

[Nidhi Rekhan Vs. M/s Samyak Projects Private Limited: Settling the dust on "Speculative Investors"?](#)

By Sandeep Bhuraria, Senior Partner

And Purbasha Panda, Associates

ZEUS Law Associates

Published in Live law on 03rd March 2022



a) Brief Background

On 31st January 2022, the Principal Bench of the Hon'ble National Company Law Appellate Tribunal ("NCLAT") finally settled the dust regarding the very conflicted positioning of "Speculative Investors" under the framework of the Insolvency and Bankruptcy Code, 2016 ("I&B Code"). But before we delve into the facts of the case, it is pertinent to understand the existing jurisprudence of speculative investors under the framework of I&B Code, to be able to appreciate how this particular judgement aids further in crystallizing the judicial test to identify whether an individual is a genuine homebuyer or a speculative investor?

In the case of ***Pioneer Urban Land & Infrastructure Limited Vs. Union of India & Ors, (2019) SCC Online SC 1005*** ("Pioneer Urban"), the Hon'ble Supreme Court had forewarned about the possible fatalities of allowing all homebuyers to knock the doors of National Company Law Tribunals across the country and therefore it drew a clear distinction between a genuine homebuyer and a speculative investor. In *Para 50* of the judgement, the Hon'ble Supreme Court defined the term "Speculative Investors". It defined speculative investor as an individual who is not genuinely interested in taking possession of a flat/apartment but rather wants to jump ship and really get back monies by way of coercive measures.

Several cases came up before the Appellate Tribunals as well as the National Company Law Tribunals across the country concerning speculative investors intending to trigger the I&B Code. In these matters, the primary question before the forums revolved around these questions - *What are the major ingredients of a speculative investor? Is the definition of speculative investor mentioned in the Pioneer Urban case sufficient to determine if an individual is a homebuyer or a speculative investor? In what*

kind of factual circumstance does one apply the ruling of Pioneer Urban regarding the speculative investor?

The Hon'ble NCLAT in this very case has settled the dust to a large extent regarding this and has elaborately explained the judicial test to determine, "*whether a particular individual is a speculative investor or a genuine allottee?*" Let's delve into the facts of the case to understand the same.

b) Facts of the Case

In this particular case, an agreement was entered between the Corporate Debtor (real estate builder) and the Financial Creditor (homebuyer) whereby the Financial Creditor booked two flats in a project at Sector-86, Gurgaon, for a consideration of **Rs. 1,11,90,000/- (Rupees One Crore Eleven Lakh Ninety Thousand Only)**. As per this agreement, this entire consideration of money had to be paid by the Financial Creditor to the Corporate Debtor towards booking of the flats in a specific manner. The agreement stipulated that out of the entire consideration amount, a down payment **Rs.1,00,00,000/- (Rupees One Crore Only)** has to be made by the Financial Creditor and the remaining **Rs. 11,90,000/- (Rupees Eleven Lakh Ninety Thousand Only)** would be paid by the Financial Creditor to the Corporate Debtor at the time of execution of the sale deed.

The Agreement also provided for an "**Assured Returns Clause**" whereby the Corporate Debtor was entitled to pay the Financial Creditor interest at the rate of **24%** per annum calculated on the amount deposited as down payment.

Interestingly, the Agreement also provided an option at the disposal of the Financial Creditor to cancel booking of the flats after one year of registration of the aforementioned agreement. Additionally, in the very same clause in the Agreement, it was stipulated that the implication of such cancellation of booking by the Financial Creditor would be that the Corporate Debtor would have to refund the entire payment made by the Financial Creditor as down payment as well as the assured returns accrued, till the date of refund.

In accordance with the terms of the agreement, the payment towards down payment was made by the Financial Creditor to the Corporate Debtor by way of two cheques each for an amount of **Rs. 50,00,000/- (Rupees fifty lakhs only)**.

Just right after completion of a year from the date when the Agreement was entered, the Financial Creditor exercised its right to cancel the booking of the flats and sought refund of the amount paid towards down payment and the amount towards assured returns which was due and payable to her.

Further, a letter dated 15.06.2019 was issued by the Corporate Debtor, wherein the Corporate Debtor informed the Financial Creditor that it will continue to pay the assured returns till refund of the amount paid by the Financial Creditor towards down payment.

However, since the Financial Creditor had not received the outstanding due, it went ahead to file an Insolvency Application under Section 7 of the I&B Code before the Hon'ble National Company Law Tribunal, New Delhi bench ("**Hon'ble NCLT**"). This Insolvency Application i.e (C.P (IB) No. 784 (ND)/2020) was dismissed by Hon'ble NCLT vide order dated 20.10.2020 ("**Impugned Order**"), on the ground that the Allottee is not a Financial Creditor within the meaning of the I&B Code. It is rather

a speculative investor and hence it cannot be allowed to trigger the I&B Code and use it as recovery mechanism.

