

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL****NEW DELHI****COMPANY APPEAL (AT) No.37 of 2019**

(ARISING OUT OF THE FINAL ORDER DATED 20.11.2018 PASSED BY THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI (COURT III) IN C.P. NO.234(ND)/2017)

**In the matter of:****Arpit Agarwal**

S/o Shri Rajive Agarwal,  
2<sup>nd</sup> Floor, NBCC Tower,  
15 Bhikaji Cama Place,  
New Delhi-110066

Also at

Flat No.M-203, Ajnara Heritage Society,  
Sector 74,  
Noida 201301

**Appellant****Vs****1. Skytech Constructions Pvt Ltd,**

385, Kohat Enclave,  
Pitampura  
Delhi-110088.

**2. Mr Rakesh Chawla,**

385, Kohat Enclave,  
Pitampura  
Delhi-110088.

**3. Mr. Mayank Chawla,**

385, Kohat Enclave,  
Pitampura  
Delhi-110088.

**4. Ms Renu Chawla,**

385, Kohat Enclave,  
Pitampura  
Delhi-110088.

**5. M/S Jatasya Promoters Pvt Ltd**

385, Kohat Enclave,  
Pitampura  
Delhi-110088.

**Respondents**

Mr. Arpit Agarwal, Appellant in person.

Mr. B.P. Singh and Ms Geetanjali Tyagi, Advocates for Respondent.

**JUDGEMENT**  
**(24<sup>th</sup> June, 2020)**

**Mr Balvinder Singh, Member (Technical)**

The present appeal has been filed by the appellant under Section 421 of the Companies Act, 2013 against the judgement dated 20<sup>th</sup> November, 2018 passed by the National Company Law Tribunal, New Delhi in C.P. No.234(ND)/2017. The appellant has sought the following relief:

1. Allow the appeal and set-aside the order dated 20.11.2018 passed by the National Company Law Tribunal in CP No.234(ND)/2017.
2. Direct the National Company Law Tribunal

Either

- a) To pass a detailed/reasoned order on merit on all issues raised in the Company Petition and to adjudicate the matter by giving a reasonable hearing opportunity to the Appellant based on written submissions made by the appellant (in Company Petition, rejoinder, Addl. Evidences and Arguments); and
- b) To deliberate and dispose the Interim Application of the Appellant on merit, filed for cross examination of R-2 to R-4 under Section 424(2) of the Companies Act, 2013 in the interest of justice.

OR

- c) To forward the Company Petition File (Petition, Rejoinder, Additional Evidences, Cross/Summon application and Written Arguments) to the Special Court to adjudicate whether offense is

established against Respondents under Section 74(3), 75 and 447 of the Companies Act, 2013 and further decision on punishment as the Special Court may think fit.

3. To pass an order that observations of the National Company Law Tribunal in Para 8 of the final order that several proceedings are pending and property was constructed when advance was made are invalid and devoid of merit.

4. To pass any other order(s) deem fit by this Hon'ble Appellant Tribunal.

2. The facts of the case are that the appellant booked a flat with Respondent No.1 and gave Rs.48.99 lakhs in June and July, 2012 against booking of Unit No.G-402 on 4<sup>th</sup> floor in Skytech Matrott Project, Sector 76, Noida. The receipts of the said amount were duly given by 1<sup>st</sup> respondent. The appellant stated that substantial amount being 95% of the cost of the property had been deposited, However, by virtue of the clauses of BBA, the developer retained the authority over the property and they did not give any lien of the property or interest of the property. The appellant stated that he tried to contact 1<sup>st</sup> respondent many times in relation to the progress of the property, the respondent did not contact him but started threatening him with the sole objective that the appellant to stop asking the status of the funds deposited by him.

3. The appellant stated that the respondents have played a fraud with him and taken the deposit and filed company petition before the NCLT, New Delhi on 01.09.2017 and sought the following relief:-

