellant stated that the matter may be adjourned so that on next date, he can keep a Senior Counsel present, as the matter is at the stage of admission and on 15.10.2019 it was posted for Admission to-day, we asked learned Counsel to make submissions. He has taken us through the record and he has made submissions. We have heard the learned Counsel for Respondent also.

2. In this matter, the Section 7 Application filed by the Appellant has been rejected. The question before us is whether the Appeal is fit to be admitted.

3. It is stated by the learned Counsel for the Appellant that the Appellant - Monica Ramesh Shah filed the Section 7 Application as she had earlier entered into a transaction with the Respondent so that she could purchase a unit in Pinnacle Business Park. It is stated that the Appellant already had one unit in that Pinnacle Business Park which was constructed by the Respondent

and she wanted to buy another unit from the Respondent. The case as was put up before the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) and as is stated before us is that on 6th August, 2016 with this object, the Appellant advanced Rs.50 Lakhs to the Respondent as token money and rest of the amount was to be paid in parts after execution of the Agreement. The learned Counsel states that the Appellant deposited Rs.49,50,000/- in the account of Respondent and deducted Rs.50,000/- TDS as can be seen from the document at page – 44 of the Paper Book. Copy of TDS Certificate has been placed at page – 45. Learned Counsel states that no Agreement as such was executed between the parties but these documents are available to show the transaction. It is stated that the Respondent did not complete the transaction and thus, the Appellant filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority. The learned Counsel states that the Adjudicating Authority erroneously dismissed the Application on the basis that financial debt was not established and that it was not proved that the amount was paid against time value of money.

4. The learned Counsel for the Respondent has referred to the written submissions which were filed by the Respondent – Corporate Debtor (copy of which has been filed by the Appellant at Annexure A-4). It is stated that the Respondent had taken a stand that the Appellant had approached the Respondent in 2016 as the Appellant wanted to buy a unit in the existing Pinnacle Business Park for a consideration of Rs.10,32,20,000/-. According to the learned Counsel, it was agreed between the parties that the Appellant

will pay Rs.1 Crore and then Sale Agreement would be registered. The counsel states that the ledger account of the Respondent (copy of which has been filed by the Appellant at page -57) shows that after receipt of the initial amount of Rs.49,50,000/-, other cheques issued by the Appellant bounced and the Respondent on 31st December, 2016 forfeited the amount which had been deposited by the Appellant as can be seen in the entry at page – 58 of the Paper Book. It is stated that the transaction was for a unit in building which was already in existence and it was in the nature of party trying to enter into an Agreement of sale which did not take place and thus, the Counsel states that it cannot be said to be financial debt which was recoverable. It is argued that the amendment to Section 5 Sub-Section (8) came in June, 2018 and thereafter, the Appellant sent Notice (page – 46) in October, 2018 to take benefit of the provisions of IBC.

Sub-Section (8) of Section 5 reads as under:-

“(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting

Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation.— For the purpose of this sub-clause,—

(i) 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; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

5. The expression ‘allottee’ and the expression ‘real estate project’ are to be understood on the basis of Clause – d and Clause – z(n) of Section 2 of Real Estate (Regulation and Development) Act, 2016 which expressions have been defined in the said Act as under:-

“(d) “allottee” in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted,

sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

- (zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"

Keeping in view the object with which Explanation was added in Section 5(8) of IBC and above definitions of 'allottee' and 'real estate project', considering the facts of the present matter, what appears is that the transaction was an attempt to enter into an agreement of sale in existing building. It was a project completed and executed and cannot be still referred to as a real estate "project". Section 3(11) defines debt as follows:-

"(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

6. Even if there would have been a regular agreement of sale executed between the parties for a unit in existing building, if there was a default, it would at the most create a "debt" to be recovered but would not create "financial debt". The explanation added by the legislature in Section 5(8) has been added for specific purpose to protect allottees in development projects

which are going into problems. It is not for enforcing specific performance of Contract of existing property.

7. We do not find any reason to take a different view from that of Adjudicating Authority where it found that the financial debt was not established. We find no reason to entertain the present Appeal. We decline to admit the Appeal.

The Appeal stands disposed of accordingly.

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

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md