This appeal arises out of this particular Impugned Order, wherein the Financial Creditor claimed a default amount to the tune of **Rs. 2,19,56,000/- (Rupees Two Crore Nineteen Lakh Fifty-Six Thousand)**.

(d) Arguments advanced by the Financial Creditor and the Corporate Debtor before the Hon'ble NCLAT

(i) That the transaction in the instant case falls under the definition of "Financial Debt" under Section 5(8)(f) of the I&B Code.

The first argument advanced by the Financial Creditor was that the transaction under the aforementioned case falls under the definition of Financial Debt as defined under Section 5(8)(f) of the I&B Code. It relied on the ruling of the Hon'ble NCLAT in the case of ***Nikhil Mehta Vs. AMR Infrastructure Ltd, Company Appeal (AT) (Ins) No.07 of 2017*** ("Nikhil Mehta Case"). It argued that the down payment made by the Financial Creditor to the tune of **Rs.1,00,00,000/-(Rupees One Crore Only)** and an assured return of **24%** charged on the same to the Corporate Debtor had a commercial effect of borrowing. The transaction fulfils the two ingredients laid down in the ***Nikhil Mehta*** case i.e (a) Disbursal of loan (b) Disbursal of the same against the time value of money and since the transaction under this case allegedly fulfilled these two criteria, it argued that the transaction falls under the definition of Financial Debt under Section 5(8)(f) of the I&B Code.

(ii) That "borrowing" would also include money disbursed for temporary use for purposes of earning returns

The second argument advanced by the Financial Creditor was that according to *Para 67 of Pioneer Urban*, the expression "borrow" is wide enough to include an advance given by the homebuyer to a real estate developer for temporary use i.e for use in construction of project so long as it is intended by the agreement to give "something equivalent" towards money back to homebuyers.

(e) Arguments advanced by the Corporate Debtor before the Hon'ble NCLAT

(i) No date of default was mentioned under the Section 7 Application filed before the Hon'ble NCLT

The Corporate Debtor argued that the Section 7 Application filed before the Hon'ble National Company Law Tribunal, New Delhi Bench did not mention any "Date of Default". It is settled law that for admission of a Section 7 Application, it is necessary that Form-I filed with the Section 7 Application under the I&B Code must be complete and that it must mention the "Date of Default".

(ii) That the Financial Creditor is a "speculative investor" and it cannot invoke the I&B Code and unique positioning of

The Corporate Debtor argued that the Financial Creditor was not interested in taking possession of the flat and thus it is not a genuine allottee. It relied on ***Pioneer Urban*** case and its dicta on speculative investor. Further it also relied on ***Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Ltd & Ors (2020) 8 SCC 401*** to distinguish between any "Creditor" and the unique position of a "Financial Creditor" under the framework of the I&B Code. The Corporate Debtor relied on *para-73* of the judgement wherein the Hon'ble Supreme Court has elaborately discussed the special position of a Financial Creditor under the I&B Code. It essentially explains that under the scope of the I&B Code, a Financial Creditor means an entity which is aiding to the growth, vitality and rehabilitation of the Corporate Debtor by way of loan advances. It argued that in the instant case an advance was given by the alleged Financial Creditor which had no correlation with the growth and development of the Corporate Debtor, hence the transaction under this case could be any other Financial Debt but it cannot be a Financial Debt within the meaning of Section 5(8)(f) of the I&B Code. The Corporate Debtor argued that the Financial Creditor under this case can possibly be any other creditor but it is certainly not a Financial Creditor under the framework of the I&B Code and hence it cannot invoke the I&B Code.

(iii) *Factual components relating to the agreement and the transaction aimed towards speculative nature of the Financial Creditor*

It argued that an inflated assured returns interest rate of 24% clearly points towards the fact that the entire transaction was undervalued. It argued that the entire transaction was nothing but a way of the Financial Creditor to earn profit.

(f) Decision of the Hon'ble NCLAT

The Hon'ble NCLAT undertook an analysis of certain factual components of the Agreement. The Hon'ble NCLAT noted that the Agreement from which the entire transaction arises does not have essential components of a builder-buyer agreement. The Hon'ble NCLAT noted further that the Agreement does not have a possession clause neither did it specify any repayment schedule. The Hon'ble NCLAT took the view that the Agreement is not a builder-buyer agreement but it is merely an agreement stipulating the rights and obligations arising out of an investment made by the Financial Creditor. In light of these facts and circumstances, the Hon'ble NCLAT held that the Financial Creditor had actually approached the NCLT under the garb of an allottee but essentially the Financial Creditor is a speculative investor and hence it cannot invoke the I&B Code.

(g) Conclusion and the way forward

In this case, the Hon'ble NCLAT arrived at the decision by taking into consideration factual analysis of the case. Keeping this approach in mind, it would not be a stretch to conclude that possibly a *case to case analysis* is the only way to determine if an allottee is a speculative investor. Applying judicial rulings in a pedantic straight jacket manner may result in key facts being overlooked.