- i) To admit the application and pass an order that the advance deposited by the Petitioner to Respondent No1 company comes under the definition of 'deposit' as stated in the Section 2(31) of the Companies Act, 2013 read with the Rule 2(c)(xii) of the Companies (Acceptance of Deposits) Rules, 2014.
- ii) To impose fine on Respondent No.1 for an amount of ten crore rupees and punish the defaulting Directors (Respondents 2 and 3) with imprisonment of seven years alongwith the fine of Rs. two crore rupees on each Director in accordance with the Section 74(3) of the Companies Act, 2013.
- iii) To pass an order that deposits had been accepted by Respondents 1 with the intent to defraud the depositor and for fraudulent purposes and hence, to pass orders against the Respondents 2, 3 and 4 as the Tribunal deem fit in the circumstances of the case in accordance with the Section 75(1) of the Companies Act, 2013 read with the Section 447 of the Act.
- iv) To pass order that the status of the petitioner is a 'Depositor' as defined in the Rule 2(d) of the Companies (Acceptance of Deposits) Rules, 2014 and to pass an order to allow the Petitioner to file any further suit, proceedings or other action under Section 75(2) including but not limited to further approach Competent Authorities i.e. Reserve Bank of India, National Company law Tribunal, SEBI etc under the provisions other than those mentioned herein this petition.
- v)To cause a public announcement/advertisement so that other depositors who have paid advance to the Respondent 2 under the

definition of deposits in the Companies Act 2013 can also seek justice against the Respondent 1 and its Directors.

vi) To allow losses and damages for an amount of Rs.2 Crores, to compensate the actual loss and sufferings of the Petitioner, to be recovered from the Respondents in accordance with the Section 75(1).

vii) That such further orders be passed as the Tribunal deem fit in the circumstances of the case.

4. The appellant stated that he also had filed complaint under Section 21 of the Consumer Protection Act, 1986 before the National Consumer Disputes Redressal Commission, New Delhi on 19.6.2015.

5. Respondent filed their reply and stated that the money given against a real estate is not included in the term of 'Deposit' as per Rule 2(c)xii) of the Companies) Rules, 2014. Respondent stated that the appellant has filed a case before the National Consumer Disputes Redressal Commission and similar relief has been sought. Respondent stated that criminal case has been filed by 1<sup>st</sup> respondent against the appellant and the petition filed by the appellant is counterblast to the said case and other cases. Respondents stated that the appellant was offered possession of the flat vide letter dated 5.8.2015 (Annexure 5 of Reply) and email dated 17.7.2017 (Page 148 of documents filed by respondents) but the appellant did not come forward to take the possession.

5. After hearing the parties the NCLT delivered the judgement dated 20.11.2018. The relevant portion of the judgement is as under:

***“8. Without going into the legal issues raised herein whether the amount advanced against the property which has already been***

***constructed at the time of making advance payment by the petitioner and having been appropriated by R-1 against the property agreed to be sold and whether the same constitutes a deposit, we find that there are numerous proceedings pending as against the parties initiated by each other consideration by this Tribunal will result only in multiplicity of proceedings as between before various forums which is required to be eschewed and in the said circumstances this petition is dismissed but without cost.”***

6. Being aggrieved by the said judgement, the appellant has filed the present appeal.

7. The appellant has stated that he had advanced his hard earned life savings of Rs.48.99 lakhs to 1<sup>st</sup> respondent in June and July, 2012 for an immovable property. The appellant stated that 2<sup>nd</sup> and 3<sup>rd</sup> respondents had induced the appellant to pay advance with the intent of defrauding the amount and based on fraudulent representation that complete property alongwith approvals and clearances shall be delivered by March, 2013 and that property is in a pure residential complex. Appellant stated that false property complex layout was shown to him and actual lay out had a large commercial sub-complex also. Appellant stated that respondents had started other project by incorporating 5<sup>th</sup> Respondent and utilised his funds. Appellant stated that the property was never delivered to him.

8. Appellant stated that Companies Act, 2013 does not allow a Private company to accept or hold deposit from public. Appellant stated that since specific conditions defined in the Deposit Rules for transaction by companies

against immovable property are not met, therefore, the appellant's advance is Deposit under Section 2(31) of the Companies Act, 2013. Appellant stated that allegations under Section 2(31), 74(3), 75 and 447 of the Companies Act, 2013 were duly supported by numerous legal averments, evidences and facts which were not considered by NCLT. Appellant stated that even if few facts in the pendency of the case before NCDRC and company petition at NCLT are common, dismissal of petition is against the principle/law defined by the Apex Court in various judgements that civil and criminal remedy can be sought separately. Appellant stated that pendency of case at NCDRC has no conflict with Company Petition as appellant had sought punishment under Company Law for offense on appellant's deposit in the Company Petition against 1<sup>st</sup> respondent and accused directors 2<sup>nd</sup> to 3<sup>rd</sup> respondent. Lastly the appellant prayed that the appeal may be allowed and judgement dated 20.11.2018 be set aside and detailed/reasoned order on merit on all issues raised in the company petition and to adjudicate the matter by giving a reasonable hearing opportunity to appellant or the company petition file be forwarded to Special Court to adjudicate whether offense is established against Respondent under Section 74(3), 75 and 447 of the company Act, 2013 and further decision on punishment as the Special Court may think fit etc.

9. Appellant stated that the observations of the NCLT that numerous cases are pending is invalid and stated that only NCDRC matter is pending. Appellant stated that the observations of the NCLT that NCLT and NCDRC are on same cause of action is legally invalid. Appellant further stated that the remarks of NCLT at para 8 that property was already constructed when booked and advance adjusted against property are invalid as these remarks

made without considering on record material placed by appellant and against the natural justice.

10. In reply, the Respondent has stated that the appellant booked a flat in the project of 1<sup>st</sup> respondent. Respondent stated that is incorrect that the respondents played a fraud with the appellant. Respondent stated that it is wrong that false property complex layout was shown to the appellant and actual lay out had a large commercial sub-complex. Respondent stated that it is wrong that Respondents had started another project by incorporating 5<sup>th</sup> Respondent. Respondent stated that the instalment of appellant were paid by Bank and the same were used for further construction of the project, in which the appellant had booked the flat. Respondent stated that the construction work was got delayed for about 10 months due to farmers' agitation and intervention of National Green Tribunal. Respondent stated that there was no contention of the appellant before the NCLT that since specific condition defined in the Deposit Rules for transaction by companies against immovable property are not met, appellant's advance is deposit under Section 2(31) of the Companies Act, 2013. Respondent stated that the respondent have lawfully complied by all the provisions of Companies Act, 2013 and the Rules of the Companies (Acceptance of Deposits) Rules, 2014. Respondent stated that the appellant has been asked to take over the possession of the property. Respondent stated that the appellant is in the habit of filing cases against the respondent and the numerous cases are pending between the parties.



11. Respondent stated that the appellant filed a criminal complaint with SHO, Sector 71, Noida on 28.02.2015 against the respondent thereby levelling various charges including not handing over the possession. The police after proper investigation and inquiry found the allegations to be baseless and fabricated and submitted final opinion in all complaints. Lastly Respondent stated that the NCLT has rightly dismissed the petition and stated that the appeal may be dismissed.

12. Respondent stated that the appellant has filed a Complaint under Section 21 of the Consumer Protection Act, 1956 and the appellant cannot avail another remedy for similar cause of action. Respondent stated that Hon'ble Supreme Court of India in the case of Steel Authority of India Ltd, Bhilai Steel Plant, Bhilai Vs CERC & Others 2014 SCC Online APTEL held that *"We hold on principle that the Appeal is not maintainable when the Review is pending before the Regulatory Commission on the same issues"*. Respondent stated that when the case is pending before the NCDRC, New Delhi, the appellant cannot be allowed to agitate the same before this Tribunal on the same cause of action. Respondent stated that the NCLT has rightly dismissed the petition.

13. Rejoinder have been filed by the appellant who reiterated the contents of the appeal and the company petition.

14. We have heard the parties and perused the regard.

15. Before we proceed further we may put on record that at the time of hearing firstly both the parties were given an opportunity to settle the matter

out of court. But both the parties stated before the Appellate Tribunal that they could not reach to a settlement due to one reason or other.

16. Further we find from the record that the FIR has been lodged by 3<sup>rd</sup> respondent on 26.3.2015 with SHO PS Saraswati Vihar and DCP Ashok Vihar. FIR has also been lodged on 20.5.2015 by 3<sup>rd</sup> Respondent with PS Netaji Subhash Chandra Place. We also note that appellant filed a criminal complaint with SHO, Sector 71, Noida on 28.02.2015 against the respondent thereby levelling various charges including not handing over the possession. We have also gone through the order dated 18.9.2017 (Page 70 of appeal) passed by Hon'ble Supreme Court of India. In this order the Hon'ble Supreme Court has allowed the Respondent to move to National Consumer Disputes Redressal Commission. The relevant portion of the order is as under:-

*“The special leave petitions are allowed to be withdrawn without prejudice to the remedy of moving to the National Consumer Disputes Redressal Commission.”*

A criminal complaint as per Chapter XIV & under Section 190/200 Cr PC has been filed on 18.3.2015 by the 1<sup>st</sup> Respondent before the Hon'ble Court of ACMM, Rohini Court, Delhi against the appellant. We also note that the complaint filed on 19.06.2015 before the NCDRC is still pending. On going through the above records, we find that all these complaints and FIR has been filed by parties against each other prior to filing of Petition before NCLT on 1.9.2017.

17. Appellant argued and stressed that the Respondent had received advance/deposit as per Section 2(31) of the Companies Act, 2013 read with Rule 2(c)(xii)(b) of the Companies (Acceptance of Deposits) Rules, 2013 in

consideration for immovable property (Flat) under an agreement or arrangement, however, it fraudulently not adjusted the advance against the property in terms of the Agreement or arrangement. Appellant further argued that 1<sup>st</sup> Respondent and its directors failed to secure necessary approvals and permissions in terms of the Agreement to deal in the properties for which the money was taken. Appellant further argued that 1<sup>st</sup> Respondent is a private limited company, not allowed to undertake any deposit in terms of Section 73 and 74 of the Companies Act, 2013 and the 1<sup>st</sup> respondent has breached the law i.e. Section 73 and 74 of the Companies Act, 2013 by accepting the deposit from the appellant.

18. Respondent argued that there was no contention of the appellant before the NCLT that since specific condition defined in the Deposit Rules for transaction by companies against immovable property are not met, appellant's advance is deposit under Section 2(31) of the Companies Act, 2013. Respondent argued that the respondent have lawfully complied by all the provisions of Companies Act, 2013 and the Rules of the Companies (Acceptance of Deposits) Rules, 2014. Respondent argued that the appellant has been asked to take over the possession of the property. Respondent stated that the appellant is in the habit of filing cases against the respondent and the numerous cases are pending between the parties. Respondent argued that they have obtained necessary approvals and permissions in terms of the Agreement to deal in the properties for which the money was taken. Respondent further argued that the appellant had paid the amount against booking of flat and the possession has been offered to him and the amount has been utilized in constructing the flats. Respondent further argued that

they have not breached the law i.e. Section 73 and 74 of the Companies Act, 2013.

19. We have heard the parties on this issue. We note that the appellant had raised this issue in his Company Petition stating that he had advanced against immovable property is Public Deposit under Section 2(31) of the Companies Act, 2013 and his main contention was that the advance against immovable property is deposit and such deposit was given to 1<sup>st</sup> Respondent based on fraudulent representations of 2<sup>nd</sup> and 3<sup>rd</sup> Respondent as their sole intent was to defraud the appellant. The appellant had prayed that the Respondents may be punished under Section 74(3) under the Companies Act, 2013. Definition of 'Deposit' is given in Section 2(31) of the Companies Act, 2013 which is as follows:-

***“(31) ‘Deposit’ includes any receipt of money by way of deposit or loan or in any other form by a Company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.”***

The appellant had also raised the contention that the Respondents may be punished under Section 74(3) of the Companies Act, 2013. We also note that the Respondent had stated that the money paid towards the allotment of flat does not come under the purview of definition of 'Deposit' as given under Section 2(31) of the Companies Act, 2013 read with Sections 74(3), 75(1) and Section 447 of the Companies Act, 2013 and further as the term defined under rule 2(c)(xii) of the Companies (Acceptance of Deposits) Rules, 2014.

20. On going through the impugned order we find that the appellant has raised the issue of 'deposit' in its Company Petition. But this issue has not been determined by the NCLT. Such determination will requiring looking into the facts and the nature of the transactions which may call for more submissions to be examined to arrive at a conclusion. In absence of such exercise having not been done by NCLT, we are unable to express our opinion on this issue. Therefore, we remit the matter back to NCLT to decide whether the advance received by the Respondent against allotment of flat is 'deposit' in terms of Section 2(31) of Companies Act, 2013 read with the Rule 2(c)(xii) of the Companies (Acceptance and Deposits) Rules, 2014 and whether the Tribunal has the jurisdiction under the Companies Act, 2013.

21. In view of the foregoing discussions and observations, the appeal is disposed off by directing NCLT to rehear the matter on the above issue and dispose off the petition as per law.

**(Justice Jarat Kumar Jain)**  
**Member (Judicial)**

**(Mr. Balvinder Singh)**  
**Member (Technical)**

**(Dr. Ashok Kumar Mishra)**  
**Member (Technical)**

New Delhi

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